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Information Duties

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Marc Dernauer / Harald Baum / Moritz Bälz

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Table of Contents

Preface ... iii

Economic Foundations

Information and Disclosure Duties from a Law-and-Economics Perspective. A Primer
Klaus Ulrich Schmolke ... 3

I. Civil Law

Information Duties in Relation to the Ownership and Transfer of Rights to Objects and Other Assets under Japanese Civil Law
Hisanori Nemoto ... 27

Information Duties under Japanese General Contract Law and Japanese Law of Consumer Contracts
Marc Dernauer ... 49

Information Duties under German General Contract Law and the German Law of Consumer Contracts
Carsten Herresthal ... 93

Information Duties under the Japanese Law Governing Public Interest Incorporated Associations and Foundations
Makoto Arai ... 121

Information Duties under the German Law Governing Non-profit Entities
Moritz Bälz ... 149

II. Trade Law and Company Law

Information Duties under Japanese Trade Law and Company Law
Masao Yanaga ... 173

Information Duties under German Trade Law and Company Law
Ingo Saenger ... 191

III. Capital Markets Law

Information Duties under Japanese Capital Markets Law
Toshiaki Yamanaka / Gen Goto ... 209

Information Duties under German Capital Markets Law
Harald Baum ... 217

IV. Insurance Law

Information Duties under Japan's Insurance Act
Yuji Ito ... *239*

Pre-contractual Information Duties in German Insurance Contract Law
Giesela Rühl ... 255

Contributors ... 283

Pre-contractual Information Duties in German Insurance Contract Law

Giesela Rühl[*]

I. Introduction
II. The regulation of Insurance Contracts in Germany
   1. German Law: Insurance Contracts Act and Insurance Supervision Act
   2. European Law: Harmonization of Insurance (Contract) Law
III. The Insurer's Pre-contractual Information Duties
   1. Purpose
   2. Design
IV. The Policyholder's Pre-contractual Information Duties
   1. Purpose
   2. Design
V. Conclusion
Annex: Excerpts from the German Insurance Contract Act

I. INTRODUCTION

Information play a key role for insurance contracts:[1] The insurer needs to know the risk before he can offer insurance coverage and calculate the insurance premium.[2] And the policyholder needs to know whether a certain insurance policy actually suits his needs.[3] Naturally, assessing risks and understanding insurance policies is not a piece of cake. To ease at least the information gathering process, national laws, including German law, impose numerous information duties on numerous parties involved in the conclusion of an insurance contract.[4] To begin with, the insurer is usually under a duty to inform the prospective policyholder about the terms of the insurance policy prior to conclusion of the contract.[5] If the contract comes

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1 L. LOACKER, Informed Insurance Choice? (Cheltenham et al. 2015) 1 ff.

2 See, for example, J. BASEDOW/T. FOCK, Rechtsvergleich, in: Basedow/Fock (eds.), Europäisches Versicherungsvertragsrecht, Volume I (Tübingen 2002) 69; U. KNAPPMANN, § 14 Verletzung der vorvertraglichen Anzeigepflicht, in: Beckmann/ Matusche-Beckmann (eds.), Versicherungsrechts-Handbuch (Munich 2009) para 1.

3 LOACKER, *supra* note 1.

into existence with the help of an insurance intermediary, a similar duty usually falls on the intermediary.[6] The policyholder, in turn, is under a duty to disclose to the insurer all facts that might turn out to be material for the insured risk.[7] And he is usually obliged to inform the insurer should the insured risk increase after conclusion of the contract.[8]

For reasons of time and – more importantly – space, I cannot discuss the details of all these information duties under German law. I will, therefore, limit my contribution in several ways. First, I will focus on information duties that fall on the insurer and the policyholder prior to conclusion of the contract.[9] I will, therefore, neither elaborate on information duties that fall on the insurer and on the policyholder after conclusion of the contract, nor will I elaborate on information duties that fall on third parties, such as insurance intermediaries. Second, when examining the insurer's and the policyholder's pre-contractual information duties, I will focus on provisions that apply to insurance contracts in general. In contrast, I will ignore provisions that apply only to specific insurance contracts like motor, life or health insurance. And, third, I will only examine the insurer's and the policyholder's pre-contractual information duties concerning the mass risk insurance sector. As a consequence, I will disregard information duties concerning the large risk insurance sector. Before going into the details, however, I will briefly sketch the overall regulatory landscape in which insurance contracts operate in Germany.[10]

II. THE REGULATION OF INSURANCE CONTRACTS IN GERMANY

Insurance contracts are complex legal products. To the extent that they are governed by German law, they are subject to a multitude of rules and regulations which are of both national and European origin.

