

# THE INSURANCE UTMOST GOOD FAITH PRINCIPLE: THE CASE OF MALTA

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## ABSTRACT

*Amidst a world of change and development, the insurance industry is accustomed to adapting its products, services and practices to suit the needs of the customer. One practice which is in the limelight where insurance business is concerned is the disclosure of material facts truthfully, accurately and positively, given the asymmetric nature of an insurance contract.*

*After several years of public outcry and disputes, the UK went through several attempts by the industry to self-regulate until legislators took the plunge to reform the century old principle in the year 2012. However, Malta, although being a commonwealth country that has traditionally been reliant on UK practice, has not yet followed suit. The Consumer Insurance (Disclosure and Representations) Act 2012 insurance reform, could potentially affect the indigenous insurance practice to the extent that the position taken by the UK could trigger the need for Malta to reform. Moreover, being an EU member state, Malta finds itself at another crossroad having to endorse EU Directives and Regulations.*

*With this paper we therefore examine where Malta stands with respect to the duty of utmost good faith, which is a principle affecting the way insurers do business and how the respective claims will be treated by the courts. It also has an impact on the relationship with the customer and how the industry is being portrayed by the public on the perception scale.*

*Although a small country, Malta holds excellent relationships with its international counterparts and significant business is made with international corporates to secure local and foreign risks. The importance of having practices that are in sync with those carried out internationally is paramount to ensure Malta remains competitive in the area of insurance.*

*We herein also seek to establish a position of the state of affairs and shed light on whether Malta should reform this legislation, to follow the footsteps of the UK or wait for an EU initiative.*

*Experts in the technical and legal field were interviewed with a view of obtaining a limpid picture of the current situation and its corresponding shortcomings leading to the establishment of the benefits of reform, if at all. Any decision taken by Malta might have a ripple effect on similar small countries and could see Cyprus, Hong Kong and Singapore adopting similar changes.*

*Findings highlight that Malta is not insular and always has to network with other foreign market players to diversify and cross sell its services. To retain competitiveness and relevance in the international business, it is recommended that Malta changes its practices in line with changes in trends especially the ones dictated by the consumer. Most did admit that UK remains the Island's greatest influencers and it is only a matter of time before the Maltese practice will mimic these changes in the British practices. However, experts note that Brexit adds complications, since any EU directive or regulation can have an overriding effect on UK practices.*

**Keywords:** Insurance, Accountancy, Potential Harmonisation

## INTRODUCTION

The principle of utmost good faith in insurance has brought about a long-standing history of debates on whether it brings equity and fairness among the contracting parties. In the UK, this principle was recently abolished by virtue of the Consumer Insurance Disclosure and Representations Act (2012) and the Insurance Act (2015), both Acts intending to reform the century-old principle as found in the Marine Insurance Act (1906).

In Malta, the practice of dealing with utmost good faith cases still follows the provisions found in the UK Marine Insurance Act (1906) and cases in Maltese courts have largely been dealt with using UK case law and precedent.

Therefore, we argue that the Maltese insurance market requires more comprehensive legislation to guide the courts on utmost good faith related positions and decisions, since the current legislation is very limited and is based on principles as applied in the UK, some obsolete in the light of modern developments.

In the UK the principle of utmost good faith underwent a legislative overhaul and has moved away from the strict common law position. This common law position is still one adopted by a good number of commonwealth countries that traditionally followed UK practice. These include countries such as Malta, Singapore, Hong Kong and Cyprus. It is worth noting that Australia, another commonwealth country, introduced reforms well before the UK. Therefore, through this study, we evaluate the current position of Malta and investigate the need, readiness or otherwise of the insurance industry to reform in the light of changing and evolving insurance business traits and tendencies. This leads to prompt the research question “Should Malta wait for the EU to harmonise this principle and therefore avoid having to go through a review process; should it follow the UK or should it adopt its home-grown legislation independent of any existing Statutes?”

