



Disclosure duties in German insurance contract law

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Abstract This paper analyses disclosure duties in insurance contract law in Germany on the basis of questions developed in preparation of the World Congress of the International Insurance Law Association (AIDA) 2018. As risk factors are within the policyholder's sphere of knowledge, the insurer naturally depends on gaining such knowledge from its policyholder in order to calculate and evaluate premium and risk. Legal approaches as to how the insurer may obtain relevant information and the legal consequences differ in national insurance contract laws around the globe. Taking part in this legal comparison, the paper describes the key elements of such a mechanism from a German perspective and comprises both duties of the policyholder and duties of the insurer.

As for the policyholder, these issues are differences between a duty to (spontaneously) disclose and a duty not to misrepresent as a reaction to questions of the insurer, the prerequisites and remedies of such duty, the subjective standard of the disclosure duty and a duty to notify material changes during the contract term. On the other hand, the paper also addresses an insurer's duty to investigate, a duty to ascertain the policyholder's understanding of the policy and a duty to inform during the contract term or after the occurrence of an insured event. In doing so, the paper offers a comprehensive and critical overview on the transfer of knowledge in the insurance (pre-)contractual relationship.

This paper is an updated version of a report answering the questionnaire "Disclosure Duties in Insurance Contract Law" developed by *Peggy Sharon* in preparation of the World Congress of the International Insurance Law Association (AIDA) 2018. The original report partly based on *Wandt/Bork (2018)*.

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Anzeigepflichten im deutschen Versicherungsvertragsrecht

Deutscher Länderbericht. Weltkongress der International Insurance Law Association (AIDA) 2018

Zusammenfassung Der vorliegende Beitrag analysiert Anzeige- und Informationspflichten im deutschen Versicherungsvertragsrecht auf der Grundlage von Fragen, die in Vorbereitung auf den Weltkongress der International Insurance Law Association (AIDA) 2018 entwickelt wurden. Von den Risikofaktoren hat zunächst lediglich der Versicherungsnehmer Kenntnis, sodass der Versicherer bei der Kalkulation und Bewertung von Prämie und Risiko darauf angewiesen ist, Informationen von seinem Versicherungsnehmer zu erhalten. Rechtliche Ansätze, wie der Versicherer relevante Informationen erhalten kann und welche rechtlichen Konsequenzen sich daraus ergeben, unterscheiden sich in den nationalen Versicherungsvertragsgesetzen rund um den Globus. Der Beitrag, der an diesem Rechtsvergleich teilnimmt, beschreibt die Kernelemente eines solchen Mechanismus aus deutscher Sicht und umfasst sowohl Pflichten des Versicherungsnehmers als auch Pflichten des Versicherers.

Was den Versicherungsnehmer betrifft, so werden die Unterschiede zwischen spontaner Anzeigepflicht und (nicht-spontaner) Anzeigepflicht auf Fragen des Versicherers, die Voraussetzungen und Rechtsbehelfe dieser Pflicht, die subjektive Kenntnis des Versicherungsnehmers und die Anzeige gefahrerhöhender Umstände während der Vertragslaufzeit. Andererseits befasst sich der Beitrag auch mit der Nachfragepflichten des Versicherers, der Nachsorge um das Verständnis des Versicherungsnehmers von der Police und der Informationspflichten während der Vertragslaufzeit oder nach Eintritt eines Versicherungsfalls. So bietet der Beitrag einen umfassenden und kritischen Überblick über den Wissenstransfer im (vorvertraglichen) Versicherungsverhältnis.

1 The insured's pre-contractual disclosure duty

1.1 Does your national law impose a duty to answer questions put to the applicant/insured by the insurer?

According to sec. 19 para. 1 VVG¹, the policyholder² 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 insurer in text form as defined by sec. 126b BGB³. Thus,—except in the case of fraudulent behaviour—the pre-contractual duty not to

¹ German Insurance Contract Act 2008 (*Versicherungsvertragsgesetz—VVG*). English version available at http://www.gesetze-im-internet.de/englisch_vvg (please note that this translation does not necessarily reflect terminological differences).

² The answers refer to the term “policyholder” instead of “insured” in order to maintain the differentiation between the terms provided for in German insurance law.

³ German Civil Code (*Bürgerliches Gesetzbuch—BGB*). English version available at http://www.gesetze-im-internet.de/englisch_bgb.

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 (sec. 19 para. 1 sentence 2 VVG).

