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Disclosure Duties in Insurance

General Reporter: **Peggy Sharon, Adv.**
Levitan, Sharon & Co., Israel

The issue of disclosure of information by one party to a contract to the other is one which arises in all types of contracts e.g. contracts of sale, lease, etc. The scope of the disclosure required from a contracting party is determined by various legal systems by the need to balance between several principles, such as the wish to encourage parties to invest in research and discovery of information; the attempt to create an efficient market and moral considerations of good faith and fair dealing. The issue of the amount of information which should be disclosed to the other contracting party was always a ground for debates and controversies between various theories of law, especially in the pre-contractual negotiations[1].

Does the contract of insurance require special duties of disclosure, to be imposed on the Insured and on the Insurer which are different than those applicable in the field of general contracts?

The answer is yes.

The insurance contract is different from other contracts in some important characteristics that are unique and do not exist in other contractual transactions. The main feature is the risk factor. The insurance contract is based on an uncertainty that a future event against which the contract insures, will occur[2]. The Insured transfers to the Insurer a risk concerning his property, his business, or his health condition, which the Insured has superior access to the relevant information relating thereto, while the Insurer has one main source for this information – the Insured himself.

1 A.M. Musy "Disclosure of Information in the Pre-Contractual Bargaining – a Comparative Analysis University of Trento, Italy, 1995
P. Matthews Uberrima Fides in Modern Insurance Law New Foundations for Insurance Current Legal Problems (London 1997)
B. Rudden "Disclosure in Insurance The Changing Scene" Lectures on the Common Law (Vol 3)
2 Schwarz & Schlinger "Law of Insurance", Bar Ilan University 2005, p. 63. D. Schwartz, Interpretation and Disclosure in Insurance Contracts, 21 Loyola Consumer Law Review, 105 (2008)

As a result, the Insurer has to assess the likelihood of the occurrence of damage, and price the premium accordingly, while depending on the information known to the Insured and unknown to the Insurer. This is a gap which we may call – **the information imbalance**.

Due to this uniqueness, special rules relating to disclosure duties have been developed and applied to insurance contracts, which have been described very commonly as contracts of "uberrimae fidei" good faith or utmost good faith. On this basis, the Insured has been required to give the Insurer broad disclosure during the pre-contractual stage of all material facts that would induce Insurers to insure the risk.

However, the scope of the disclosure and the question whether it should be initiated by the Insured or defined in questions posed by the Insurer – may differ in one jurisdiction from another according to the fundamental economic or consumer protective notions which are at the basis of the various legal systems.

On the other hand, the "product" sold to the Insured is a kind of standard contract drawn up by the Insurer, including terms and exclusions not always clear and understandable to the Insured, especially the consumer insured.

Also, during the years up to the modern times, the Insurer has been considered to be the stronger party with significant financial resources and also a better understanding and assessment of the data at hand to better evaluate the risk under of the insurance transaction.[3]

Hence the Insured is at an inferior position vis-a-vis the Insurer – **the power imbalance**.

Between these two positions of imbalance, the various legal systems established rules and obligations relating to the duty of disclosure on the Insureds and on the Insurers, both in the pre contractual and the post contractual phases, aiming at abridging the gaps and seeking to achieve a fair balance between the Insured and Insurer in the various stages of the relationship.

This report is based on the answers to six questions on disclosure received from 29 countries which will be analyzed hereinafter. A table which lists the different responses to each question, and examples of selected responses taken from the answers sent to us appear in the report.

The general view which can be drawn from the responses is that the pursuit of fairness and possible balance between the parties to the

3 J. M. Fischer "Why are Insurance Contracts Subject to Special Rules of Interpretation: Text versus Context" 24 Ariz St. I.J. (1992) 1050

insurance contract, is shared by all legal systems. However, the application of the means to achieve these goals are different and stem from the extra weight given by each jurisdiction to the various considerations and the different interests of Insurer vis a vis Insured in each of them.

Is it possible to find a clear distinction between the approaches to the Disclosure Duties in Insurance, in Common Law systems compared to Civil Law systems?

The answer is no.

As we can see in the answers below,(Question 1) the scope of the disclosure required from the Insured is similar in various jurisdictions spread all over the globe – e.g. the duty to provide a truthful answer to Insurer's questions applies in Australia, Chile, France, Mexico, Japan, Poland, Russia, Turkey, Israel and others, and on the other hand, systems which do not directly impose such a duty (but the insurer may decline the application for insurance) include among others Argentina, Denmark, Peru, Great Britain (consumers), Serbia, South Africa and Uruguay.

The nature of the disclosure, whether limited to the actual knowledge of the insured or includes also what the insured should have known was dealt with in Question 2. It sometimes combines the two kinds of information (e.g. Australia, Mexico and Belgium) and sometimes is limited (e.g. France, Germany and Peru)

During the years, the pendulum between the need to respond to the information gap and the need to balance the power gap has been swinging from one end towards the other even in the same legal system.

For example, legal reforms in the field of insurance law in Great Britain have changed the focus from wide disclosure duty imposed on the Insured, to a limited duty not to make a misrepresentation which includes the Insured's duty to answer truthfully, questions posed by the Insurer (e.g. **The Consumer Insurance (Disclosure and Representations) Act, 2012** and the **Insurance Act, 2015)**.

Such a legal change was made also in Israel whereby the broad duty of disclosure of material matters which had previously required the insured to give the information upon his own initiative, was changed by the **Insurance Contract Law 1981** to the duty to answer fully and honestly to the Insurer's questions. By this, the law recognizes the need for truthful information given by the Insured, however, gives more weight to the insurer's professionalism and ability to decide what is the relevant information necessary for the conclusion of the insurance contract with the Insured.

The Insured owes a duty of disclosure also after the contract is concluded – the duty to notify the Insurer of a material change in the risk.(Question 4)

This duty is sometimes imposed by the Statutory Law (e.g. Argentina, Bolivia, Chile, Denmark, Switzerland, Israel, Finland and others) and sometimes by the policy terms and conditions, based on the principle of freedom of contract (e.g. Australia, Japan, Poland, South Africa). The importance of this duty is crucial where the change is so material as to change the nature of the risk from what the insurer had originally agreed to cover, but it is also important to the insurer where it increases its exposure under the policy.

The report relates also to disclosure duties imposed on the Insurer which is another balancing factor.

For example, whether the Insurer has a duty to ascertain the Insured's understanding of the scope of the insurance or to draw the Insured's attention to exclusions and limitations. (Question 3).

The comparison between the various answers shows that in some countries (e.g. Chile, France, Greece, Japan, Israel, Turkey) there is a positive duty to draw the Insured's attention to exclusions and limitations, and in others the object of protecting the Insured is fulfilled by the duty to provide clear and comprehensible information, emphasize and highlight the conditions of the contract in a way which is clear and fair.

Also after the occurrence of the insured event, the Insurer owes disclosure duties (Question 5).

In most countries the insurer ought to give the Insured the reasons for a full or partial declination of the claim. By disclosing that, the Insured has an opportunity to respond properly to the Insurer's arguments when filing a claim in Court, or to avoid unnecessary legal proceedings (e.g. Argentina, New Zealand, Israel, Russia) where such a duty is not imposed by a specific provision of the law, most of the countries regard it as part of the Insurer's duty to act in good faith (e.g. Australia) or as arising from principles of fairness, reasonableness, equality, reciprocity and good faith (Taiwan).

Finally, we checked the issue of the remedies provided by law for the breach of the Insured's duty of disclosure (Question 6). There is a consent between all jurisdictions that where the breach is revealed prior to the occurrence of the insured event, the Insurer may terminate the contract or adjust the premium to the new risk.

But, where the insured event has occurred prior to revealing the undisclosed information, we asked whether the insurer will be totally exempted from liability (the All or Nothing approach) or only partially. Most jurisdictions apply a partial discharge rule. The partial remedy was adopted, for example, concerning the pre-contractual disclosure by the French Law (except in case of bad faith), the Israeli Law (except where the incorrect answer was given with fraudulent intent, or where no reasonable

Insurer would have concluded the contract even for a higher premium). In Turkey, the law imposes a sanction system based upon negligence and causal connection, and the amount will vary by the degree of negligence or the proof of causal connection. In the absence of negligence or causal connection to the occurrence – the Insurer will not be entitled to any remedy.

Where the duty that was breached is the insured's obligation to notify the insurer of a material change in risk – several jurisdictions totally discharge the insurer of any liability, where the risk becomes in effect a different risk (Great Britain),where the insurer would have refused to insure had the new conditions existed at the time the contract was made (Denmark) or where no reasonable insurer would have accepted the risk even for higher premium (Israel).

Another conclusion which we may draw from the comparative review of the answers is that all systems will totally discharge the insurer where the concealment of material information was made with fraudulent intent.

Even where the Insurer is required to ask the relevant questions, (what we can consider as being a limited duty of disclosure of the Insured) the insured is obliged not to conceal information relating to material matters not included in the questions (Turkey and Uruguay – in bad faith, Israel- with fraudulent intent)

The participating Jurisdictions:

Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Chile, Colombia, Denmark, Finland, France, Great Britain, Germany, Greece, Israel, Japan, Mexico, New Zealand, Peru, Poland, Portugal Russia, Serbia, South Africa, Spain, Switzerland, Taiwan, Turkey and Uruguay.

Question Number 1

1. The Insured's Pre-Contractual Disclosure Duty

a Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

From first sight, it seems that the answers are divided to two different directions. While in the first group there are countries that require the insured to respond to the insurer's questions, the countries in the second list do not impose on the insured such an express obligation, but if the insured does not answer the insurer's questions, the insurer may decide not insure him. The result is that despite the existence of two separate ways, the insured is

required to answer the insurer's questions, whether by a statutory obligation or by the fear of his application for insurance being declined.

For example, in **Chile** there is a duty to respond to the insurer question as provided by the law that regulates the pre-contractual duty of the assured:

"The insured shall be obligated to:
Sincerely declare all circumstances that the insurer request in order to identify the object insured and to appreciate the extension of the risk."

The **Chilean** law adopted a "closed questionnaire system", according to which, the insurer has to give the insured a form with questions and the Insured meets his duty of disclosure upon responding to the questions therein.

In **Colombia**, the obligation of the candidate to truthfully declare the risk status to the insurer is regulated by Article 1058 of the Commercial Code. This regulation is applicable for life and nonlife (damages) insurances.

> **"Article 1058 – The policyholder <u>is obliged to truthfully declare the facts or circumstances that determine the risk according to the questionnaire provided by the insurer</u>…"**

The **French** Insurance Code provides that the insured must answer insurer's questions in good faith as set up in Article L.113-2:

"**The insured shall be obligated to: (…) : truthfully answer questions put by the insurer"**

Furthermore, the French Court ruled that the insurer's questions should be clear, with a question mark. Where the question was not clear enough, there will be no sanctions on the applicant in case of a wrong response.

