Switzerland

BÄR & KARRER

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, "uberrimae fidei") and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Direct Insurance Contracts

At its most stringent, the principle of utmost good faith imposes on the parties to a contract a *duty to disclose any and all material facts on their own motion*.[1] Such general, comprehensive principle of utmost good faith is not provided for in Swiss law on **direct insurance contracts**.[2]

However, the Swiss Federal Act on Insurance Contracts ("**ICA**") imposes certain duties of information and disclosure ("**Information Duties**") on the parties to an insurance contract, which are, to a certain extent, similar to the duties deriving from the principle of utmost good faith (for details cf. questions 7 and 12 below):

For example, *"before concluding the insurance contract, the insurer is obliged to inform the insured about its identity and the essential elements of the insurance contract in a comprehensible way […]"* ("**Duty to Inform**"; art. 3 para. 1 ICA). In return, the offeror (i.e., in the meaning of the ICA, the insured[3]) must, *"based on a questionnaire or other written questions, […] disclose to the insurer in writing all facts which are important for the assessment of the risk and which are known or must be known to the offeror when concluding the contract"* ("**Duty to Disclose**"; art. 4 para. 1 ICA).

Further, the general statutory civil law principle of good faith, stating that *"every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations"* (art. 2 of the Swiss Civil Code ["**CC**"]) applies to insurance contracts as well.[4] The principle of good faith can be a basis for deriving, through contract interpretation, implied covenants such as, e.g., duties to inform or advise the other party to a contract of certain facts, in cases where such duties are not otherwise applicable based on the law or the contract itself, but where the other party could in good faith rely on their application.[5]

In light of the above, our answers to the questions below will address the parties' Information Duties under Swiss statutory law rather than the duty of utmost good faith in the narrow sense (which has not been implemented in Swiss law).

Reinsurance Contracts

Reinsurance contracts are, in contrast to direct insurance contracts, not governed by the specific legislation of the ICA (cf. art. 101 para. 1 no. 1 ICA). Rather, reinsurance contracts are subject to the general contract law rules of the Swiss Code of Obligations ("**CO**") (cf. art. 101 para. 2 ICA) and to the general principle of good faith as embodied in art. 2 CC.[6] However, the CO does neither impose any duties similar to the duties deriving from the principle of utmost good faith on the parties, nor does it specifically address reinsurance contracts. Moreover, many provisions of the CO are of a non-mandatory nature only (*dispositives Recht*). The parties may therefore contractually modify or waive such provisions of statutory law. Consequently, the parties to a reinsurance contract can in general freely agree upon their duties as well as upon possible remedies in case of a breach of such duties.

It is largely undisputed among Swiss scholars that even in the case where the parties did not specifically negotiate or agree on them, certain disclosure duties apply in the context of reinsurance contracts.[7]

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[1] SCHEIDER, Uberrima Fides, Berlin 2004, p. 80 et seq.; U. NEF, in: Honsell/Vogt/Schnyder (eds.), Basler Kommentar zum schweizerischen Privatrecht, Bundesgesetz über den Versicherungsvertrag (VVG), Basel/Zurich 2000, art. 4 no. 60 et seq. (citation: BSK VVG-AUTHOR); BUTLER/MERKIN, Reinsurance Law, Volume I, London 1986 to 2001, A.6.1-01.

[2] GRABER/LANG/KUNSZT, Switzerland, in: Insurance & Reinsurance Jurisdictional comparisons, European Lawyer Reference, 2012, p. 280; BSK VVG-U. NEF, art. 4 no. 23.

[3] Please note that the statutory duties mentioned apply to the policyholder rather than to the insured/beneficiary of an insurance contract. However, for the sake of consistency with the questions we will refer to the insured instead of the policyholder (where not mentioned otherwise).

[4] BSK VVG-NEBEL, art. 100 no. 8; GRABER/LANG/KUNSZT, p. 280.

[5] HONSELL, in: Honsell/Vogt/Geiser (eds.), Basler Kommentar Zivilgesetzbuch I, 4th edition, Zurich/St. Gallen 2010, art. 2 no. 16 et seq.

[6] BSK VVG-NEBEL, art. 101 no. 34; GERATHEWOHL, Reinsurance Principles and Practice Volume I, Karlsruhe 1980, p. 449.

[7] BSK VVG-NEBEL, art. 101, no. 35; GRABER, Reinsurance in Switzerland – The legal framework, in: International Reinsurance Review 04/05, 2005, p. 21.

However, the legal basis and scope of such duties remains unclear.

