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ABHANDLUNG

"Utmost" good faith in German contract law

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1 Introduction

Both Common Law und Civil Law—regardless of their methodologically different starting points—are dominated by the principle of good faith (*bona fides*; *Treu und Glauben*). In contrast to Common Law, the expectations of legal practitioners towards the legislator's law-making in a Civil Law system are significantly greater. The abundance of statutory law fuels the assumption that every issue in life is ultimately determined by a legal provision. However, language by itself is not capable of preventively and explicitly addressing all eventualities in life; no legislator is able to predict every possible situation. For this reason, the Civil Law legislator must make use of abstractions that apply to a large number of cases. As a consequence, Civil Law must rely on judges carrying forward the legislator's (i.e., society's) intentions. To fulfil this duty, statutory law provides for flexible clauses and indefinite legal terms. Hence, Civil Law appears *de facto* similar to the mechanisms of finding justice in Common Law.

Likewise similar is the important task of the Civil Law judge when applying the law. Not only is he entitled to determine the content of norms by the recognised methods of interpretation (such as wording, systematics, *telos* and history) but also requested to apply fairness in the individual case. Probably the most important instrument complying with this request is the principle of good faith. It serves to

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prevent injustice that can arise through the mere application of a provision and constitutes a necessary corrective for the weaknesses of statutory law.

This principle, dating far back to ancient Roman law, is incorporated in Art. 1.7(1) UNIDROIT Principles of International Commercial Contracts (PICC)[1] and, thus, has to be considered a general principle of international contract law.[2] Despite the differences of worldwide predominant legal systems, Common Law acknowledges the very same principle even though the Common Law judge already acts in a norm-setting manner via the method of creating precedent.

The purpose of good faith naturally differs depending on the legal system, and still the principle itself has the same origin and wording. Consequently, the question arises whether the content of the principle of good faith is not only comparable but similar around the world. Both UK and German law can be seen as one of the most acknowledged national laws of their respective legal system. Hence, this study is designed to contribute to a better understanding of the principle by first analysing the manifestations of good faith in general German contract law and endeavours to allow a comparison with UK law. The most vivid example where the similarities and differentiations come to light is (re)insurance contract law. In this respect, the principle of good faith sometimes is amplified by the adjective "utmost" in UK law. The meaning of the principle of utmost good faith remained vague through centuries and will neither be clarified by this analysis. Yet, the analysis will answer the question, whether *a* principle like utmost good faith has any standing in German contract law, with the conclusion that such a principle does not exist in German contract law.

2 The principle of good faith in German contract law

The German Civil Code (BGB)[3], which came into force on 1 January 1900, expressly provides for the principle of good faith in sec. 242 BGB and attaches it to every contractual relationship as well as any obligation. It literally stipulates that "an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration". The conceptual components of good faith (literally: *allegiance and faith, Treu und Glauben*) are constitutive elements of the legal principle of sec. 242 BGB. Allegiance includes an attitude of reliability and considerateness whereas faith describes the fundamental trust in such upright conduct of the contractual partner.[4] Therefore, parties are obliged to duly consider protection-worthy interests of the other party and to conduct themselves loyally.[5] This is even explicitly reflected by other provisions of general contract law provid-

[1] Accessible at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

[2] *Cf.* the comprehensive compilation in Looschelders D/Olzen D, in: Staudinger, *BGB-Commentary*, 2019, § 242, paras. 1160 et seqq.

[3] English version accessible at https://www.gesetze-im-internet.de/englisch_bgb/.

[4] Grüneberg C, in: Palandt, *BGB-Commentary*, 79th ed., 2020, § 242, para. 6.