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4 See, for example, BASEDOW/FOCK, *supra* note 2, 31, 70; BASEDOW/BIRDS/CLARKE/COUSY/HEISS/LOACKER (eds.), Principles of European Insurance Contract Law (PEICL) (2nd ed., Cologne 2016) Article 2:201, para N1.

5 See, for example, BASEDOW/FOCK, *supra* note 2, 30; BASEDOW et al., *supra* note 4, Article 2:201, para C1, N1.

6 See, for example, BASEDOW/FOCK, *supra* note 2, 41; BASEDOW et al., *supra* note 4, Article 3:101, para N4, N5.

7 See, for example, BASEDOW/FOCK, *supra* note 2, 69 f.; BASEDOW et al., *supra* note 4, Article 2:101, para N1.

8 See, for example, BASEDOW/FOCK, *supra* note 2, 82; BASEDOW et al., *supra* note 4, Article 4:202, para C1, N1.

9 See *infra* III. and IV.

10 See *infra* II.

1. German Law: Insurance Contracts Act and Insurance Supervision Act

At the level of German national law, essentially two statutes regulate insurance contracts. The first one is the Insurance Contract Act (ICA).[11] Adopted in 1908, the ICA is a wholesale codification of the private law aspects of the insurance business meant to complement and, as the case may be, supersede the general provisions on contract law to be found in the German Civil Code. The Act was substantially reformed in 2007 to adjust it to the needs of modern life, most importantly the needs of enhanced consumer protection.[12] It contains all provisions that are relevant for the following contribution, namely provisions on the insurer's pre-contractual information duties as well as provisions on the policyholder's pre-contractual duty of disclosure.

The second German statute that regulates insurance contracts is the Insurance Supervision Act (ISA).[13] Adopted in 1901 and reformed several times ever since to implement European Directives, the ISA deals with the public law aspects of the insurance sector. Most importantly, it determines the conditions for the admittance and operation of insurance undertakings and regulates the power of the government to oversee insurance companies. Since I will focus on the private law aspects of information duties, I will not discuss the provisions of the ISA in detail.

2. European Law: Harmonization of Insurance (Contract) Law

a) Current status

The fact that insurance contracts are governed by two national statutes might lead us to believe that German insurance law is a purely national matter. However, this is not the case. In fact, a large part of German law derives from Euro-

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11 Insurance Contract Act of 23 November 2007 (Federal Law Gazette I, 2631), as amended. An English translation of the Act is available at *https://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html.*

12 See for a more detailed discussion of the reform E. B. FRANZ, Die Reform des Versicherungsvertragsrechts – ein großer Wurf?, Deutsches Steuerrecht 2008, 303; E. LORENZ, Reform des Versicherungsvertragsrechts in Deutschland. Grundsätze und Schwerpunkte, Versicherungsrundschau 2005, 265; E. NIEDERLEITHINGER, Generaleinführung, in: Baumann/Beckmann/Johannsen/Johannsen (eds.), Versicherungsvertragsgesetz, Volume I (9th ed., Berlin 2008) 248 ff. (with further references). An English summary of the reform is offered by H. HEISS, Proportionality in the new German Insurance Contract Act 2008, Erasmus Law Review 5 (2012) 105.

13 Act on the Supervision of Insurance Undertakings of 1 April 2015 (Federal Law Gazette I, 434), as amended. An English translation of the Act is available at *https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/VAG_va_en.html?nn=8356586.*

pean law.[14] This holds particularly true for the public law provisions to be found in the ISA. They have been enormously influenced by a large number of European Directives adopted ever since the 1970s and aimed at realizing the freedom of establishment and the freedom of services within the European Union.[15] In addition, the provisions relating to the insurer's pre-contractual information duties go back to various European Directives, notably the E-Commerce Directive,[16] the Distance Marketing of Financial Instruments Directive,[17] the Solvency II-Directive,[18] and the Insurance Distribution Directive.[19] Originally placed in the ISA, the provisions implementing these Directives were moved to the ICA by the German legislature in 2007.

All other provisions of German insurance contract law, notably those provisions in the ICA that relate to the policyholder's pre-contractual duty of disclosure, have remained unaffected by European law – even though the European Commission considered the harmonization of insurance contract law as an important means to make the Single European Market for insurances come true.[20] However, an official proposal for a Directive on the coordination of insurance contract law submitted in 1979[21] and modified in

14 L. LOACKER/S. PERNER, Einleitung, C. Europäisches Versicherungsvertragsrecht, in: Looschelders/Pohlmann (eds.), VVG (2nd ed., Cologne 2011), para 1.

