



Original Article

# Incorporating Utmost Good Faith into Vietnamese Insurance Law: Challenges for Effective Adoption

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**Abstract:** This article examines Vietnam’s recent reform of insurance law in June 2022, which incorporates the principle of utmost good faith, presenting a critical opportunity to distinguish it from the general principle of good faith in the Vietnamese Civil Code 2015. By analysing the application of utmost good faith in navigating the pre-contractual duties of disclosure and information provision for both insurers and policyholders, the article highlights potential challenges for effective adoption and offers solutions to harmonize its application and interpretation with the general good faith in the Civil Code. Effective adoption and implementation of the utmost good faith principle can foster a more transparent, consumer-friendly insurance market while ensuring the harmony of Vietnam’s legal system.

**Keywords:** Insurance law, utmost good faith, pre-contractual duties, disclosures, information.

## 1. The Principle of Utmost Good Faith and Duty of Information in The Insurance Law Across Jurisdictional Divides

The principle of utmost good faith originated in common law countries, is often regarded as a cornerstone of insurance law, and plays a pivotal role in balancing the rights and obligations of insurers and insureds [1]. Originally established in English insurance law in the eighteenth century, the principle of utmost good faith in

insurance contracts and the related duty of disclosure were first identified in the 18<sup>th</sup>-century case *Carter v Boehm* (1766). In his judgment in *Carter v Boehm*, commercial law Master Lord Mansfield declared that utmost good faith was the “governing principle”, which has set out a strong milestone and influenced UK insurance legislation in its first MIA 1906.

“The governing principle is applicable to all contracts and dealings. Good faith forbids either

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party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon” (per Lord Mansfield, *Carter v Boehm* (1766) 3 Burr 1905 at 1910 - 1911).

By Lord Mansfield’s judgment, this principle requires both parties to an insurance contract to act honestly and to disclose all material facts that could influence the agreement during the pre-contractual phase. The judgment opened the door for good faith to serve as the foundation for pre-contractual disclosure duties in the common law [2].

In common law jurisdictions, the principle of utmost good faith was initially incorporated into the marine insurance and later extended to encompass non-marine insurance contracts during the pre-contractual phase [3]. The utmost good faith principle in UK insurance law is usually manifested as a specific duty to provide pre-contractual information [4]. Under the duty of utmost good faith in UK insurance law, it is unlawful to withhold any material information from the other party during the pre-contractual period, and a breach of this duty entitles the aggrieved party to rescind the contract [5].

The UK insurance industry, over the past 250 years, has witnessed significant changes in the principle of utmost good faith in case law and legislation [6]. As a result of attempts to reform the insurance law to ensure a satisfactory and fair result relating to the disclosure obligations of the insureds since 2006, there is a distinct difference in how utmost good faith is applied between consumer insurance law (a contract of insurance between an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession ) and business insurance (a contract of insurance that is not a consumer insurance contract. This includes insurance for charities, micro-businesses and small or medium enterprises, as well as large risks, marine insurance and reinsurance).

In consumer insurance, the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) sets out the inquiry-based disclosure, which requires the policyholder to take reasonable care not to make a misrepresentation and removes the duty of voluntary disclosure. The determination of whether the consumer has exercised "reasonable care" is based on several factors outlined in the CIDRA. The CIDRA shifts the focus to a duty not to misrepresent, thereby obliging an insurer to rely solely on information derived from direct questions put to the insured. In business insurance, the policyholder is required to disclose information voluntarily, without direct prompting in Section 3.3 of the Insurance Act (IA) 2015.

In other common law jurisdictions, the UK’s legal framework has significantly shaped insurance law, particularly by embedding the principle of utmost good faith as a core tenet of insurance contracts. Under the influence of the UK law, they adopted the same acknowledgment that utmost good faith is the core principle of the insurance contract.

Australia, having adopted the MIA 1906 in its Marine Insurance Act 1909, introduced a broader Insurance Contracts Act 1984 (ICA), which makes utmost good faith an implied obligation in all insurance contracts (section 13 ICA). Recent amendments in 2021 aligned Australia’s consumer insurance law with UK reforms by simplifying the duty of disclosure and introducing a duty to take reasonable care [7].