Being a member of the European Union, Malta is duty bound to harmonise EU legislation and transpose it into national law. This, itself carries a number of advantages as witnessed by the several Motor Insurance Directives, which presented ready-made legislation for Malta to adopt reforming the shortcomings in this sector. Such readily available legislation means that Malta requires little effort to bring change through reform as opposed to undertaking the full legislative protocol and processes. In this respect, in order to carry out the evaluation of the Maltese application of the principle of utmost good faith and to determine whether there is a need for reform, not only did we consider the British influence and their respective position and insurance practices but also the potential harmonisation of insurance practices by the EU.

## Literature Review

The only reference to good faith in Maltese contract legislation is found in Article 993 of the Civil Code, Chapter 16 of the Laws of Malta, which states that:

1. Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature (Article 993 of the Civil Code, Chapter 16 of the Laws of Malta)

Moreover, Article 385 of the Commercial Code, Chapter 13 of the Laws of Malta, details the application of the insurance principle of utmost good faith, which follows that of the UK. This article specifically allows the contract to become void on breaches of disclosure.

1. 385 Any concealment, or any misrepresentation by the assured, or any discrepancy between the contract of insurance and the bill of lading, shall render the contract of insurance void, if such concealment, misrepresentation, or discrepancy is such as to lessen the estimate of the risk or to change the subject-matter thereof.
2. The insurance shall be void even if the concealment, misrepresentation, or discrepancy shall have had no effect upon the damage or loss of the things insured (Article 385 of the Commercial Code, Chapter 13 of the Laws of Malta).

Insurance judgements before the courts still follow the legal concept of precedent even to the extent of having Maltese courts using UK case law as the basis for their decisions. Therefore, although Malta has a civil law legal system, it adopts common law as its legal basis for settling insurance disputes. Moreover, although the principle of utmost good faith is not written law, its application follows that of the UK pre 2012 (when the Consumer Insurance (Disclosure and Representations) Act 2012 was enacted) and is accepted as customary law, resulting in Maltese Courts taking decisions based on English common law and judicial precedent and definitions taken verbatim from law reports and books by UK authors (Di Lorenzo & Assunta, 2014).

Before an insurance contract comes into effect, there is a duty bestowed on both parties to act in accordance to the principle of *uberrima fides* (utmost good faith) to disclose all facts material to the contract. This requirement has been highlighted in various case law notably in the case of *Salvu Sammut* against the insurance company Middlesea Insurance, wherein the presiding Judge, Albert J. Magri, accepted that there was a non-disclosure on the part of the insured which rendered the contract void (Salvu, 2004).

Moreover, the requirement of utmost good faith extends to after the contract has been formed and a continuing duty extends during the currency of the contract of insurance. The relevant case law is in *Adriano Cassar Galea* against *Paul Cuschieri* which is testament to this (Adriano & Paul, 1996).

Judgements are sometimes met with vociferous reaction by the media and public at large, which only serves to throw a dark shadow upon the insurance industry, labelling it as taking an unfair advantage of the legal policy provisions. Moreover, the civil law, particularly Article 385 of the Maltese Commercial Code, mentions the application of the law on good faith and which allows an insurance contract to be rescinded entirely upon any breach of good faith. This is in line with the 'old' English law under the Marine Insurance Act 1906.

Maltese Courts have in fact been critical of application of the utmost good faith principle. In fact, in their *obiter dicta*; the presiding judges have sometimes commented on this. Judges in the Maltese Courts have expressed their thoughts on the harsh effects of the law and occasionally sought to mitigate them.

The principle of utmost good faith is a requirement in all type of insurance contracts, both personal and commercial lines, as well as long term and general insurance contracts.

As expected, due to the nature of the contract, the duty of utmost good faith is frequently bestowed on the insured who is expected to disclose all material facts related to the risk being proposed and also to ensure that no facts are concealed. There have been cases, coming before the court, involving insurers making a plea to allow them to avoid the contract on grounds of a breach of utmost good faith after the discovery of a non-disclosure or a misrepresentation of a material fact, which was the result of breach of duty at the proposal stage or after. An example of this is the case of a couple by the family name of *Baron* suing *Thos.C.Smith Insurance Services*

Ltd, where the insured had failed to disclose, to the insurance agent when submitting the proposal form, that he had made a claim four years earlier with another insurer in relation to the same insured property (Paul et al., 2004).