15 J. BASEDOW, Towards a European Insurance Contract Law? The Commission Expert Group, its Antecedents and Consequences, in: Contratto e Impresa/Europa 2015, 2 ff. See also P. POHLMANN, Principle-based insurance regulation: lessons to be learned from a comparison of the EU and German law of risk management, in: Burling/Lazarus (eds.), Research Handbook on International Insurance Law and Regulation (Cheltenham/Northampton 2011) 329 ff.

16 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178, p. 1.

17 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002 L 271, p. 16.

18 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ 2009 L 335, p. 1.

19 Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ 2016 L 26, p. 19.

20 General Programme for the abolition of existing restrictions on freedom of services, OJ 1962 No 2, p. 3.

21 Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, OJ 1979 C 190, p. 2. See for a more detailed account *infra* I.1.

1980[22] never came close to adoption.[23] Despite intensive negotiations, the Member States simply could not reach agreement on the many detailed provisions of the proposal, among them the rules concerning the policyholder's pre-contractual duty of disclosure.[24] In 1993, the European Commission eventually declared that it no longer considered the harmonization of insurance contract law a necessary condition for the realization of the Single European Market – and withdrew the proposal.[25]

b) *Future prospects*

As a result of the above, the law of insurance contracts – with little exception[26] – remains a domain of national law up to the present day. However, this is not, at least not necessarily, the end of the story. During the past decades it has become clear that – despite the large number of European Directives – insurance companies refrain from cross-border activity within the European Union at least as far as small commercial and consumer insurance is concerned.[27] This finding is usually attributed to the interplay of several factors, one of which has been recognized as being the lack of a

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22 Amendment of the Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, OJ 1979 C 335, p. 30. Article 1 of the Proposal limited the scope of application to direct insurance with the exception of life assurance, health insurance as well as marine, aviation, transportation and some other types of insurance.

23 See for a more detailed discussion G. RÜHL, Common Law, Civil Law, and the Common European Market for Insurances, International and Comparative Law Quarterly 55 (2006) 879.

24 Art. 3 and 4 of the Proposal.

25 Withdrawal of certain proposals and drafts from the Commission to the Council, OJ 1993 C 228, p. 4, 14.

26 See R. BECKMANN, Auswirkungen des EG-Rechts auf das Versicherungsvertragsrecht, Zeitschrift für Europäisches Privatrecht 7 (1999) 809 ff.; U. HÜBNER/ A. MATUSCHE-BECKMANN, Auswirkungen des Gemeinschaftsrechts auf das Versicherungsrecht, Europäische Zeitschrift für Wirtschaftsrecht 1995, 263, 269 f.; M. PRÖLSS/C. ARMBRÜSTER, Europäisierung des deutschen Privatversicherungsrechts, Deutsche Zeitschrift für Wirtschaftsrecht 1993, 449, 451 ff.

27 Frankfurter Allgemeine Zeitung, No. 187 of 14 August 1998, p. 26. See also J. BASEDOW, The Case for a European Insurance Contract Code, The ICFAI Journal of International Business Law 2001, 569, at 573; J. BASEDOW, European Insurance Market, Harmonization of Insurance Contract Law, and Consumer Policy, Connecticut Insurance Law Journal 7 (2001) 495, at 500; BASEDOW/FOCK, *supra* note 2, 4; RÜHL, *supra* note 23, 883 f. See also the Final Report of the Commission Expert Group on Insurance Contract Law (2014), available at *http://ec.europa.eu/justice/contract/files/expert_groups/insurance/final_report.pdf,* p. 9 para 6.

common – or at least harmonized – insurance contract law.[28] At the end of the 1990s a group of European academics, therefore, set out to revive the idea of harmonization and founded the Project Group Restatement of European Insurance Contract Law.[29] In 2009 and 2015 this Group published the Principles of European Insurance Contract Law (PEICL)[30] that were meant to serve as a basis for a future European instrument in the field.[31] In 2013, the European Commission took up the idea and decided to set up an Expert Group on European Insurance Contract Law.[32] The Expert Group submitted a report in 2014 concluding that legal differences prevented cross-border activities in the mass risk insurance market.[33] It is now for the European Commission to decide how to proceed further. Chances are that we will see some form of European legislation relating to insurance contracts, including the policyholder's information duties, in the near future.

III. The Insurer's Pre-contractual Information Duties

The core provision that establishes pre-contractual information duties of the insurer under German law is Section 7 ICA. In conjunction with the Regulation on Information Obligations for Insurance Contracts, adopted and published by the Federal Ministry of Justice in accordance with Section 7(2) ICA,[34] the provision implements a large number of European

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28 See Final Report of the Commission Expert Group on European Insurance Contract Law, *supra* note 27, p. 6 para 5, p. 7 para 7. See also Basedow, European Insurance Contract Code, *supra* note 27, 574; Basedow, European Insurance Market, *supra* note 27, 501; Basedow/Fock, *supra* note 2, 4; Rühl, *supra* note 27, 883 f.