Although certain authors consider the principle of utmost good faith as such to be applicable on reinsurance contracts,[8] there is no definition of such principle, neither in Swiss statutory law nor based on case law of Swiss courts.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

Direct Insurance Contracts

As outlined above, for **direct insurance contracts**, Swiss law does not provide for a principle of utmost good faith *per se*, but rather imposes Information Duties on the parties to an insurance contract. These Information Duties qualify as statutory law principles under the ICA.[9]

Reinsurance Contracts

The source of a duty of utmost good faith / duty to disclose for **reinsurance contracts** is unclear. Swiss legal authors take different views, considering the duty to disclose a civil law principle derived from the broader statutory principle of good faith[10] or basing such principle on an analogous application of the statutory Duty to Disclose provided for in art. 4 of the ICA[11]. Other authors consider such duty to stem from international principles governing reinsurance contracts.[12]

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Direct Insurance Contracts

A general principle of utmost good faith does not exist for **direct insurance contracts**. However, direct insurance contracts are governed by the Duty to Disclose (based on a questionnaire or other written questions) pursuant to art. 4 ICA.

Reinsurance Contracts

For **reinsurance contracts**, the statutory Duty to Disclose of the ICA does not apply directly because reinsurance contracts are exempted from the scope of application of the ICA (art. 101 para. 1 no. 1 ICA). It is controversial among Swiss legal scholars whether the Duty to Disclose applies by analogy, whether a similar duty deriving from the principle of good faith applies or whether the principle of utmost good faith is applicable by virtue of general international reinsurance practice. However, we would expect that such concepts would each apply exclusively.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Direct Insurance Contracts

In general, **direct insurance contracts** (including life insurance contracts[13]) are, to the extent the ICA is applicable, governed by the statutory Information Duties of the ICA. Certain types of insurance contracts are subject to specific legislation such as e.g. the compulsory accident insurance, the social health insurance or the occupational pension insurance scheme.[14] While the Information Duties apply by analogy to compulsory accident insurance,[15] they do not extent to the compulsory social health insurance and occupational pension insurance schemes in general, but only to the respective voluntary (additional) insurance schemes.[16]

Reinsurance Contracts

Reinsurance contracts are exempted from the scope of the ICA (art. 101 para. 1 no. 1 ICA). Whether or not the principle of utmost good faith applies is controversial amongst scholars. However, it appears to be undisputed that there are similar pre-contractual duties to disclose certain information which apply between the insurer and the reinsurer.[17]

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[8] BSK VVG-NEBEL, art. 101 no. 31 et seqq.; MORSCHER, Switzerland, in: Getting the Deal Through Insurance & Reinsurance 2014, p. 123; LÖRTSCHER, Rückversicherung in der Rechts- und Schadenpraxis, in: Schweizerische Gesellschaft für Haftpflicht- und Versicherungsrecht – Festschrift zum fünfzigjährigen Bestehen, Fuhrer (ed.), 2010, p. 374.

[9] Cf. art. 3 et seqq. ICA.

[10] MORSCHER, p. 123.

[11] Cf. in particular art. 4 para. 1 ICA; BSK VVG-NEBEL, Art. 101 no. 35; GRABER, p. 21; GRABER/LANG/KUNSZT, p. 281.

[12] BSK VVG-NEBEL, art. 101 no. 31; LÖRTSCHER, p. 371.

[13] Please note that pursuant to the draft bill of the Swiss Federal Financial Services Act published by the Federal Council on 27 June 2014 ("**Draft FFSA**"), life insurance policies that can be surrendered will be governed by the FFSA, which will impose additional duties on the insurer (cf. art. 3 lit. b no. 6, 6 et seqq. and 60 Draft FFSA). However, the Draft FFSA is still subject to consultation in Swiss parliament and enactment by the Federal Council.

[14] BSK VVG-NEBEL, art. 101 no. 53 et seqq.

[15] BSK VVG-NEBEL, art. 101 no. 53.

[16] BSK VVG-NEBEL, art. 101 no. 55 et seqq.

[17] GRABER, p. 21.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The Information Duties as described above (cf. question 1) apply at the pre-contractual stage only. However, with regard to the insured, the ICA contains further obligations concerning the providing of information which only become relevant at a post-contractual stage.[18]

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Under art. 3 and 4 of the ICA, both the insurer and the insured are bound by specific pre-contractual Information Duties aiming to balance the respective information deficits.[19]

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Based on its Duty to Disclose, the insured has to disclose to the insurer upon written request all significant facts which are relevant for the assessment of the risk to be insured that the insured is or must be aware of at the point in time of conclusion of the contract (art. 4 para. 1 ICA). Significant risk factors are risk factors that may influence the insurer's decision to conclude the contract at all or to conclude it based on the agreed terms (art. 4 para. 2 ICA).