[5] Schubert C, in: Säcker F J/Rixecker R/Oetker H/Limperg B [eds.], *BGB-Commentary*, 8th ed., 2019, § 242, para. 10.

ing for the consideration of good faith when interpreting statements and a single contract[6] as well as the control of General Terms and Conditions (GTC). The wording itself is vague enough to conclude that it has little significance for the recognition and application of the principle—or as the Higher Regional Court Hamm eidetically phrased it: Sec. 242 BGB rather addresses "a general legal feeling".[7]

In fact, the significance attached to sec. 242 BGB cannot be fully grasped by looking at the wording. It is a central legal principle, which generally demands fairness. A characteristic element of the principle of good faith in German law is that it does not explicitly provide for a course of action. Rather, as a whole, it is a binding commitment of the legal community that attaches to legal relationships and serves as benchmark and limitation to such provisions influencing said legal relationship.[8]

The openness of the principle aims at and enables a dynamic development of the law. Referring to sec. 242 BGB, case law regularly motivates the legislator to explicitly implement its variants into statutory law. Many provisions in German contract law are a specific manifestation of this principle. Some would even say that contract law could solely consist of this particular principle in order to provide for fair and adequate answers to specific legal problems—obviously to the disadvantage of legal certainty. Therefore, civil law in itself can be seen as a materialization of said principle.

Nevertheless, the German judge is simultaneously expected to restrict the gap-filling function of sec. 242 BGB to objectively assessable fairness, for example with respect to traceable changes in society.[9] Admittedly, the line between mere opinions and socio-political convictions cannot be drawn with sufficient clarity. Particularly, in Germany—bearing in mind its historical experiences during its National Socialist era—a judge will regularly double-check any intended application of sec. 242 BGB. The outcome of this reflection is the judge's task to find a rational and transparent justification for the application of sec. 242 BGB in the individual case. He will find such justification long-time established and consequence-wise bundled in case categories developed by an extrinsic body of case law and academic opinions.

The broadness of the principle of good faith in German contract law does not support the assumption of static legal consequences due to a breach of the obligation of good faith. On the contrary, good faith serves as a basis to develop legal principles in law to attach to certain situations and to give rise to specific causes of action appropriate to the situation. The principle of good faith applies to every legal relationship,[10] which is mirrored by a multitude of court decisions. Yet, this brief analysis can solely draw a more general picture and will not describe respective case law in greater detail. From a macro-perspective, the examples of good faith in

[6] Sec. 157 BGB.

[7] Higher Regional Court [OLG] Hamm, ZIP 1991, p. 1571 (1572).

[8] German Supreme Court [BGH], Neue Juristische Wochenschrift (NJW) 1986, p. 177.

[9] *Cf.* with respect to constitutional impacts, Schubert C, in: Säcker F J/Rixecker R/Oetker H/Limperg B [eds.], *BGB-Commentary*, 8th ed., 2019, § 242, para. 53.

[10] German Supreme Court [BGH], BGHZ 85, p. 39 (48); Grüneberg C, in: Palandt, *BGB-Commentary*, 79th ed., 2020, § 242, para. 1.

German contract law given in the following are quite comparable to the Common Law approach and only differ in detail.

3 Examples of the principle of good faith in German contract law

3.1 Ancillary duties of contractual parties

Besides influencing the interpretation of main obligations and ancillary duties expressly stipulated by contract or provided by specific legal provisions, sec. 242 BGB may be used to establish several ancillary duties of the contractual parties.[11] Important ancillary duties, which give rise under application of the good faith principle, are disclosure duties and protective duties.

One aspect of this effect is that parties are obliged to refrain from engaging in any action that might be detrimental to or might endanger the contractual purpose.[12] This relates to preparation, successful performance, subsequent protection of the performance, contractual compliance and assistance in general.[13] It may even result in a duty to defend the interests of the contractual partner against a third party.[14] Secondly, the parties are obliged to cooperate by laying the foundations of contractual success and eliminating obstacles. Therefore, this component of the principle of good faith is aiming towards the fulfilment of the contractual purpose.

Furthermore, protective duties exist and demand protection of a so-called "concern for integrity". This means that parties are obliged to behave in a way that is not endangering the other party's legal assets, such as health or property.[15] Lastly, the general disclosure duty is calling for notification, information and warning irrespective of being asked by the other party and provided that the respective circumstance is relevant.[16] A disclosure duty usually exists if the other party could reasonably expect being notified.[17]

3.2 Unlawful exercise of rights—abuse of rights

The second main operating principle deriving from sec. 242 BGB may be described as a duty to refrain from an unlawful exercise of rights. It aims to sanction a party whose claim or exercise of a right is improper, illegal or fraudulent.[18] Hence, it ren-

[11] Schubert C, in: Säcker F J/Rixecker R/Oetker H/Limperg B [eds.], *BGB-Commentary*, 8th ed., 2019, § 242, paras. 166 et seqq.

