

## AIDA - RIO CONGRESS 2018

### DISCLOSURE DUTIES IN INSURANCE

General Reporter: Peggy SHARON

Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.

Finally, your remarks and comments from your point of view will be appreciated.

## QUESTIONNAIRE – German report

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The answers and comments provided partly base on a (as-of-yet unpublished) joint analysis of the authors, see in 2018: Wandt/Bork, *Pre-contractual information duties under German insurance law*, in Han/Pynt (eds), *Pre-Contractual Duties in Insurance Law: Carter v Boehm 250 Years on* (Hart Publishing, Oxford).

Further references to legislation, court decisions and scholars can be found in the footnotes. In general, insurance disclosure duties are stipulated by the German Insurance Contract Act 2008 (*Versicherungsvertragsgesetz* – hereinafter referred to as VVG)<sup>1</sup> and, additionally, by the German Civil Code (*Bürgerliches Gesetzbuch* – hereinafter referred to as BGB)<sup>2</sup>. Also, the comments will as well use the term “policyholder” instead of “insured” in order to maintain the differentiation between the terms. The term “post-contractual” – in line with the term used within the questions – shall be interpreted as “during the contract term” (*ie* after the conclusion of the contract, but not after the contract has ceased to exist).

### 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?**

According to VVG s 19(1), the policyholder shall represent to the insurer before the insurance contract is concluded all circumstances, which are material to the insurer's decision whether to conclude the contract with the agreed content and which were requested by the

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<sup>1</sup> English version available at [www.gesetze-im-internet.de/englisch\\_vvg](http://www.gesetze-im-internet.de/englisch_vvg) (although this translation is partially not addressing terminological differences).

<sup>2</sup> English version available at [www.gesetze-im-internet.de/englisch\\_bgb](http://www.gesetze-im-internet.de/englisch_bgb).

insurer in text form as defined by BGB s 126b. Thus, – except in the case of fraudulent behaviour – the pre-contractual duty not to misrepresent is limited to answering questions asked by the insurer in text form. Insurers most commonly use questionnaires fitting this particular purpose best.

The insurer may ask questions on material circumstances as long as the contract is not concluded. Even if the insurer had asked questions before the policyholder has made his contractual declaration, the insurer may ask further questions as long as the contract is not concluded (VVG s 19[1] sentence 2).

Assuming that the insurer asked questions regarding material circumstances, VVG ss 19 to 22 are also applicable in case of a renewal of a contract. In case of an amendment of the contract, these provisions shall apply with respect to the particular circumstances, provided that the amendment is substantial to the extent of coverage.<sup>3</sup> In practice, the question of applicability only arises if, on renewal or amendment, the insurer asks questions on material circumstances.

#### ***aa. Questions Asked in Text Form***

Pursuant to BGB s 126b, text form means that inquiries of the insurer must be conducted on a durable medium. This includes, in particular, messages sent by telegram, telex, telefax and e-mail. The purpose of the intention behind the text form requirement is, on the one hand, to decrease the risk of misconceptions caused by spoken word and to give the policyholder the chance to read and re-read the inquiries word by word. On the other hand, this formality requirement serves evidentiary purposes. Hence, within the meaning of VVG s 19(1), solely displaying inquiries on the insurance agent's laptop without having arranged for any separate documentation for the policyholder's own use, must be considered insufficient.<sup>4</sup> It is also insufficient if an agent fills in the questionnaire of the insurer on its own and urges the applicant to sign while not giving him due time to read the questions and respective answers.<sup>5</sup>

#### ***bb. Questions Submitted by the Insurer***

VVG s 19 expressly requires the insurer to ask questions. Since queries must be made in writing, insurers mostly use questionnaires for this particular requirement. Hence, the insurer can easily demonstrate having asked questions in text form.<sup>6</sup>

However, the allocation of questions of an insurance broker can be problematic. With regard to a questionnaire of an insurance broker, the *Oberlandesgericht* Hamm (OLG – German Higher Regional Court) held that questions (with respect to risk factors) contained in such a broker questionnaire generally are not to be considered as questions of the insurer in the sense of VVG s 19(1) – and that, therefore, misrepresentations in this questionnaire do not

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<sup>3</sup> cf Langheid in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 19 VVG para 36 with further references.

<sup>4</sup> KG Berlin, *Versicherungsrecht* 2014, pp 1357 to 1360.

<sup>5</sup> Looschelders in Looschelders/Pohlmann (eds), *VVG Kommentar*, 2nd ed (Cologne, 2011), § 19 para 21.

<sup>6</sup> Written questions of an agent with the authority to conclude the contract are those of the insurer (VVG s 71).

trigger the legal consequences of VVG s 19.<sup>7</sup> However, there might be scenarios in which an insurer takes “ownership” of pre-defined questions, provided by the broker prior to the policyholder’s responses – in case these circumstances are apparent to the policyholder. According to several decisions of German Higher Regional Courts, those questions activate the policyholder’s duty not to misrepresent.<sup>8</sup> However, this approach should be restricted to the field of non-consumer contracts in the sense of VVG s 210 whereas in the field of mass risk insurance (especially when it comes to personal insurance) such an approach is considered inadequate. This is why, in this field, the rule provided by law is to be followed strictly. It goes without saying that an insurance broker can contribute to preparing the wording of questions or even can impose the wording on the insurer – if the broker is sufficiently influential in the market. However, in the field of mass risk insurance there is no convincing reason why the insurer should be exempted from asking the policyholder its own questions.

### ***cc. Questions Material to the Conclusion of the Contract***

The insurer’s request for representation of a certain risk factor indicates that this circumstance is “material to the insurer’s decision to conclude the contract with the agreed content”, VVG s 19(1). The point of view of the prospective insurer is considered as decisive factor with due regard to the insurer’s underwriting decision. However, considering the policyholder’s need for protection, the insurer’s subjective view should not be the exclusive criterion. According to the legislative materials, the inducement into contracting must be evidential from an objective point of view, as well. This requirement is not met, for instance, when a question refers to a matter reaching far back into the past.<sup>9</sup> Substantially, it comes down to a double test: The inquired risk factor must be crucial looking at the actual insurer’s usually practiced way of concluding insurance contracts, but company-individual behaviour must be reasonable as measured by the market-wide usually practiced way of concluding insurance contracts, as well.

In this context, the Act on Human Genetic Testing (*Gendiagnostikgesetz* – GenDG)<sup>10</sup> which shall prevent discriminations against persons with crucial diseases must be taken into account.

According to GenDG s 18(1), the insurer is neither allowed to request the policyholder or the insured to undergo genetic testing or analyses, nor to request information on genetic testing

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<sup>7</sup> OLG Hamm, *Versicherungsrecht (VersR)* 2011, pp 469 to 477, annotated by Nujoks/Heydorn, pp 477 to 481.

<sup>8</sup> OLG Köln, *Versicherungsrecht (VersR)* 2015, pp 477 to 479; OLG Köln *Versicherungsrecht (VersR)* 2013, pp 745 f; KG Berlin, *Versicherungsrecht (VersR)* 2014, pp 1315 to 1317; OLG Frankfurt, decision of 17 September 2015 – 12 U 172/13; there is a dispute about the stipulations on the identification, in particular *cf* Langheid in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 19 VVG para 67. With regard to the allocation of a pseudo agent *cf* LG (Landgericht – Regional Court) Dortmund, *Recht und Schaden (r+s)* 2012, pp 426 to 428 as well as Tschersich, *Recht und Schaden (r+s)* 2012, pp 53 to 61 (p 55).

<sup>9</sup> BT-Drs 16/3945 p 64: *Begründung der Bundesregierung zum Entwurf des VVG 2008* (Explanatory Notes of the German Federal Government regarding the Draft of Insurance Law 2008).