Mexico Insurance Contract Law imposes on the insured an obligation to answer the insurer's question:

> " Yes, pursuant to article 8 of the Insurance Contract Law ("**<u>LCS</u>**"), the insured must respond in writing the questionnaire provided by the insurer.
>
> Based on such questionnaire, the insured must disclose all information that may influence the terms and conditions of the policy. The statements signed by the insured will be the basis for the contract.

See also the **Japanese** position on disclosure:

> **"Yes. The Insurance Act (2008) obliges the policyholder or the insured to disclose the insurer of the facts on the material matter which the insurer requested to disclose concerning risks (Articles**

4, 37 and 66 of the Insurance Act). This is a unilateral mandatory provision that does not permit adverse changes for policyholders, insured or beneficiary, with the exceptions of insurance in the business field, such as marine insurance (Articles 7, 41 and 70 of the Insurance Act)."

Another example from **Poland**:

Under Polish law (article 815 of Civil Code):
"The insuring party (policy holder) is obliged to disclose to the insurer only the facts about which the insurer inquires either in the offer form or in other documents submitted prior to the insurance contract being concluded."

The **Russian** position on disclosure:

Yes. Sub-Articles 1 and 3 of Article 944 of the Civil Code provide for an obligation of the insured to provide the insurer with the information that is necessary for concluding a contract and evaluating the insured risk, as well as the consequences of breaching such obligation:

“1. Upon entering into an insurance contract, the insured (or policyholder) must inform the insurer about the circumstances known to him that have material significance for determining the probability of occurrence of the insurable event and the amount of possible damage (insurance risk) if the insurer is not or should have not been aware of such circumstances.

Material circumstances are, in any case, those circumstances that are expressly defined by the insurer in his standard insurance contract form (insurance policy) or in his written request.”

In **Turkey:**

The Turkish Commercial Code (the **TCC**) imposes on the applicant the duty to respond truthfully to a list of questions in writing, given by the Insurer, and also to the Insurer’s additional questions on matters not included in the list. Article 1435 TCC provides that the applicant has to inform the Insurer of all important points the applicant knows or ought to be aware of at the time of conclusion of the insurance contract. 'Important points’ means those which may influence the Insurer’s decision whether to conclude the contract or to do it on different terms.

The fact that a matter was included in the Insurer's questions – it will be considered important.

Also, in **Israel** this duty is imposed on the applicant.

Under the **Insurance Contract Law**, the insured owes a duty to give full and honest answers to questions on a material matter posed by the Insurer prior to the conclusion of the contract (Article 6A). Therefore, any response which is partial or conceals part of the facts will not satisfy the requirement.

See: B.G.Z 6215/12 **Bastamkar v. The Finance Minister**.

In order to check whether the answer was "full" – the Court will apply objective yardsticks, but the "honesty" element is subjective. However, in most cases where the answer was partial, one may conclude that it was not honest either.
(Friedman & Cohen, on Contracts, p.837)

Where the Insured was asked during negotiations to purchase a health insurance policy whether he suffered from a hormonal disturbance including of the Thyroid Gland and answered in the negative, the Court dismissed his claim under the policy for medical treatments when it transpired that he had known prior to the conclusion of the insurance contract that he had a problem concerning the Thyroid Gland, as his medical files showed intensive examinations for this problem. In this case (C.A. 44243-09-12 **Ahron Presh v. The Phoenix** (5.11.15)) the questions were posed in a verbal communication and not in writing, however, the Court held that a telephone questionnaire which is properly proven, is similar to posing questions on a written form.

Where the contract is negotiated over the phone, the recording of the conversation is a legitimate and proper replacement of the writing.
(C.C. – Magistrate Court Beer Sheba 3620/04 **Hagag v. Bituach Yashir**)

The fact that the Insurer asked about a specific disease may show that it is a material matter that influences the Insurer's decision whether to conclude the insurance contract. (C.A. (Dist. Beer Sheba) 20495-03-10 **Hachsharat Hayeshuv v. Aloofer** 13.9.10).

The materiality of the matter is dependent on the question whether the matter which was asked to be disclosed is relevant to the risks which

the policy intended to cover. The test is objective – in the eyes of the reasonable insurer.

On the other hand, there are jurisdictions inter alia, Great Britain, which do not impose a pre-contractual duty on the applicant to answer the insurer's questions. But, if the applicant does not answer the insurer's questions, the latter is entitled to refuse to make an insurance contract with the applicant.

The **Great Britain** response:

> **"Under the Consumer Insurance (Disclosure and Representations) Act, the English law does not impose a positive duty on the consumer to answer questions put by the insurer. Nevertheless an applicant is unlikely to be insured if he or she does not answer questions posed by the insurer, therefore, if questions are posed by an insurer to a consumer, he or she must take reasonable care not to make a misrepresentation in his or her answers to questions asked by the insurers".**
>
> It is important to note that the English law makes a distinction between consumer and commercial insurance. While in the first there is no obligation to answer the questions asked by the insurer, in the second there is a duty to answer fairly: under the Insurance Act 2015 the commercial insured has a duty to provide a fair presentation of the insured risk to the insurer.

In addition, as we can see in the **New Zealand** response:

> **"The insured is not under a duty to answer a question or questions put by the insurer. However, if the insured fails or refuses to answer, the insurer is free to refuse to issue a policy. If the insured does answer a question put by the insurer pre-contract then the insured is subject to the duty to avoid saying anything false or misleading. Although this is a duty applying in contract law generally, in the insurance context in New Zealand an alleged breach will be assessed against whether the answer was:**
>
> **(i) Substantially incorrect (in the sense that a prudent insurer would see the inaccuracy as significant); and**
> **(ii) Material (in the sense the inaccuracy would influence the mind of a prudent insurer in deciding whether and/or on what terms to issue a policy)."**

:Also, the **Serbian** Chapter answered

"There is no explicit provision setting out duty of the insured to answer insurer's questions. However, insurers are authorized to use the questionnaires and put questions, should they find it appropriate for the purpose of collecting material information from the insured."

:The **Peruvian** response

"Although not expressly it can be deduced from articles 5 and 6 of the Insurance Contract Act (LCS) that the insured has the obligation to answer the questions if he wants the insurer to issue the policy."

In summary, even if it appears that several jurisdictions do not directly impose on the insured an express obligation to answer the insurer's questions, they do so indirectly, by allowing the insurer not to insure the applicant if he does not answer the insurer's questions.

Insured has a duty to respond to insurer's questions.	**Insured Does Not have a duty to respond to insurer's questions.**
Australia	Argentina
Austria	Denmark
Belgium	Great Britain - consumers
Bolivia	New Zealand
Brazil	Peru
Chile	Serbia
Colombia	South Africa
Finland	Uruguay
France	
Germany	
Great Britain – commercial	
Greece	
Israel	
Japan	
Mexico	
Poland	
Portugal	
Russia	
Spain	
Switzerland	
Taiwan	
Turkey	

b **Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?**

As we can see in the chart below, most of the jurisdictions impose on the insured a duty to disclose information initiatively. The main explanation for the decision stems from the thought of a proper risk assessment. In other words, when a policyholder does not provide material information related to his insurance, a chain failure is created which leads to an erroneous assessment of the risk that can harm future policyholders by adding a premium of non-disclosure or by a 'pocket' that is not deep enough to compensate for these cases.

For example, in **Germany**:

> **"The insurer depends on information about the circumstances relating to the risk in order to decide whether, and if so to what extent (insured amount, exclusions etc.) it would conclude the insurance contract. In addition, the insurer depends on the knowledge of risk-relevant facts as well in order to calculate an adequate premium. Therefore, the policyholder's pre-contractual duty to "give specific information" to the insurer is of significant relevance in German insurance law as in most legal systems."**

Furthermore, in **Israel** the law extends the duty to answer questions by providing that the Insured should not conceal with fraudulent intent, a material matter even if not asked by Insurers:

> **"Insured has the duty to initiate disclosure where he has information which is material for the Insurer, even if he was not expressly asked about it. This duty stands separately and in addition to the duty to give full and honest answers to the Insurer's questions, B.G.Z 6215/12 Bastamkar v. The Finance Minister**
>
> The Supreme Court ruled that where a material matter was not disclosed, it will be deemed "concealed" but the fraudulent intent should be proven, by deducting from the circumstances and the actions of the insured, to prove that he concealed the matter due to his fear that the Insurer will not insure him if the matter is disclosed.

This position seems similar to the **Turkish Law** where in addition to the duty to answer the Insurer's questions, there is a duty to inform the Insurer of important matters known to the applicant even if not asked:

If a point that has not been included in the questions directed to the applicant/insured in writing/verbally is considered as "important" the applicant/insured shall inform the insurer of these points as well on his owned initiative."

The applicant should not hide in bad faith any important information not included in the questions. The duty of initiated disclosure will apply also to changes that have occurred between the time of proposal and acceptance.

And in the **Belgium** Chapter:

> **This general disclosure rule obliges the applicant “to declare accurately, on conclusion of the contract, all circumstances known to him which he ought reasonably to consider as being material to the assessment of the risk by the insurer.**

In addition, the **Uruguay** system provides an initiated disclosure duty by using the "good faith rule" and we quote:

> **It is understood that at the time of requesting the insurance contract, the applicant must provide the Insurer with all relevant information to determine the true state of risk. Therefore, even if it has not been specifically asked by the Insurer, the applicant must provide in good faith all relevant information for the delimitation of the state of risk for which it is intended.**

Furthermore, the **Colombian** response shows that according to Article 1058, the fact that the insurance company has not provided a questionnaire for the risk declaration does not exempt the candidate from the responsibility to truthfully declare the risk status.

According to subparagraph two of Article 1058:

> **“If the declaration is not made in a determined questionnaire, the reticence or inaccuracy shall produce the same effects if the policyholder deliberately conceals facts or circumstances that imply objective aggravation of the risk status.”**

On the other hand, the countries that do not impose the duty to disclose information initiatively base it on the balance of powers between the parties. The insured is perceived as the weaker party in the relationship and therefore should be protected by the law.

In contrast, the insurer is the stronger party and therefore should direct the insured by explicit questions.

Great Britain distinguishes between consumers and commercial applicants, while the former do not have an obligation to initiate disclosure, the others must disclose material details regarding the nature of the insurance contract. This is imposed by Acts from 2012 (consumers) and 2015 (commercial) and reflect a change in the English Law which previously required disclosure from all insureds regarding circumstances which would influence the judgement of a prudent underwriter/insurer when determining whether he will take the risk or when determining the premium.

As quoted:

Consumers

i)... There is no duty on a consumer applicant/insured to disclose information on his or her owned initiative. He or she has a duty to take reasonable care not to make misrepresentations when giving information to insurers.