[12] German Supreme Court [BGH], BGHZ 93, p. 29 (39 et seqq.); Neue Juristische Wochenschrift (NJW) 1978, p. 260; Neue Juristische Wochenschrift (NJW) 1983, p. 998.

[13] Grüneberg C, in: Palandt, *BGB-Commentary*, 79th ed., 2020, § 242, paras. 27 et seqq.

[14] German Supreme Court [BGH], Neue Juristische Wochenschrift (NJW) 2012, p. 2184.

[15] Former German Supreme Court [RG], RGZ 78, p. 239 et seqq.

[16] Gregor Bachmann, in: Säcker F J/Rixecker R/Oetker H/Limperg B [eds.], *BGB-Commentary*, 8th ed., 2019, § 241, paras. 114 et seqq.; derived from sec. 241 BGB as a manifestation of good faith.

[17] German Supreme Court [BGH], Neue Juristische Wochenschrift (NJW) 1989, p. 763.

[18] German Supreme Court [BGH], BGHZ 12, p. 154 (157).

ders the exercise void—generally, irrespective of the party's fault.[19] In consequence, the principle of good faith can be seen as a general limitation of law.[20] Exercising a right is unsustainable and must be refused for good faith purposes if a party relies on an unlawfully acquired right; if the exercised right has arisen from the breach of its own obligations; if the relying party lacks own protection-worthy interests; if the particular interest of the relying party is solely harmed with (slight) negligence of the other party in a marginal and negligible manner (with the consequence that a reliance on the harm is not reasonable); or if a party's conduct is evidently inconsistent (*venire contra factum proprium*).[21]

3.3 Forfeiture of rights

In addition, a party may forfeit its right if it is not relying on said right for a long time. Such, however, only applies where the other party is, due to its obligor's actions and inactions, rightfully expecting this party to refrain from exercising this right permanently.[22] In this scenario, the principle of good faith is breached by a disloyal delay in exercising the right.[23]

3.4 Interpretation of General Terms and Conditions (GTC)

The principle of good faith is not only a basis for corrections of injustices by applying statutory law but also reference point for modern legislation. One example of explicit reference to good faith is the control mechanism of GTC. Before the control of GTC had been specifically regulated in 1976, the key legal premises of using GTC had been derived from good faith alone. Now, sec. 307 BGB provides for the ineffectiveness of GTC if they—contradictory to good faith—unreasonably disadvantage the party confronted with GTC. One consequence of this requirement expressly provided by statutory law is that the user of GTC is obliged (in accordance with the principles of good faith) to present rights and duties of his contractual partner as clearly and transparently as possible. It is not only important that the wording of the clause is understandable for the average contractual partner. Rather, good faith also requires that the clause puts the other party in the position to recognize the economic disadvantages and burdens as clearly as possible under the circumstances.[24]

Statutory law on GTC can be seen as an illustrative example of another function of the principle of good faith as provided by sec. 242 BGB: developments in law on

[19] German Supreme Court [BGH], Neue Juristische Wochenschrift (NJW) 1975, p. 827; Neue Juristische Wochenschrift (NJW) 2009, p. 1343.

[20] Grüneberg C, in: Palandt, *BGB-Commentary*, 79th ed., 2020, § 242, para. 38.

[21] Grüneberg C, in: Palandt, *BGB-Commentary*, 79th ed., 2020, § 242, paras. 42 et seqq.

[22] German Supreme Court [BGH], Neue Juristische Wochenschrift (NJW) 2010, p. 3714; Neue Juristische Wochenschrift (NJW) 2011, p. 21; Neue Juristische Wochenschrift (NJW) 2014, p. 1230.