<sup>10</sup> Act of 31 July 2009, BGBl I, pp 2529 to 2538.

and analyses conducted in the past, nor to receive any such information. However, this provision could be easily ignored unless the purpose of this provision is kept in mind. Therefore, the insurer is not allowed to ask if genetic testing has ever been previously conducted, either.<sup>11</sup> In respect to already conducted genetic testing, this prohibition does not apply to life-insurance, disability insurance and care pension insurance if the one-time insurance cover is more than EUR 300,000 or if the annual pension exceeds EUR 30,000 (the relevant sum is the fixed sum agreed upon in the contract, ignoring any dynamic progress). The reason for this re-exemption is to prevent an advantage in knowledge at the expense of the insurer or the insured individuals, constituting a community of solidarity. It is, however, controversial if sum limits are to be calculated per insurance contract with the consequence that a policyholder could conclude several contracts with various insurers up to the permitted sum (see above) without being obliged to reveal his genetic disposition.<sup>12</sup> Yet, the policyholder must represent to the insurer existing and pre-existing conditions according to VVG ss 19 to 22, 47 even if these illnesses were diagnosed by genetic testing, GenDG s 18(2).<sup>13</sup>

In addition, requests aiming for revelation of circumstances, upon which any differentiated treatment of policyholders is unlawful pursuant to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), are not permitted. This is true, for instance, regarding a request for revelation of any existing pregnancy.<sup>14</sup>

#### ***dd. Missing or Obviously Inconsistent Answers of the Policyholder***

Regarding questions not answered at all or answered obviously inconsistently by the policyholder, German case law has imposed on the insurer a duty to request information. It is to be prevented that the insurer reserves its remedies until the insured event had occurred albeit serious indications pointing towards the policyholder's incomplete, inconsistent or incorrect statements have existed prior to the occurrence. From a systematic point of view, the duty of the insurer to request information does not affect the policyholder's duty. However, the insurer is not allowed to exercise any remedies (*venire contra factum proprium*).<sup>15</sup> Contrary to former case law,<sup>16</sup> it is now established that the insurer has no duty to request information in case the policyholder misrepresented to the insurer.<sup>17</sup>

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<sup>11</sup> RegE BT-Drs 16/10532, p 36.

<sup>12</sup> According to prevailing doctrine, several independent insurance contracts are to be added up in order to avoid that a policyholder could conclude several contracts with various insurers up to the permitted sum without being obliged to reveal his genetic disposition; cf Hahn, *Zeitschrift für die gesamte Versicherungsrechtswissenschaft (ZVersWiss)* 2013, pp 519 to 536 (p 535); Armbrüster, *Versicherungswirtschaft (VW)* 2010, pp 1309 to 1310 (favouring an analogous application); Neuhaus, *Recht und Schaden (r+s)* 2009, pp 309 to 319 (p 315).

<sup>13</sup> OLG Saarbrücken, *Versicherungsrecht (VersR)* 2012, pp 557 to 559. Regarding the pre-contractual duty not to misrepresent concerning genetic defects cf Neuhaus, *Zeitschrift für Schadensrecht (ZfS)* 2013, pp 64 to 69.

<sup>14</sup> Brand, *Versicherungsrecht (VersR)* 2009, pp 715 to 721 (p 718).

<sup>15</sup> Case law qualifies the duty to request as an *Obliegenheit* of the insurer; regarding its legal nature see Ch II B.

<sup>16</sup> BGH, *Versicherungsrecht (VersR)* 1992, pp 603 f.

<sup>17</sup> BGH, *Versicherungsrecht (VersR)* 2007, p 96.

**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?**

The policyholder's risk of economic loss devolves upon the insurer due to the insurance contract. The insurer calculates the risk based on different factors influencing its realization. However, most of these factors are naturally within the applicant's (*ie* the prospective policyholder's) sphere of knowledge. 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. Although German insurance law is solely distinguishing between misrepresentation and disclosure by way of adding an adjective (*Anzeigepflicht und spontane Anzeigepflicht*), we will follow the linguistic approach differing between the duty to (spontaneously) disclose (meaning to inform or to provide information without being explicitly asked to; *spontane Anzeigepflicht*) and the duty to take reasonable care not to make a misrepresentation to the insurer (in short "duty not to misrepresent"; meaning not to untruthfully answer a question asked by the insurer; *Anzeigepflicht*).<sup>18</sup> With regard to general statements, we will use the term "duty to notify".

The revision of the rules on pre-contractual information duties was one of the core elements of the reform by the VVG 2008. The reason was that several rules of the VVG 1908 were unduly burdensome to the policyholder and, therefore, no longer complying with modern requirements on consumer protection. VVG 1908 s 16 imposed on a genuine pre-contractual duty to disclose to the insurer all risk-relevant facts even though the insurer had filed no inquiries. Nowadays, VVG 2008 s 19 constitutes the key provision on the policyholder's pre-contractual duty not to misrepresent. Pursuant to VVG 2008 s 19(1), the policyholder must notify the insurer of all risk factors known to him, material to the insurer's decision to conclude the insurance contract with the agreed content and requested by the insurer in text form (*Textform*). If the policyholder makes a misrepresentation, the insurer is entitled to avoid the contract unless less strict remedies apply as stipulated by VVG 2008 ss 19(3), 19(4) and 19(5). The provisions on the policyholder's pre-contractual duty not to misrepresent (VVG 2008 ss 19, 20 and 21) are composed in a rather complicated way. In this respect, the law reform 2008 regrettably did not achieve its general objective to simplify the existing legal framework.<sup>19</sup>

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<sup>18</sup> For further advice with regard to England see *Zurich General Accident and Liability Insurance Co v Leven* [1940] SC 406, 415; Lowry, Pre-contractual information duties: the insured's pre-contractual duty of disclosure – convergence across the jurisdictional divide, in Burling/Lazarus (eds), *Research Handbook on International Insurance Law and Regulation* (Cheltenham and Northampton, 2011), pp 56 to 92.

<sup>19</sup> Wandt, Haben sich die Neuregelungen zum Allgemeinen Teil des VVG 2008 bewährt? Gedanken aus der Perspektive der Rechtswissenschaft, in Koch/Werber/Winter (eds), *Der Forschung – der Lehre – der Bildung: 100 Jahre Hamburger Seminar für Versicherungswissenschaft und Versicherungswissenschaftlicher Verein in Hamburg eV* (Karlsruhe, 2016), p 229.

Following the courts and prevailing doctrine in German insurance contract law, the legal nature of the duty not to misrepresent to the insurer is a *gesetzliche Obliegenheit* (“legal obligation”). Unlike an enforceable duty (*echte Rechtspflicht*), a *gesetzliche Obliegenheit* does not confer an enforceable claim for either performance or damages. Instead, a breach of a *gesetzliche Obliegenheit* leads to other specific legal consequences determined by law.

The general provisions on the policyholder’s pre-contractual duty to inform, *ie* VVG ss 19 to 22, 47,<sup>20</sup> are semi-mandatory (VVG s 32).<sup>21</sup> This means that it is prohibited to contract out of these provisions to the policyholder’s disadvantage. These restrictions of the contractual freedom are, however, not applicable to large (industrial) risks in the meaning of VVG s 210. Thus, some sectors of insurance are granted a broader extent of contractual freedom, for example transport insurance, credit or suretyship insurance (unless contracts are concluded for private demand) and indemnity insurance, in general, if the policyholder is an entity exceeding a specific size.<sup>22</sup> As a consequence of the limited scope of VVG s 210, the semi-mandatory provisions of the VVG are not only protecting consumers seeking and taking out insurance. Self-employed persons and tradespersons are also protected – as long as the requirements of VVG s 210 are not met. Even if parties of a contract regarding large (industrial) risks in the meaning of VVG s 210 are contracting by way of *Allgemeine Geschäftsbedingungen* (AGB – General Conditions of Insurance, GCI) the general provisions on the policyholder’s pre-contractual duty not to misrepresent (VVG ss 19 to 22) serve as a point of reference in the framework of controlling the legal admissibility of the respective GCI clause according to *Bürgerliches Gesetzbuch* ss 307 to 309 (BGB – German Civil Code). This causes evident uncertainty concerning the outcome of a judicial review.