Commercial insureds

(ii) … other applicants/insureds have a duty to provide a fair presentation of the risk to insurers and a key component of this is disclosure. The disclosure required is expressed as follows in section 3(4) of the 2015 Insurance Act:

(a) Disclosure of every material circumstance which the insured knows or ought to know, or
(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances".

The **South African** chapter shows that the "duty of good faith" is shrinking while we are talking about insurance:

> The duty of disclosure is subject to a materiality test, as above, which means that an insured need only disclose information which a 'reasonable, prudent person would think was warranties material to the assessment of risk in question. This statutory test limits the duty. In the recent case Mahadeo v Dial Direct Insurance Ltd, the materiality test was held not to extend much further than responding to questions asked by the insurer over the telephone. This case should be viewed in the light of its facts, however, namely that it concerned a consumer policy, concluded over the telephone.

In addition, **Mexico** does not impose on insureds a duty to disclose information initiatively. But, as they have duty to act in "good faith" they have to disclose relevant information as they can't hide it:

> **"Mexican law does not expressly impose upon the insured a duty to disclose information upon the insured's own initiative. However, under Mexican law, the duty of utmost good faith is an implied principle applicable to all insurance contracts. This duty demands diligent and honest conduct from both parties, including the duty of the insured to disclose to the insurer any fact that may help the underwriter to evaluate the risks and determine the premium".**

The **Finish Insurance Contract Act** does not impose a duty to disclose information initiatively:

"As a starting point, the Finnish Insurance Contracts Act does not impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative. The insured or policyholder/applicant has only to answer to the questions imposed to him/her in a truthful and complete manner. The applicant's/insured's disclosure duty regards only matters that have impact on the insurer's liability. However, the policyholder and the insured shall without undue delay rectify any errors or deficiencies that they may discover in the information give to the insurer."

In **France** there is no such a duty, however, the French Supreme Court allows the applicant to disclose information initiatively in order to obtain some benefits (for example lower premium). In addition, if the applicant decided to disclose information it must to be true. Otherwise, legal sanction will apply.

From the responses to this question, it seems that the different approaches are adopted by various legal systems from all parts of the globe, Continental Europe together with South America or Anglo-American systems on both sides of the controversy. The main argument of one group is that the majority of the information is in the insured's possession and in order to create an accurate risk assessment, an obligation of initiated disclosure must be imposed. The opponents believe that due to the imbalance of powers between the insurers and the policyholders, it is not necessary to impose an obligation of initiated disclosure, but rather the insurer should examine the material matters by himself (through a questionnaire or other independent checks).

Insured has a duty to disclose information initiatively	**Insured does not have a duty to disclose information initiatively**
Australia	Bolivia
Austria	Chile
Argentina	Finland
Belgium	France
Brazil	Great Britain - consumers
Colombia	Mexico
Denmark	Japan
Great Britain – commercial	Peru
Germany	Poland
Greece	Portugal
Israel	Russia
New Zealand	Spain
Serbia	Switzerland
Taiwan	South Africa
Turkey	
Uruguay	

Question Number 2

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective?

Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information which he or she should have been aware of?

The positions are divided also on this subject. On the one hand, a number of countries believe that a subjective disclosure obligation should be applied. In other words, the insured's duty of disclosure should be examined according to his actual knowledge at the relevant time. One of the reasons for that is to protect the applicants, as being the weaker party in the insurance contract.

In this context, there may be a conflict between the insured's subjective obligation of disclosure and the test of material non-disclosure that is examined objectively.

As reflected in the **South African** response:

> **"The leading SA textbook, Reinecke et al, argue here that SA law is the same as English law, namely that the insured need only disclose information which is within her actual knowledge. It should be noted, however, that the materiality test for a non-disclosure is objective. Thus in sum, an insured need only discloses information subjectively known to her, but a failure to disclose such information will be subject to an objective materiality test in determining the resultant rights of the insurer".**

The **Peruvian** chapter:

> **"there is no express norm that establishes that there is information that the insured should know, so we can conclude that a situation of this type will be subject to the judge's discretion."**

On the other hand, some jurisdictions have a combined duty that examines the applicant's disclosure in both objective and subjective manners. In their opinion, in order not to impair assessments that an insurance event will occur, a reliable examination must be carried out according to objective criteria. In addition, by expanding the duty of disclosure, we can make policyholders disclose all the information in their possession and thereby reduce the deviation in the actuarial estimates.

One of the systems which imposes subjective and objective duty of disclosure on the applicant is **Australia:**

> The applicant’s disclosure duty contains both subjective and objective elements. There are two limbs with respect to the duty of disclosure

> under section 21. The first limb provides that the matters that must be disclosed are confined to those matters within the applicant's actual knowledge. In the case of **ABN AMRO Bank NV v Bathurst Regional Council (2014) 224 FCR 1**, the Full Court of the Federal Court stated that section 21 is not breached by a failure to disclose a matter which is not actually known by the insured.
>
> Once it is ascertained that a matter is within an applicant's actual knowledge, the second limb provides that the matter must be disclosed if it is relevant to the insurer's decision to accept the risk with respect to either the insured's subjective knowledge or the knowledge of a reasonable person on an objective basis.

Additionally, **Mexico** imposed subjective and objective disclosure duty:

> **According to article 8th of the LCS, the insured must declare in writing to the insurance company all relevant facts that the insured knows and also those that the insured should know at the time of entering into the contract.**

According to the **Colombian** response:

"With respect to the insurance candidate and the scope of their declaration being limited to their real or presumed knowledge, it is a point which has only been tangentially addressed by the national jurisprudence and doctrine, but without Article 1058 of the Commercial Code expressly stating that the candidate must reveal those facts that they are effectively aware of and those they should have known about."

[*the Colombian]* "…doctrinal and jurisprudential position coincides with that provided in Article 863 of the Commercial Code,[4] general rule applicable to the commercial contracts, which states that the contracting parties must concur in signing their legal businesses, **acting in good faith exempt from guilt, which is to say acting with objective honesty**. This should necessary lead us to think that under our legal system, in a unitary way, **what is relevant is not only what the candidate or insured actually knows, but also what they objectively should have known if their behaviour was exempt from fault**."

Also in **Turkey**, the applicant should inform the Insurer the points that the applicant knows and those he/she has to know however the applicant may prove that the Insurer knows the undisclosed information and such proof may justify the failure to inform.

Another example is found in the **Belgian** answer:

4 ARTICLE 863. GOOD FAITH IN THE PRE-CONTRACTUAL PERIOD. The parties must proceed in good faith exempt from fault in the pre-contractual period, under the penalty of indemnifying the damages caused.

First, Article 58 clearly states that the applicant must only disclose what is known to him. Second, the applicant has to disclose only those facts he ought reasonably to consider as constituting a basis for assessment of the risk by the insurer.

The applicant disclosure duty is limited to the actual knowledge	**The applicant disclosure duty includes an actual knowledge and information that the applicant should have been aware of**
Argentina	Australia
Austria	Belgium
Brazil – consumer	Brazil – commercial
	Chile
Finland	Colombia (as implied by doctrine and jurisprudence)
France	Denmark
Germany	Great Britain - commercial
Japan	Greece
Peru	Israel
Poland	Mexico
Russia	New Zealand
South Africa	Portugal
Spain	Switzerland
Uruguay	Taiwan
	Turkey

Question Number 3

3. The Insurers' Pre-Contractual Duties

a. **Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?**

Most states do not impose a pre-contractual obligation on the insurer to investigate the company they insure. In other words, in most countries the insurers base the decision on whether to insure the applicant on the basis of the insureds' disclosure obligation. However, when there is a concern that the insured companies are misrepresenting their statements, the insurer will investigate the company to calculate and evaluate the true risk of the insurance. Such investigations may lead to a correct assessment regarding the insurance risk and hence, proper determination of the premium.

An example of this position can be seen in the law of **Finland** which states:

> **"The insurer has to be aware of what kind of insurance contracts it has concluded. Therefore, especially if the insurance is taken out by businesses, the insurer may investigate the applicant's business beforehand, but there is no duty to do so".**

We can see the same conclusion in the **South Africa** report about pre-contractual duties:

> **"In such cases there is not even a proposal form and practically an investigation of the relevant business circumstances will be required by the insurer in order to assess its risk."**

A number of countries, including **Russia**, do not impose on the insurers a duty to investigate the applicant company. However, it appears that the court in Russia established a practice according to which the insurer should conduct an investigation. As quoted from the Russian response:

> **"Therefore, the highest courts establish a rule, "trust but verify", and discourage the insurer from relying on good faith of the insured and require him to check all the facts provided by the insured under the risk of losing his defence under Sub-Article 3 of Article 944 of the Civil Code (invalidation of the policy *ab* initio)."**

Israel doesn't impose a duty to investigate the applicants' business:

> **"The insurance contract law does not require investigation of the applicant's business in order to obtain the relevant information".**

Mexico does not impose such a duty, but the insurer may ask the insured by using questionnaires in order to obtain relevant information:

> **"Mexican law does not impose on an insurer a pre-contractual duty to investigate the applicant's business.**
>
> **The insurer must, however, ask the correct questions in the questionnaire provided to the insurer to obtain the information required to make an adequate assessment of the risk. If the insurer does not ask questions, it may be deemed such information was not relevant to the insured for the assessment of the risk".**

Although there is no such a duty, the **French** Court allows the insurer to investigate, in order to manage risks and to criticize wrong answers:

> **"the insurer may investigate (for technical risks : factories, etc.) : if he does, he will not be entitled, later, to criticize a wrong answer if he has been aware of the reality of the risk thanks to this investigation;**

If the answer given by the applicant shows, obviously, an inconsistency, the insurance intermediary has to fulfill his duty to warn. He must just draw the applicant's attention on this problem".

The **Turkish** Law does not impose on the insurer such a duty. The evaluation of the risk and of the adjustment of the contract are all done according to the information disclosed by the applicant.

Contrary to the above, the laws of four countries impose a pre-contractual obligation to investigate the insured company prior to concluding the contract. The main argument for this is that the insurer is committed to getting to know its applicant. In other words, the insurer must recognize all the risks arising from the specific insurance contract.