In case a representative concludes the insurance contract for the insured, the Duty to Disclose extends to the knowledge of the represented person as well as to the knowledge of the representative (art. 5 para. 1 ICA). If a contract is entered into for the account of a third party, the significant risk factors known by this third party have to be disclosed by the policy holder as well, unless the contract is concluded without the knowledge of this third party or a timely transmission of the third party's information to the policy holder is not possible (art. 5 para. 2 ICA).

It has to be noted that the insured's Duty to Disclose only encompasses facts for which the insurer has asked in writing and in a sufficiently clear and unambiguous manner.[20] For example, the Swiss Federal Supreme Court ("**SFSC**") has decided that an insured cannot be expected to understand relatively unknown medical terminology such as "Lumbago" for aches in the lower back.[21]

The insured has to answer the questions raised by the insurer completely and truthfully.[22] The insured has to provide the answers to the insurer in writing (art. 4 para. 1 ICA).

The relevant point in time with regard to the Duty to Disclose is the conclusion of the contract and not e.g. the date of the application of the prospective insured or the date of the completion of the questionnaire.[23] As the contract is regularly concluded after the declaration of risks by the prospective insured, the prospective insured has an additional duty to update its disclosure until conclusion of the contract in case the risk factors change or new risk factors arise.[24]

Describe the insured's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The most illustrative cases with regard to the insured's Duty to Disclose deal with the scope and the interpretation of the questions asked by the insurer and the expected level of detail of the insured's answers to such questions:

- An insured who was in hospital for three days after a suicide attempt may not negate the question whether he has been in hospital for therapy without violating its Duty to Disclose (SCD 110 II 499, 503).
- Regular persons can be expected to recall the consultation of a medical doctor which has occurred in the previous four or five years. Related facts must therefore be disclosed in response to the respective question. Omission of such facts, deliberately or negligently, constitutes a violation of the insured's Duty to Disclose (SCD 109 II 60, 64).
- Upon request whether the insured has filed an application for life insurance with another insurance company, the insured must, if

[18] Cf. art. 28 et seqq., 28 and 39 ICA.

[19] FUHRER, Schweizerisches Privatversicherungsrecht, Zurich/Basel/Geneva 2011, no. 6.3 et seqq.

[20] BSK VVG-NEF, art. 4 no. 44 et seqq.; FUHRER, no. 6.134 et seq.

[21] Swiss Federal Supreme Court Decision ("**SCD**") 101 II 339, 343.

[22] SÜSSKIND, Die vorvertragliche Informationspflicht des Versicherers gemäss Art. 3 des revidierten Versicherungsvertragsgesetzes, in: HAVE – Haftung und Versicherung 2006, p. 16.

[23] Cf. the wording of art. 4 and 6 ICA; NEF/VON ZEDTWITZ, in: Honsell/Vogt/Schnyder/Grolimund (eds.), Basler Kommentar Versicherungsvertragsgesetz Nachführband, Basel/Zurich 2012, art. 4 ad no. 7 (citation: Addendum BSK VVG-AUTHOR); FUHRER, no. 6.117 et seqq.

[24] FUHRER, no. 6.117 et seqq.; SCD 4A_488/2007, E. 2.1.

applicable, disclose all its applications for life insurances and not just one of several applications, otherwise the insured violates its Duty to Disclose. (SCD 108 II 143, 146 et seq.).

- If another insurer has rejected an application for insurance, the insured must disclose such rejection upon reasonable request, irrespective of whether such rejection has been communicated to the insured in writing or by phone only (SCD 120 II 266, 269 et seq.).

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

There is no duty of utmost good faith as such in Swiss law on insurance contracts (cf. question 3 above). However, the statutory Duty to Disclose is to a certain albeit limited extent comparable to the duty of utmost good faith (cf. questions 1 and 7 above).

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

N/A. Please see the answer to question 8 above.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

If an insured did not comply with its Duty to Disclose, the insurer is entitled to terminate the insurance contract (art. 6 para. 1 ICA). In such a case, the insurer must issue the termination notice in writing. The right of termination expires four weeks after the insurer becomes aware of the insured's violation of its Duty to Disclose (art. 6 para. 2 ICA).