Assuming that the insurer asked questions regarding material circumstances, sec. 19–22 VVG 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.⁴ In practice, the question of applicability only arises if, on renewal or amendment, the insurer asks questions on material circumstances.

1.1.1 Questions asked in text form

Pursuant to sec. 126b BGB, 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 sec. 19 para. 1 VVG, 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.⁵ 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.⁶

1.1.2 Questions submitted by the insurer

Sec. 19 VVG 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.⁷

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 sec. 19 para. 1 VVG—and that, therefore,

⁴ Cf. *Langheid* in Langheid/Wandt (eds.), *Münchener Kommentar zum VVG*, vol. 1, 2nd ed. (Munich, 2016), § 19 para. 36 with further references.

⁵ KG Berlin, *VersR* 2014, pp. 1357–1360.

⁶ *Looschelders* in Looschelders/Pohlmann (eds.), *VVG Kommentar*, 3rd ed. (Cologne, 2016), § 19 para. 21.

⁷ Written questions of an agent with the authority to conclude the contract are those of the insurer (sec. 71 VVG).

misrepresentations in this questionnaire do not trigger the legal consequences of sec. 19 VVG.⁸ 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.⁹ However, this approach should be restricted to the field of non-consumer contracts in the sense of sec. 210 VVG 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 on its own.

1.1.3 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”, sec. 19 para. 1 VVG. 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.¹⁰ 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)¹¹ which shall prevent discriminations against persons with crucial diseases must be taken into account.

According to sec. 18 para. 1 GenDG, 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 and analyses conducted in the past, nor to receive any such information. However, this provision could be easily ignored unless the

⁸ OLG Hamm, VersR 2011, pp. 469–477, annotated by *Nujoks/Heydorn*, pp. 477–481.

⁹ OLG Köln, VersR 2015, pp. 477–479; OLG Köln VersR 2013, pp. 745 f; KG Berlin, VersR 2014, pp. 1315–1317; OLG Frankfurt, ZfS 2018, pp. 153–155; 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 para. 67. With regard to the allocation of a pseudo agent cf. LG Dortmund, r+s 2012, pp. 426–428 as well as *Tschersich*, r+s 2012, pp. 53–61 (p. 55).

¹⁰ 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 the Insurance Contract Act 2008).

¹¹ Act of 31 July 2009, BGBl I, pp. 2529–2538.

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.¹² 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 € 300,000 or if the annual pension exceeds € 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.¹³ Yet, the policyholder must represent to the insurer existing and pre-existing conditions according to secc. 19–22, 47 VVG even if these illnesses were diagnosed by genetic testing, sec. 18 para. 2 GenDG.¹⁴

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.¹⁵

1.1.4 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*).¹⁶ Contrary to former case law,¹⁷ it is now established that the insurer has no duty to request information in case the policyholder fraudulently misrepresented to the insurer.¹⁸

¹² RegE BT-Drs 16/10532, p. 36.

¹³ 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*, ZVersWiss 2013, pp. 519–536 (p. 535); *Armbrüster*, VW 2010, pp. 1309–1310 (favouring an analogous application); *Neuhaus*, r+s 2009, pp. 309–319 (p. 315).

¹⁴ OLG Saarbrücken, VersR 2012, pp. 557–559. Regarding the pre-contractual duty not to misrepresent concerning genetic defects cf. *Neuhaus*, ZfS 2013, pp. 64–69.

¹⁵ *Brand*, VersR 2009, pp. 715–721 (p. 718).

¹⁶ Case law qualifies the duty to request as an *Obliegenheit* of the insurer; regarding its legal nature see 1.2.

¹⁷ BGH, VersR 1992, pp. 603 f.

¹⁸ BGH, VersR 2007, p. 96.

1.2 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 (i.e. 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*).¹⁹ 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. Sec. 16 VVG 1908 imposed a genuine pre-contractual duty to disclose to the insurer all risk-relevant facts even though the insurer had filed no inquiries. Nowadays, sec. 19 VVG 2008 constitutes the key provision on the policyholder's pre-contractual duty not to misrepresent. Pursuant to sec. 19 para. 1 VVG 2008, 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 sec. 19 paras. 3–5 VVG 2008. The provisions on the policyholder's pre-contractual duty not to misrepresent (secs. 19, 20 and 21 VVG 2008) 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.²⁰

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* (literally: "legal obligation"). Unlike an enforceable duty (*echte Rechtspflicht*), a *gesetzliche Obliegenheit* does not confer an enforceable claim for either perfor-

¹⁹ For further advice with regard to England see Zurich General Accident and Liability Insurance Co v Leven [1940] SC 406, 415; Lowry (2011).