For example, **Taiwan** has provided in Article 9 of the **Financial Consumer Protection Act** that:

> **"Before a financial services enterprise enters into a contract with a financial consumer for the provision of financial products or services, it shall fully understand the information pertaining to the financial consumer in order to ascertain the suitability of those products or services to the financial consumer".**

In **Colombia,** There is no specific rule that imposes on the insurer the pre-contractual obligation of investigating matters that mention the insurance candidate. However, **"The legislative absence of an obligation of verification or confirmation by the insurance company has been tempered to a certain extent by the national jurisprudence… The Constitutional Court in some rulings has imposed said burden on the insurance companies, when protecting the life of financial entities customers group or that pre-existing conditions are intended to be included in a health insurance policy, in those cases in which the protection of fundamental rights to life, health, decent housing and minimum wage is exceptionally pursued."**

Countries that impose pre-contractual duty to investigate applicants' business	Countries that do not impose pre-contractual duty to investigate applicants' business.
Argentina	Australia

Belgium	Austria
Bolivia	Brazil
Taiwan	Colombia (duty imposed by court in cases concerning human rights)
	Denmark
	Finland
	France
	Great Britain
	Germany
	Greece
	Israel
	Japan
	Mexico
	New Zealand
	Peru
	Portugal
	Russia (but the court practice has developed such implied duty)
	Serbia
	South Africa
	Spain
	Switzerland
	Turkey
	Uruguay

b. **Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?**

Policyholders deserve protection against the powerful Insurer and each legal system defines the ways to achieve this protection, and establish a balance between the insured and insurer.
It seems that the prevailing opinion in most countries is that there is no express obligation on the insurer to ascertain that the insured understands the terms of the insurance policy or to draw the insureds' attention to the limitations and exclusions in the policy.

However, the absence of a specific statutory obligation does not mean that the object of protecting the insured is ignored – it is achieved by the duty to provide clear and comprehensible terms in the policies.

A number of countries, including **Great Britain, Finland, Denmark, Germany** and **Switzerland,** have fulfilled the object of protecting Insureds vis a vis insurers without establishing a specific statutory law. The following are some examples of this concept:

According to the **Finnish** chapter:

> **"The Finnish insurance regulation does not impose on the insurer a duty to ascertain the insured's understanding of the scope of**

insurance, but the insurer has to provide all information to the applicant regarding the insurance and its scope in a clear and comprehensible manner."

According to the Denmark response:

"*The Danish Insurance Contracts Act Part 1a has rules on information duty and right to withdraw from contracts which implement EU directive 2002/65 concerning the distance marketing of consumer financial services. The Insurance Contracts Act Section 34e, subsection 2 specifies that the information must be clear, apparent and comprehensible and the information must be conveyed in a manner that is suitable considering the communication method used."*

In **Great Britain**:

Statutes and case law do not impose on an insurer a general positive legal duty to ascertain that the insured understands the scope of the insurance or to draw the insured's attention to exclusions and limitations. However, some rules made by the Financial Conduct Authority (FCA), which is responsible for regulating the conduct of insurance business in the UK, may in practice have that effect. There are certain important core principles required of insurers, which include the principle that insurers should act with integrity (see PRIN 1) and treat their customers fairly (see PRIN 6). In particular, PRIN 7 states that:

> **"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".**

Breaching these principles may result in the FCA imposing sanctions on insurers (or brokers). The FCA may regard some policy terms as not amounting to treating customers fairly, particularly in the consumer context.

Moreover, rules in Chapter 5 of the FCA's Conduct of Insurance Business Sourcebook ("ICOBS"), part of the FCA's Handbook, provide that, as regards non-investment contracts other than "contracts of large risks" where the risk is outside the EEA or the risk is inside the EEA but the contract is arranged for a commercial customer, an insurer has a duty to ascertain the insurance demands and needs of the customer before the conclusion of the contract."

According to the **Uruguay** chapter:

> **"The current legislation, specifically related to the insurance contract, does not establish this obligation. However, general consumer protection rules, which impose**

> **adequate information duties, may be applicable. It is also a common practice of the market, to emphasize and highlight in the General Conditions of the Contracts, all those clauses limiting the rights of the insured. It is considered of capital importance in this regard that the role of the professional insurance advisor, who is a professional freely chosen by the insured, becomes of paramount importance. One of the essential tasks of these professionals is to properly advise and explain to the insured all aspects related to the contract that will be signed."**

In addition, according to the **Peruvian** chapter:

> **The answer is no, but the LCS establishes some rules that we transcribe below:**
>
> Article 28.

The clauses that establish expiration dates of the insured's rights, or exclusions of coverage contained in general or particular conditions or in annexes, should be printed in bold fonts that stand out from the rest of the text, and should be highlighted, in the front part of the policy.

From all of the above, it seems that in a large number of countries there is no specific requirement that the insurer ascertain the insured's understanding of the insurance policy, and no obligation to draw the attention of the insured to limitations and exclusions included therein.

However, based on general principles, such as the duty of good faith, the insurance contract must be presented clearly, and insurers owe the insureds the general obligation to make the policy understandable and clear.

On the other hand, some jurisdictions impose an express mandatory duty on the insurer to ascertain the insured's understanding of the insurance policy. In addition, the insurer must direct the insured's attention to exceptions and limitations, and emphasize them.

According to the **Israeli** law:

> The **Insurance Contract Law** imposes on the insurer various duties which are aimed at making the policy terms and exclusions clear and understandable for the insured. First of all, the policy should be delivered to the Insured where it was not proven by the Insurer that the policy was delivered to the Insured – the Insurer was not allowed to rely on an express exclusion therein. (See: RCA 4032/17 The Phoenix Insurance Company v. S.A.L. v. Eggs Marketing 14.5.18). Secondly, limitations to the insurer's liability or policy exclusions should be emphasized or written close to the subject they relate to:

Article 3 provides:

“Any condition or exclusion to liability of the Insurer or on the extent thereof shall be specified in the policy close to the subject to which it relates or be indicated therein with special emphasis. The Insurer is not entitled to rely on a condition or exclusion in respect of which this provision is not complied with.

See for example C.A 11081/**02 Dolev Insurance Company v. Kadosh** the Insurer has an obligation to indicate to the policyholder about the limitations in the policy and to emphasize the exceptional cases to which the policy will not respond.

Where this provision is breached and the exclusion was not properly emphasized the exclusion would not apply.

The Courts have extended the Insurer’s obligations based on this rationale, and imposed an active duty on the Insurer to ascertain the Insured’s understanding of the limitations and qualifications to the Insurer’s liability under the policy (C.A. 4819/92 **Eliyahu Insurance Ltd. v. Yashar** – (1995) PD 49(20p. 749).

It does not require a verbal explanation of all the policy terms, but the insurer should find the appropriate way to draw the Insured’s attention to the policy limitations and exclusions.

In C.A. 4819/92 **Carmi Uzi v. Menashe Yashar** the Supreme Court held that as part of the Insurer’s duty of good faith the law requires the Insurer to emphasize the exclusions of the policy. Section 3 does not impose a duty to explain the policy terms to the Insured, but its aim is to draw the Insured’s attention to the limitations on the Insurer’s liability, under the policy.

According to the **Greek** chapter:

"The insurer has to draw the attention of the insured as regards the scope, limitations and exclusions as the insurer is obliged to mention the above in the first page of the policy in bold letters."

According to the **Mexico** chapter:

"Yes, the insurance company must provide to the insured an insurance policy stating the rights and obligations of each one of the parties, including, at least, the following information:

i. **The names, addresses of the contractors and signature of the insurance company;**
ii. **The designation of the asset or of the insured person;**
iii. **The nature of the risks guaranteed;**

iv. **The moment from which the risk and duration of this guarantee is guaranteed;**
v. **The amount of the guarantee;**
vi. **The insurance premium or premium;**

Moreover, standard wordings of insurance contracts available in the market are registered with the insurance regulator and with the National Commission for the Defense and Protection of Consumers of Financial Services (consumer's ombudsman), for purposes of protecting the consumers from unfair terms and conditions."

The **Serbian** response:

"In accordance with the article 82 of the Law on Insurance 2014, before concluding an insurance contract, the insurance underwriter shall inform the policyholder, inter alia, of the following: The policy conditions and the law applicable to the insurance contract; term of validity of the contract and the risks covered by insurance and exclusions related to the said risks."

In **Taiwan**:

***"*Yes**.

According to Article 10 of Financial Consumer Protection Act:
Before a financial services enterprise enters into a contract with a financial consumer for the provision of financial products or services, it shall fully explain the important aspects of the financial products or services, and of the contract, to the financial consumer, and shall also fully disclose the associated risks."

The **Japanese** chapter:

"The Insurance Act has no related provisions. However, the Insurance Business Act, which is the regulatory law for supervision of the insurance industry, stipulates the obligation for an insurance company to provide important information and explain material matters to policyholders, to understand the intent of the policyholders, and to obtain confirmation from the policyholders if what is offered in the insurance contract matches the intent of the policyholders."

According to the **French** Chapter:

"The insurer has 3 duties : duty to deliver clear information (definition of the risk,…) + duty to advise (better to take this coverage, etc.) + duty to warn (this insurance is not good for you, there is a lack in the coverage, …). See UE Directive 2002/92/CE of

9 December 2002, implemented in French law for Insurance Intermediaries"

From all of the above, a number of countries have imposed in their insurance laws an obligation to ascertain the policyholder's understanding of the policy. In addition, the insured's attention should be drawn to the restrictions and exceptions. These obligations were imposed to redress the imbalance between the strong party in the insurance relationship being the Insurer. The insured will not read every section of the insurance contract as it is a uniform, long and exhausting contract. By establishing this obligation, the Insured understands the scope and limitations of the insurance policy.

The third option, which is adopted by a few countries partially recognizes the insurer's obligation to ascertain the policyholder's understanding by either verifying the terms of the policy or by emphasizing significant parts of the policy. Among these countries we can find **Austria** and **Brazil-consumers** as quoted from the responses:

According to the **Austrian** chapter:

> **"In the Austrian Insurance Contract Law unwritten protective responsibilities and due diligence, which are part of the information of the insured, are an issue. The insurer has no duty of validation if the offered insurance product completely covers the protection requirements of the insured. However, the insurer has to correct misconception of the insured with regard to the coverage if the insured speaks out about same. There is a duty of clarification of the insurer about the risk exclusion if it is recognizable that the insured wants the insurance protection for a risk, which in fact is not covered"**

> The **Turkish** TCC does not explicitly impose a duty of ascertaining the Insured's understanding, however requires the Insurer to present all the information regarding the contract and all the rights of the insured in respect of any terms to which the Insured should pay special attention.

> Art. 1423 TCC relates to the insurer's pre-contractual information duty, and mentions *"all information regarding the insurance contract to be concluded", "the rights of the insured"* and *"the terms to which the insured should pay special attention"*.

> In addition, Art. 8/1 RegInfo requires the insurer to hand over to the applicant an information form before the conclusion of the contract, which among other notices it shall contain general warnings regarding the contract, the remarks on the scope and the exclusions of the insurance.

> According to the **Brazilian** response:

"For business insurance, in which there is a consumer as contracting party/insured, Law No. 8.078, of 1990, establishes in article 6, item III, that providers of products and services (insurance companies, for example) are responsible for informing consumers clearly and appropriately on the characteristics of the products and services. It also establishes, in article 54, paragraph 4, that the contractual clauses that result in the limitation of consumer´s rights should be drafted with emphasis, in order to permit its immediate and easy understanding.
There is no express and objective legal provision so that insurer verifies if insured understood the coverage of the insurance and its limitations and exclusions."