With regard to consumer contracts, the VVG 2008 is *grosso modo* similar to the rules of the Consumer Insurance (Disclosure and Representations) Act 2012 Chapter 6. However, referring to non-consumer contracts the legal framework is considerably different from the Insurance Act 2015 in the UK. In German law, the VVG 2008 is applicable to both consumer and non-consumer insurance contracts, with the only exception to free parties to an insurance contract on large (industrial) risks from the restrictions of semi-mandatory provisions in order to allow them to contract differently.

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<sup>20</sup> Specific regulations apply for preliminary coverage (VVG s 56[1]), transport insurance (VVG s 131), life insurance (VVG s 157) and health insurance (VVG s 194[1] sentences 3 and 4).

<sup>21</sup> The latest entire revision of the Act on the Supervision of Insurance Undertakings dates from 1 April 2015 (BGBl I, pp 434 to 570 – legislative acts passed by the German Parliament [*Bundestag*] are generally accessible at [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl)).

<sup>22</sup> VVG S 210(2) para 3 provides that the policyholder must exceed at least two of the following characteristics: lit a) Euro 6,200,000 balance sheet total, lit b) Euro 12,800,000 net turnover, lit c) an average of 250 employees per fiscal year.

## **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 policyholder is solely obliged to reveal material circumstances known to him. Negligent lack of knowledge does not trigger his duty even if it is to be qualified as gross negligence. However, any policyholder, having forgotten facts priorly known to him, can reasonably be expected to try to memorize;<sup>23</sup> the principle of good faith actually constitutes an obligation of the policyholder to look it up or to inquire.<sup>24</sup> However, it is prevailing doctrine that, subject to fraud, the duty for policyholders to do reasonable research for information is restricted to facts previously known to the policyholder<sup>25</sup>.

## **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?**

**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?**

Caused by the close connection of both questions both will be answered at once, in the following.

### ***aa. Insurer's Duty to Advise According to VVG s 6***

In contrast to the old VVG 1908, VVG 2008 s 6(1) stipulates a duty of the insurer to advise the policyholder. VVG ss 6(1) to 6(4) are not applicable if the contract was mediated by an insurance broker (VVG s 6[6]), since in this scenario the duty to advise applies only to the insurance broker having a closer connection with the policyholder. An exception to this rule – with the result of the insurer having the duty to warn or correct – is acknowledged and based on the principle of good faith (BGB ss 241[2], 311[2], 242) if the insurer is aware that the policyholder is mistaken despite being advised by the insurance broker.<sup>26</sup>

<sup>23</sup> Established case law and doctrine cf OLG Frankfurt, decision of 23 July 2010 – 7 U 90/09; Langheid in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 19 VVG para 60 with further references.

<sup>24</sup> Affirmative Langheid in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich 2016), § 19 VVG para 60.

<sup>25</sup> Rolfs in Bruck/Möller (founders), *VVG Kommentar*, vol 1, 9th ed (Berlin, 2009), § 19 VVG para 56; Looschelders in Looschelders/Pohlmann (eds), *VVG Kommentar*, 2nd ed (Cologne, 2011), § 19 VVG para 33; as well as Langheid in Langheid/Rixecker (eds), *VVG Kommentar*, 5th ed (Munich, 2016), § 19 VVG para 28.

<sup>26</sup> OLG Saarbrücken, *Versicherungsrecht (VersR)* 2011, pp 1441 to 1448; Rudy in Prölss/Martin (founders), *VVG Kommentar*, 29th ed, (Munich, 2015), § 6 VVG para 70; Armbrüster in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 6 VVG para 352; Rixecker in Römer/Langheid (eds), *VVG Kommentar*, 4th ed (Munich, 2014), § 6 VVG para 36; Schwintowski in Bruck/Möller (founders), *VVG Kommentar*, vol 1, 9th ed, (Berlin, 2009), § 6 VVG para 48. Dissenting view: Muschner, *Versicherungsrecht (VersR)* 2012, pp 703 to 706.

Pursuant to VVG s 6(6), the duty to advise neither applies to large risks in terms of VVG s 210(2) since in these cases for those large risks the policyholder typically has sufficient insurance-related business experience, a necessity of protection by specific duties to advise does not arise. Again, duties to advise according to general principles of contract law are still possible.

VVG s 6(1) contains a whole series of pre-contractual duties of the insurer that aim to secure adequate advice to the prospective policyholder: The insurer is obliged to ask (if circumstances require) for wishes and needs of the potential policyholder, to advise and to reason given advice. Moreover, questioning, advising and reasoning are to be recorded in order to ease the proof of the facts in favour of the policyholder. A general prerequisite for setting up these duties for the insurer is a discernible cause.<sup>27</sup> In case of a breach of a duty under VVG s 6, the insurer is obliged to pay damages pursuant to VVG s 6(5).

A breach of this duty by an insurance agent can be attributed to the insurer by way of BGB ss 278, 311(2). On the other hand, the action of a broker (closer connected with the policyholder) is generally not attributed to the insurer. In exceptional circumstances the *Bundesgerichtshof* (BGH – Federal Supreme Court of Germany) attributes the action of all intermediaries of a structured distribution system in terms of a marketing network including brokers if the insurer refrained from building up its own distribution system in order to fulfil its duties to clarify and advise.<sup>28</sup> Pursuant to VVG s 6(5) sentence 2 respectively s 63 sentence 2, there is a rebuttable presumption of the fault of the insurer or the insurance agent.

Decisions of the *Bundesgerichtshof* concerning the insurer's (and the insurance intermediary's) duties to advise are still rare.<sup>29</sup> This is due to the fact that the requirements adding up to a duty to advise (as stipulated in VVG ss 6 and 61) are deliberately drafted softly to keep up the opportunity to consider the circumstances of individual cases.<sup>30</sup> However, when establishing duties to advise German courts are not going down slippery slopes but rather ground such duties on principles of general contract law. Resultantly, court judgments on the required discernible cause (see above), up to now, are doubtlessly plausible when they had to deal with premature terminations of existing life insurance contracts, the conclusion of new life insurance contracts, substitutions of health insurers or risks resulting from underinsurance.<sup>31</sup> Only in a special situation where a net policy with an additional

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<sup>27</sup> The PEICL (Art 2:202 and Art. 2:203) followed this approach; this approach is criticised for being too defensive by Loacker, *Informed Insurance Choice* (Cheltenham and Northampton, 2015), pp 221 ff, pp 248 ff, pp 256 ff, p 291; Kieninger, *Archiv für die civilistische Praxis (AcP)* 199 (1999), pp 190 to 247 (pp 195 ff); Heiss, *Zeitschrift für die gesamte Versicherungswissenschaft (ZVersWiss)* 2003, pp 339 to 374 (p 367).

<sup>28</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245; BGH, *Recht und Schaden (r+s)* 2013, pp 117 to 119.

<sup>29</sup> Yet, BGH, *Versicherungsrecht (VersR)* 2014, pp 861 to 862.

<sup>30</sup> cf Beyer, *Versicherungsrecht (VersR)* 2016, pp 293 to 298; Loacker, *Informed Insurance Choice* (Cheltenham and Northampton, 2015), p 291 (solely a principle-based approach is reasonable).