²⁰ Wandt (2016).

mance 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, i.e. secc. 19–22, 47 VVG,²¹ are semi-mandatory (sec. 32 VVG). 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 sec. 210 VVG. 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.²² As a consequence of the limited scope of sec. 210 VVG, 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 sec. 210 VVG are not met. Even if parties of a contract regarding large (industrial) risks in the meaning of sec. 210 VVG 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 (secc. 19–22 VVG) serve as a point of reference in the framework of controlling the legal admissibility of the respective GCI clause according to secc. 307–309 BGB. 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 UK 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.

2 Scope of the applicant's disclosure duty—subjective or objective?

2.1 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

²¹ Specific regulations apply for preliminary coverage (sec. 56 para. 1 VVG), transport insurance (sec. 131 VVG), life insurance (sec. 157 VVG) and health insurance (sec. 194 para. 1 sentences 3 and 4 VVG).

²² Sec. 210 para. 2 no. 3 VVG provides that the policyholder must exceed at least two of the following characteristics: lit. (a) € 6,200,000 balance sheet total, lit. (b) € 12,800,000 net turnover, lit. (c) an average of 250 employees per fiscal year.

to him, can reasonably be expected to try to memorize;²³ the principle of good faith actually constitutes an obligation of the policyholder to look it up or to inquire.²⁴ 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 policyholder²⁵.

3 The insurers' pre-contractual duties

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

3.2 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.

3.2.1 Insurer's duty to advise according to sec. 6 VVG

In contrast to the old VVG 1908, sec. 6 para. 1 VVG 2008 stipulates a duty of the insurer to advise the policyholder. Sec. 6 paras. 1–4 VVG are not applicable if the contract was mediated by an insurance broker (sec. 6 para. 6 VVG), 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 (sec. 241 para. 2, sec. 311 para. 2, sec. 242 BGB) if the insurer is aware that the policyholder is mistaken despite being advised by the insurance broker.²⁶

Pursuant to sec. 6 para. 6 VVG, the duty to advise neither applies to large risks in terms of sec. 210 para. 2 VVG since in these cases for those large risks

²³ Established case law and doctrine cf. OLG Frankfurt, VersR 2011, pp. 92 f.; *Langheid* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 19 para. 60 with further references.

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

²⁵ *Rolfs* in Bruck/Möller (founders), VVG Kommentar, vol. 1, 9th ed. (Berlin, 2009), § 19 para. 56; *Looschelders* in Looschelders/Pohlmann (eds.), VVG Kommentar, 3rd ed. (Cologne, 2016), § 19 para. 34; as well as *Langheid* in Langheid/Rixecker (eds.), VVG Kommentar, 5th ed. (Munich, 2016), § 19 para. 28.

²⁶ OLG Saarbrücken, VersR 2011, pp. 1441–1448; *Rudy* in Prölss/Martin (founders), VVG Kommentar, 30th ed. (Munich, 2018), § 6 para. 70; *Armbrüster* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 6 para. 352; *Rixecker* in Römer/Langheid (eds.), VVG Kommentar, 4th ed. (Munich, 2014), § 6 para. 36; *Schwintowski* in Bruck/Möller (founders), VVG Kommentar, vol. 1, 9th ed. (Berlin, 2009), § 6 para. 48. Dissenting view: *Muschner*, VersR 2012, pp. 703–706.

the policyholder typically has sufficient insurance-related business experience and 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.

Sec. 6 para. 1 VVG 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.²⁷ In case of a breach of a duty under sec. 6 VVG, the insurer is obliged to pay damages pursuant to sec. 6 para. 5 VVG.

A breach of this duty by an insurance agent can be attributed to the insurer by way of secc. 278, 311 para. 2 BGB. 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.²⁸ Pursuant to sec. 6 para. 5 sentence 2 VVG respectively sec. 63 sentence 2 VVG, a rebuttable presumption of the fault of the insurer or the insurance agent applies.

Decisions of the BGH concerning the insurer's (and the insurance intermediary's) duties to advise are still rare.²⁹ This is due to the fact that the requirements adding up to a duty to advise (as stipulated in secc. 6, 61 VVG) are deliberately drafted softly to keep up the opportunity to consider the circumstances of individual cases.³⁰ 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.³¹ Only in a special situation where a net policy with an additional payment agreement was concluded, the respective court had to reason its decision with profound dogmatics.