The **Colombian** response states that **"Although there is no specific rule that provides that the insurer must prove the understanding of the insured regarding the scope of the insurance, there are some consumer protection legislative guidelines that were provided in Law 1328 of 2009 for financial consumers and later on a generic form in Law 1480 of 2011 - Consumer Statute, which provides some information obligations by the entities controlled by the Financial Superintendence of Colombia, which were later on developed and regulated by the Basic Legal Circular No. 29 of 2014. All these rules indicate that the client must be informed of the scope of the acquired coverages, its limitations and exclusions.**

In conclusion, most of the countries do not impose on the insurer an obligation to ascertain the policyholder's understanding of the insurance policy. However, it appears that the laws imply this duty by using general principles such as the duty of good faith, and the need to diminish the imbalance of powers between insurer – insured.

As concerns insurance contracts for large business companies such as banks, airlines and the like, where the system distinguishes between this insurance and the consumer contracts, this obligation does not play a role.

A duty to ascertain the insured understanding and to draw his attention to exclusions and limitations.	No duty to ascertain the insured understands but a duty to draw the insured's attention to exclusions and limitations.	No duty to ascertain the insured understands nor to draw his attention to exclusions and limitations.
Chile	Austria	Argentina
France	Belgium	Australia
Greece	Brazil	Bolivia

Israel	Colombia	Denmark
Japan		Finland
Mexico		Great Britain
Serbia		Germany
Spain (via EU directive 2016/97)		New Zealand
Taiwan		Peru
Turkey		Poland
		Portugal
		Russia
		South Africa
		Switzerland
		Uruguay

Question Number 4

4 **The Insured's Post-Contractual Disclosure Duty**

a **Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?**

From a bird's-eye view, it appears that a sweeping majority of the countries contain, in one way or another, the insured's obligation to notify the insurer of a material change in the insurance risk.

It seems that there are two trends: one imposes a statutory obligation on the insured to proactively disclose a significant change in the insurance risk; the other does not impose such obligation by law, but the insurer may demand this in the insurance policy. In other words, a contractual obligation requires the policyholder to report any material change in the insurance risk.

In South America, there is a statutory duty to notify the insurer about material change in the risk.

For example, the **Argentinian** response:

> **"The insured or the contracting party, as the case may be, must notify the insurer in writing of the facts or circumstances that aggravate the risk and are of such magnitude that, if they are known to the latter at the time of the conclusion of the contract, the insurer would not have concluded the contract under such difficult conditions."**

The duty to notify the insurer about a material change in the risk should be in writing.

The **Bolivian** answer:

> **"Yes, this is a duty that has been established by the Bolivian Commerce Code and it has an immediate effect upon any change in the risk."**
>
> **The Bolivian answer expands the duty by stipulating that any change must be notified to the insurer.**

The European perspective shows a similar position. An overwhelming majority of European countries accept this statutory duty, including: **Denmark, Finland, Greece, Turkey, Russia, Portugal** and others.

According to **Mexico** Chapter:

> **Yes, pursuant to article 52 of the LCS, the insured must inform the insurance company any material aggravation in the risk. The notification by the insured must be made within twenty-four hours after the insured knows about the aggravation of the risk. If the insured does not notify the insurer or causes the material aggravation of the risk, the obligations of the insurance company cease.**
>
> **Insurance companies are entitled to terminate the contract if the risk changes as a result from actions of the insured.**

According to the **Peruvian** Chapter:

> **"The insured or the contracting party, as the case may be, must notify the insurer in writing of the facts or circumstances that aggravate the risk and are of such magnitude that, if they are known by the latter at the time of the contract's conclusion, he or she would not celebrate it in more burdensome conditions."**

The **Colombian** response:

> **"Yes, in accordance with article 1060 of the Code of Commerce the insured party is obligated to inform of an aggravation of risk or a change or variation in their local identity."**
>
> **"When the aggravation depends on the intent of the insured party, prior notification to the insurer must be made with an advance period of ten business days from the date in which said variation**

occurs. (i.e. a change in economic activity or the purpose of an insured immoveable good)."

Under the **Turkish** law, Art. 1444/TCC forbids the insured to act or transact in a way that would lead to an increase of the amount of indemnity by aggravating the risk or current status without the insurer's prior consent. Secondly, the insured shall inform the insurer, if there is a material change, no matter whether the insured or another person authorized by the insured has caused the material change.

According to the **Danish** Chapter:

> **"*The Danish Insurance Contracts Act Section 45, subsection 1 states that if the insured knowingly alters any hazards specified in the policy in such a manner that the risk of the insurance company is increased in excess of that which the company at the time of the conclusion of the contract may be presumed to have taken into consideration, the company shall be discharged from liability, provided that the company would have refused the insurance, had the conditions caused by the alteration existed at the time when the contract was made"***

The **Greek** response explains the scope of this duty as quoted:

> **"Yes, the insured has such duty. This obligation refers to circumstances liable to entail a significant aggravation of the risk, to such a degree that had the insurer been aware of same it would not have concluded the insurance contract or would not have concluded it under the same terms."**

According to Article 17 in the **Israeli Insurance Contract Law**, where the Insured becomes aware that a material change has occurred, he shall immediately notify the Insurer to such effect in writing.

Furthermore, in **France** the Insurance Act provides that the insured has a duty to notify the insurer in a case of material change in risk.

In **Spain**, under section 11 of the LCS, the insured has a duty to notify the insurer on circumstances which may increase the risk in such a way that, if the insurer had known them he would have refused to sign the contract or the conditions of the contract would have been worse for the insured. Besides, it is limited to the circumstances mentioned in the questionnaire. If the matter was not asked about during the pre-contractual stage, the duty of notifying such aggravation is nonexistent as it is understood that the insurer has not considered it as relevant. It is also necessary that the insured knows about the aggravation of risk.

In **Great Britain** the insured must notify the insurer about change in the risk **only** if the nature of the risk changes and creates another head of risk:

> **"There is no duty in common law to notify the insurer of an increase in risk during the course of the insurance contract, provided that the nature of the risk remains in essence the same. If, however, the nature of the risk changes so materially as to become in effect a different risk from that which the insurer originally agreed to cover, the insurer is discharged from liability [*Law Guarantee Trust v Munich Re*,**
> **1912]. If the change in the risk is sufficiently substantial so as to affect the very character (as opposed to the degree) of the risk, the insurer may be discharged in a way that the insured would - in practical effect – have to disclose the change to the insurer if the insured wanted insurance cover to be maintained (see *Kausar v Eagle Star* [2000] Lloyd's Rep.I.R.154)."**

In **Japan** the duty is imposed by the policy terms**:**

> **"The Insurance Act does not have any provision which stipulates that the policyholder or the insured has an obligation to notify the insurer in the event of a major change in risk. However, most insurance contracts oblige the policyholder or the insured to notify the insurer in the case of increasing risk. Therefore, the Insurance Act has regulations on the validity of such provisions. The Insurance Act stipulates that if there are changes in the content of notification items in an insurance contract, and the policyholder or the insured party is required to notify the insurer to such effect without delay, and if the policyholder or the insured fails to give notice either intentionally or by gross negligence, the insurer may terminate the insurance contract even if it is possible to continue the insurance contract by adjusting the insurance premium proportionately to the relevant increase in danger (Articles 29, 56 and 85 of the Insurance Act)".**

In conclusion, despite the differences between the basis of the obligation - whether statutory or contractual, there is some similarity which creates an obligation of the insured to notify every case in which there is a material change in the insurance risk.

Insured has statutory duty to notify the insurer about material change in the risk	Insured has the duty to notify the insurer about material change in the risk only if it is written in the policy – contractual liability.
Argentina	Australia

Austria	Great Britain
Belgium	Japan
Bolivia	New Zealand
Brazil	Poland
Chile	South Africa
Colombia (excluding life insurance)	
Denmark	
Finland	
France	
Greece	
Israel	
Mexico	
New Zealand	
Peru	
Portugal	
Russia	
Serbia	
Spain	
Switzerland	
Taiwan	
Turkey	
Uruguay	

b **What is defined in your jurisdiction as a material change?**

Most of the countries have a legal definition for material changes. In some, it is defined by legislation, and in others, through binding precedent of the Courts. A few countries do not have such definition at all but under the freedom of contract the insurer may define what is considered as a material change in the particular case.

As we can see in the chart below, most of the countries that responded to the questionnaire on disclosure have a definition for material changes in their statutory law.

Israel Insurance Contract Law defined in article 17 what will considered as a material matter:

"Any of the following:

(1)**A change in a material matter, concerning which a question was put to the Insured before the conclusion of the contract, such change occurring after a reply to this question was given;**

(2)**A change which occurred after delivery of the policy to the Insured in respect of a matter expressly noted therein as a material matter;**

(3) **The discovery that the reply to a question concerning a material matter was incorrect and that the risk to the Insurer is substantially increased in consequence.**

Within thirty days from the day on which notice of a material change is delivered to the Insurer or from the day on which he otherwise becomes aware thereof, whichever the earlier, and so long as the event of risk Insured against has not occurred, the Insurer may cancel the contract by written notice to the Insured".

The Supreme Court in **Israel** ruled in C.A **Eliyahu Insurance Company v. The Estate of Shahar Piamenta** that a material matter is any matter that may affect the willingness of a reasonable insurer to conclude the contract in general or under the terms thereof.

According to the **Mexico** answer:

Material change or essential aggravation is defined as a material fact that changes the risk subject matter of the insurance and that to the extent the insurance company would have known such fact, it wound have proposed different terms and conditions to insure the risk.

The **Peruvian** answer shows that:

"It is the one indicated in the aforementioned article 60 of the LCS: 'the facts or circumstances that aggravate the risk and are of such magnitude that, if they are known by the latter when the contract is perfected, they would not celebrate it or would do so in more burdensome conditions. . "

The response of **Finland** provides a test for a change to be considered as material change:

"A material change is at hand for example when the insurer would not issue insurance at all or would issue insurance for a considerably higher premium for the increased risk. When issuing insurance, the insurer should take into consideration all changes in the circumstances that can normally be expected, such as ageing and natural wear".

In **Turkey** a material change is a change in the peril situation which is not favourable for the insurer.

It is necessary that the change is an unforeseen one. For example, “aging” is not a material change being a foreseen situation. Subjective aggravation of risk is where it was caused by the insured’s actions, whereas objective aggravation is caused without the involvement of the insured. Yet, both should be disclosed to insurer.

The **Danish** response:

> **"The insurance company must show that it would not have accepted the risk or would have done so on other terms or at another premium. In order to prove it, the company must disclose their relevant underwriting procedures at the time when the “insurance contract was made" as it was written in the Danish disclosure duty chapter.**

Some countries do not have a statutory definition but their Courts provided a definition in binding precedents.