<sup>31</sup> With regard to risks related to premature terminations of existing life insurance contracts and the conclusion of new life insurance contracts, cf BGH, *Versicherungsrecht (VersR)* 2015, pp 107 to 109; cf OLG Hamm, *Recht und Schaden (r+s)* 2013, pp 523 to 524; OLG München, *Versicherungsrecht (VersR)* 2012, pp 1292 to 1295; OLG Hamm, *Versicherungsrecht (VersR)* 2016, pp 394 to 397 (Change of health insurance). OLG München,



payment agreement was concluded, the respective court had to reason its decision with profound dogmatics. Following the established case law of the *Bundesgerichtshof*, an insurance agent – in contrast to a broker<sup>32</sup> – shall instruct the customer on the impact of the conclusion of a net policy in cases of premature termination. In detail, this means that the agent must make the customer aware of the fact that he is still obliged to pay the agent-fee if the insurance contract is terminated after a short time period; if this instruction has not taken place, the court will assume that the policyholder would otherwise not have concluded the net policy.<sup>33</sup>

The *Bundesgerichtshof* decided rather dogmatically uncomplicated that a breach of the duty to record leads to a reduction of the burden of proof in favour of the policyholder or even in an inversion of the onus of proof.<sup>34</sup> If a necessary notice of evident importance has not at all been recorded, the *Bundesgerichtshof* states that the insurer or the insurance intermediary basically bears the burden of proof.

#### ***bb. Insurer's Pre-contractual Duties to Advise According to General Contract Law***

According to German case law, a general duty to clarify during contractual negotiations exists without further request where the other party is reasonably (pursuant to the principle of good faith and generally accepted standards) entitled to expect a notification of facts, which are apparently evidential to the decision-making of that party.<sup>35</sup> Especially, this applies to facts, which could have a significant impact on the particular purpose of the contract. In addition, facts that could be of fundamental economic damage to the other party are to be considered as facts of significant impact. However, where the party itself is individually responsible with regard to these facts, the party is restricted from relying on the explained duty to pre-contractually advise.<sup>36</sup>

In its decisions of 11 July 2012, the *Bundesgerichtshof* ruled on life insurance contracts named “Wealthmaster Noble” (single premium; *Einmalbeitrag*) and advertised in Germany from the late 1990s until late 2007 by the English insurer *Clerical Medical Investment Group Ltd.*<sup>37</sup> In summary, the *Bundesgerichtshof* decided that customers were entitled to damages<sup>38</sup> because the intermediary's breaches of duties to clarify when concluding the contract were

*Versicherungsrecht (VersR)* 2016, pp 318 to 320. With regard to risks resulting from underinsurance if a reduction of the respective sum insured is intended OLG Karlsruhe, *Versicherungsrecht (VersR)* 2013, pp 885 to 888; cf BGH, *Versicherungsrecht (VersR)* 2014, pp 625 to 628.

<sup>32</sup> BGH, *Versicherungsrecht (VersR)* 2014, pp 240 to 247; affirmative BGH, *Versicherungsrecht (VersR)* 2007, pp 1127 to 1129.

<sup>33</sup> BGH, *Versicherungsrecht (VersR)* 2014, pp 240 to 247; cf BGH, *Neue Juristische Wochenschrift (NJW)* 2014, pp 2782 to 2784; cf BGH, *Versicherungsrecht (VersR)* 2014, pp 1328 to 1331.

<sup>34</sup> BGH, *Versicherungsrecht (VersR)* 2015, pp 107 to 109.

<sup>35</sup> Settled case law since RG, *Entscheidungen in Zivilsachen (RGZ)* 111, pp 233 to 236; recently BGH, *Neue Juristische Wochenschrift (NJW)* 2010, pp 3362 to 3363.

<sup>36</sup> BGH, *Neue Juristische Wochenschrift (NJW)* 2010, pp 3362 to 3363.

<sup>37</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245; cf the substantially conforming decisions of the BGH of 11 July 2012 (IV ZR 122/11, IV ZR 151/11, IV ZR 271/10).

<sup>38</sup> In the alternative, the BGH affirmed policyholder's claims for performance with regard to regular payments expelled in the insurance certificate.

attributed to the insurer.<sup>39</sup> According to its reasoning, the damage to the policyholder consisted of a disadvantageous contract.<sup>40</sup> The insurer was obliged to clarify according to established principles of clarification in case of investment businesses (*Anlagegeschäfte*) because the conclusion of the life insurance contract in question was similar to an investment business from an economic perspective. In particular, the fact that the insurer had drawn a wrongful and far too optimistic picture of profits from the expected return of the life insurance contract amounted to the breach of its duty to clarify.<sup>41</sup> A second breach of the contract resulted from the lack of adequate clarification in respect of the specifics of the so-called *Glättungsverfahren* (smoothing technique).<sup>42</sup>

### *cc. Application of the Formerly Customary Liability for Performance?*

A controversial question, which has not been decided yet by the *Bundesgerichtshof*, affects the formerly recognised and case law-established<sup>43</sup> liability for performance by customary<sup>44</sup> insurance contract law. Before the VVG 2008 entered into force, German courts followed this approach alongside general principles on pre-contractual liability (*culpa in contrahendo*) or *positive Vertragsverletzung* (positive infringement).<sup>45</sup> The term “liability for performance” originates from the legal consequence of incorrect advising concerns the extent of the insurance cover: The insurer is obliged to adhere – in terms of performance – to the contract with the content the policyholder could reasonably expect as a result of the incorrect advising. However, this liability for performance dropped unsubstitutedly (*Alles-oder-nichts-Prinzip* – principle of all-or-nothing) if the mistaken understanding of the policyholder was due to its own substantial fault.<sup>46</sup>

Some German courts and parts of doctrine considered the aforementioned liability for performance as applicable even after the VVG 2008 entered into force.<sup>47</sup> Certainly, the

<sup>39</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245 (para 52).

<sup>40</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245 (paras 63 ff).

<sup>41</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245 (para 54).

<sup>42</sup> BGH, *Versicherungsrecht (VersR)* 2012, pp 1237 to 1245 (para 57); cf OLG Düsseldorf, I-4 U 151/11, 4 U 151/11, para 16 and paras 73 ff.

<sup>43</sup> The so-called *Sturmflut-Fall* (“storm flood case”) is well-known, Reichsgericht RG, *Entscheidungen in Zivilsachen (RGZ)* 86, pp 128 to 135.

<sup>44</sup> cf BGH, *Versicherungsrecht (VersR)* 2010, pp 373 to 374; Langheid in Römer/Langheid (eds), *VVG Kommentar*, 2nd ed (Munich, 2003), § 43 old VVG paras 38 ff. Criticised by Kollhosser in Prölss/Martin (founders), *VVG Kommentar*, 27th ed (Munich, 2004), § 43 old VVG paras 35a f.

<sup>45</sup> cf for the jurisprudence before commencement of the new VVG 2008: Kieninger, *Archiv für die civilistische Praxis (AcP)* 199 (1999), pp 190 to 247 (pp 195 ff); Heiss, *Zeitschrift für die gesamte Versicherungswissenschaft (ZVersWiss)* 2003, pp 339 to 374.

<sup>46</sup> BGH, *Entscheidungen in Zivilsachen (BGHZ)* 40, pp 22 to 28.