²⁷ The PEICL (Art 2:202 and Art. 2:203) followed this approach; this approach is criticised for being too defensive by Loacker (2015), pp. 221 ff., pp. 248 ff., pp. 256 ff., p. 291; *Kieninger*, AcP 199 (1999), pp. 190–247 (pp. 195 ff.); *Heiss*, ZVersWiss 2003, pp. 339–374 (p. 367).

²⁸ BGH, VersR 2012, pp. 1237–1245; BGH, r+s 2013, pp. 117–119.

²⁹ Yet, BGH, VersR 2014, pp. 861–862.

³⁰ Cf. *Beyer*, VersR 2016, pp. 293–298; Loacker (2015), p. 291 (solely a principle-based approach is reasonable).

³¹ With regard to risks related to premature terminations of existing life insurance contracts and the conclusion of new life insurance contracts, cf. BGH, VersR 2015, pp. 107–109; cf. OLG Hamm, r+s 2013, pp. 523–524; OLG München, VersR 2012, pp. 1292–1295; OLG Hamm, VersR 2016, pp. 394–397 (change of health insurance). OLG München, VersR 2016, pp. 318–320. With regard to risks resulting from underinsurance if a reduction of the respective sum insured is intended OLG Karlsruhe, VersR 2013, pp. 885–888; cf. BGH, VersR 2014, pp. 625–628.

Following the established case law of the BGH, an insurance agent—in contrast to a broker³²—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.³³

The BGH 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.³⁴ If a necessary notice of evident importance has not at all been recorded, the BGH states that the insurer or the insurance intermediary basically bears the burden of proof.

3.2.2 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.³⁵ 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.³⁶

In its decisions of 11 July 2012, the BGH 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.*³⁷ In summary, the BGH decided that customers were entitled to damages³⁸ because the intermediary's breaches of duties to clarify when concluding the contract were attributed to the insurer.³⁹ According to its reasoning, the damage to the policyholder consisted of a disadvantageous contract.⁴⁰ The insurer was obliged to clarify according to established principles of clarification in case of in-

³² BGH, VersR 2014, pp. 240–247; affirmative BGH, VersR 2007, pp. 1127–1129.

³³ BGH, VersR 2014, pp. 240–247; cf. BGH, NJW 2014, pp. 2782–2784; cf. BGH, VersR 2014, pp. 1328–1331.

³⁴ BGH, VersR 2015, pp. 107–109.

³⁵ Settled case law since RG, RGZ 111, pp. 233–236; recently BGH, NJW 2010, pp. 3362–3363.

³⁶ BGH, NJW 2010, pp. 3362–3363.

³⁷ BGH, VersR 2012, pp. 1237–1245; cf. the substantially conforming decisions of the BGH of 11 July 2012 (IV ZR 122/11, IV ZR 151/11, IV ZR 271/10).

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

³⁹ BGH, VersR 2012, pp. 1237–1245 (para. 52).

⁴⁰ BGH, VersR 2012, pp. 1237–1245 (paras. 63 ff.).

vestment 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.⁴¹ 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).⁴²

3.2.3 Application of the formerly customary liability for performance?

A controversial question, which has not been decided yet by the BGH, affects the formerly recognised and case law-established⁴³ liability for performance by customary⁴⁴ 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).⁴⁵ The term “liability for performance” originates from the legal consequence of incorrect advising and 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 unsubstituted (*Alles-oder-nichts-Prinzip*—principle of all-or-nothing) if the mistaken understanding of the policyholder was due to its own substantial fault.⁴⁶

Some German courts and parts of doctrine considered the aforementioned liability for performance as applicable even after the VVG 2008 entered into force.⁴⁷ Certainly, the opposite opinion⁴⁸ is more convincing as the need for this approach dropped after the revision of the VVG. This dogmatically doubtful former construc-

⁴¹ BGH, VersR 2012, pp. 1237–1245 (para. 54).

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

⁴³ The so-called *Sturmflut-Fall* (“storm flood case”) is well-known, RGZ 86, pp. 128–135.

⁴⁴ Cf. BGH, VersR 2010, pp. 373–374; *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.

⁴⁵ Cf. for jurisprudence prior to the new VVG 2008: *Kieninger*, AcP 199 (1999), pp. 190–247 (pp. 195 ff.); *Heiss*, ZVersWiss 2003, pp. 339–374.

⁴⁶ BGHZ 40, pp. 22–28.