As an exception to this, the insurer may only terminate a personal insurance contract on the basis of an incorrect indication of the insured's age if the real age at the time of conclusion of the contract is not within the limit of admission set up by the insurer (art. 75 para. 1 ICA). Otherwise, the insurer can only reduce its performance at the ratio between the stipulated premium and the tariff rate for the real age at entry (art. 75 para. 2 no. 1 ICA).[25]

It is controversial in Swiss legal literature whether the insured must be notified within these four weeks[26] or whether it is sufficient for the insurer to issue the notification within the four-week period[27]. The SFSC has, under the former version of art. 6 oldICA[28], in two instances relied on the date of issuance of the notice of termination.[29] However, in a recent decision, the SFSC indicated that the termination notice has to be served to the insured within the four-week prescription period.[30] In any case, the termination becomes effective only once the notice has been served on the insured (art. 6 para. 1 last sentence ICA).

In general, the termination has effect for the future only.[31] However, if an insured event has already occurred, the insurer is exempted from its obligation to indemnify the insured if i) the insurer made use of its right of termination pursuant to art. 6 para. 1 ICA and ii) the omitted or incorrect disclosure of the significant risk factor has influenced the occurrence or extent of the damages in question.[32] If the insurer has already indemnified the insured for such damages, he is entitled to restitution (art. 6 para. 3 ICA).

The insurer may not terminate an insurance contract upon a violation of the insured's Duty to Disclose if (art. 8 ICA):

i) the non-disclosed or incorrectly notified fact had ceased to exist before the insured event occurred;

ii) the insurer provoked the violation of the obligation to disclose;

iii) the insurer knew or must have known the non-disclosed fact;

iv) the insurer correctly knew or must have known the incorrectly disclosed fact,

v) the insurer waived the right to terminate the contract; or

[25] BSK VVG-FUHRER, art. 75 no. 7 et seqq.

[26] Addendum BSK VVG-NEF/VON ZEDTWITZ, art. 6 ad no. 16; FUHRER, no. 6.149; GAUCH, Das Kündigungsrecht des Versicherers bei verletzter Anzeigepflicht des Antragstellers – Ein Kurzkommentar zu den am 1. Januar 2006 in Kraftgetretenen Änderungen der Art. 6 und 8 VVG, in: ZBJV 142/2006, p. 367.

[27] POUGET-HÄNSELER, Anzeigepflichtverletzung: Auswirkungen der Revision auf die Praxis, in: HAVE – Haftung und Versicherung 2006, p. 29.

[28] Cf. Official Compilation of Federal Legislation ("**AS**"), AS 24 719.

[29] SCD 5C.5/2005, no. 3.3 et seq.; SCD 129 III 713, 714.

[30] SCD 4A_112/2013, no. 2.

[31] POUGET-HÄNSELER, p. 29; GAUCH, p. 367.

[32] FUHRER, no. 6.153 et seqq.

vi) the person who had the duty to disclose did not answer one of the questions asked and the insurer nevertheless concluded the contract, unless based on other information of the person the question must have been considered as to be answered in a certain way that amounts to an incorrect or non-disclosure of a significant risk factor which the person knew or must have known.

The remedy in case of the insured's violation of the Duty to Disclose is unilaterally mandatory. Modifications to the detriment of the insured are therefore not possible (art. 98 para. 1 ICA).

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

N/A. Please see questions 8 and 9 above.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

Based on its Duty to Inform, the insurer must inform the insured in writing prior to the conclusion of the insurance contract in a comprehensive way (e.g. in non-technical language) about the essential elements of the insurance contract, such as (art. 3 para. 1 ICA):

i) the insurer's identity;

ii) the insured risks;

iii) the insurance coverage;

iv) the premiums due and the other obligations of the insured;

v) the term and termination of the insurance contract;

vi) the methods, principles and bases for calculating and distributing surplus profits;

vii) the surrender and transformation values; and

viii) the handling of personal data, including purpose and type of data collections as well as data recipients and data storage.

Further, the information regarding the personal data and the general conditions of insurance must be in possession of the insured at the time of conclusion of the contract (art. 3 para. 2 ICA).

In addition to the statutory Duty to Inform the insured, the SFSC acknowledges a limited duty of the insurer or his agent to advise the prospective insured in case the insured evidently needs such advice.[33]

Further, not only the insurer, but also an insurance intermediary, as the case may be, has a duty to inform the insured. An insurance intermediary must inform the insured at least about (art. 45 of the Swiss Federal Act on Insurance Supervision ["**ISA**"]):

i) its identity and address;

ii) whether the insurance coverage offered by the intermediary in a particular line of insurance is provided only by one or by several insurers, and which insurers are involved;

iii) its contractual relationship with the insurers on whose behalf they act and the name of these insurers;

iv) the person who can be held liable for negligence, mistakes or incorrect information in connection with the intermediary's activity; and

v) the processing of personal data, in particular the purpose, scope and recipients of data, as well as the storage of data.