Since the policy of insurance is one based on the principle of utmost good faith, it is implied that the duty of disclosure is expected of the proposer or insured. The all or nothing principle applies in the case of a breach. In fact, a remedy for a pre contractual breach of the duty of disclosure is the avoidance of the insurance policy. Therefore, the insurer may not only refuse to pay the claim lodged by the insured or a third-party beneficiary but also avoid the contract 'ab initio' with the consequent effect of reserving the right to request the return of any claims paid. By doing so, the Maltese Courts try to restore the parties to their pre contract position as much as it is practically possible (Mario et al., 2003).

According to Maltese jurisprudence, the duty of disclosure is always implied when entering into a contract of insurance. Some cases have also held that the prospective insured is bound to disclose material or substantial facts even if not specifically requested by a proposal form. This is a position which requires a positive duty to disclose material facts even if not asked (Charles, 1962; Joseph, 1999).

Maltese courts require that the insured has an obligation to interpret the terms of the insurance policy in good faith; and not to make any misrepresentations or false statements in the claim (Bianchi, 2014). Privity of the contract treats the third party as an external party and not a party to a contract and therefore has no disclosure obligations, however such a party is still bound to use good faith when lodging a claim to the extent that the law or the terms of the insurance policy allows him to do so (Bianchi, 2014).

When plaintiff Charles Grech sued Rausi Insurance, it was revealed that the insured had falsified a fire extinguisher receipt to show that it complied with a proposal form question, since the absence of which would have precluded the insured from indemnity under the policy due to a breach. This breach also had a criminal connotation in that criminal activities are deemed to be material and thus subject to disclosure (Charles, 2007). The reformed Life Insurance Contracts in the Civil Code Article 1712A et al., sequitur of the Civil Code, Chapter 16 of the Laws of Malta, lays no provision for a duty on the insured to disclose a record of criminal activities (Bianchi, 2014). That being said, insurers do make sure that such is a proposal form question, which forms part of the moral hazard assessment (Di Lorenzo & Assunta, 2014).

The duty of disclosure and hence the duty of utmost good faith is a requirement on both parties and although it is frequently expected of the insured, the principle is also an obligation on the insurer, who has a duty to inform the prospective policyholder of the exclusions, limitations and restrictions under the insurance policy (to be issued), to fairly assess the proposal form submitted by the prospective insured and to reveal any information pertinent to the risk (Bianchi, 2014).

A case in point demonstrating the obligation upon the insurer was the case of Bertu Camilleri suing the insurance company represented by Harold Bartoli. In this case, the insurer was in possession of information, which it did not reveal until faced with the court judgement. The details of the case involved the non-disclosure by the insurers' representative that 20 boxes instead of the claimed 40 boxes were being kept, a fact, which was withheld by the insurers. However, the non-disclosure emerged when the insurers wanted to refuse the claim on grounds of misrepresentation when they were faced with a claim of 40 boxes. The judge did not allow the insurers plea since they also owed a duty to disclose facts material to the risk (Camilleri, 2003).

The principle of utmost good faith requires the insurer to interpret the terms of the insurance policy in good faith; and to assess and pay the claim in good faith (Bianchi, 2014). Cases where the insurer tried unsuccessfully to repudiate a claim following the poor or evasive application of the policy wording, included the case in which Carmel Bajada sued Middle Sea Insurance Company Limited, wherein the insurers argued that the position of the residence of the insured could never have experienced a flood claim, giving flood an interpretation, which was not accepted by the courts. Here the insurers were considered to have breached their duty of interpreting the terms of the insurance policy in good faith and to assess and pay the claim in good faith. (Carmel et al., 2001).