⁴⁷ OLG Frankfurt, VersR 2012, pp. 342–344; LG Saarbrücken, VersR 2014, pp. 317–321; *Ebers* in Schwintowski/Brömmelmeyer (eds.), Praxiskommentar zum Versicherungsvertragsrecht, 2nd ed. (Münster, 2010), § 6 para. 56; *Schneider*, r+s 2015, pp. 477–489; *Michaelis* in Schwintowski/Brömmelmeyer (eds.), Praxiskommentar zum Versicherungsvertragsrecht, 2nd ed. (Münster, 2010), § 69 para. 12; *Schimikowski*, Versicherungsvertragsrecht, 5th ed. (Munich, 2014), para. 134; Koch (2014); *Bruns*, Privatversicherungsrecht (Munich, 2015), § 8 para. 13.

⁴⁸ Cf. *Reiff* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 69 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 para. 21; *Pohlmann* in Looschelders/Pohlmann (eds.), VVG Kommentar, 3rd ed. (Cologne, 2016), § 6 para. 27; *Rudy* in Prölss/Martin (founders), VVG Kommentar, 30th ed. (Munich, 2015), § 6 para. 78; *Jacob*, juris Praxis Report Versicherungsrecht (jurisPR-VersR) 12/2009

tion (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 sec. 6 para. 5, sec. 63 VVG.

Supporters of the continued application of this legal instrument (generated from customary law) argue as to the merit⁴⁹ 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 secc. 6, 63 VVG⁵⁰—albeit a reasoning that explains the inadequacy of the solution provided by the VVG is missing. Secc. 6, 63 VVG 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

4.1 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 secc. 23–27 VVG, which are semi-mandatory pursuant to sec. 32 VVG (meaning the parties are not allowed to deviate from these stipulations 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 (i.e. sec. 313 BGB) is not applicable.⁵¹ On the other hand, secc. 23–27 VVG do not apply where even more specific provisions on material increases in risk become necessary. This is the case with open policies (*laufende Versicherungen*, sec. 57 VVG), transport insurances (sec. 132 VVG), life insurances (sec. 158 VVG), occupational disability insurances (secc. 176, 158 VVG) and accident insurances (sec. 181 VVG). In addition, secc. 23–27 VVG do not apply to life health insurances (sec. 194 para. 1 sentence 2 VVG) as the increasing risks of aging have already been taken into account when having calculated the premium.

note 3; *Fricke*, VersR 2015, pp. 1090–1094; Lorenz (2007); *Armbrüster*, Privatversicherungsrecht 2nd ed. (Tubingen, 2013), para. 890; *Wandt*, Versicherungsrecht, 6th ed. (Munich, 2016), para. 432.

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

⁵⁰ *Schneider*, r+s 2015, pp. 477–489.

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

In line with the three subsections of sec. 23 VVG, the provisions introduce three different legal obligations (*gesetzliche Obliegenheit*; with regard to the meaning of this term see 1.2) of the policyholder with respect to post-contractual⁵² 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 party⁵³ as well as by acts of god (such as natural forces or weather conditions⁵⁴).

In consequence, German law differentiates between increases in risk intended by the policyholder (subjective increase in risk, sec. 23 paras. 1 and 2 VVG) and unintended increases in risk (objective increase in risk, sec. 23 para. 3 VVG).

4.2 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, sec. 27 VVG clarifies that any immaterial/irrelevant increase does not trigger the duties drawn up by sec. 23 VVG. 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:

⁵² In line with the questions, this report uses the term “post-contractual” with the meaning “during the contract term” (i.e. after the conclusion of the contract, but not after the contract has ceased to exist).

⁵³ Cf. LG Köln, VersR 2004, pp. 636 ff. (regarding a termination of an insurance contract because of the terrorist attacks of 11 September 2001); see as well *Beckmann*, ZIP 2002, pp. 1125 ff.

⁵⁴ A famous historical example would be OLG Stettin, JRPV 1928, 247 (lightning damages electric cables and causes an increase in fire risk).

⁵⁵ Cf. OLG Köln, 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, 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, VersR 2017, 756 (drug production in the cellar of an insured house).

1. Increase of basic risks (*Erhöhung der Grundgefahr*,⁵⁵ e.g. worn tyres).
2. Increase of damage extent risks (*Erhöhung der Schadenauswirkungsgefahr*, e.g. increasing risk of bursting water pipes due to a house's residents' absence for a longer period of time).
3. Increase of contractual risks (*Erhöhung der Vertragsgefahr*, i.e. increased risk of claiming insurance coverage, e.g. if the policyholder is sentenced for insurance fraud).