The referred information must be delivered to the insured upon first contact on a durable and accessible medium (art. 45 para. 2 ISA).

13. Describe the insurer's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The current version of art. 3 and art. 3*a* ICA have been in force since January 2007 only. Consequently, the insurer's Duty to Inform as described above does not apply to contracts concluded before 1 January 2007. No Supreme Court decisions are yet available on these provisions. Under the former art. 3 oldICA[34], the insurer only had to provide the insured with an excerpt of its general conditions of insurance as opposed to the Information Duties described under question 12 above. The respective case law is therefore outdated.

[33] SCD 5C.267/2007; MAURER, Schweizerisches Privatversicherungsrecht, Zurich 1995, p. 258 et seq.; FUHRER, no. 6.40 et seqq.

[34] Cf. AS 24 719.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Based on art. 3 para. 1 lit. c ICA, the insurer must inform the insured about its duty to pay the premium and about the insured's further duties under the insurance contracts. This includes the insured's duty to notify the insurer of any aggravation of risks and the duty to immediately inform the insurer in case of occurrence of an insured event.[35] However, under the current legislation in the ICA, there is no obligation to notify the prospective insured of the consequences of any pre-contractual omission of information, misrepresentation or similar. Consequently, the insurer's omission to inform the prospective insured about its Duty to Disclose does not constitute a breach of the insurers Duty to Inform the insured. This applies for the actual Duty to Disclose as well as for the duty to update such information until conclusion of the contract.

Such an obligation to inform the insured about its Duty to Disclose was included in the draft bill of the total revision of the Insurance Contract Act,[36] which has been rejected by the Swiss parliament in 2013 with the instruction to the Federal Council to prepare a partial revision on certain defined issues. Whether an obligation of the insurer to notify the insured of the consequences of any misrepresentation will form part of this partial revision is unknown at this stage, since it is not listed as an issue which the Federal Council was instructed to address in the partial revision. A draft for the partial revision is not yet available.

In any case, under the current legislation it is not a breach of the insurers Duty to Inform not to notify the prospective insured of the nature and extent of its Duty to Disclose.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

If the insurer violated its Duty to Inform, the insured is entitled to terminate the insurance contract by written notice (art. 3*a* para. 1 ICA). The termination right expires four weeks after the insured becomes aware of the insurer's breach, but in any case no later than a year after the breach of the Duty to Inform (art. 3*a* para. 2 ICA). Similar to the termination right of the insurer in case of a violation of the insured's Duty to Disclose, it is unclear whether the notice of termination has to be issued within the four weeks prescription period or whether the notice has to be served to the insurer within such period.[37]

Until the termination notice is served to the insurer, the insurance contract remains in force and the insured is obliged to pay the insurance premium.

The insurer's Duty to Inform (art. 3 ICA) as well as the right to terminate the contract in case of breach of such Duty to Inform (art. 3*a* ICA) are unilaterally mandatory law (art. 98 para. 1 ICA). These provisions cannot be contractually modified to the detriment of the insured.[38]

If the insurer breaches its ancillary duty to advise the insured, the insured may not avoid the contract, but is entitled to damages.[39]

If an insurance intermediary violates its information duty towards the insured (see question 12 in fine), the insured may potentially claim damages, but cannot avoid the contract.[40]

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

At the post-contractual stage, the insured's Duty to Disclose does no longer apply.[41] Nevertheless, beside the obligation to pay the premium, the insured has certain further obligations regarding the adjustment of the information imbalance between the insurer and the insured/beneficiary as is the case in connection with the **aggravation of risk** (art. 28 et seqq. ICA), the **occurrence of an insured event** (art. 38 ICA) or the **justification of the insurance claims made under the contract** (art. 39 ICA).

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[35] Addendum BSK VVG-KUHN/GEIGER-STEINER, art. 3 no. 11 et seq.

[36] Cf. art. 22 para. 1 of the draft bill on the total revision of the ICA, Federal Gazette ("**BBl**") 2011 7819, p. 7825; dispatch to the draft bill on the total revision to the ICA, BBl 2011 7705, p. 7746; VON ZEDTWITZ, Die vorvertragliche Anzeigepflicht, in: HAVE – Haftung und Versicherung 2011, p. 429; HEISS, Informationspflicht des Versicherungsnehmers, in: Internationales Forum zum Privatversicherungsrecht 2008, p. 60; HASENBÖHLER, Anzeigepflicht des Versicherungsnehmers und die Folgen von deren Verletzung, in: ZSR 2007 I, p. 357.