Singapore, under the Application of English Law Act 1994, adopted the MIA 1906 wholesale and codified the principle of utmost good faith in its Insurance Act 1966. A 2020 report by the Singapore Academy of Law proposed reforms aligning with UK and Australian approaches, distinguishing between consumer and business insurance - requiring consumers to answer insurers’ questions honestly and reasonably, while businesses would adhere to a duty of fair presentation [9].

While common law jurisdictions generally

recognize and uphold the principle of utmost good faith, key civil law jurisdictions such as France and Germany reject it as an overarching principle in insurance law.

French scholars denied the existence of the concept of “utmost good faith” in French law [10]. Instead, it is affirmed that the policyholder’s duty of inquiry-based disclosure and the insurer’s pre-contractual duty to inform and advise the policyholder were the result of applying the ground of good faith in the Civil Code. All French codes and legislation in the insurance sector reflect the general principle of good faith at the pre-contractual stage. In France, Article 1134 of the French Civil Code provides that all contracts “must be performed in good faith”. A general duty of disclosure in the context of pre-contractual negotiations in the contractual relationship was established in the French Civil Code [11]. A recent reform of the French Civil Code in 2016 (Ordonnance No 2016-131) formalized a general duty to inform during the pre-contractual phase in all kinds of contracts in Article 1112-1, thereby giving the *devoir d’information* enhanced significance by making it an independent and separate duty. Article 1112 of the French Civil Code in 2016 provides that negotiations must satisfy the requirements of good faith, and this requirement applies to all kinds of contracts, including insurance contracts.

Under the French insurance code, the policyholder is obliged to provide precise responses to all inquiries posed by the insurer concerning the completion of the specific application form prior to finalizing the contract, as well as inquiries regarding circumstances essential to the insurer’s understanding of the nature of the risk [12]. On the insurer’s side, in the French insurance code, the insurer’s pre-contractual information duty is established based on good faith in the Civil Code during the 1990s. Under the 2016 reform of the Civil Code, the insurer is bound to provide standardised information required by the Insurance Code and to give advice to the policyholder on the adequacy of the coverage to their personal situation, required under the Civil Code [10].

Similar to the approach in French law, German insurance contract law, and the parties’ pre-contractual duties generally developed independently from *Carter v Boehm* [13]. The general principle of good faith (*Treu und Glauben*) is applicable in both general contract law and, notably, permeated in insurance contract law, as set out in the German Civil Code (*Bürgerliches Gesetzbuch - BGB*) [14]. The pre-contractual obligation is stipulated under section 311 BGB, which is strongly influenced by the general principle of good faith [15].

In the revised German Insurance Contract Act (*Versicherungsvertragsgesetz - VVG*) 2008, Section 19 VVG provides a detailed set of rules with regard to the policyholder’s duty of disclosure and the legal consequences following a violation of the disclosure at the pre-contractual stage, i.e., the policyholder shall disclose to the insurer the risk factors known to him which are relevant to the insurer’s decision to conclude the contract with the agreed. Additionally, sections 6 and 7 of VVG prescribe the insurer’s pre-contractual duty to inform and advise. The insurer is required to give advice to the policyholder before the conclusion of an insurance contract, and this advice must be documented and provided in a clear and comprehensible manner.

A denial of recognising the utmost good faith in France and Germany may reflect a divergence among legal traditions in recognising the principle of utmost good faith in insurance law. As leading jurisdictions in the civil law tradition, both France and Germany rely on the general principle of good faith, as stipulated in their Civil Codes, to govern the duties of the contracting parties in the negotiations, requiring both parties to enter into relationships honestly, fairly, with truthful motives and purposes [16]. Instead of focusing on the existence of the utmost good faith principle, both France and Germany adopted a substantive approach to specify the duties of information for the insurer and the policyholder in the pre-contractual phase, grounded in the general principle of good faith.