Without a difference in substance, the BGH (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).⁵⁶ This definition takes up the provision of sec. 27 VVG. Pursuant to this provision, an increase is not to be considered material if—according to the circumstances (“*nach den Umständen*”)—the increase in risk is part of the insurance cover. Hence, the reasonable expectations of the insurance customers are decisive.⁵⁷

In addition, the definition of a material increase in risk entails an element of duration (or durable suitability).⁵⁸ 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 (i.e. the state of peril needs to reach a new, higher and stabilized level constituting the basis for a natural evolution of peril).⁵⁹ 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.⁶⁰ 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 sec. 81 VVG.

⁵⁶ BGH, VersR 1981, pp. 245 ff.; BGH, VersR 2005, pp. 218 ff.

⁵⁷ This was the position of German case law with regard to the old VVG, cf. BGH, NJW 1965, pp. 156 ff.; OLG Köln, 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, VersR 2010, 1032.

⁵⁸ This is to be derived from secc. 27, 23 para. 2 VVG.

⁵⁹ Cf. BGH, VersR 1952, pp. 387 ff., annotated by *Prölss*, VersR 1952, pp. 399 ff.

⁶⁰ LG Hamburg, VersR 1984, pp. 752 ff.

5 The insurer's post-contractual duty

5.1 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.)?

5.1.1 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.⁶¹ For this reason, the insurer has the post-contractual duty to inquire and advise, according to sec. 6 para. 1 sentence 1 VVG (yet, this does not entail a duty to document⁶²), provided that there is an objective reason, which is recognisable to the insurer (sec. 6 para. 4 sentence 1 VVG). 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, e.g. 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.⁶³ However, there is a tendency to make strict demands on the objective cause and on the insurer's ability to recognise it.⁶⁴ It should also be noted that there must always be an occasion for a review of the existing insurance cover, i.e. it is not necessary to give general advice.

5.1.2 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 sec. 14 para. 1 VVG, the maturity of payments of the insurer depends on the fact that the elicitations (*Erhebungen*) are necessary to establish the insured event and the scope of the insurer's payments have been completed.⁶⁵ "Completed elicitations" (and thus the maturity date is also given) with the receipt of

⁶¹ 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 the Insurance Contract Act 2008).

⁶² 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.

⁶³ OLG Karlsruhe, VersR 2013, pp. 885 ff.

⁶⁴ Cf. BGH, VersR 2014, pp. 861 ff. (p. 862); OLG Karlsruhe, VersR 2013, pp. 885 ff. (p. 886); OLG Saarbrücken, VersR 2011, pp. 1556 ff. (regarding the old VVG).

⁶⁵ Cf. OLG Saarbrücken, VersR 2004, pp. 1301 ff.; OLG München, ZfS 2011, pp. 150 ff.

a definitive refusal of coverage by the insurer⁶⁶ or, in the case of delayed elicitation, at the time when the elicitation would have ended if processed properly.⁶⁷

This provision reflects the legitimate interests of the policyholder when the insured event has occurred. In addition to the maturity description, sec. 14 VVG provides for a duty of the insurer to determine the insured event and to conduct elicitation thereto.⁶⁸ 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 elicitation (stated in sec. 14 para. 1 VVG) needs to be interpreted as elicitation 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.⁶⁹

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.⁷⁰ Additionally, this conclusion is supported by sec. 15 VVG 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.⁷¹ With its final statement, the insurer is as well obliged to refrain from any further elicitation. In case its final statement was delayed by the insurer, the maturity date is prepone to the date the notification would have reached the policyholder in the usual course of business.⁷²

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, sec. 106 VVG 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 (sec. 101 para. 1 VVG), i.e. 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, sec. 173 VVG. 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

⁶⁶ Settled case law, cf. BGH, VersR 2000, pp. 753 ff.; BGH, VersR 1990, pp. 153 ff.; OLG Köln, ZfS 2007, pp. 217 ff.

⁶⁷ Cf. BGH, VersR 1977, pp. 471 ff.; OLG Hamm, VersR 1991, pp. 1369 ff.

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

⁶⁹ *Fausten* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 14 para. 19.

⁷⁰ OLG Karlsruhe, r+s 1993, pp. 443 ff.; OLG Hamm, VersR 1977, pp. 954 ff.

⁷¹ *Fausten* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 14 para. 49.