<sup>47</sup> OLG Frankfurt, *Versicherungsrecht (VersR)* 2012, pp 342 to 344; LG Saarbrücken, *Versicherungsrecht (VersR)* 2014, pp 317 to 321; Pohlmann in Looschelders/Pohlmann (eds), *VVG Kommentar*, 2nd ed (Cologne, 2011), § 6 VVG para 15; Ebers in Schwintowski/Brömmelmeyer (eds), *Praxiskommentar zum Versicherungsvertragsrecht*, 2nd ed (Münster, 2010), § 6 VVG para 56; Schneider, *Recht und Schaden (r+s)* 2015, pp 477 to 489; Michaelis in Schwintowski/Brömmelmeyer (eds), *Praxiskommentar zum Versicherungsvertragsrecht*, 2nd ed (Münster, 2010), § 69 VVG para 12; Schimikowski, *Versicherungsvertragsrecht*, 5th ed (Munich, 2014), para 134; Koch, Zum Stand der versicherungsrechtlichen Literatur in Deutschland, in Wandt et al, *Versicherungsrecht, Haftungs- und Schadensrecht: Festschrift Lorenz* (Karlsruhe, 2014), pp 199 to 257; Bruns, *Privatversicherungsrecht* (Munich, 2015), § 8 para 13.

opposite opinion<sup>48</sup> is more convincing as the need for this approach dropped after the revision of the VVG. This dogmatically doubtful former construction (which in itself did not fit in with general principles and systematics of general contract law) is no longer tenable since the liability for damages is now expressly set out in statutory law, namely VVG ss 6(5), 63.

Supporters of the continued application of this legal instrument (generated from customary law) argue as to the merit<sup>49</sup> that cases in which the policyholder is promised insurance coverage which is otherwise not available in the market cannot be solved adequately by relying on VVG ss 6, 63<sup>50</sup> – albeit a reasoning that explains the inadequacy of the solution provided by the VVG is missing. VVG ss 6, 63 protect the incorrectly advised customer uncomplicatedly if the promised insurance cover is available in the market. Even in today's rare and exceptional cases in which the insurance cover is unavailable in the market, the policyholder is protected inasmuch as he trusts the existing insurance cover and behaves riskily which he would not if there were no insurance coverage at all. With regard to evidentiary issues of casualty, the incorrectly advised policyholder, thereby, is granted with certain reductions of the burden of proof. A reason for an additional protection through liability of performance based on general principles of private law is, therefore, no longer obvious.

#### **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?**

Disclosure of material increases in risk (the analysis will stick to the term “increase in risk” rather than “change in risk”) is governed by VVG ss 23 to 27, which are semi-mandatory pursuant to VVG s 32 (meaning the parties are not allowed to deviate from these stipulation to the disadvantage of the policyholder). They are considered specific rules of frustration of contract (*Störung der Geschäftsgrundlage*), wherefore the general provision in German contract law (*ie* BGB s 313) is not applicable.<sup>51</sup> On the other hand, VVG ss 23 to 27 do not apply where even more specific provisions on material increases in risk become necessary. This is the case with open policies (*laufende Versicherungen*, VVG s 57), transport

<sup>48</sup> cf Reiff in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 69 VVG paras 77 ff; Reiff in Beckmann/Matusche-Beckmann (eds), *Versicherungsrechts-Handbuch*, 3rd ed (Munich, 2015), § 5 para 159; Rixecker in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 49 VVG para 21; Rudy in Prölss/Martin (founders), *VVG Kommentar*, 29th ed (Munich, 2015), § 6 VVG para 78; Jacob, *juris Praxis Report Versicherungsrecht (jurisPR-VersR)* 12/2009 note 3; Fricke, *Versicherungsrecht (VersR)* 2015, pp 1090 to 1094; Lorenz, Die „gewöhnheitsrechtliche“ Erfüllungshaftung des Versicherers im bisherigen und im zukünftigen Versicherungsvertragsrecht, in Heldrich et al, *Festschrift Canaris*, vol 1 (Munich, 2007), pp 757 to 776; Armbrüster, *Privatversicherungsrecht* (Tübingen, 2013), para 780; Wandt, *Versicherungsrecht*, 6th ed (Munich, 2016), para 432.

<sup>49</sup> Moreover, parts of doctrine argue that the legislator gave no indication as to his intention to abandon the approach developed by German courts.

<sup>50</sup> Schneider, *Recht und Schaden (r+s)* 2015, pp 477 to 489.

<sup>51</sup> See with respect to the historical developments Weyers, *Versicherungsvertragsrecht*, 2. ed (Munich 1995), para 511 and the historical German legislator *Motive zum VVG* (recitals on the VVG; Berlin 1963 – reprint), pp 302ff.

insurances (VVG s 132), life insurances (VVG s 158), occupational disability insurances (VVG ss 176, 158) and accident insurances (VVG s 181). In addition, VVG ss 23 to 27 do not apply to life health insurances (VVG s 194[1] sentence 2) as the increasing risks of aging have already been taken into account when having calculated the premium.

In line with the three subsections of VVG s 23, the provisions introduce three different legal obligations (*gesetzliche Obliegenheit*; see with regard to the meaning of this term see question 1b) of the policyholder with respect to post-contractual material increases in risk:

- (1) Intentional subjective increase in risk (*bewusste subjektive Gefahrerhöhung*): The policyholder must not aggravate the risk insured or permit its increase by a third party without the consent of the insurer.
- (2) Duty of disclosure upon recognition of an unintentional subjective increase in risk (*Anzeigepflicht bei Erkennen einer unbewussten subjektiven Gefahrerhöhung*): The policyholder must disclose (without undue delay) an increase in risk insured, which he has aggravated or permitted without the consent of the insurer, upon recognising this fact.
- (3) Duty of disclosure upon recognition of an objective increase in risk (*Anzeigepflicht bei Erkennen einer objektiven Gefahrerhöhung*): The policyholder must disclose (without undue delay) to the insurer an increase in risk insured, which occurs notwithstanding his intention. Objective increase in risk entails aggravation by a third party<sup>52</sup> as well as by acts of god (such as natural forces or weather conditions<sup>53</sup>).

In consequence, German law differentiates between increases in risk intended by the policyholder (subjective increase in risk, VVG ss 23[1] and 23[2]) and unintended increases in risk (objective increase in risk, VVG s 23[3]).

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

German statutory law does not provide for a definition of the term “material change” or “material increase”. Yet, VVG s 27 clarifies that any immaterial/irrelevant increase does not trigger the duties drawn up by VVG s 23. The meaning of the term is rather taken from the sense of the insurance contract as such. In consequence, essential circumstances need to have changed in a way that claiming insurance coverage is more likely compared to the point of time the contract has been concluded. Following this guideline, three different situations may derive from this definition:

- (1) Increase of basic risks (*Erhöhung der Grundgefahr*,<sup>54</sup> eg worn tyres).

<sup>52</sup> cf LG Köln, *Versicherungsrecht (VersR)* 2004, pp 636 ff (regarding a termination of an insurance contract because of the terroristic attacks of 11 September 2001); see as well Beckmann, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2002, pp 1125 ff.

<sup>53</sup> A famous historical example would be OLG Stettin, *JRPV* 1928, 247 (lightning damages electric cables and increase in fire risk).

<sup>54</sup> cf OLG Köln, *Versicherungsrecht (VersR)* 2016, pp 845 ff (regulatory prohibition order to enter a flat due to the risk of damages of snow pressure constituting an objective increase in risk); OLG Köln, *Versicherungsrecht*

- (2) Increase of damage extent risks (*Erhöhung der Schadenauswirkungsgefahr*, eg increasing risk bursting water pipes due to a house's residents' absence for longer period of time).
- (3) Increase of contractual risks (*Erhöhung der Vertragsgefahr*, ie increased risk of claiming insurance coverage, eg if the policyholder is sentenced for insurance fraud).