29 Detailed information about the Group is available at *http://www.restatement.info*.

30 Basedow/Birds/Clarke/Cousy/Heiss (eds.), Principles of European Insurance Contract Law (1st ed., Cologne 2009); Basedow/Birds/Clarke/Cousy/Heiss/Loacker (eds.), Principles of European Insurance Contract Law (PEICL) (2nd ed., Cologne 2016).

31 See for a more detailed account of the PEICL H. Heiss, Optionales Europäisches Versicherungsvertragsrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht 76 (2012) 316 ff.; H. Heiss/M. Clarke/M. Lakhan, Europe: towards a harmonised European insurance contract law – the PEICL, in: Burling/Lazarus, *supra* note 15, 603 ff. See also the list of references to be found in Basedow et al., *supra* note 4, pp xlvii ff.

32 Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law, OJ 2013 C 16, p. 6.

33 Final Report of the Commission Expert Group on Insurance Contract Law, *supra* note 27, 6. See for a more detailed presentation of the Group's work J. Basedow, Die Expertengruppe für Europäisches Versicherungsvertragsrecht – Ein analytisch-kommentierende Erfahrungsbericht zur Politikberatung, in: Ackermann/Köndgen (eds.), Festschrift für Wulf-Henning Roth (2015) 21 ff.

Directives[35] and requires insurance companies to provide prospective policyholders with a broad array of information relating to the insurance contract on the one hand and to the insurance company on the other.

1. Purpose

Owing to the instrument's European origin, the pre-contractual information duties of the insurer that are enshrined in Section 7 ICA serve different purposes.[36] The primary purpose is, of course, informing the policyholder.[37] He is to be placed in a position that allows him to make an informed decision before entering an insurance contract. This, in turn, is meant to foster two additional aims: The first aim relates to the policyholder himself. His bargaining position vis-à-vis the insurer shall be improved by bridging any existing information gap.[38] The second aim goes beyond the individual policyholder and relates to the single European market for insurance.[39] By informing the policyholder he shall be enabled to compare different insurance policies which, in turn, will stimulate competition between insurance companies – nationally and internationally.

Of course, all this sounds wonderful and convincing – in theory. The problem, however, is that policyholders – in practice – almost never read all the information provided to them by insurers prior to conclusion of the contract. The costs associated with reading the paperwork simply exceed the expected benefits. And even if policyholders do the reading, this does not necessarily mean that they make better decisions.[40] In fact, there is abundant evidence from the field of behavioural science showing that humans are only able to take in and process a certain amount of information. Too much information, in contrast, will lower the actual quality of decisions because important information gets lost *(information overload)*.[41] Against this background there is a fairly broad consensus that providing

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34 Regulation on Information Obligations for Insurance Contracts of 18 December 2007 (Federal Law Gazette I, p. 3004), as amended. An English translation of the Regulation is available at: *https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Verordnung/VVG-InfoV_va_en.html?nn=8232246.*

35 See *supra* II.2.a).

36 See, for example, P. POHLMANN, § 7 Information des Versicherungsnehmers, in: Looschelders/Pohlmann (eds.), *supra* note 14, para 6.

37 POHLMANN, *supra* note 36, para 7.

38 LOACKER, *supra* note 1, 3.

39 Solvency II Directive, *supra* note 18, Recitals 2, 3, 77, 79; POHLMANN, *supra* note 36, para 6.

40 See for more details and with further references LOACKER, *supra* note 1, 110 ff.

41 See for a detailed account S. BECHER, Behavioral Science and Consumer Standard Form Contracts, Louisiana Law Review 68 (2007) 117 ff.; R. HILLMAN/

policyholders with a large volume of information prior to conclusion of the contract neither improves their bargaining position vis-à-vis insurance companies nor stimulates competition between insurance companies.