Although there is divergence in the

recognition of the principle of utmost good faith and its meaning in insurance law across different legal traditions, the recent law reforms in the UK and Germany during the first two decades of the twentieth century sought to clarify the scope of disclosure obligations. These reforms increasingly shifted towards an insurer-driven inquiry process rather than relying solely on voluntary disclosures by the insured. They also placed greater responsibilities on insurers, requiring them to pose clearer questions and provide guidance to policyholders. Furthermore, the convergence of pre-contractual disclosure duties enhances legal certainty and fosters a more equitable balance between insurer and insured interests in the global insurance market [17].

## 2. Incorporation of the Utmost Good Faith in the New Vietnamese Insurance Law 2022

### *Before the amendment of the Law on Insurance Business 2000*

Since the first enactment of the law on business insurance in Vietnam in 2000 (LOIB 2000), the principle of utmost good faith has not been recognised. Hence, the duty of disclosure and information set out for the insurer and the policyholder in the pre-contractual phase was grounded in the notion of good faith under the Vietnamese Civil Code.

At the negotiation stage, although the parties are free to enter into a contract, including an insurance contract, the Vietnam Civil Code requires the contracting parties to negotiate in good faith [18]. During the pre-contractual stage, the 2015 Civil Code specifies the parties' obligations of good faith in its Article 387 on information duties in contractual agreements, which further outlines a duty to provide truthful information and a duty of confidentiality before entering into the contract.

Providing information in good faith during the pre-contract stage in the insurance transaction is an essential requirement for fulfilling the obligation to disclose accurate information. The principle of good faith is a

constant duty for both the insurer and the policyholder throughout the contractual relationship, regardless of whether an insurance contract is concluded.

Although legal rules governing the duty of disclosure and information were established on the principle of good faith in the Vietnamese Civil Code before 2022, the legislator indicated a demand for the transplantation of the principle of utmost good faith in amending the insurance law. The working papers of the Drafting Law Commission, published in 2021, indicated that utmost good faith, encapsulated in the Latin maxim 'uberrima fidei', originates from English insurance law and is regarded as a fundamental principle of insurance law in many countries, whether they follow civil law or common law systems [19]. It is emphasized that Vietnamese lawmakers highlighted the significance of establishing an underlying rationale for the duty of disclosure and providing truthful information in insurance contracts through incorporating the principle of utmost good faith into the new insurance law.

Unlike ordinary commercial transactions, insurance contracts rely heavily on trust and accurate risk assessment, necessitating specific obligations that go beyond standard contractual principles [20]. It is widely acknowledged that the duty to provide accurate information during the pre-contractual stage serves distinct purposes in insurance law, justifying its unique legislative treatment. First, it addresses the asymmetry of information between the insurer and the policyholder [21]. Accurate disclosure of the subject to be insured by the policyholder enables the insurer to assess the insured risk, determine appropriate terms, and define optimal rate classes, which are critical to profitability in the insurance business [22]. For policyholders, access to truthful information ensures understanding of coverage, limitations, and obligations, aiding informed decision-making.

During the application of the duty of information of the policyholder and the insurer in the negotiation, critics argue that the absence of the principle of utmost good faith in Vietnam's legal

framework reflects a lack of understanding of the unique nature of insurance transactions for the contracting parties [23]. Moreover, Vietnamese legal scholarship has yet to engage in substantive discourse on the historical and conceptual relationship between the duty of disclosure and information in insurance law. This gap has hindered a deeper understanding of why these duties are crucial to ensuring fairness and transparency in insurance contracts, as reflected in Vietnamese courts' practical rulings.

Policyholders, especially individuals, may face unclear or general questions in application forms, making it difficult for them to provide precise answers in practice. They may not receive adequate advice from agents or insurer staff to properly assess whether to purchase insurance, and, if so, on what terms and at what premium, relevant to the risk types and frequency [24]. Many policyholders are unaware that breaching the duty of disclosure can result in the rescission of their contract and the forfeiture of indemnity. If a policyholder leaves questions unanswered or provides an innocent but incorrect response, it may still constitute a breach of the duty to provide truthful information. This holds true even if the insurer accepts the application form, does not seek further clarification, and subsequently issues the policy.