Without a difference in substance, the *Bundesgerichtshof* (in determining if a change is material) nowadays asks whether the insurer would not have had concluded the contract or would not have had concluded the contract on the conditions agreed upon (at least not on the agreed upon premium).<sup>55</sup> This definition takes up the provision of VVG s 27. Pursuant to this provision, an increase is not to be considered material if – according to the circumstances (“*nach den Umständen*”) – the increase in risk being part of the insurance cover. Hence, the reasonable expectations of the insurance customers are decisive.<sup>56</sup>

In addition, the definition of a material increase in risk entails an element of duration (or durable suitability).<sup>57</sup> In consequence, a material increase in risk requires that the former state of peril is replaced by a new state of peril in a way that the risk is suitable of lasting (ie the state of peril needs to reach a new, higher and stabilized level constituting the basis for a natural evolution of peril).<sup>58</sup> The necessity for this additional requirement is reasoned by legitimate interests of the policyholder as he is allowed to reasonably expect that short-term changes are not causing negative legal consequences and, therefore, no disclosure duty towards the insurer. An example of a non-durable change would be a policyholder leaving his apartment for a short time without locking the closed door.<sup>59</sup> A non-durable increase in risk might still release the insurer from its duty to provide insurance coverage if the policyholder caused the insured event in the sense of VVG s 81.

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(*VersR*) 2016, 1435 (increase in risk due to a resignation of the only professional pilot who was engaged by a vendor of commercial helicopter rides); OLG Celle, *Versicherungsrecht (VersR)* 2017, 756 (drug production in the cellar of an insured house).

<sup>55</sup> BGH, *Versicherungsrecht (VersR)* 1981, pp 245 ff; BGH, *Versicherungsrecht (VersR)* 2005, pp 218 ff.

<sup>56</sup> This was the position of German case law with regard to the old VVG, cf BGH, *Neue Juristische Wochenschrift (NJW)* 1965, pp 156 ff; OLG Köln, *Versicherungsrecht (VersR)* 2001, pp 580 ff (an increase in risk is not given where the policyholder moves into a flat that is located above a carpenter's workshop). With respect to an increase in risk by third parties if the insurance cover entails damages by third parties BGH, *Versicherungsrecht (VersR)* 2010, 1032.

<sup>57</sup> This is to be derived from VVG ss 27 and 23(2).

<sup>58</sup> cf BGH, *Versicherungsrecht (VersR)* 1952, pp 387 ff, annotated by Prölss, *Versicherungsrecht (VersR)* 1952, pp 399 ff.

<sup>59</sup> LG Hamburg, *Versicherungsrecht (VersR)* 1984, pp 752 ff.

## 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)?**

### a. General Information during the Contract Term

During the term of the policy, circumstances may arise which may cause the policyholder to push for contract change or to conclude a new insurance contract.<sup>60</sup> For this reason, the insurer has the post-contractual duty to inquire and advise, according to VVG s 6(1) sentence 1 (yet, this does not entail a duty to document<sup>61</sup>), provided that there is an objective reason, which is recognisable to the insurer (VVG s 6[4] sentence 1). An objective reason for inquiry and advice may be given in the event of actual or legal changes that could cause the policyholder to change the contract or conclude a new insurance contract, *eg* in the event of a change in legal framework conditions. An objective reason is also given if the policyholder expresses the desire for a reduction of the insured sum in a consultation. The insurer must then inform the policyholder of the risk of underinsurance and of the significance of the replacement values for the sum insured.<sup>62</sup> However, there is a tendency to make strict demands on the objective cause and on the insurer's ability to recognise it.<sup>63</sup> It should also be noted that there must always be an occasion for a review of the existing insurance cover, *ie* it is not necessary to give general advice.

### b. Post-Contractual Disclosure with respect to the Occurrence of an Insured Event

With regard to the occurrence of an insured event, disclosure duties of the insurer are linked to the maturity date of the insurer's performance under the insurance cover. In accordance with VVG s 14(1), the maturity of payments of the insurer depends on the fact that the elicitations (*Erhebungen*) necessary to establish the insured event and the scope of the insurer's payments have been completed.<sup>64</sup> "Completed elicitations" (and thus the maturity date is also given) with the receipt of a definitive refusal of coverage by the insurer<sup>65</sup> or, in

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<sup>60</sup> See with regard to an example in this respect BT-Drs 16/3945 p 58: *Begründung der Bundesregierung zum Entwurf des VVG 2008* (Explanatory Notes of the German Federal Government regarding the Draft of Insurance Law 2008).

<sup>61</sup> For further information concerning the evolutionary legislative process see the statement of the Bundesrat dating 24 November 2006 and the approving statement of the Bundesregierung, BT-Drs 16/3945, pp 125 ff (p 130). Yet, despite approval, the duty to document was not implemented into the VVG.

<sup>62</sup> OLG Karlsruhe, *Versicherungsrecht (VersR)* 2013, pp 885 ff.

<sup>63</sup> *cf* BGH, *Versicherungsrecht (VersR)* 2014, pp 861 ff (p 862); OLG Karlsruhe, *Versicherungsrecht (VersR)* 2013, pp 885 ff (p 886); OLG Saarbrücken, *Versicherungsrecht (VersR)* 2011, pp 1556 ff (regarding the old VVG).

<sup>64</sup> *cf* OLG Saarbrücken, *Versicherungsrecht (VersR)* 2004, pp 1301 ff; OLG München, *Zeitschrift für Schadensrecht (ZfS)* 2011, pp 150 ff.

<sup>65</sup> Settled case law, *cf* BGH, *Versicherungsrecht (VersR)* 2000, pp 753 ff; BGH, *Versicherungsrecht (VersR)* 1990, pp 153 ff; OLG Köln, *Zeitschrift für Schadensrecht (ZfS)* 2007, pp 217 ff.

the case of delayed elicitations, at the time when the elicitations would have ended if processed properly.<sup>66</sup>

This provision reflects the legitimate interests of the policyholder when the insured event has occurred. In addition to the maturity description, VVG s 14 provides for a duty of the insurer to determine the insured event and to conduct elicitations thereto.<sup>67</sup> Failures and delays on the part of the insurer may cause existentially detrimental situations for the policyholder. Hence, the policyholder must rely on the insurer's reasonable claims handling, wherefore reasonable expectations must be considered. Against this background, the term necessary elicitations (stated in VVG s 14[1]) needs to be interpreted as elicitations an average and prudent insurer must carry out in order to determine the insured event, its duty to provide coverage and the scope of the payment.<sup>68</sup>

After determining the key elements of the insurer's claims handling, the policyholder has to be notified of the result. Yet, this duty is not explicitly stipulated by statutory law but by German case law.<sup>69</sup> Additionally, this conclusion is supported by VVG s 15 as the beginning of the limitation period for claims of the policyholder is linked to the insurer's final statement regarding its duty to provide coverage.<sup>70</sup> With its final statement, the insurer is as well obliged to refrain from any further elicitations. In case, its final statement was delayed by the insurer, the maturity date is preponed to the date the notifications would have reached the policyholder in the usual course of business.<sup>71</sup>

More precisely, the VVG entails a special provision with regard to specific insurances. First and foremost, this is true for third party liability insurances. Here, VVG s 106 provides for a duty of the insurer to release the policyholder from the third party's claim within two weeks, beginning at the time when the third party's claim is established with binding effect for the insurer by final judgement, acknowledgement or settlement. The same applies with respect to the reimbursement of judicial and extra-judicial costs arising from claims asserted by a third party (VVG s 101[1]), *ie* payment within two weeks after communication of the calculation.

In occupational disability insurance, the policyholder is entitled to receive a notification (in text form) on the existence or non-existence of a duty of the insurer to provide coverage, VVG s 173. The insurer carries out this duty by acknowledging its duty or by stating that it is not obliged to perform. This duty arises on the maturity date defined by VVG s 14(1). In case

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<sup>66</sup> cf BGH, *Versicherungsrecht (VersR)* 1977, pp 471 ff; OLG Hamm, *Versicherungsrecht (VersR)* 1991, pp 1369 ff.

<sup>67</sup> Fausten in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 14, para 2.

<sup>68</sup> Fausten in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 14, para 19.

<sup>69</sup> OLG Karlsruhe, *Recht und Schaden (r+s)* 1993, pp 443 ff; OLG Hamm, *Versicherungsrecht (VersR)* 1977, pp 954 ff.