The decisive question, therefore, is whether there is any way to make the insurer's pre-contractual information duties more effective? Unfortunately, I cannot provide a fully fledged answer in this contribution. In particular, I cannot discuss the various insights from behavioural science that might help to design better regulatory responses to the information problem just described. However, I should note that the European legislature has recognized the problems associated with the currently applied information model and adopted measures designed to ensure that the policyholder takes note of and understands what product he is about to buy. I will briefly discuss two of these measures further below.[42]

2. *Design*

As indicated above, the core provision regulating the insurer's pre-contractual information duties under German law is Section 7 ICA. It applies to all kinds of insurance contracts[43] and to all kinds of policyholders, whether consumers or businesses.[44] Also, it applies irrespective of whether the contract is concluded at a distance or in person.[45] As I look at Section 7 ICA in more detail, I will focus on three aspects, namely the information to be provided, the time at which the information is to be provided and the effects of non-disclosure.

a) *Information to be provided*

The information the insurer has to provide in accordance with Section 7(1) ICA first and foremost covers the terms of the contract, including the general conditions of insurance. In addition, Section 7(2) ICA requires the insurer to provide all information set out in the Regulation on Information Obligations for Insurance Contracts. Implementing the information requirements of the earlier mentioned European Directives[46] the Regulation starts in Section 1

J. RACHLINSKI, Standard-Form Contracting in the Electronic Age, New York University Law Review 77 (2002) 429 ff.

42 See *infra* III.2.a).

43 Pursuant to Section 210(1) ICA an exception applies only to large risk insurances.

44 C. ARMBRÜSTER, § 7 Information des Versicherungsnehmers, in: Langheid/Wandt (eds.), Münchener Kommentar zum VVG (2nd ed., Munich 2016) para 12 ff.; POHLMANN, *supra* note 36, para 8, 12.

45 POHLMANN, *supra* note 36, para 2.

46 See *supra* II.2.a).

with a list no less than 20 items of information that need to be provided prior to conclusion of any insurance contract including, among others:

- the premium as well as any costs, fees and taxes to be paid,
- the precise extent of insurance coverage,
- the right to revoke or cancel the contract,
- alternative dispute resolution mechanisms, and
- the competent supervisory authority.

Sections 2 and 3 of the Regulation go on and list additional items of information that the insurer has to communicate when offering life insurance, certain disability insurance and health insurance. Section 5 of the Regulation, finally, complements and modifies the information the insurer has to provide when he contacts prospective policyholders by phone.

It does not need to be emphasized that the amount of information the insurer has to provide under Section 7 ICA and the Regulation on Information Obligations for Insurance Contracts is enormous – so enormous that no policyholder will ever take the time to read everything prior to conclusion of the contract. However, as indicated earlier the European legislature has adopted measures that are meant to ensure that the policyholder takes note of and understands at least the most important aspects of the product he is about to buy. The first measure is to be found in Section 4 of the Regulation on Information Obligations for Insurance Contracts. It requires insurance companies to prepare a short product information leaflet that sums up the most important features of the insurance contract if the policyholder is a consumer.[47] The second measure is embodied in the Regulation on Key Information Documents for Packaged Retail and Insurance-Based Investment Products,[48] the so-called PRIIPs-Regulation,[49] which deals with information about investment instruments and also covers insurance contracts having an investment character, such as funds-linked life insurance. It requires insurers who offer insurance contracts with an investment character to provide the policyholder with a so-called key information document that contains a brief summary of essential information that retail investors need before making their investment decision.[50] The key information doc-

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47 For details see Section 4 of the Regulation on Information Obligations for Insurance Contracts.

48 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ 2014 L 352, p. 1.

49 See for a detailed discussion of the PRIIPS-Regulation and insurance contracts L. LOACKER, Basisinformation als Entscheidungshilfe, in: Wandt/Reiff/Looschelders/Bayer (eds.), Festschrift für Egon Lorenz (2014) 259 ff.

50 Article 13(1) PRIIPs-Regulation.

ument is to be a short stand-alone document, clearly separate from marketing material, written in a concise manner and no longer than three pages on A-4 sized paper.[51] It must contain the information required by the Regulation and meet certain layout and design standards meant to ensure that consumers will actually be able to understand the product and to compare it with others.[52] Together with the product information leaflet, the key information document certainly increases the chance that the policyholder can understand the insurance product in question. Whether they also help to improve his bargaining power vis-à-vis insurance companies and to stimulate competition between insurance companies remains, of course, to be seen.

b) *Timing of information*

This brings me to the time at which information is to be provided: Since the insurer's information duty is meant to allow the policyholder to make a well-founded decision as regards the insurance coverage offered, Section 7(1) ICA, requires the insurer to provide the policyholder with the requested information in "in good time"[53] before he submits his "contractual declaration"[54], i.e. before the policyholder declares that he wants to be contractually bound. What "in good time" means is not further specified in Section 7(1) ICA. However, there is consensus that it requires the insurer to provide the requested information before the policyholder declares that he wants to be bound so as to ensure that he may actually read, understand and, as the case may be, compare what he is offered.[55] The exact time span depends on the form, the complexity and the economic significance of the insurance contract in question.[56] Information regarding complex retirement

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51 Article 6(2) Sentence 1 and (4) Sentence 1 PRIIPs-Regulation.