For example, **Austria**:

> **"There is no legal definition of the terms “risk” or “increase of risk”. The Supreme Court of Justice (Oberster Gerichtshof - OGH) defines an increase of risk as a risk process, which by its nature may build a new shape of risk through a longer period of time and may encourage the occurrence of the insurance case. An increase of risk for the purpose of § 23 VersVG means that the circumstances subsequently change after the conclusion of the contract. This change makes the occurrence of the insurance case or an enlargement of damage more likely and can therefore induce the insurer to overrule the contract or continue only with a higher insurance rate. The increase of risk is always the result of a permanent condition. The insured has to be conscious of the fact that his behavior is appropriate to increase the danger of the occurrence of the insurance case."**

In **Colombia:**

> **"There is no definition of material change of risk in our legislation… the Supreme Court of Justice indicated, in accordance with Professor J. Efrén Ossa Gómez, that events and circumstances that aggravate risk, which are those that when known would cause the company to not wish to sign the contract or to do so under more onerous conditions, must have the following characteristics: a) They must not be foreseen; b) They must be subsequent to or consequent of the signing of the contract; c) They must be known to the insured party, whether for real or presumed and d) They must aggravate the state of risk**

originally declared. In other words, they must present an increase in probability or intensity of risk."

However, there are a number of jurisdictions which establish an option in which the insurers are entitled to determine in the contract what will be considered a material change and what would be the result of breaching the duty to notify it. Eventually, the court will determine whether the change was material or not.
The **Great Britain** chapter:

> **"There is no set definition of what is a material change. If insurers have an express term regarding notification of a material change, then they may further define this in the policy but there is no obligation to do so. Ultimately it would be for a court to decide whether or not there has been a material change. A failure to define a material change in a consumer contract might be treated by the FCA or the court as rendering the relevant clause "unfair" for the purpose of the Consumer Rights Act 2015."**

In **Russia** an express indication in the policy of what is material is required:

> **"According to Article 959 of the Civil Code, significant in any case are those changes that were expressly mentioned in the insurance contract (the policy) and in the Rules of insurance (general terms and conditions) delivered to the insured. However, the courts tend to interpret this provision in a narrow way by limiting such circumstances only to those expressly mentioned in the policy and in the general terms and conditions."**

In summary, even where there is a law that provides a definition of what a material change is, and even a binding precedent of the Supreme Court, the clear priority is given to specifying in the policy what is considered as a material change that increases the risk of the insurance event.

Countries which defined material changes by statutory law.	Countries which defined material changes by Court's precedents.	Countries in which based on the freedom of contract material changes are defined in the policy.
Argentina	Austria	Australia
Belgium (increase or decrease)	Brazil	Great Britain
Bolivia	Colombia	Russia
Chile	France	South Africa
Denmark	Germany	
Finland	Japan	
Greece	New Zealand	
Israel		
Mexico		

Peru		
Poland		
Portugal		
Serbia		
Switzerland		
Taiwan		
Turkey		
Uruguay		

Question number 5

5 **The Insurer's Post-Contractual Duty**

Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

When we examine the insurer's disclosure duties after the occurrence of the insured event we have two different patterns that lead to one conclusion. In addition, there are differences in the mode of the process. In some, Insurers have to respond to the claim only in writing, while others have an option to do so in different ways, such as: Email, Phone Call, and by Writing.

In most countries the Insurer ought to reveal the reasons for accepting or declining the insured's claim for coverage. The answer should be concise and relevant to the claim. The duty stems from the principles of good faith and fairness. By disclosing the reason for declining the insured's claim, the insured has an opportunity to defend himself and respond properly to the Insurer's arguments when filing a claim with the court.

An example of this approach can be found in the **Israeli** chapter:

> **"The Insurer who wishes to decline fully or partially an insurance claim, should give the insured (or the Third Party Plaintiff), in writing, the reasons behind the declination. The duty was imposed by the Commissioner of Insurance in a Directive issued in 1998 and later was approved by the Supreme Court as being a binding legal duty of Insurers. According to the Directive, the Insurer should detail in its first position letter all the arguments for the declination of the claim. If the insurer fails to do so, it will not be possible for the insurer to raise any declination reason which could have been raised at the first opportunity."**

The **New Zealand** chapter extends the reason above by using general duty as "Good Faith":

> **"Yes. Until recently this was an unsettled question, however there is now authority (albeit somewhat limited and not at appellate level) that, as a matter of the general duty of utmost good faith, the insurer has a duty of disclosure which applies when the insured makes a claim, and that this is a strict (objective) duty, i.e., requiring disclosure not only of what the insurer knows but also what it ought to know."**

According to the **Mexico** report:

> Yes; pursuant to articles 69 and 71 of the LCS, the insurance company must accept or reject liability within thirty days after receipt of the documents and information that allows the insurer to know the basis of the claim. In order to determine the cause and consequences of a loss the insurance company is entitled to request from the insured or the beneficiary all the information and the facts related to the loss. If a claim is rejected, the insurance company has the burden of proof on the rejection of the claim.

The **Brazilian** chapter provides a different point of view on the insurer's duty to explain the reason for declination:

> **"In the insurances in mass, in which contracting party/insured is a consumer, Law No. 8.078, of 1990, establishes that the consumer is entitled to information and it includes reasons of the negative of coverage, justified in a form that the consumer may discuss its grounds and require the change of the decision. In the insurances not in mass, the duty of good-faith established by Law No. 10.406, of 2002, the Civil Code includes the obligation of the insurer to explain the reasons that establish the lack of coverage of damage fact, so that the insured may challenge the decision, in case there are elements for that. In both events, the maximum term should be the term of payment of the indemnity value established by the Superintendence of Private Insurance - SUSEP within thirty (30) days."**

In **Colombia**, "There is no regulation that in all cases indicates that the insurer must assess or clarify the scope of coverage to the insured party when an insured event has been verified. Nor has there been a judicial judgement in which the existence of such a responsibility at the responsibility of the insurance company has been acknowledged. Notwithstanding the above, a sector of Colombian doctrine (Professor Andrés Ordóñez[5]) has

5 ORDÓÑEZ ORDÓÑEZ, Op. Cit. 124 – 125. *"But in general, it is reasonable to consider that the insurer has a duty to disclosure imposed upon them by the general principle of good faith, subsequent to the signing of the contract which refers to: A. An adequate orientation of the insured party in the claims process in the case of loss, that is particularly important in a means such as ours in which it is*

indicated that the development of the second duty of conduct of information of the insurance company must offer said information to the insured party once the loss has occurred."

"Finally, in relation to the duty to disclose all reasons for which the insurer has rejected the claim, although there is no regulation that specifically imposes the responsibility of said extension on the insurance company, it is clear from what appears in the contents of Articles 1053, 1077 and 1080 of the Code of Commerce that the insurer shall have a period of one month from the moment in which they receive the formal claim from the insured party (which confirms the occurrence of the loss and the quantity of loss), to either a) Process the payment of compensation claimed under the penalty of paying moratorium interest for delayed payment or b) Object under this term the claim presented accrediting the reasons for which they consider themselves not to be responsible for the payment sought by the insured party.

In **Turkey**, although there is no such duty by law, the Regulation Art. 12/I RegInfo, requires the insurer to answer all information requests submitted in writing or by electronic means by the insured in 15 working days. In addition, according to Art. 30/13 of the Insurance Business Act, a declination notice by the insurer is a condition required to entitle the insurer to refer the dispute to arbitration. In the absence of an answer from the insurer in 15 working days, the insured may apply to the Insurance Arbitral Commission to deal with the dispute.

Hence, no direct express duty, but in practice the insurer is expected to give a clear answer to a claim notified by the insured.

In some countries there is no such a duty, but the insurers have to detail the reason for declining the claim, in order to avoid an unnecessary claim in court.

An example to that approach can be found in the **Great Britain** chapter :

> **"Statutes do not impose disclosure duties on insurers after the occurrence of an insured event. There is no positive duty in any UK statute or in English case law requiring an insurer to provide the coverage position in writing within a limited period or to disclose all reasons for declinature. They may, however, be compelled to disclose those reasons if the customer brings a suit alleging unfair discrimination under the Equality Act 2010. In practice, insurers do almost invariably provide reasons for**

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known that insurers are prone to making the claims processes indeterminable (…) B. equally adequate information to the insured party, in the case of multiple insurances or in the case of the existence of various insurances covering similar risks, on which of these is the applicable coverage to the loss occurred and which covers the insured interest in the most thorough way. (….) C. Adequate information on the terms under which it is possible for the contract to be renewed, in the common event that the insured party requires the maintenance of the coverage in the future."

declinature, because (inter alia) if they do not, they may have no defense to legal proceedings brought by a policyholder claiming indemnity under the policy or a declaration that the loss is covered by the policy, or no answer to a complaint made by the policyholder to the FOS in circumstances where the FOS jurisdiction applies"

Furthermore,

"As stated, insurers have to abide by certain core principles, such as treating customers fairly and can be sanctioned by the Regulator, the FCA, if they are in breach. In addition Principle 7 provides that "a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading". Non-disclosure of information may in certain circumstances amount to a breach of this principle."

Australia provides a reason why such a duty is not necessary:

"The Insurance Contracts Act and the common law do not expressly impose disclosure duties on the insurer after the occurrence of an insured event, although such duties may be a term of the insurance contract or required by the duty of utmost good faith. It has been held by the Courts that the duty of utmost good faith on the part of the insurer includes making a timely decision on a claim and communicating the decision to the insured".

In **Serbia**:

"There are no specific provisions on this. There are no fines if the insurer does not provide reasons for rejecting the claim, but the insured has a right to object to the insurer and the National Bank of Serbia if he believes he was ill-treated."

In **Taiwan** there is a different explanation to the reason why insurers do not have an obligatory duty to explain the policy declination:

"The regulations focus on disclosure duties to the insurer mainly on pre-contract as required by Financial Consumer Protection Act to act with the principles of fairness, reasonableness, equality, reciprocity, and good faith. Based on such principles, the insurer should be consistent in its attitude towards the insured/beneficiary regarding demands although there are no explicit disclosure duties. "

In conclusion, insurers have to explain why they decline the insured's claim

even if they do not have a statutory duty. Most of the countries provide such a duty but even if they do not, insurers will explain the reasons for the declination in order to avoid a claim and in order to act in Good Faith and fairly.