[23] German Supreme Court [BGH], BGHZ 25, p. 47 (52); Neue Juristische Wochenschrift (NJW)-RR 2014, p. 195.

[24] Comprehensively Wandt M, *Transparency of Insurance Contract Terms*, in: Kotsiris L/Noussia K [eds.], Liber Amicorum in Honour of Ioannis K. Rokas, 2017, p. 419.

the basis of good faith which have been taken up by the legislator and implemented into statutory law. In case of GTC, even specific manifestations of good faith have been captured by an extensive catalogue of prohibitions in secc. 308, 309 BGB.

4 Pre-contractual information and the nature of the insurance contract

Though German insurance contract law is extensively comprised by statutory law (namely the Insurance Contract Code, *Versicherungsvertragsgesetz*—VVG[25]), the insurance contract is also influenced by the principle of good faith.[26] Insurance is not only in itself instructive with regard to good faith considerations but also extraordinarily suitable to compare Common Law and Civil Law approaches to the principle.

The insurance contract obliges the insurer to assume the risks of the policyholder and consequently bases its premium calculations on the probabilities of the realization of these risks. Yet, the insurer has no specific knowledge of the factors of the risk realization and would regularly miscalculate the premium or assume a risk, which it would not have signed had he known about the specific circumstances. Naturally, the applicant[27] to an insurance contract has knowledge about the facts, which are crucial for the insurer's decision. Hence, corresponding obligations of the applicant to disclose risk-relevant facts derives from the nature of insurance respectively the principle of good faith—which also requires the applicant to disclose properly and truthfully.[28]

In German insurance contract law, statutory law explicitly provides for such a duty—rendering a recourse to the principle of good faith obsolete in this respect. E.g., the applicant to an insurance contract has a duty to notify what the insurer had asked for, which needs to be distinguished from a so-called spontaneous duty to notify. In English terms, this would be named a duty not to misrepresent in contrast to a duty of disclosure.[29] Concerning consumer contracts, the stipulations of the VVG are widely comparable with the provisions of Chapter 6 of the UK Consumer Insurance (Disclosure and Representations) Act 2012.[30] Yet, non-consumer contracts are governed by the UK Insurance Act 2015[31]—a considerably different legal framework.

[25] English version accessible at https://www.gesetze-im-internet.de/englisch_vvg/.

[26] E.g., Wandt M, Versicherungsrecht (VersR) 2018, p. 321 (326 et seqq.); Fischer R, Versicherungsrecht (VersR) 1965, p. 197 (199 et seqq.); in relation to utmost good faith Wandt M/Bork K, *Pre-contractual Duties under the German Insurance Law*, in: Han Y Q/Pynt G [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, p. 261 (261 et seq.).

[27] "Applicant" is a synonym for "prospective policyholder".

[28] Due to its nature, insurance is specifically suitable for good faith considerations, Deutsch E/Iversen T, *Versicherungsvertragsrecht*, 7th ed., 2015, p. 11.

[29] In detail Wandt M/Bork K, *Pre-contractual Duties under the German Insurance Law*, in: Han Y Q/Pynt G [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, p. 261.

[30] Accessible at http://www.legislation.gov.uk/ukpga/2012/6/contents/enacted.

[31] Accessible at http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted.

Even after the conclusion of the insurance contract, the economic transfer of the risk by the insurer does not change the fact that the actual risk remains within the sphere of the policyholder and is initially realized in his person or in his assets. Therefore, the latter has many hardly controllable possibilities of obtaining unjustified advantages, entailing the deliberate or fraudulent causation of the insured event or its extent.[32] This phenomenon is called "moral risk" on part of the policyholder or "moral hazard".[33] The continued information gap results in particular stipulations (at least originally based on good faith) which differentiate the insurance contract from other types of contract.