The local court in Ho Chi Minh City issued conflicting judgments on the same incorrect answer given by policyholders to a question about the number of life insurance contracts they had signed. In one case, the court found a breach of the duty of disclosure, voided the policy, and denied the claim. However, in a subsequent judgment months later, the court ruled that the insurer could not avoid the policy, as the question was deemed immaterial to the insurer's risk assessment [25].

#### *Issuance of the new Law on Insurance Business 2022*

Under the strong criticism of the scholars of lacking the basic doctrine to explicitly govern the duty of disclosure and information for the

insurer and the policyholder, Vietnam has amended its regulations to incorporate the principle of utmost good faith. In June 2022, the National Assembly revised the Law on Insurance Business (LOIB 2022), which took effect on 1 January 2023, to formally introduce this principle.

Article 16 of the new LOIB requires the parties to provide information and exercise their rights and obligations in the most honest manner, on the basis of utmost trust in each other during the conclusion of the contract and performance of the insurance contract.

Although the LOIB 2022 adopted the principle of utmost good faith in its substantive law, it maintained the same approach as the old law in stipulating the specific duties imposed on policyholders and insurers. For example, the new law does not specify the requirements for determining a breach of duty of disclosure, nor does it require insurers to provide evidence of how they would have decided had they known the truth, i.e., whether they would have provided coverage and on what terms.

To date, no subordinate legal documents have been issued to clarify the interpretation and application of the utmost good faith principle, particularly regarding the specific disclosure and informational duties of insurers and policyholders. This lack of guidance has led to uncertainty and unpredictability in both application and enforcement.

### **3. Key Considerations for the Effective Adoption of Utmost Good Faith**

The incorporation of the utmost good faith principle has sparked debate over whether it differs in meaning from the general principle of good faith under the Civil Code. The interpretation of the principle of utmost good faith in the insurance context in Vietnamese jurisprudence is still unfolding following the official recognition in the new LOIB 2022. However, it is clear that the general principle of good faith holds a paramount position; the

legislators mentioned the general principles of the Civil Code applicable to insurance contracts before describing the utmost good faith principle in the new law in Article 16.

Under Article 16, LOIB 2022, the legislator underscores that all the principles outlined in the Vietnamese Civil Code must be adhered to by the insurance contracting parties. Afterwards, Article 16 stipulates other principles and describes the meaning of the utmost good faith. The legislator's mindset is not to allow any conflicts in the interpretation and application between a newly incorporated principle in the insurance sector and the overarching principle of good faith in the Civil Code.

*An emphasis on the meaning of trust and good faith in the insurance transaction*

In Article 16(1) in the new LOIB, the utmost of good faith is defined as “The parties to the insurance contract must provide information and exercise their rights and obligations in the most honest way, on the basis of utmost trust in each contracting party during the process of concluding and implementing the insurance contract”.

The principle of utmost good faith places both parties to a contract to perform the information duty in the process of concluding the contract and other duties in a trustworthy and honest way. This is a reciprocal duty that ensures that both the insurer and the policyholder maintain their respective duties of utmost good faith in the process of concluding and implementing the insurance contract. It shared the same echo with the general principle of good faith, as expressed in the Vietnamese Civil Code, based on the principle of honesty and faithfulness [26]. In its literal meaning, the principle of utmost good faith indicates that parties shall be truthful in their representations and shall not deceive the other party; they shall honour their promise and fully perform their obligations.

While the interpretation of the principle of utmost good faith in the insurance context by Vietnamese judges remains uncertain following

the recent incorporation, such interpretations would not go out of the general notion of the overarching principle of good faith towards honesty, goodwill, integrity, and equitable outcomes.

*Overarching role of the principle of good faith to govern the contract life*

Although the principle of utmost good faith is recognised in the LOIB 2022, which was indicated by the Drafting Law Commission about its origin in the common law [19], the expression of the utmost good faith may be different from its meaning in the common law.