Duty to disclose reasons for declination of claim	No statutory duty to give reasons for declination
Argentina	Australia
Belgium	Brazil
Bolivia	Colombia
Brazil	France
Chile	Great Britain
Denmark	Japan – personal insurance
Finland	Serbia
Greece – special agreement for Motor Third Party Liability	Spain
Israel	Switzerland
Mexico	Taiwan
Japan	Turkey
New Zealand	Uruguay
Poland	
Portugal - special agreement for Motor Third Party Liability	
Russia	
South Africa	

Question number 6

a **What is the insurers' remedy in case an insured breached his/her pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?**

There is a major consent between all of the jurisdictions that if the breach of the disclosure duty was revealed prior to occurrence of an insured event, the insurer may terminate the insurance policy or adjust the premium to the risk created.

But, in case the insured event has occurred prior to revealing the undisclosed information, there is no consensus regarding the remedy for breaching the pre-contractual disclosure duty. While most of the countries have a partial discharge rule, in several others the "all or nothing" rule applies.

In my view, it is very reasonable and fair to apply a partial discharge model based on the principles of distributive and of corrective justice. Before the insurer enters into the contract with the insured, a calculation of the probability of occurrence of the insured event is made according to the information received from the insured. In the event that the true facts were different, the insured is not entitled to full insurance benefits for his claim.

The insurer will recalculate the price of the insurance cover comparing the previous declarations and the new information received, and on this basis the insured will be indemnified for the occurrence proportionately.

If the insurer proves that under the new information this Insurer (or any reasonable insurer) would not insure the risk, the Insured will not be entitled to any amount. The same will apply where the insured breached its disclosure duty intentionally, or fraudulently.

The **Israeli Insurance Law Contract** clause 7:

"Where the insured event occurred prior to the cancellation of the policy – the insurer is obliged to pay only the share of the insurance benefits which is at the same ratio as the premium which would have been charged for the true facts, had they been known, and the premium actually charged".

The burden lies on the insurer to prove the premium which would have been charged for the hidden facts and where the insurer fails to do so – he will not be granted a reduction of his liability to partial payment.

Pursuant to Article 7 (c)(2), following the occurrence of an insured event, the insurer is completely exempt from payment of insurance benefits where the insured provided an incorrect answer when questioned on a material matter if

it was done with fraudulent intent, or if it is proven that a reasonable insurer would have not concluded the contract even for a higher premium.

In C.A. 25690/15 **Shomera Insurance Company v Nadi** the court ruled that the insured's false response to the question of a criminal record is a material matter that could affect the insurer's decision to insure. The insureds' car was stolen and only after the occurrence it was revealed that they both had had criminal records. The court ruled that the answer of no criminal record was given with fraudulent intent in order to hide the true facts. The insureds undoubtedly knew that if they would have given the true information – this would influence the insurer's decision whether or not to insure them.

Therefore, it is unnecessary to deal with the question whether a reasonable insurer would have accepted the risk in similar circumstances for higher premium.

In case of breaching the pre-contractual disclosure duty it will be hard for the insurer to completely avoid payment except if the breach was fraudulent:

> The remedies available to an insurer are contained in the *Insurance Contracts Act* and differ depending on the type of breach. The effect of these remedies is that it is very difficult for an insurer to completely avoid paying a claim.
>
> If a breach of the pre-contractual duty of disclosure was fraudulent, under section 7(c) the insurer is totally discharged of liability.

In **Turkey** where the insurer finds out about the breach before the materialization of the risk, the insurer may avoid the contract or request additional premium within 15 days starting to run from the date that the insurer has become aware of the breach of the duty (Art. 1439/I TCC). If the insured has not accepted the request of additional premium within 10 days, the contract shall be deemed to be avoided (Art. 1439/I TCC).

In case the insurer has knowledge about the matters being disclosed falsely or not at all, the insurer is not permitted to avoid the contract (Art. 1438 TCC). The burden of proof in this regard lies upon the insured (Art. 1438 TCC). The insurer must declare its will of avoidance to the insured (Art. 1440/I TCC). Provided that the insured has breached his/her pre-contractual disclosure duty intentionally, the insurer who has avoided the contract shall be entitled to claim the part of the premium which is related to the time period during which it has carried the risk (Art. 1441 TCC). Accordingly, in other cases the insurer shall not be entitled to claim the relevant premium.

Where the risk has materialized, TCC introduces a sanction system based upon the negligence and the causal relation. The enforceable remedy varies by the degree of the negligence and by the existence of the causal relation.

If the breach of the duty affected the amount of the insurance indemnity or the insurance sum to be paid, or if the breach was relevant to the materialization of the risk, and the insured was negligent by breaching his/her duty, a deduction of the insurance indemnity or insurance sum shall be made in compliance with the degree of the negligence.

In case the insured breached the pre-contractual disclosure duty intentionally, and there was a connection between the breach and the materialization of the risk, the insurer shall be relieved of its obligation to pay the insurance indemnity or the insurance sum. If there is no such connection, the insurer shall pay the insurance indemnity or the insurance sum in accordance with the proportion between the premium which was actually paid and the premium which ought to be paid.

Apparently, there is no enforceable remedy for the insurer to pursue, if the insured has violated his/her pre-contractual disclosure duty without negligence, or unintentionally if there is no connection between the violation and the materialization of the risk.
It appears that this legal framework establishes the solution of partial discharge rather than the “all or nothing” rule.

In **France**, the insurance benefits will be partial except in a case of bad faith. In that case, the contract will be null and the insured won't get anything:

> **Either the applicant behaved in good faith (he made a simple mistake): the insurance contract will continue to be valid (special rule for insurance contract, because for any other contract, a substantial mistake means that the contract is void).**
> **Sanction: Article L.113-9 Insurance Code:**
> **- Regarding the contract: the insurer is entitled to terminate the insurance contract**
> **- Regarding the occurrence of the loss: the insurer must pay the insurance money, BUT with a reduction: amount of the loss x (paid premium/premium which would have been asked if the declaration of the risk had been correct).**

Brazil uses the term "bad-faith" instead of fraudulent.

> **"Thus, in the cases in which representations are false or omitted in bad-faith, the insured shall not have any right as a**

result of the agreement, nor in addition be entitled to the payment of the premium amount.

Should representations be false or omitted without proved bad faith, then insurer may terminate the agreement or, after the loss, collect the difference of the premium and indemnify the insured."

According to the **Peruvian** Law:

"The LCS establishes:
Article 13. Reluctance and / or inaccurate declaration not malicious
If the reluctance and / or inaccurate declaration is not due to fraud or inexcusable fault of the contractor and / or insured and is verified before the loss occurs, the insurer must offer the contracting party the revision of the contract within a period of thirty (30) days computed from the referred verification. The offer must contain an adjustment of premiums and / or coverage and grant a term of ten (10) days for the contracting party to pronounce on acceptance or rejection. If the revision is accepted, the readjustment of the premium is paid as agreed."

Another aspect of the partial discharge can be seen in the **Finnish** answer:

"According to Section 34 of the Finnish Insurance Contracts Act, any consideration on whether compensation is to be reduced or refused on any of the grounds contained above shall also pay attention to how a circumstance on which the policyholder or the insured has given incorrect or incomplete information, or a change in a circumstance which has increased the underlying risk, or an act or a non-act of the insured, has contributed to the occurrence of the bodily injury, property damage or loss. Other aspects that need to be considered are possible negligence and the nature of such negligence on the part of the policyholder or the insured as well as the circumstances in general. (34.1 §) In such a case, there has to be a causal connection between the misconduct of the policyholder or the insured and the insured event. This means that, for example, if the policyholder has given false or incomplete information on a building's fire safety conditions, the insurer cannot reduce the insurance compensation on occurred water damage on a building because of the lack of causality"

The **Colombian** response:
"In the case of reticence or inaccuracy at the fault of the applying candidate, this is sanctioned by Colombian law with relative nullity. When said reticence or inaccuracy is not the fault of the applying candidate, the sanction in the case of damage shall be a proportional reduction of the same in accordance with the adequate relation between the state of risk and the rate paid by the policyholder. However, this shall not vitiate the contract and the insurer shall be obligated to pay the loss.

With regard to collective or group insurance, Article 1064 of the Code of Commerce allows that only the contractual link corresponding to the insured party who incurred the reticence or inaccuracy be affected, and not the links of those others who did not participate in said infraction. Additionally, it can occur that when multiple goods are insured under the same policy and the inaccuracy or reticence only concerns some of them, they will be considered as one risk under the insurer's technicalities, except where indicated otherwise by regulation.

When there have been actions of bad faith by the insured party at the time of declaring the state of risk and the relative nullity of the contract has proceeded, the insurance company shall have the right to retain as punishment the totality of the premium paid (art. 1059)."

In conclusion, the notion of "all or nothing" ignores the real evaluation of the risk under the policy and the manner in which the policy premium is calculated, however, it creates a deterrent factor that encourages policyholders to disclose all the relevant information in their possession. On the other hand, a partial and proportionate approach leads to a more balanced and fair outcome, but lacks the deterrent factor.

The basis of the all or nothing rule after the occurrence of an insured event, is a penal principle.

Where the failure to disclose results from fraud, the policyholder will not be entitled to any insurance benefits at all. This may occur when the insurer has asked an explicit question and the insured lied about it.

This idea may be found in the **Austrian** chapter:

> **"The insurer can rescind the contract according to §§ 16 (2), 17 (1), 18 VersVG, if the disclosure duty is culpably breached by the insured. Thereby, it is to differentiate between concealed circumstances and wrong disclosure. For wrong disclosure neither § 16 (3) S 2 HS 2 VersVG nor § 18 VersVG is applicable, so that even slight negligence will cause harm.**
>
> **A spontaneous violation of disclosure duties concerning concealed circumstances will occur, if the insurer has asked explicitly and distinctly about these circumstances either orally**

or in writing. For the grade of culpability neither § 16 (3) S 2 HS 2 VersVG, which requires culpable negligence, nor § 18, which demands malicious behavior, are relevant."

The **Japanese** approach to the remedy for breach of the duty of disclosure is more rigid and provides that only when the policyholder intends to violate the duty of disclosure he will not be entitled to insurance benefits. In any other case, the insured will receive insurance benefits:

"The insurer is entitled to cancel a contract if the policyholder or the insured violates their obligation to provide disclosure. However, such cancellation is permitted only in cases of intentional act or gross negligence on the part of the policyholder or the insured (Articles 28, 55 and 84 of the Insurance Act). The cancellation is effective only for the future, in principle. However, in case of the cancellation based on the failure of disclosure, the insurer is not liable to make insurance payment for insured events that already occurred before the cancellation. However, the insurer is not exempt from responsibility in cases where events have occurred that require insurance payments and that bear no relation to the breach of obligation to provide notification."

The **Swiss** law provides that in several circumstances the breach of the duty of disclosure will not lead to the cancellation of the insurance policy:

"According to Article 8 ICA the insurer may not terminate the contract despite the violation of the notification obligation for a number of exemptions of which the most relevant are:
if the non-disclosed or incorrectly notified fact had ceased to exist before the insured event occurred,
if the insurer knew or must have known the incorrectly disclosed fact.