On the other hand, the policyholder (respectively the insured person) highly depends on the insurer's compliance with the contract. In the event of an insured event, proper claims settlement by the insurer requires that the insurer has accumulated and still holds sufficient capital from the premiums collected from its policyholders.[34] Although restrictions in this respect are stipulated by insurance supervisory law, these have an influence on insurance contract law, which can be classified as contract-necessitated good faith considerations. Accordingly, German courts brought up information and advisory duties of the insurer on multiple occasions—with reference to good faith.[35]

5 Where common law meets civil law: the principle of utmost good faith

Looking at the openness of the principle of good faith and having disclosure duties of the applicant to an insurance product in mind, it comes with surprise that literally something more than "mere" good faith shall exist in law. The so-called principle of *utmost* good faith does not originate from Civil Law—nor can it be derived from Ancient Roman Law although the often used Latin phrase *uberrima fides* indicates so.[36] Yet, UK case law developed this supplemented principle more than 250 years ago and all the way acknowledged its *raison d'être* meaning that it has been thought to be a necessary element of UK law although such supplemented principle is missing a dogmatic origin[37].

The principle of utmost good faith was firstly introduced in 1766 by *Lord Mansfield* in his famous landmark decision *Carter v. Boehm*[38]—and it was the information

[32] Wandt M, *Versicherungsrecht*, 6. ed., 2016, para. 171.

[33] Farny D, *Versicherungsbetriebslehre*, 5th ed., 2011, pp. 32 et seq.; Wandt M, *Versicherungsrecht*, 6. ed., 2016, para. 171.

[34] *Cf.* Higher Regional Court [OLG] Saarbrücken, Versicherungsrecht (VersR) 1996, p. 1494.

[35] E.g., German Supreme Court [BGH], Versicherungsrecht (VersR) 1974, p. 121 (regarding the old version of the VVG).

[36] Han Y Q, *Conclusions: (Utmost) Good Faith and Pre-Contractual Duties Globally in the Twenty-first Century*, in: Han/Pynt [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, p. 447 (449 f.). In Manifest Shipping Co Ltd v. Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1 (para. 5) the origin was also addressed but remained unanswered.

[37] Nowadays, incorporated in Art. 17 Marine Insurance Act.

[38] Carter v. Boehm [1766] 3 Burr 1905 (1909); e.g., printed in Han Y Q/Pynt G [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, pp. 11 et seqq.

gap of the insurance contract (and non-existent statutory law) that promoted the idea of a specific duty of the applicant with respect to pre-contractual information.[39] Interestingly *Lord Mansfield* did not literally create the principle of utmost good faith. Rather, he commented on the nature of insurance being the reason for a disclosure duty[40] when stating:

> Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.[41]

The "mere" principle of good faith would forbid a concealment of information as such.[42] Concealment would draw the insurer "into a bargain, from his ignorance of that fact, and his believing the contrary"[43]. Hence, before asking which content the "utmost"-supplement implies, it must be said that utmost good faith originates from the same considerations as the German statutory stipulation of the applicant's disclosure duty, which is said to be a result of "mere" good faith. This conclusion leads to the contentual question: Is the supplement "utmost" just motivated by the attempt to highlight the meaning of good faith in insurance in comparison with good faith in general contract law?; in other words: Is "utmost good faith" the mere abbreviation of "utmost importance of good faith" without amending the meaning of the principle itself?

UK case law continuously reflected upon this principle and even frequently tried to give contentual meaning to the supplement "utmost".[44] In 2001 *Lord Hobhouse* described utmost good faith as "the most extensive, rather than the greatest, good faith".[45] Apparently, any such paraphrase will lack clarity but reveals the intention to differentiate between good faith and utmost good faith. On the other hand, courts came to the conclusion that "utmost" (or its Latin equivalent *uberrima*) does not

[39] Concerning primary insurance, Lowry J, *Utmost Good Faith*, in: Merkin R [ed.], Insurance Law—an Introduction, 2007, pp. 37 et seqq.

[40] *Cf.* Watterson S, *The History of a Landmark: Carter v Boehm*, in: Han Y Q/Pynt G [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, p. 23 (46 et seq.).

[41] Carter v. Boehm [1766] 3 Burr 1905 (1909).

[42] Carter v. Boehm [1766] 3 Burr 1905 (1918): "The reason of the rule against concealment is, to prevent fraud and encourage good faith".