<sup>70</sup> Fausten in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 14, para 49.

<sup>71</sup> Fausten in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 1, 2nd ed (Munich, 2016), § 14, paras 49 f, 68.

the insurer omits to notify the policyholder, the latter is – after a reminder – entitled to damages caused by the delay in accordance with BGB s 286(1).<sup>72</sup>

In addition, VVG ss 186, 187 stipulate specific disclosure duties of the insurer for accident insurances. In this respect, the insurer especially has to notify the policyholder of the time-limited requirements of his claim for coverage (VVG s 186).<sup>73</sup> However, this duty is again drafted as an *Obliegenheit* of the insurer (with regard to the terminology see above), *ie* the insurer is restricted from relying on the expiry of the policyholder's time period. Moreover, VVG s 187(1) sentence 1 generally obliges the insurer to notify the policyholder (in text form) if it recognizes a duty to provide cover and to what extent within a one-month-period after having received all necessary documents. Yet, this recognition is not considered to establish a duty of the insurer. That is why the insurer may still be entitled to reclaim the payment on ground of unjust enrichment (BGB 812[1] sentence 1 case 1).<sup>74</sup> Any breach of this duty may, again, solely entitle the policyholder to damages caused by the delay pursuant to BGB s 286(1).

## **6. Remedies in Case of Breach of the Insured's Disclosure Duties**

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

#### ***aa. Remedies at a Glance***

VVG s 19 provides for a scaled set of remedies with the right to avoid the contract being the basic remedy. Accordingly, the insurer's right to avoid or to vary the contract is restricted only by exclusions set out in VVG ss 19(3), 19(4) and 19(5).

The question whether the insurer is exempted from indemnifying the policyholder for loss suffered on the occurrence of an insured event prior to the avoidance is governed by VVG s 21(2). This crucial matter is linguistically hidden in the provision's heading "exercise of the rights of the insurer" and located between VVG s 21(1) (time period and the requirement to give reasons) and VVG s 21(3) (expiration period for remedies).

For example, in life insurance there is a specific provision on false declarations of the insured person's age. In such a case, and according to VVG s 157, the insurer's liability is modified in the proportion that the insurance premium commensurate with his actual age bearing to the agreed insurance premium. In deviation from VVG s 19(2) the insurer shall only have the right to avoid the contract on account of the misrepresentation if it would not have concluded the contract had the age been notified correctly.

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<sup>72</sup> Dörner in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 2, 2nd ed (Munich, 2017), § 173, paras 4 ff.

<sup>73</sup> Dörner in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 2, 2nd ed (Munich, 2017), § 186, para 4.

<sup>74</sup> Dörner in Langheid/Wandt (eds), *Münchener Kommentar zum VVG*, vol 2, 2nd ed (Munich, 2017), § 187, para 5.



In health insurance, an innocent misrepresentation does not lead to any negative consequences (VVG ss 194[4], 206). Contrary to VVG s 19(3), the insurer is not entitled to terminate the contract due to slight negligence of the policyholder in mandatory health insurance since any termination is excluded according to VVG s 206.<sup>75</sup>

Except in the case of fraudulent behaviour, any remedy requires that the insurer must have already instructed the policyholder in due time of the consequences of any misrepresentation (VVG s 19(5) sentence 1).

The burden of proof generally lies with the insurer claiming remedies according to VVG s 19.<sup>76</sup> However, the burden of proof regarding the fact that the policyholder acted without fault or only slightly negligently lies with the policyholder (VVG s 19(3) sentence 1). This also applies to the fact that the insurer, nevertheless, would have concluded the contract had it known the facts, which were not revealed – albeit with other conditions. In order to prove the latter, the policyholder's allegation is generally sufficient; in the aftermath, it is up to the insurer to substantiate that it would not have concluded the contract at all.

### ***bb. Legal Consequences in Particular***

For the ease of comprehension, the following depiction does not mechanically follow the intricate statutory regulation, but displays the legal consequences of breach with reference to the policyholder's degree of fault.

It should be noted that VVG ss 19 to 21 do not provide for a separate remedy in case of fraudulent intent of the policyholder. However, fraudulent intent for which the burden of proof is borne by the insurer exempts the insurer from its duty to ask questions in case of obviously incomplete or inconsistent answers by the policyholder. It also exempts the insurer from the requirement to instruct the policyholder on the consequences of a misrepresentation and denies the policyholder a rebuttal of causality.

If the policyholder misrepresents without fault or with only slight negligence, the insurer is entitled to terminate the contract within a one-month period where the insurer would have refrained from concluding the contract had it known the facts (*Vertragshinderungsstände*). The one-month period aims to enable the policyholder to obtain insurance coverage elsewhere.

- (1) If the insurer would have concluded the contract on different terms with regard to undisclosed facts (*Vertragsänderungsstände*), both parties' interests call for maintaining the contract with these "other conditions". Therefore, the insurer is not entitled to terminate the contract but may require these "other conditions" to

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<sup>75</sup> However, according to case law VVG s 206 does not exclude the general right to terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period (BGB s 314); cf BGH, *Versicherungsrecht (VersR)* 2012, pp 304 to 310.

<sup>76</sup> This follows from the application of the general rules on burden of proof. In line with these general rules VVG s 69(3) sentence 3 states that the insurer bears the burden of proof for a misrepresentation (if an agent is involved).

subsequently vary the contract (remedy to adapt the contract). The temporal effectiveness of the contractual variation is determined by the policyholder's degree of fault, VVG s 19(4) sentence 2. The adaption of the contract takes effect retroactively to the conclusion of the contract, unless the policyholder – indisputably or as evidenced by him – has acted innocently. In this case, the adaption of the contract takes effect retroactively to the beginning of the current insurance period.

- (2) If the policyholder misrepresents with gross negligence (which is assumed) the insurer is entitled to avoid the contract unless it had concluded the contract (albeit by agreeing upon different terms) with knowledge of the undisclosed circumstances. The insurer shall be entitled to the insurance premium up until the point in time the declaration of avoidance of contract becomes effective, VVG s 39(1) sentence 2.
- (3) If the insurer would have concluded the contract on different terms with regard to undisclosed facts,<sup>77</sup> the insurer may adapt the contract by notification. In this scenario, the different conditions become part of the contract retroactively to the conclusion of the contract.
- (4) If the policyholder has acted intentionally (which is assumed), the insurer may avoid the contract (VVG s 19[2]) being entitled to the insurance premium up until the point in time the declaration of avoidance of contract becomes effective (VVG s 39[1] sentence 2).

Upon avoidance of the contract, the insurer is released from its obligation with regard to a previously occurred insured event, VVG s 21(2).<sup>78</sup> However, the insurer is liable if the policyholder proves that the misrepresentation is of a fact that has neither been the cause of the occurrence or of the assessment of the insured event nor of the determination or the scope of the insurer's liability (rebuttal of causality, VVG s 21[2] sentence 1 half sentence 2). However, the policyholder is denied a rebuttal of causality if he misrepresented fraudulently, VVG s 21(2) sentence 2.

In the course of varying the contract, the equivalence ratio of insurance coverage and premium is either established retroactively from the beginning of the contract (in case of slight negligence) or retroactively from the beginning of the insurance period (in case of no fault).

As a reaction to the notification by the insurer, the policyholder may terminate the contract within one month without prior notice if the insurance premium increases more than 10 per cent on account of an adaption of the contract or if the insurer refuses to cover the risk of the unrevealed circumstance, VVG s 19(6) sentence 1. The insurer shall notify the policyholder of this right of termination in the notification of the variation of the contract, VVG s 19(6) sentence 2.

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<sup>77</sup> It is worth mentioning that even if the policyholder has acted with gross negligence there is no sanction if the insurer would have concluded the contract on equal terms with regard to unrevealed facts.