The common law principle of utmost good faith is closely tied to the pre-contractual phase [27], during which both parties to an insurance contract fulfill their duties of disclosure and information exchange. This ensures that each party can make a well-informed decision before entering into the contract.

The Vietnamese LOIB 2022 appears to broaden the scope of the good faith principle beyond the traditional pre-contractual emphasis on accurate disclosure found in common law. It now imposes continuous duties of good faith throughout the duration and execution of the insurance contract, covering obligations like timely notification of insured events, investigation of claims, and payment of claims. While the specific duties outlined in the law cannot address all forms of misconduct by the insurer or the policyholder during the claims process or contract implementation, the overarching good faith principle serves as a foundation for interpreting and applying good faith standards. This ensures vulnerable parties are protected against dishonest practices, such as delayed payments or fraudulent claims. The general principle of good faith shall help to provide an interpretation in situations where the insurance law may lack clear provisions or solutions.

*Observations from the approach of Germany and France*

Observing the approach of other civil law countries, such as Germany and France, these

jurisdictions have opted to enact specific legislation governing the duty of information and disclosure rather than focusing on formally recognizing the principle of utmost good faith.

The principle of utmost good faith in the realm of English insurance law has primarily been associated with placing a pre-contractual responsibility traditionally linked more to policyholders, it is a valid justification for an insurer's pre-contractual duty remains somewhat ambiguous. The specific duties of good faith applicable to insurers under common law remain unclear, with obligations such as the duty to provide information of the policy and duty to explain to the policyholder the contents of the policy, particularly clauses exempting insurer's liabilities and obligations, duty to consider the insured's needs when proposing a policy and ensuring the accuracy of the insured's disclosure being inconsistently articulated [28].

Unlike English insurance law, which lacks a limitation on the principle of utmost good faith, France and Germany have led the way in explicitly defining clearer and more specific duties for insurers. In France, the insurer's pre-contractual duty of information has been rooted in the principle of good faith under the Civil Code since the 1990s. Following the 2016 reform of the law of obligations, insurers are now required not only to provide standardized information as mandated by the Insurance Code but also to advise policyholders on the adequacy of coverage based on their personal circumstances. Similarly, in Germany, sections 6 and 7 of the VVG explicitly impose a pre-contractual duty on insurers to inform and advise policyholders before the conclusion of an insurance contract. This duty requires insurers to provide clear and comprehensible information and to document the advice given.

In Vietnam, unlike the common law position, the specific pre-contractual duties of the insurer stipulated in the LOIB and its new version in 2022 comprise the duty to provide information of the policy and the duty to explain to the policyholder the contents of the policy,

particularly clauses exempting the insurer's liabilities and obligations. This approach aligns more closely with the frameworks adopted in Germany and France, where insurers are subject to clearly defined pre-contractual disclosure and advisory duties.

With that said, it might be more suitable to have the requirement of good faith, rather than utmost good faith, as the underlying principle behind the insurer's duty to explain and elucidate the meaning of the contract terms to the prospective policyholder. Such obligations of the insurer under the new LOIB are regarded as rooted in the civil law notion of good faith. This stands in clear contrast to the common law concept of utmost good faith. Therefore, in insurance, on a level playing field between the insurer and the policyholder, the principle of good faith provides an important foundation for the application and interpretation of the insurer's duties.

#### 4. Conclusion

This article has examined the distinctions between the principle of utmost good faith and the general principle of good faith applicable in insurance law, particularly in Vietnam's legal framework. While there are significant differences in their meanings, interpretations, and applications, the integration of utmost good faith into Vietnam's insurance legislation has become a key focus, providing the foundation for the duty of disclosure and information during the pre-contractual phase. The incorporation is examined in a manner that ensures coexistence with the general good faith without conflict. The findings suggest that utmost good faith serves as a specialized doctrine governing insurance contracts, while the broader principle of good faith continues to provide foundational support for resolving practical disputes where insurance provisions may lack specificity. Ultimately, the coexistence of these principles strengthens the legal framework by reinforcing transparency, fairness, and trust in insurance transactions.

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