[43] Carter v. Boehm [1766] 3 Burr 1905 (1910).

[44] For further advice with regard to pre-contractual information in England *see* John 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 (2011), pp. 56 et seqq.; Zurich General Accident and Liability Insurance Co v Leven [1940] SC 406 (415).

[45] Manifest Shipping Co Ltd v. Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1 (para. 44).

give another meaning to the general principle. In 1985, e.g., the *Supreme Court of South Africa* concluded that "there is no magic in the expression uberrima fides".[46]

6 The amplitude of good faith in German reinsurance contract law

A principle of *utmost* good faith cannot be derived from German statutory law for the simple reason that it does not entail an implication whatsoever. Despite its doubtful origin and content, German scholars occasionally invoked the principle of utmost good faith in order to argue in favour of increased duties of care. In particular, a transfer of this principle has been endorsed with respect to the reinsurance contract. In order to evaluate whether to follow this approach or not, one has to take a step back and primarily ask which implications the acknowledged principle of good faith (as stipulated by sec. 242 BGB) has on reinsurance contracts.

Sec. 209 VVG states that provisions of the Insurance Contract Code shall not apply to the reinsurance contract. There is, therefore, no reinsurance specific German statutory contract law, but rules may only be derived from the application of general principles of contract law. For this reason, sec. 242 BGB and its underlying principle of good faith are also applicable to reinsurance contracts. The parties to a reinsurance contract are—in accordance with the principle of party autonomy—free to stipulate contractual provisions on their own and there are basically no limitations to their contractual freedom. It has, however, been established that under German law they are not in a position to opt-out of the principle of good faith.[47] Hence, the contractual duties of good faith pursuant to sec. 242 BGB remain of paramount importance to the interpretation and performance of reinsurance contracts and are not dispensable.[48]

The importance of the principle of good faith within contractual relationships of reinsurance law is substantiated by the fact that numerous business processes are within the sole sphere of the reinsured and are not influenceable by the reinsurer. Therefore, the reinsurer has to trust its reinsured at least to some extent blindly.[49] E.g., these processes are the proper selection and tariffing of risks or the adequate settling of claims.[50] With respect to the latter and the follow-the-settlements duty of

[46] Mutual and Federal Insurance Co v. Oudtshoorn Municipality 1985 (1) SA 419 (433). Also, Han Y Q, *Conclusions: (Utmost) Good Faith and Pre-Contractual Duties Globally in the Twenty-first Century*, in: Han Y Q/Pynt G [eds.], Carter v Boehm and Pre-contractual Duties in Insurance Law, 2018, p. 447 (452); *see* as well the observation by Stammel C, *Waving the Gentlemen's Business Goodbye*, 1998, p. 169.

[47] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 4.

[48] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 47; Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, p. 458.

[49] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, pp. 458, 498.

[50] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, p. 458.

the reinsurer, even rare German case law[51] highlights the importance of good faith in the reinsurance contract[52].[53]

The prohibition of unlawful or inconsistent behaviour (*venire contra factum proprium*) is a fundamental principle of German general private law, and applicable to reinsurance contracts. E.g., this affects one party's reliance on the lapse of a limitation period.[54]

An additional manifestation of the principle of good faith is the duty of confidentiality with regard to information, which is not generally accessible. In the case of transfer of information, a duty to verify the authorization of the recipient takes place—even if the transfer is organizationally or legally necessary.[55] This duty is accompanied by a general right of the reinsurer to be granted access to information.[56] In case of violation, the breaching party has to reimburse the harmed party pursuant to sec. 280 subsec. 1 BGB.

Lastly, the principle of good faith may call for an additional right to terminate the reinsurance contract for good cause. This general guideline is part of German general contract law and an aspect of the principle of good faith. Good cause is defined as a substantial endangerment of the fulfilment of the contract, rendering adherence to the contract untenable.[57] These circumstances can amount to a frustration of contract according to sec. 313 BGB—with the later provision, in turn, being a specific implementation of the principle of good faith.[58]

7 The reinsurance gentlemen's agreement as decisive factor?

When it comes to reinsurance, an explicit extraordinary allegiance duty exceeding the general principle of good faith is not applicable in German reinsurance contract law.[59] However, some authors characterize the reinsurance contract as a gentlemen's agreement impliedly demanding a "higher degree" of good faith.[60] Some say that

[51] Although the decision dates as far back as 1917, reinsurance contract law features the characteristic that due to missing statutory law, supposedly outdated German case law forms a valid source of law, *see* generally Bork K, *Tension of Reinsurance: die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers*, 2020, pp. 6 et seq.