⁷² *Fausten* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 1, 2nd ed. (Munich, 2016), § 14 paras. 49 f., 68.

maturity date defined by sec. 14 para. 1 VVG. In case the insurer omits to notify the policyholder, the latter is—after a reminder—entitled to damages caused by the delay in accordance with sec. 286 para. 1 BGB.⁷³

In addition, secc. 186, 187 VVG 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 (sec. 186 VVG).⁷⁴ However, this duty is again drafted as an *Obliegenheit* of the insurer (with regard to the terminology see above), i.e. the insurer is restricted from relying on the expiry of the policyholder's time period. Moreover, sec. 187 para. 1 sentence 1 VVG 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 (sec. 812 para. 1 sentence 1 case 1 BGB).⁷⁵ Any breach of this duty may, again, solely entitle the policyholder to damages caused by the delay pursuant to sec. 286 para. 1 BGB.

6 Remedies in case of breach of the insured's disclosure duties

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

6.1.1 Remedies at a glance

Sec. 19 VVG 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 sec. 19 paras. 3–5 VVG.

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 sec. 21 para. 2 VVG. This crucial matter is linguistically hidden in the provision's heading "exercise of the rights of the insurer" and located between sec. 21 para. 1 VVG (time period and the requirement to give reasons) and sec. 21 para. 3 VVG (expiration period for remedies).

In life insurance a specific provision on false declarations of the insured person's age applies. In such a case, and according to sec. 157 VVG, 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 sec. 19 para. 2 VVG the insurer shall only have the right to avoid the contract on account of

⁷³ Dörner in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 2, 2nd ed. (Munich, 2017), § 173 paras. 4 ff.

⁷⁴ Dörner in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 2, 2nd ed. (Munich, 2017), § 186 para. 4.

⁷⁵ Dörner in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, vol. 2, 2nd ed. (Munich, 2017), § 187 para. 5.

the misrepresentation if it would not have concluded the contract had the age been notified correctly.

In health insurance, an innocent misrepresentation does not lead to any negative consequences (sec. 194 para. 4, sec. 206 VVG). Contrary to sec. 19 para. 3 VVG, 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 sec. 206 VVG.⁷⁶

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 (sec. 19 para. 5 sentence 1 VVG).⁷⁷

The burden of proof generally lies with the insurer claiming remedies according to sec. 19 VVG.⁷⁸ However, the burden of proof regarding the fact that the policyholder acted without fault or only slight negligently lies with the policyholder (sec. 19 para. 3 sentence 1 VVG). 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.

6.1.2 *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 secc. 19–21 VVG 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.

⁷⁶ However, according to case law, sec. 206 VVG 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 (sec. 314 BGB); cf. BGH, VersR 2012, pp. 304–310.

⁷⁷ Previously, the BGH complemented that the instructions must clearly stand out from the rest of the text and that the insurer must ensure that they cannot be overlooked by the policyholder, BGH, VersR 2018, p. 281.

⁷⁸ This follows from the application of the general rules on burden of proof. In line with these general rules, sec. 69 para. 3 sentence 3 VVG states that the insurer bears the burden of proof for a misrepresentation (if an agent is involved).

1. If the insurer would have concluded the contract on different terms with regard to undisclosed facts (*Vertragsänderungsumstände*), 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 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, sec. 19 para. 4 sentence 2 VVG. 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, sec. 39 para. 1 sentence 2 VVG.
3. If the insurer would have concluded the contract on different terms with regard to undisclosed facts,⁷⁹ 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 (sec. 19 para. 2 VVG) being entitled to the insurance premium up until the point in time the declaration of avoidance of contract becomes effective (sec. 39 para. 1 sentence 2 VVG).

Upon avoidance of the contract, the insurer is released from its obligation with regard to a previously occurred insured event, sec. 21 para. 2 VVG.⁸⁰ 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, sec. 21 para. 2 sentence 1 half sentence 2 VVG). However, the policyholder is denied a rebuttal of causality if he misrepresented fraudulently, sec. 21 para. 2 sentence 2 VVG.

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, sec. 19 para. 6 sentence 1

⁷⁹ 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.

⁸⁰ This was already the position set out in the repealed sec. 21 VVG 1908.

VVG. The insurer shall notify the policyholder of this right of termination in the notification of the variation of the contract, sec. 19 para. 6 sentence 2 VVG.