[37] Cf. question 10 above.

[38] SÜSSKIND, p. 25.

[39] MAURER, p. 259.

[40] DU PASQUIER/MENOUD, in: Stupp/Hsu (eds.), Basler Kommentar Versicherungsaufsichtsgesetz, Zurich 2013, art. 45 no. 53 et seqq. (citation: BSK VAG-AUTHOR); FUHRER, no. 6.65.

[41] BSK VVG-U. NEF, art. 4 no. 7.

Aggravation of risk

Regarding the **aggravation of risk**, the respective **notification to the insurer** and the insurer's remedies, the law distinguishes between the aggravation of risk caused by acts of the insured (art. 28 ICA) and aggravation of risk without acts of the insured (art. 30 ICA). The consequences of such aggravation of risk in both cases depend on whether or not the insured has notified the insurer of the aggravation of risk. However, while the insured is under an obligation to notify the insurer in case of an aggravation of risk not caused by the insured (in such a case, the insurer may basically not terminate the contract; see below), such an obligation does not exist if the insured has caused the aggravation of risk (in such a case, the insurer may terminate the contract).[42]

Prerequisite for the application of the rules on the aggravation of risk is the substantial aggravation of a significant risk factor after conclusion of the contract.[43] An aggravation of risk is deemed to be substantial, if it i) had influenced the insurer's decision to conclude the contract at all or on the basis of the terms agreed (material substantiality) and if ii) the scope of this specific risk has been determined by the parties at the conclusion of the contract (formal substantiality) (art. 28 para. 2 ICA).[44]

In case of an **aggravation of risk caused by acts of the insured**, i.e. if the insured has set an adequate cause for such aggravation, the insurer is no longer bound by the contract (art. 28 para. 1 ICA) and therefore basically has the right, during an indefinite period, to terminate the contract by notice to the insured.[45] In contrast to the termination in case of the violation of the pre-contractual Duty to Disclose, this notice is not subject to any formal requirements.[46] Since this comes with an immense legal uncertainty for the insured, he may notify the insurer in writing of the aggravation of the risk, with the consequence that the insurer's right to terminate the contract expires 14 days after receipt of such notification (art. 32 no. 4 ICA).[47]

In addition, the consequences of an aggravation of risk do not apply if:

i) the aggravation neither influenced the occurrence nor the extent of the insured event (art. 32 no. 1 ICA);

ii) the aggravation was undertaken with the intention to protect the insurer's interest (art. 32 no. 2 ICA);

iii) the aggravation was caused due to an act of humanity (art. 32 no. 3 ICA); or

iv) the insurer expressly or tacitly renounced the right to terminate the contract (art. 32 no. 4 ICA).

Nevertheless, unless otherwise agreed (art. 28 para. 2 ICA), the insured has **no duty to notify the insurer** of such aggravation of risk.[48]

If the **aggravation of risk was not caused by the insured**, the insured is under a **duty to notify the insurer** in writing of such aggravation within due time,[49] after it came to his knowledge.[50] In such a case, the insurer is, unless contractually otherwise agreed upon, bound by the insurance contract and its terms, despite of the aggravated risk (art. 30 para. 2 ICA). If the insurer terminates the contract based on a contractually stipulated right to terminate in case of an aggravation of risk, the termination becomes effective 14 days after notification of the insured (art. 30 para. 3 ICA).

If the insured breaches its duty to notify the insurer, the remedies are the same as in case of an aggravation of risk caused by the insured himself (art. 30 para. 1 ICA).[51] In addition, the insured may become liable for damages based on its violation of the duty to notify the insurer.[52]

The articles regarding the aggravation of risk are unilaterally mandatory law (art. 98 para. 1 ICA). Consequently, the prerequisites may only be heightened and the remedies allayed for the benefit of the insured.[53]

Notification in case of the occurrence of an insured event

The beneficiary of an insurance has a statutory duty to notify the insurer in case of the occurrence of an insured event, as soon as he has learned about the

[42] FUHRER, no. 13.85.

[43] FUHRER, no. 13.63 et seqq.

[44] FUHRER, no. 13.72 et seqq; BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 45 et seqq.

[45] BSK VVG-FUHRER, art. 28 no. 22 et seqq.

[46] BSK VVG-FUHRER, art. 28 no. 24.

[47] BSK VVG-FUHRER, art. 28 no. 28.

[48] BSK VVG-FUHRER, art. 28 no. 20; FUHRER, no. 13.88.