[52] Hanseatic Higher Regional Court [Hanseatisches OLG], Hanseatische GerichtsZeitung (HGZ) 1918 (Hauptblatt), p. 177 (179); upheld by the former German Supreme Court [RG], RGZ 91, p. 83.

[53] In detail Bork K, *Tension of Reinsurance: die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers*, 2020 (on the influence of good faith on follow-the-settlements pp. 232 et seqq.).

[54] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 54.

[55] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, paras. 60 et seqq.

[56] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, pp. 414 et seq.

[57] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, p. 466.

[58] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, p. 467.

[59] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 49; Looschelders D, Versicherungsrecht (VersR) 2012, p. 1 (3).

[60] See, e.g., Noussia K, *Reinsurance Arbitration*, 2013, pp. 21, 82.

"utmost good faith" had in any case not been "fully incorporated into the commercial practices applicable to reinsurance".[61] Yet, from this statement one could infer a partial adoption of this principle, i.e., at least an indirect influence through the adoption of statements of UK law, which were stamped by the principle of utmost good faith.

This should, however, not be understood to mean that the standard of good faith expected of reinsurance parties is less demanding compared to, e.g., in UK law. As illustrated in the beginning of this analysis, the principle of good faith is extremely flexible and its content particularly transforms depending on the type of contract. Since reinsurance contracts carry on the information gap of the primary insurance contract on a second level, one can conclude that a reinsurance contract typically is a contract governed by a relatively high degree of trust.[62] Again, and in more general terms, this simply means that the parties to a reinsurance contract are obliged to reasonably take into account the interests of the respective counterpart.[63]

8 Evaluated importance of good faith in German contract law

Compared to UK law, a particular due diligence (stemming from the principle of utmost good faith) which extended the general principle is neither acknowledged in German (re)insurance contract law nor in German general contract law. Contentual stipulations drawn from utmost good faith are even doubtful in UK law but at least not transferable to German contract law. This even leads to the conclusion that *ab initio* the descriptive supplement "utmost" solely aimed at highlighting the importance of good faith where the nature of a contract necessitates extraordinary allegiance. Existing differences in law are not reasoned by a different conception of good faith but by different understandings of specific contract types like, e.g., reinsurance.[64] Therefore, specific legal consequences may be different, e.g., with respect to pre-contractual information in reinsurance. Yet, the principle as such is not different but only differently applied.[65]

Consequently, German contract law does not entail a principle of utmost good faith in a sense of a duty of increased good faith. However, the nature of the contract is decisive to evaluate the specifications of good faith and all contracts, whatsoever, are strongly influenced by the principle of good faith. In German contract law, the

[61] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 50.

[62] Gerathewohl K et al., *Rückversicherung*, vol. 1, 1976, p. 458; Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, paras. 47 et seq.

[63] Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 49.

[64] E.g., German law does not oblige the reinsured to disclose unknown facts whereas UK law (at least pre-contractually) obliges the reinsured to disclose everything a prudent businessman may reasonably be expected to know of; Cannawurf S/Schwepcke A, in Lüer D W/Schwepcke A [eds.], *Rückversicherungsrecht*, 2013, § 8, para. 50.

[65] Schwepcke A, in Langheid T/Wandt M [eds.], *VVG-Commentary*, vol. 3, 2nd ed., 2017, RückVersR, para. 52.

principle of good faith as stipulated by sec. 242 BGB remains the reference point for every contract type and any obligation. The only conclusion that can be drawn from this observation is that the principle of good faith is of utmost importance in German contract law, and specifically in German (re)insurance contract law.

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