More onus is bestowed on the insurer by the Consumer Affairs Act Chapter 378 of the Laws of Malta, which notes that the terms of the insurance policy may be disregarded if these are illegal or against public policy, or if they are deemed unfair (Bianchi, 2014). From a non-statutory position, the insurance industry in Malta tried to launch guidebooks and practices to clarify the position of this principle of insurance. The Malta Insurance Association for example issues a Handbook of Best Practice for Third Party Motor Liability Claims, which contains non-binding guidelines in relation to third party motor vehicle insurance. Such a publication has been released to complement the insurer's duty of utmost good faith (Bianchi, 2014).

The Maltese regulator also plays a part in safeguarding the intention of this principle. This it does through administrative fines or sanctions when the insurer is found to be in breach of the principle of utmost good faith, such as in the handling and payment of a claim (Malta Insurance Association, July 2014).

To date, no substantial reform has however taken place in Malta, and nor has there been any significant reform in a number of other common law jurisdictions, including Cyprus, Hong Kong and Singapore, although there have been occasional calls for change (Yeo, 2014) with court case decisions and public dissatisfaction being witness to this

## METHODOLOGY

We have used online facilities *via* ZOOM<sup>®</sup> to carry out semi-structured open-ended face-to-face interviews with 32 respondents, who hail from all aspects of the Maltese insurance business. The selection was based on their willingness to share their experiences together with their technical and legal knowledge on the subject. All chosen respondents were experts in the field of insurance business and persons who have been involved in the field in general for a number of years. We continued to carry out interviews although noting that after conducting 28 interviews, saturation was reached meaning that further interviews did not contribute to new knowledge (Mack et al., 2005; Petty et al., 2012; Suen et al., 2014). Special care was given to interview guides given by Merriam (1998) on what to ask and what to avoid and also how the questions should be introduced, establishing the most appropriate rapport and avoiding bias (Merriam, 1998).

The duration of a typical interview lasted between 45 minutes and 1 hour and were all recorded and transcribed individually after permission was sought from the interviewee/s. All respondents consented to be interviewed and be recorded accordingly. The transcripts were then subjected to a thematic analysis for identifying, analysing, and reporting of patterns (Braun & Clarke, 2006). This enabled us to organise themes that have relevance to the study.

## RESULTS

### Workability of the Principle in the Maltese Insurance Industry

The main arguments that emerged from the interviews on the workability of the principle of utmost good faith in the Maltese insurance industry, voiced the viewpoints of both the insurer or the consumer perspective. In fact, most (26) respondents argued that for insurers, the principle is an effective way of identifying genuine policyholders and distinguishing these from the fraudulent ones, since the effect of a breach of utmost good faith renders the contract void. These respondents continue to note that the insurance principle acts as a shield protecting the insurer, given the nature of the insurance contract, which is akin to a buyer who is not immediately able to inspect the risk that is being proposed. This “blind” acceptance of the risk opens a floodgate to abuse with the potential of having the proposer/insured make false declarations or hide important facts from the insurer. A case in point made by one respondent was a recount on how a customer accurately described a yacht which did not exist leading the underwriter to accept this risk, oblivious to the fraudulent misrepresentation. Eventually a claim was made exposing the breach of utmost good faith giving the insurer the right to refuse the claim and the right to avoid the contract. This is an example of how the principle works defending the insurers from such unfaithfulness. (11) further pointed out that the principle as it stands, shifts the onus onto the proposer who signs the proposal as a true and accurate representation of the risk. This provides the insurer with full protection as the proposal form is the basis of the contract and the statements made in it will have a determining effect on the validity of the policy contract. Some (12) respondents argued that from a policyholder’s perspective the principle places a harsh and unreasonable obligation to ensure the disclosure of all material facts even if not expressly asked for by the insurer in a proposal form or other means. This places an undue burden on the proposer, who is most of the time not fully cognisant with what is material and what is not. A few respondents (6) argue that such a principle is placing the genuine policyholder in an unfair position. In that an innocent misrepresentation or non-disclosure has the effect of leading the proposer to believe that a valid contract is in force, only to find that the contract is rendered void upon the discovery of a breach of utmost good faith, albeit made innocently.