[49] BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 86.

[50] FUHRER, no. 13.95 et seqq.

[51] FUHRER, no. 13.98.

[52] BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 89 et seqq.

[53] BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 108 et seqq.

event and about the resulting insurance claims (art. 38 ICA). Unless otherwise agreed upon, the notice need not be made in writing (art. 38 para. 1 ICA). If such a notification of claims is by fault of the beneficiary not made within due time, the insurer may deduct the amount from the indemnification by which the indemnification would have been reduced in case of a notice on time (art. 38 para. 2 ICA). If the beneficiary omitted the immediate notification with the intention to prevent the insurer from establishing the circumstances of the insured event on time, the insurer is no longer bound by the contract (art. 38 para. 3 ICA). In such a case, the insurer need not indemnify the insured for the damages of the event in question and has the right to terminate the contract with effect for the future.[54]

The parties can contractually alter the provisions of art. 38 ICA.[55] However, by virtue of art. 45 para. 1 ICA, restrictions to the detriment of the beneficiary are valid only in case the beneficiary has violated its duty to notify the insurer by fault.[56]

Justification of the insurance claim

Upon request of the insurer, the beneficiary is obliged to provide any information known to him, which may help the insurer to establish the circumstances under which the insured event occurred (e.g. place, time and course of the insured event) or the consequences of such event (e.g. affected items and persons and medical reports) (art. 39 para. 1 ICA). As long as the beneficiary does not provide such information to the insurer, the insurance claim does not become due (art. 41 para. 1 ICA).[57] If the beneficiary notifies the insurer incorrectly or conceals facts which would exclude or reduce the insurer's obligation to indemnify the insured, or if a notification pursuant to art. 39 ICA was, for the purpose of deception, given too late or not at all, the insurer is not bound by the contract vis-à-vis the beneficiary (art. 40 ICA).

This duty to substantiate the initial notification following the occurrence of an insured event should enable the insurer to regulate the damages. Further, this information may also be helpful in order to reveal a potential violation of the insured's pre-contractual Duty to Disclose. However, the beneficiary must only answer questions, which are connected to the regulation of the damages. He is not obliged to answer questions that only aim at revealing a breach of the pre-contractual Duty to Disclose.[58]

[54] BSK VVG-J. NEF, art. 38 no. 25.

[55] BSK VVG-J. NEF, art. 38 no. 17; cf. art. 98 et seq. ICA.

[56] BSK VVG-J. NEF, art. 38 no. 17.

[57] BSK VVG-J. NEF, art. 39 no. 15 et seq.

[58] FUHRER, no. 11.55 et seqq.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The duty to notify the insurer in case of an aggravation of risk applies to the insured only.[59] A third party beneficiary is neither under an obligation to notify any aggravation of risk, nor is the insured accountable for the knowledge of the third party beneficiary.[60]

In contrast, as outlined above, the duty to report the occurrence of an insured event and the justification of a claim lies with the beneficiary of the insurance rather than with the insured.

17. Describe the insured's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Aggravation of risk

- A change of profession may constitute an aggravation of the risk related to an accident insurance in case the accident risk related to the new profession has to be classified as substantially higher than the risk related to the former profession. For example, the SFSC held in its decision SCD 122 III 458 that the occupational change from an assistant nurse to a prostitute qualifies as an aggravation of risk pursuant to art 28 ICA, which allows the insurer to terminate the insurance contract.

Notification in case of the occurrence of an insured event

- If the insured informs the insurer about a insured event only after the damages have been repaired and the description of the circumstances of the accident appears to be unreliable, the insurer need not indemnify the insured based on the insured's violation of his duty to notify the insurer in case of an insured event, especially because the notification only after the damages have been repaired make a verification of the accident impossible (Decision of the cantonal court of Nidwalden of 13 October 1993).

Justification of the insurance claim

- Art. 39 para. 1 ICA only obliges the insured to provide information regarding the insured event. Questions of the insurer in respect of a potential violation of the insured's Duty to

[59] BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 86.

[60] BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 83.

Disclose pursuant to art. 4 ICA need not be answered by the insured (SCD 129 III 510, 512 et seq.).

18. Is the insured's intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Under Swiss insurance law, there is no exception from the Duty to Disclose regarding criminal activities. Therefore, if a current or former criminal activity forms a significant risk factor and if the insurer has asked a question that objectively triggered the Duty to Disclose regarding such criminal activity, the concealment of this activity would constitute a breach of the insured's Duty to Disclose.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

At a post-contractual stage, there are no specific information duties for the insurer. However, when dealing with a claim, the insurer is bound by the general principle of good faith pursuant to art. 2 CC.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

No, we do not see such duty to be applicable between the insurer and the beneficiary.