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.⁸¹ 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 sec. 19 para. 4 sentence 2 VVG to the basis that slight negligent or innocent misrepresentation of a material circumstance (the revelation of which 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.⁸² However, this approach is not conclusive. If the insurer would not have concluded the contract at all, the misrepresentation would at least have 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.⁸³

6.1.3 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, sec. 19 para. 5 sentence 1 VVG; the burden of proof lies with the insurer. However, according to case law this requirement shall not apply to a fraudulent policyholder.⁸⁴ "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.⁸⁵ Such

⁸¹ See the prevailing doctrine, cf. *Wandt, Versicherungsrecht*, 6th ed. (Munich, 2016), para. 842; implicitly confirmed by BGH, VersR 2016, pp. 780–783 stating that pursuant to sec. 19 para. 5 VVG 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.

⁸² E.g. *Looschelders* in *Looschelders/Pohlmann* (eds.), *VVG Kommentar*, 3rd ed. (Cologne, 2016), § 19 para. 70 with further references.

⁸³ Implicitly confirmed by BGH, VersR 2016, pp. 780–783 (p. 781).

⁸⁴ BGH, VersR 2014, pp. 565–567.

⁸⁵ BGH, VersR 2013, pp. 297–300.

instruction must generally be rendered prior to the date on which the policyholder must fulfil his duty.⁸⁶

The insurer's rights are excluded according to secc. 19 paras. 2–4 VVG if the insurer was aware of the unrevealed risk factors or the erroneous representation (sec. 19 para. 5 sentence 2 VVG; 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 secc. 69, 70 and 72 VVG 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.⁸⁷ The same applies to a statement of the policyholder vis-à-vis the physician being engaged by the insurer.

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

Secc. 24–26 VVG 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 sec. 28 VVG, 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 sec. 24 VVG) are also to be met in case of a contractual adjustment (prescribed by sec. 25 VVG). Finally, any release of the insurer from its liability (possible under sec. 26 VVG) additionally requires that the termination period has not already expired (sec. 26 para. 3 no. 2 VVG).

The three-folded definition of what constitutes an increase in risk (priorly described in accordance with sec. 23 VVG, see answer to 4.b.) affects the provided remedies, too. Due to the intentional behaviour of the policyholder in cases of sec. 23 para. 1 VVG, the remedies provided are stricter than the remedies for breaches of the duty of disclosure prescribed by sec. 23 paras. 2 and 3 VVG—the latter provisions are remedied equally.⁸⁸ For example, sec. 24 para. 1 VVG 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 sec. 23 paras. 2 and 3 VVG), and sec. 26 para. 1 VVG fully releases the insurer from its duty to provide insurance coverage (whereas with regard to breaches of sec. 23 paras. 2 and 3 VVG this is

⁸⁶ 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.

⁸⁷ Established case law since BGH, VersR 1992, pp. 217 f.

⁸⁸ 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 the Insurance Contract Act 2008).

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 sec. 23 VVG. An exception is granted by sec. 24 para. 2 VVG.⁸⁹ According to this provision, the insurer is entitled to terminate the contract with one month's notice (because of the link to sec. 25 VVG) and to adjust the contract in the event of an unconscious subjective or objective increase in risk (sec. 23 paras. 2 and 3 VVG). 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.⁹⁰ The insurer's right to terminate is, therefore, independent from the knowledge of the policyholder of the increase in risk.⁹¹ In practice, there may be cases in which the insurer becomes aware of an increase in risk before the policyholder learns about it.

With regard to sec. 23 para. 1 VVG, the responsibility of the policyholder needs to be referred to the risk-increasing nature of the circumstances known to the policyholder.⁹² 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, e.g. a failure of a vehicle, and if he refrains from carrying out a check in order to secure his legal advantages as a result of his ignorance.⁹³

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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⁸⁹ *Matusche-Beckmann* in Bruck/Möller (founders), VVG Kommentar, vol. 1, 9th ed. (Berlin, 2009), § 24 para. 14.

⁹⁰ *Langheid* in Langheid/Rixecker (eds.), VVG Kommentar, 5th ed. (Munich, 2016), § 24 paras. 2, 5.

⁹¹ Differently, *Armbrüster*, *Privatversicherungsrecht* 2nd ed. (Tübingen, 2019), para. 1281, referring to the objective existence of a disclosure duty, thus to the policyholder's knowledge of an increase in risk.

⁹² BGH, VersR 2014, pp. 1313 ff.

⁹³ BGH VersR 1982, pp. 793 ff.; BGH, VersR 1987, pp. 897 ff.; OLG Düsseldorf, VersR 2004, pp. 1408 ff.

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