<sup>78</sup> This was already the position set out in the repealed VVG 1908 s 21.

By retroactively inserting an exclusion clause, the insurer may be exempted from liability for an insured event that occurred after the adaption of the contract came into effect if the insurer proves that it would have concluded the contract with the exclusion clause had it known the unrevealed fact.<sup>79</sup> It is argued, however, that such a solution would not be in line with the insurer not being entitled to avoid but only to terminate the contract. Following this argument, German doctrine proposes to teleologically reduce the application of VVG s 19(4) sentence 2 to the basis that slight negligent or innocent misrepresentation of a material circumstance (whose revelation would have caused the insurer to exclude the respective risk) does not entitle the insurer to exclude the risk retroactively but only for the future.<sup>80</sup> However, this approach is not conclusive. If the insurer would not have concluded the contract at all, the misrepresentation would at least been sanctioned by termination of the contract within one month. If, however, the insurer would have concluded the contract but would have excluded the risk, a slightly negligent misrepresentation would not be sanctioned at all, if the risk exclusion solely applied for the future. Hence, a slightly negligent policyholder would be privileged in comparison with a policyholder properly representing all circumstances, since the latter was confronted with a risk exclusion from the very beginning. Consequently, the policyholder's incentive in the pre-contractual representation of material circumstances would be weakened and the retroactive exclusion of the respective risk should, therefore, be possible.<sup>81</sup>

### ***cc. Instruction Requirement and Lack of Knowledge of the Insurer***

All available remedies require that the insurer has instructed the policyholder in a separate notification in text form of the consequences of any misrepresentation, VVG s 19(5) sentence 1; the burden of proof lies with the insurer). However, according to case law this requirement shall not apply to a fraudulent policyholder.<sup>82</sup> "Separate notification" does not require a separate document and it is sufficient that the notification clearly differs from the rest of any text, for instance by using typographical design and placing in order to ensure that the instruction catches the policyholder's eye while he is fulfilling his duty not to misrepresent.<sup>83</sup> Such instruction must generally be rendered prior to the date on which the policyholder must fulfil his duty.<sup>84</sup>

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<sup>79</sup> See the prevailing doctrine, cf Wandt, *Versicherungsrecht*, 6th ed (Munich, 2016), para 842; implicitly confirmed by BGH, *Versicherungsrecht (VersR)* 2016, pp 780 to 783 stating that pursuant to VVG s 19(5) the validity of the instruction is not called in question by the fact that the drawing of legal consequences of a contractual adjustment does not explicitly mention that already occurred insured events are not covered in case the contractual adjustment retroactively introduces a risk exclusion to the contract.

<sup>80</sup> eg Looschelders in Looschelders/Pohlmann (eds), *VVG Kommentar*, 2nd ed (Cologne, 2011), § 19 VVG para 67 with further references.

<sup>81</sup> Implicitly confirmed by BGH, *Versicherungsrecht (VersR)* 2016, pp 780 to 783 (p 781).

<sup>82</sup> BGH, *Versicherungsrecht (VersR)* 2014, pp 565 to 567.

<sup>83</sup> BGH, *Versicherungsrecht (VersR)* 2013, pp 297 to 300.

<sup>84</sup> Until the contract has been finalised, the insurer should be allowed to file a previously missing instruction subsequently, provided that the insurer clearly warns the policyholder that the subsequent instruction is also related to questions already answered. Thus instructed, the policyholder is entitled to correct a previously given answer if, otherwise, he breaches his duty not to misrepresent.

The insurer's rights are excluded according to VVG ss 19(2), 19(3) and 19(4) if the insurer was aware of the unrevealed risk factors or the erroneous representation (VVG s 19[5] sentence 2; the burden of proof lies with the policyholder). In this respect, policyholders often invoke that the involved agent of the insurer was aware of a notifiable fact (for example a previous illness) and, on top of that, did expressly advise the policyholder not to mention this fact in the insurer's questionnaire. According to VVG ss 69, 70, 72 the knowledge of the agent is equivalent to the knowledge of the insurer, since the agent is to be considered as being "eye and ear of the insurer", with the result that the duty not to misrepresent is properly fulfilled to this extent.<sup>85</sup> The same applies to a statement of the policyholder vis-a-vis the doctor being engaged by the insurer.

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

VVG ss 24 to 26 stipulate the remedies for breaches of post-contractual disclosure duties of the policyholder. In line with the general deliberations on breaches of *Obliegenheiten* (see with regard to the meaning of the term above) set out in VVG s 28, these remedies are termination (*Kündigung*), contractual adjustment (*Vertragsanpassung*) and release from liability (*Leistungsfreiheit*). Thereby, the remedy of termination is drafted as a basic remedy and its requirements (stipulated by VVG s 24) are as well to be met in case of a contractual adjustment (prescribed by VVG s 25). Finally, any release of the insurer from its liability (possible under VVG s 26) additionally requires that the termination period has not already expired (VVG s 26[3] no 2).

The three-folded definition of what constitutes an increase in risk (priorly described in accordance with VVG s 23, see answer to 4. b.) affects the provided remedies, too. Due to the intentional behaviour 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.<sup>86</sup> 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 legal consequences are based on the principle that the policyholder has intentionally violated a duty of VVG s 23. An exception is granted by VVG s 24(2).<sup>87</sup> According to this provision, the insurer is entitled to terminate the contract with one month's notice (because of the link to VVG s 25) and to adjust the contract in the event of an unconscious subjective or

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<sup>85</sup> Established case law since BGH, *Versicherungsrecht (VersR)* 1992, pp 217 f.

<sup>86</sup> RegE BT-Drs 16/3945, p 68: *Begründung der Bundesregierung zum Entwurf des VVG 2008* (Explanatory Notes of the German Federal Government regarding the Draft of Insurance Law 2008).

<sup>87</sup> Matusche-Beckmann in Bruck/Möller (founders), *VVG Kommentar*, vol 1, 9th ed (Berlin, 2009), § 24 para 14.

objective increase in risk (VVG ss 23[2] and 23[3]). According to the meaning and purpose of the right to terminate (within a period of one month), this right arises solely on grounds of the objective existence of an objective increase in risk.<sup>88</sup> The insurer's right to terminate is, therefore, independent from the knowledge of the policyholder of the increase in risk.<sup>89</sup> In practice, there may be cases in which the insurer becomes aware of an increase in risk before the policyholder learns from it.

With regard to VVG s 23(1), the responsibility of the policyholder needs to be referred to the risk-increasing nature of the circumstances known to the policyholder.<sup>90</sup> The knowledge of the circumstances increasing the risk is equivalent to the policyholder's fraudulent evasion of knowledge. However, fraudulent ignorance is only to be assumed if the policyholder expects the existence of a risk-increasing circumstance, *eg* 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.<sup>91</sup>

The existence of a breach of duty must always be proven by the insurer. On the contrary, the burden of proof for responsibility as such is partly imposed on the insurer, partly on the policyholder.

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<sup>88</sup> Langheid in Langheid/Rixecker (eds), *VVG Kommentar*, 5th ed (Munich, 2016), § 24 paras 2, 5.

<sup>89</sup> Differently, Armbrüster, *Privatversicherungsrecht* (Tübingen, 2013), para 1151, referring to the objective existence of a disclosure duty, thus to the policyholder's knowledge of an increase in risk.

<sup>90</sup> BGH, *Versicherungsrecht (VersR)* 2014, pp 1313 ff.

<sup>91</sup> BGH *Versicherungsrecht (VersR)* 1982, pp 793 ff; BGH, *Versicherungsrecht (VersR)* 1987, pp 897 ff; OLG Düsseldorf, *Versicherungsrecht (VersR)* 2004, pp 1408 ff.