52 Article 6 (4) Sentence 2, Articles 7 and 8 PRIIPs-Regulation.

53 See the official English translation of the ICA reprinted in the Annex to this contribution.

54 See the official English translation of the ICA reprinted in the Annex to this contribution.

55 ARMBRÜSTER, *supra* note 44, para 62; H. HERRMANN, § 7 Information des Versicherungsnehmers, in: Baumann/Beckmann/Johannsen/Johannsen, *supra* note 12, para 60; T. LANGHEID, § 7 Information des Versicherungsnehmers, in: Langheid/Rixecker/Gal/Muschner, Versicherungsvertragsgesetz mit Einführungsgesetz und VVG-Informationspflichtenverordnung (5th ed., Munich 2016) para 25; POHLMANN, *supra* note 36, para 23; M. RUDY, § 7 Information des Versicherungsnehmers, in: Prölss/Martin, Versicherungsvertragsgesetz: VVG (29th ed., Munich 2015) para 11.

56 ARMBRÜSTER, *supra* note 44, para 62; HERRMANN, *supra* note 55, BASEDOW et al., 60; POHLMANN, *supra* note 36, para 23. See, however, LANGHEID, *supra* note 55, para 25, who argues that the insurer's pre-contractual information duties are general

insurance contracts will, therefore, have to be sent out earlier than information relating to a simple liability insurance contract that may be cancelled after one year. If, upon request of the policyholder, the contract is concluded by telephone or by other means of communication which do not permit the information to be provided in writing prior to the policyholder's contractual declaration, Section 7(1) Sentence 3 ICA allows the insurer to provide the requested information "without undue delay" after the contract is made.

c) *Effects of non-disclosure*

The above analysis shows that German law – under the influence of European law – imposes fairly complex information duties on the insurer. So, what happens if the insurer violates any of these duties through his failure to provide the requested information in writing in a timely manner before the policyholder submits his contractual declaration? Unfortunately, the effects of non-disclosure are not specifically spelled out in the ICA. Nor are they prescribed by the European Directives that Section 7 serves to implement. However, it follows from Section 8(1) and (2) ICA that the policyholder is allowed to revoke the contract. In addition, the policyholder may claim damages.

aa) Revocation of the contract

Pursuant to Section 8(1) ICA, the policyholder may always, i.e. no matter how the contract has been concluded, revoke the contract within 14 days. Under Section 8(2) ICA the revocation period begins when the policyholder has received all information required by Section 7 ICA in the way and at the time prescribed by Section 7 ICA. This, in turn, means that the revocation period will not begin if the insurer fails to comply with his information duties.[57] As a result, violation of the insurer's information duty – whether severe or not – will allow the policyholder to revoke the contract for an indefinite period of time.[58]

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in nature and do not require the insurer to consider the complexity of the insurance contract or the knowledge of the policyholder in question when deciding when to send out the requested information.

57 J. HEINIG/M. MAKOWSKY, § 8 Widerrufsrecht des Versicherungsnehmers, in: Looschelders/Pohlmann, *supra* note 14, para 62; K.-O. KNOPS, § 8 Wiederrufsrecht des Versicherungsnehmers, in: Baumann/Beckmann/Johannsen/Johannsen, *supra* note 12, para 43.

58 HEINIG/MAKOWSKY, *supra* note 57, para 62; KNOPS, *supra* note 57, para 43.

bb) Damages

In addition to revoking the contract, the majority of academic authors assume that the policyholder may also claim damages under Section 311(2) of the German Civil Code if non-disclosure was intentional or negligent.[59] The problem with this view, however, is that there is nothing in the ICA or the European Directives that would suggest that the policyholder will be entitled to damages should the insurer violate any of his information duties. In contrast to a violation of the insurer's duty to advise the policyholder, which is regulated in Section 6 ICA and expressly sanctioned with a claim for damages, the ICA does not mention any such claim in the context of the insurer's pre-contractual information duties. Therefore, one might conclude that the policyholder is limited to revocation of the contract.[60]

In a recent decision, however, the German Federal Supreme Court joined the majority view and ruled that the policyholder may rely on the general remedies for breach of pre-contractual duties that are available under the German Civil Code and claim damages if the insurer violates any of his pre-contractual information duties.[61] The Court found that the right to revoke the contract and a claim for damages served different purposes – and that there was nothing in the ICA suggesting that the policyholder's right to revocation was meant to be exclusive.[62] As a result, even slight violations of the insurer's extremely broad information duties may result in severe consequences – consequences that insurers will have to consider when calculating the premium the policyholder has to pay.