As a general rule, if the person who is obliged to notify did not answer one of the questions asked and the insurer nevertheless concluded the contract".

In **Mexico** where the insured breaches his pre-contractual disclosure duty, the insurer may terminate the contract. In addition he could get 25% of the future premium which had already been paid.

If the insured breaches a pre-contractual disclosure duty, the insurer may unilaterally terminate the contract. In such case, the insurer is entitled to request reimbursement of the expenses incurred. If the premium has been already paid in advance for future periods, the insurer will reimburse to the insured three quarters of the premium paid for the future periods.

The remedy for breaching pre-contractual disclosure duty is "all or nothing" rule?	The remedy for breaching pre-contractual disclosure duty is partial discharge rule?
Austria	Argentina
Bolivia	Australia
Japan	Belgium
Mexico	Brazil
New Zealand	Chile
Russia	Colombia
Switzerland	Denmark
Taiwan	Finland
Uruguay	France
	Israel
	Great Britain
	Germany
	Greece
	Peru
	Poland
	Portugal
	Serbia
	South Africa
	Spain
	Turkey

6(b) What is the insurers' remedy in case an insured breached his/her post-contractual disclosure duty ("all or nothing" rule or partial discharge)?

The occurrence of the insured event is not within the awareness or knowledge of Insurer until being informed by the Insured. The gap of information at this point of time is against the Insurer as the Insured knows that the event has happened and probably also the extent of the damage which occurred. Therefore, the Insurer will usually have to rely on the information given by the Insured and in some cases, this information can be revealed by the Insurer after investment of resources for example, employing experts in case of fire investigators, etc.

At this instance the Insured is able to exaggerate the scope of the damage or even give false information concerning the circumstances of the occurrence in order that an uninsured event will be considered as an insured one.

As a result of this situation, after the occurrence of the insured event, the disclosure duties are responsive to the Insurers' requirement. At first the primary notification concerning the occurrence is given by the Insured, however afterwards, Insurers request from the Insured specific details concerning the occurrence including documents or proof concerning the performance of acts which the insurance coverage is subject to.

Hence, the cooperation of the Insured with the Insurer after the occurrence is aimed at mitigating the information gap from which the Insurer suffers. The balance is achieved by the law by imposing duties of disclosure and cooperation on the Insured and on the other hand, by deterring the Insurer from non-payment of insurance benefits for no basis[6].

In **Brazil** the Insured owes a duty to report an occurrence as soon as possible and to mitigate the damage. Failure to inform of the loss in bad faith exempts the Insurer.

> **"The insured must inform of the loss to the insurer, as soon as it knows of its occurrence, and provide the necessary data, to enable the insurer to perform its regulation work regarding the loss. The Insured must also endeavor to mitigate the loss.**
>
> **If the insured does not inform of the loss in bad faith, it shall totally lose the right to indemnity. Should the lack of communication result from reasons that do not reflect bad faith, the insured shall be entitled to full indemnity for the damage that may be proven, provided that evidence shall always be its obligation in compliance with good faith and mutualism".**

The **Uruguay** answer provides the "all or nothing" rule as well. Where the insured event occurred, the insurer is not liable to compensate the insured due to failure to notify:

> **"Failure to comply with the post-contractual disclosure duty, frees the Insurer from its obligation to indemnify the insured in that specific case. In addition, and according to the solutions provided in each policy, it may determine the termination of the insurance contract or its maintenance, adjusting for the future the price of the policy to the true entity of the insured risk".**

According to the **Mexican** response:

> **"In principle, if the insured breaches a post-contractual duty of disclosure, the insurer will be automatically released from any liability under the contract".**

The situation is different according to the **Israeli Insurance Contract Law**. Article 22 requires notification that the insured event has occurred without additional details. This notification should be made immediately after the Insured or the beneficiary becomes aware that the occurrence has taken place.

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6 See Shahar Veler Insurance-Interpretation of Contracts Law, Tadesky, 2005, Volume 1, page 482.

> **The Insured has a duty to immediately notify the Insurer of the occurrence of the insured event.**

Under Article 23(b):

> **The Insured or the beneficiary, as the case may be, will deliver to the Insurer, within a reasonable time after being requested to do so, the information and documents required for ascertaining the liability, and if they are not in his possession, he will, to the best of his ability, assist the Insurer to obtain them.**

The Israel **Insurance Contract Law** provides that where the duty of the Insured under Articles 22 and 23(b) was breached and this breach prevented the Insurer from ascertainment of its liability, partial benefits will be paid to the Insured.

> **24. (a) Where a duty under section 22 or 23 (b) is not fulfilled in time, and its fulfillment would have enabled the Insurer to reduce his liability, the Insurer is required to pay insurance benefits to the extent only that he would have been required to do so had the duty been fulfilled.**

For example, CC Haifa 765/80 **Kasem v. Boulus Bros**. In this case the notification of the occurrence was given only 3 years afterwards however, the Court did not exempt the Insurer as it failed to prove that it made efforts to investigate the circumstances of the accident. Only where the insurer proves that its ability to decrease its liability under the policy was prejudiced, it will lead to discharge of liability accordingly.

> The term "immediate" is not defined and the length of time will be judged under the circumstances of each case. It implies a time which is shorter than “reasonable time”.[7]
>
> The remedy of partial payment will not apply where (Article 24(a):
>
> (1) **Where the duty was not fulfilled or was fulfilled late for justifiable reasons;**
>
> (2) **Where its non-fulfillment or late fulfillment did not prevent the Insurer from ascertaining his liability and did not hinder its ascertainment.**

Section 24(b) refers to situations where the insured intentionally prevents the insurer from its ability to ascertain liability under the policy.
This situation is more extreme and may lead to total discharge of insurer similar to submitting a fraudulent claim.

7 See for example on a sale contract C.A. 465/80 **Solonetz v. Hatachuff** 38(3) PD 630,636

> **Article 24(b) Where the Insured or the beneficiary intentionally does something that prevents or hinders the Insurer from ascertaining his liability, the Insurer is liable to pay insurance benefits only to the extent that he would have been liable to do so had the aforesaid not been done**.
>
> **Article 25: Where a duty under section 22 or 23 (b) is infringed or anything mentioned in section 24 (b) is done or the Insured or the beneficiary communicated false facts to the Insurer or concealed from him facts relative to the Insured event or to the liability of the Insurer, and the same is done with fraudulent intent, the Insurer is relieved of his liability.**

The **German** law adopts the "partial discharge" rule.

Furthermore, there is a definition of what will be considered as an increase of risk:

> **"The three-fold definition of what constitutes an increase in risk… affects the provided remedies, too. Due to the intentional behavior of the policyholder in cases of VVG s 23(1), the remedies provided are stricter than the remedies for breaches of the duty of disclosure prescribed by VVG ss 23(2) and 23(3) – the latter provisions are remedied equally. For example, VVG s 24(1) grants the insurer the right to terminate the contract without adhering to a notice period of one month (which would be mandatory in case of breaches of VVG ss 23[2] and 23[3]), and VVG s 26(1) fully releases the insurer from its duty to provide insurance coverage (whereas with regard to breaches of VVG ss 23[2] and 23[3] this is only possible if the insured event occurs later than one month after the time when the insurer should have received notification).**

The responsibility of the policyholder under VVG ss 23[1] needs to be relevant to the risk-increasing nature of the circumstances known to the policyholder. The knowledge of the circumstances increasing the risk is equivalent to the policyholder's fraudulent evasion of notification. However, fraudulent ignorance is only to be assumed if the policyholder expects the existence of a risk-increasing circumstance, e.g. a failure of a vehicle, and if he refrains from carrying out a check in order to secure his legal advantages as a result of his ignorance".

In addition, the **Danish** chapter provides the same reason to adjust the premium price to the relative risk insurance:

> **"The Danish Insurance Contracts Act Section 21 and 22 states, that in the occurrence of an insured event the insured has an obligation to give the insurer forthwith notice, and on filing the claim the insured has an obligation to provide the company with all information available, which is material for estimating the nature of the insured event; for fixing the amount payable by the**

company; or for the rights of recovery which the company might have against others".

According to the **Peruvian** chapter:

"In this case, the following applies:
Article 14. Review not accepted
If the verification of the reluctance and / or inaccurate declaration indicated in the preceding article is subsequent to the production of a claim, the compensation due is reduced in proportion to the difference between the agreed premium and that which would have been applied had the real risk status"

The **Colombian** response:

"With regard to the aggravation of risk, the law obligates the insured party to inform the insurer of said variation within precise time frames, as previously stated. It is clear that the insured party's failure to notify the insurer of said variation shall cause the automatic termination of the contract from the moment in which they should have opportunely informed of said variation or the events on which the modification of the state of risk depends. This relies on the intent of the insured party from the moment when the same takes effect, provided that the insured party has not given prior and opportune notice to the insurance company.

Once the insurer has been notified about the aggravation of the state of risk they shall be able, at their will, to proceed with unilaterally revoking (cancelling) the insurance contract giving notice in time to the insured party[8] equally, they can propose to the insured party does not accept the new conditions proposed, the contract shall be understood as terminated by mutual agreement from the moment in which the insured party demonstrates their refusal to accept said increase in the premium. This shall only be effective and applicable once the insured party has indicated their express and tacit acceptance. In no case shall it be possible, despite the prior acceptance of the insured party, that said increase in the premium take place before the risk has been effectively modified.[9]

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8 Under Colombian legislation notice of revocation must be made by the insurer ten business days in advance, unless a greater period has been agreed upon. Code of Commerce. *"ARTICLE 1071. <REVOCATION>. It shall be possible for the contracting parties to unilaterally revoke the contract. For the insurer, this is via written notice to the insured party, sent to their last known address, with no less than ten days' notice, counted from the date of sending. For the insured party, this can be at any moment,* via written notice to the insurer. In the first case the revocation gives the insured party the right to recover the unearned premium. . .

9 On this matter, consult OSSA GÓMEZ, J. Efrén. Op. Cit. 375 and 376.

In conclusion, there is a similarity between pre-contractual and post-contractual disclosure duties. In both the insurer is totally discharged of liability when the insured has breached its disclosure duty in bad faith. In all other cases there is no similarity - some jurisdictions apply the "partial discharge" rule, while others have the "all or nothing" rule.

The remedy for breaching post-contractual disclosure duty is "all or nothing" rule?	The remedy for breaching post-contractual disclosure duty is partial discharge rule?
Austria	Argentina
Bolivia	Australia
Brazil	Belgium
Colombia	Chile
Japan	Denmark
Mexico	Finland
New Zealand	France
Russia	Israel
Switzerland	Great Britain
Taiwan	Germany
Uruguay	Peru
	Poland
	Portugal
	Serbia
	South Africa
	Spain
	Turkey