### The UK Model – Does it Work for Malta?

In response to the question on whether “Malta should follow the UK in reforming the principle of utmost good faith”, all respondents were unanimous in endorsing that Malta has traditionally followed the UK in most practices in different industries, emergent of the fact that Britain ruled Malta for 164 years until circa 60 years ago and therefore the influence is still very strong. Most (24) respondents commented on the fact that court sentences in Malta adopt the provisions of the UK Marine insurance Act (1906) and rely on this Act when taking decisions. The point being made here is that, to date, Malta has followed the UK scene for a very long time and the respondents can hardly see how such reliance on UK practice can suddenly be changed.

A few (6) respondents did note however, that although Malta is not immediately comparable to the UK and other countries, there is still the need of some sort of updating especially in the context that the market today is not as simple as it was a few years ago. This compounded with the fact that a number of firms from countries other than the UK have invested

in Malta by opening shop or *via* passporting of their services and are requesting other services and products.

Some (10) respondents argued that Malta fell short of certain reforms and simply relied on borrowed pieces of legislation rather than going for a fully-fledged reformed insurance law that would encompass all the related matters. However, (27) respondents suggested that the UK today is too important in the international insurance world to ignore and Malta will definitely need to follow closely the practices of the country that colonised Malta until 1964. On the other hand all respondents agreed that Malta needs to take note of both the UK and the EU and monitor the developments since foreign business would definitely have an impact on changes in Malta's insurance practice.

Most (28) respondents voiced their concern on whether Malta should have its own model, noting that they do not see this materialising since the industry is too fragmented and rarely open to change. A number (11) of respondents stated that this reform needs the support of the Judiciary and (12) other respondents noted that reforms need to be supported by the members of parliament. Designing a home-grown model would need to have a holistic commitment from the Legislature and Judiciary and requires law reform committees and related structures incorporating all stakeholders in the building of a holistic reform. (14) other respondents attributed the possibility of reform though industry lobbying which does not seem to be a strong influential factor in lobbying for reform.

There were (12) respondents who argued that the industry does not really have an interest to reform the principle of utmost good faith, since as it stands, the old principle is serving its scope well by protecting the insurance company from potential bad faith. (25) respondents, added that it is cumbersome and also unlikely as they do not see the politicians and the insurance industry supporting a reform which to date protected the insurers.

How reform was handled in the past, was a subject brought up by (3) respondents, they reminded enactment of the Life Assurance Act in 2005. This was a reform pioneered by various stakeholders and spearheaded by both the Malta Association of Insurance Companies (and brokers) and the Malta Financial Services Authority. The need for this change was lobbied strongly by the stakeholders to the extent that it received the attention of the Minister responsible for Finance which is when clear discussions led to reform. This shows that through a concerted effort reform is possible, though bringing all stakeholders around a table is not always an easy feat. Complementing this observation were (4) other respondents who were actually keen in being part of any reform initiative if ever this is brought to light.

### **The EU Factor as a Readymade Solution**

When asked whether Malta should wait for the EU to take the initiative and release its own laws, rules regulation or guidelines on this matter of utmost good faith, all respondents mentioned the fact that EU membership obliges member states to transpose laws and directives into their national legal framework. A few (8) respondents who had experience in the motor insurance business provided examples of how transposition of EU directives into Maltese Law was simple and cited five EU motor insurance directives which were incorporated in Maltese legislation, insurance policies and market practice. These directives were namely: The 1st EU Motor

Insurance Directive 1972, the 2nd EU Motor Insurance Directive 1983, the 3rd EU Motor Insurance Directive 1990, the 4th EU Motor Insurance Directive 2000, and the most recent 5th EU Motor Insurance Directive enacted in 2005, with the sixth Directive currently in the pipeline. They acknowledged that this is a rather straightforward introduction of changes in practices. (9) respondents specified that regulations are even more easily adopted by virtue of their endorsement into Maltese law as an untouched EU version and (6) of these respondents singled out the GDPR regulations as an example of how Malta adopted these provisions in their entirety with little legislative effort. However, (4) argued that waiting for the EU to act is a rather reactive approach and surely not a practice to adopt if things are not going well in the local scenario. On the other hand, (5) respondents argued that EU orders are not subject to debate and need to be endorsed, complaining that this is the price EU member states have to pay for their association as EU members. This is largely true for regulations although other EU orders such as directives are subject to the proportionality principle (Negrut, 2010) whereby small countries like Malta may plead for some leeway depending on the case.