IV. The Policyholder's Pre-contractual Information Duties

As indicated at the beginning, pre-contractual information duties are not a one-way street when it comes to insurance contracts. In fact, it is not only the policyholder but also the insurer who needs information prior to conclusion of the contract. More specifically, he needs information about the risk he is about to insure. Section 19 ICA, therefore, requires the prospective

59 Armbrüster, *supra* note 44, para 118; Herrmann, *supra* note 55, para 82; Knops, *supra* note 57, para 44; Langheid, *supra* note 55, para 37; Pohlmann, *supra* note 36, para 55; P. Präve, Die VVG-Informationspflichtenverordnung, Versicherungsrecht 2008, 151, 152; Rudy, *supra* note 55, para 40.

60 See, for example, O. Meixner/R. Steinbeck, Das neue Versicherungsvertragsrecht (Munich 2007) § 1 para 75.

61 German Federal Court (Bundesgerichtshof), 28 June 2017, Versicherungsrecht 2017, para 35.

62 R. Rixecker, Information, Beratung Versicherung – Zur informationellen Konstruktion eines Rechtsprodukts, in: Rüßmann (ed.), Festschrift für Gerhard Käfer (Saarbrücken 2009) 273, 277.

policyholder to disclose all facts that might affect the risk he is seeking coverage for.

1. Purpose

The policyholder's pre-contractual duty of disclosure enshrined in Section 19 ICA is of fundamental importance for the insurer and the community of policyholders.[63] This is because the insurer must calculate the insurance premium to be paid by the policyholder prior to conclusion of the insurance contract. And he must ensure that the premium corresponds to the risk that the policyholder wishes to insure.[64] If – for want of information – the insurer fails to calculate the premium correctly, he risks charging too much for "good risks" and too little for "bad risks". This, in turn, may lead to an adverse selection process that leaves him with the "bad risks" while the "good risks" go somewhere else.[65] Since the factors that are necessary for the assessment of the risk and the calculation of the premium are usually to be found in the sphere of the policyholder, all modern legal systems require the policyholder to disclose information affecting the risk prior to conclusion of the contract.[66] He is – in economic terms – the cheapest-cost-avoider.[67]

2. Design

Just like Section 7 ICA, Section 19 ICA applies to all insurance contracts no matter how they are concluded and to all policyholders no matter whether they are consumers or businesses. The provision was heavily modified when the ICA was reformed in 2007 because the old law did not live up to the perceived needs and modern conceptions of consumer protection.[68]

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63 O. BRAND, Die Grenzen der vorvertraglichen Anzeigepflicht des Versicherungsnehmers, Versicherungsrecht 2009, 715; T. LANGHEID, § 19 Anzeigepflicht, in: Langheid/Wandt, *supra* note 44, para 1; LOOSCHELDERS, § 19 Anzeigepflicht, in: Looschelders/Pohlmann (eds.), *supra* note 14, para 3; G. RÜHL, Die vorvertragliche Anzeigepflicht: Empfehlungen für ein europäisches Versicherungsvertragsrecht, Zeitschrift für die gesamte Versicherungswissenschaft 94 (2005) 479.

64 C. ROLFS, § 19 Anzeigepflicht, in: Baumann/Beckmann/Johannsen/Johannsen, *supra* note 12, para 6.

65 BASEDOW/FOCK, *supra* note 2, 69-70. See also N. HARNETT, The Doctrine of Concealment: A Remnant in the Law of Insurance, L. Contemp. Probl. 15 (1950) 391, 408-409.

66 BASEDOW/FOCK, *supra* note 2, 70; RÜHL, *supra* note 63, 479.

67 BRAND, *supra* note 63, 715; H. FLEISCHER, Informationsasymmetrien im Vertragsrecht (Munich 2001) 508; RÜHL, *supra* note 63, 485; G. RÜHL, Obliegenheiten im Versicherungsvertragsrecht: Auf dem Weg zum Europäischen Binnenmarkt für Versicherungen (Tübingen 2004) 106.

68 T. LANGHEID, *supra* note 63, para 4; LOOSCHELDERS, *supra* note 63, para 4.

Under the old law the policyholder was bound to disclose all material facts known to him regardless of whether the insurer had made any inquiry regarding such facts in the proposal form.[69] In addition, the old law potentially sanctioned any violation of the duty of disclosure with a complete loss of all benefits under the insurance policy. Of course, German courts did their best to avoid that result where it was deemed inappropriate. However, this was not always possible, with the result also being an undesirable tension between statutory and case law. The policyholder's duty of disclosure, therefore, took centre stage in the process leading to the reform of the ICA in 2007 – and came out considerably changed.[70] In what follows I will shed light on three aspects of the newly framed duty of disclosure: the extent of disclosure, the time of disclosure, and the effects of non-disclosure.