21. Describe the insurer's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

We are not aware of any cases in this regard.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

No, there is no insurers' code of practice in Switzerland.

There are general insurance conditions templates published by the Swiss Insurance Association (SVV), which contain provisions typically included into general insurance conditions that modify the duties described above. For example, they provide for a duty to notify the insurer in case of an aggravation of risk caused by the insured himself or the right of the insurer to terminate the insurance contract also in case of an aggravation of risk not caused by the insured. However, these exemplary conditions are not binding on insurers and therefore merely provide guidance regarding the general practice.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

If a term of the contract were e.g. opposed to the insurer's mandatory Duty to Inform, such a term would be void and therefore would have to be disregarded by the courts.[61]

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

We are not aware of any decision of Swiss courts on this issue. However, we expect that a court might disregard an avoidance in accordance with art. 2 CC, if such avoidance runs contrary to the principle of good faith or is otherwise abusive.

25. To the extent that an insurer's breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

If and to the extent the Duty to Disclose as contained in the ICA is breached, such breach constitutes a breach of the statute (i.e. the ICA).

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

The Swiss Federal Act on Insurance Supervision does not directly address the insurer's breach of its Duty to Inform the insured. However, the Swiss Financial Market Supervisory Authority FINMA may intervene in case of systematic violation of the Duty to Inform based on art. 46 para. 1 lit. f ISA.[62] Consequences of such systematic misconduct are determined according to art. 24 et seqq. of the Federal Act on the Swiss Financial Market Supervisory Authority ("**FINMASA**").[63] The available sanctions comprise, depending on the severity of the violation, a reprimand (art. 32 FINMASA), specific orders to restore compliance with the law (art. 31 FINMASA), prohibition against individuals from practicing their profession (art. 33 FINMASA) and ultimately, in severe cases, the revocation of the insurer license (art. 37 FINMASA).

Further, an insurer, as well as the persons responsible for the management, supervision, control and the conduct of the business must enjoy a good reputation and provide assurance for the proper

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[61] Addendum BSK VVG-KUHN/GEIGER-STEINER, art. 3*a* no. 13.

[62] BSK VAG-DU PASQUIER/MENOUD, art. 46 no. 45; SÜSSKIND, p. 25.

[63] BSK VAG-DU PASQUIER/MENOUD, art. 46 no. 72; cf. art. 2 para. 1 FINMASA.

conduct of business (art. 14 para. 1 ISA). This provision has to be complied with on an ongoing basis.[64] Therefore, if FINMA considers e.g. the assurance of proper business conduct to no longer be given after a severe or repeated breach of the Duty to Inform, it can impose sanctions on an insurer or the concerned persons as outlined above (e.g. revocation of the license / prohibition against an individual from practicing its profession).

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

As stated above, reinsurance contracts are not governed by specific legislation and are therefore primarily characterized by the parties' contractual agreement. To the extent the parties did not agree on specific duties and remedies, the question arises whether the ICA should be applied by way of analogy or whether a duty of utmost good faith can be applied as a term implied in the nature of reinsurance contracts or as a duty based on international principles of reinsurance. Swiss case law is silent on such matters as in general, reinsurance disputes are settled via negotiations between the insurer and the reinsurer or by arbitration proceedings rather than by proceedings in front of state court judges. Consequently, the legal sources on such issues are scarce.[65]

Amongst scholars, it seems to be undisputed that the relationship between insurer and reinsurer is governed by specific duties to disclose the relevant information. In contrast to the Duty to Disclose of the insured in a regular direct insurance contract, the prevailing view seems to be that the insurer, party to a reinsurance contract as cedent, has to disclose the relevant risk factors on its own motion.[66]

Regarding the post-contractual duty to notify an aggravation of risk to the reinsurer, an analogous application of the right to terminate the contract in case of an aggravation of the risk is not regarded as applicable.[67] However, the duty to notify the reinsurer of an aggravation of risk seems to be generally accepted among Swiss legal authors.[68]

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[64] BSK VAG-DU PASQUIER/MENOUD, art. 46 no. 7.

[65] FUHRER, no. 18.36; GRABER, p. 21 et seq.

[66] BSK VVG-NEBEL, art. 101, no. 35; LÖRTSCHER, p. 374; FUHRER, no. 18.30.

[67] BSK VVG-NEBEL, art. 101, no. 35.

[68] BSK VGG-NEBEL, art. 101, no. 35; FUHRER, no. 18.30.

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