Comments on the fact that the EU is pro-consumer and could be influential in driving consumer related directives or regulations to smoothen practices which traditionally seem to burden the consumer were provided by (5) respondents. This in itself could well mean that the EU would be a reform trigger for Malta and other non-reformed EU member states. Another (3) respondents shed doubt on the negotiating power held by the European Association of Insurers, Insurance Europe, in lobbying for reform on a specific practice such as the one affecting utmost good faith.

### **The Pros and Cons of Reinventing the Wheel through Reform**

When asked about the readiness of Malta to reform the practice of the principle of utmost good faith, (10) respondents were not sure while only (5) respondents were confident that Malta is ready for change. (17) Respondents noted that there has to be a concerted effort by a number of stakeholders and opined that the practice of utmost good faith is not a matter high on the agenda for legislators and market lobbyists. (5) respondents stated that the advantages that UK had in this regard was that the industry as a whole had already paved its way through self-regulation. Coupled with this, the UK enjoyed the service of a very effective Ombudsman. They (5) noted that the pressure is created because of the circumstances and priorities that the country would be experiencing. From the interviews it is evident that utmost good faith is not a matter which is of any national interest at all.

(4) respondents recounted their personal experience when they were involved in reform talks (on other insurance matters) involving the Malta Insurance Association and the Minister responsible and though attempts to form sub committees and other fora were proposed, nothing really materialised therefrom. One respondent went on in saying that there has to be an issue of a National scale to be able to find support from the Government and legislators to be able to set reform in motion.

### **CONCLUSION**

Generally, respondents strongly inclined their opinions to following UK practices and policies and the strongest argument pointed at the fact that the UK is a large and influential

insurance market from where one can trace old origins and practices of the business. This has led the country to develop a sound legislative infrastructure to enable the industry to operate smoothly. Moreover, the UK houses a number of large insurance corporates who hold authoritative policy wording and practices that are followed by counterparts internationally. However, Brexit adds complications, since any EU directive or regulation can have an overriding effect on UK practices.

It does not seem that Malta will be doing its own thing when it comes to reform especially since it lacks judicial and legislative commitments and industry willingness. Also, the outcome of the findings show that Malta is not ready to enact reforms of this kind any time soon as this is not a priority judging from the lack of attention it is receiving by the media, consumers, industry and related insurance stakeholders.

Although a small country, Malta holds excellent relationships with its international counterparts and significant business is made with international corporates to secure local and foreign risks. The importance of having practices that are in sync with those carried out internationally is paramount to ensure Malta remains competitive in the area of insurance. Any decision taken by Malta might have a ripple effect on similar small countries and could see Cyprus, Hong Kong and Singapore adopting similar changes. Malta is not insular and always has to network with other foreign market players to diversify and cross sell its services. To retain competitiveness and relevance in the international business, it is recommended that Malta changes its practices in line with changes in trends especially the ones dictated by the consumer.

Needless to say, the EU might be a strong driver in reform and respondents acknowledge the fact that Malta will inevitably endorse EU directives or regulations, although there is doubt that this will happen given the lack of importance the specific nature of utmost good faith presents. This being said, this paper reveals that complacency is not commendable and it will be only time when Malta has to act to change its ways in the application of disclosure of material facts at proposal and/or renewal. This, in the ambit of international change in practice and the changing consumer behaviour in the modern world. The paper sheds light into the possible reform paths that Malta would need to face and is a wakeup call to start gearing the industry for change which currently does not seem to be ready or willing to induce such a reform.

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