a) Facts to be disclosed

Under Section 19(1) ICA the policyholder has to disclose all material facts known to him prior to conclusion of the contract. However, in contrast to the old law, the policyholder is only bound to disclose facts which the insurer has specifically asked for in writing. Just like other European countries[71] and consistent with the Principles of European Insurance Contract Law,[72] the new law, thus, heeds the fact that the insurer knows much better than the prospective policyholder which facts will influence the assessment of the risk. As a result, Section 19(1) ICA substantially decreases the policyholder's risk of losing insurance coverage for non-disclosure. The provi-

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69 See for a detailed account of the old German law RÜHL, *supra* note 67, 65 ff.; RÜHL, *supra* note 23, 889 ff.; RÜHL, *supra* note 63, 479 ff.

70 See for an overview of the new duty of disclosure BRAND, *supra* note 63, 715 ff.; C. ROLFS, Die vorvertragliche Anzeigeobliegenheit nach der Reform des VVG, Wand/Reiff/Looschelders/Bayer (eds.), Festschrift für Egon Lorenz (2014) 389, 394.

71 See, for example, Section 22 of the Finish Insurance Contract Act, No. 543, of 28 June 1994; Article L113-2 (2) of the French Insurance Code (= Act no. 89-1014 of 31 December 1989, Article 10, Official Journal of 3 January 1990); Article 10 of the Spanish Insurance Contract Act of 17 October 1980 as amended by Act no. 21/1990 of 19 December 1990); Article 4 of the Swiss Insurance Contract Act of 2 April 1908. In Greece the facts that have to be disclosed are limited to those asked for in a questionnaire in the event the insurer uses a questionnaire: Article 3 of the Greek Insurance Contract Act, Law no. 2496/1997.

72 See for a detailed discussion of the policyholder's duty of disclosure under Art. 2:201 PEICL H. COUSY, The Principles of European Contract Law: the Duty of Disclosure and the Aggravation of Risk, ERA Forum 9 (2008) 119 ff.; Y. DELFOS-ROY, The PEICL and the Duty of Disclosure, European Review of Private Law (2011) 71 ff.

sion nonetheless raises problems as regards the precise extent of the policyholder's duty.

aa) Substantive limits

The first problem relates to the substantive limits of the duty. Are there any questions that insurers must not ask – or questions the policyholder is not bound to answer if they are asked? On the face of Section 19(1) ICA the answer to this question should be "no": The provision requires the policyholder to disclose all material facts known to him under the condition that the insurer has asked for them in writing. The only limit to the policyholder's duty of disclosure, therefore, seems to be a formal one, namely the insurer's written request. Nonetheless there is agreement that the insurer may not ask for everything and, hence, that there are limits as to what the policyholder is required to disclose.[73] Sources for such limits are the General Law on Equal Treatment[74,75] as well as fundamental rights.[76]

(i) Antidiscrimination law: Race, ethnic origin and gender

The General Law on Equal Treatment was adopted in 2006 to implement a number of European Antidiscrimination Directives.[77] In Sections 1 and 19(1) it declares illegal any discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. Since the provision expressly extends to private insurance contracts, insurers are, at least as a matter of principle, not allowed to consider any of these factors

73 See for a detailed discussion C. BARTHOLOMÄI, Die Begrenzung von Anzeigepflichten durch berechtigte Interessen des Versicherungsnehmers (Karlsruhe 2014).

74 General Law on Equal Treatment of 14 August 2006 (Federal Law Gazette I, p. 1897), as amended. An English translation of the Act is available at *http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile.*

75 C. ARMBRÜSTER, § 19 Anzeigepflicht, in: Prölss/Martin, *supra* note 55, para 10; LOOSCHELDERS, *supra* note 63, para 27.

76 BRAND, *supra* note 63, 715 ff.; LOOSCHELDERS, *supra* note 63, para 36.

77 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204, p. 23; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373, p. 37.

when assessing the insured risk and are not allowed to ask for them in the proposal form. However, the General Law on Equal Treatment provides for an exception specifically tailored to the needs of the insurance business: Pursuant to Section 20(2) Sentence 2, differences of treatment on grounds of religion or belief, disability, age or sexual orientation are permissible where these are based on recognized principles of actuarial risk assessment and statistical evidence. By way of counter-exception, insurers are, thus, allowed to resort to these factors when assessing the insured risk – and to ask for them in the proposal form. Policyholders will, in turn, be required to answer these questions.

Interestingly, however, Section 20(2) Sentence 2 does not mention race or ethnic origin or gender as a ground for different treatment. As regards race and ethnic origin, it was never disputed that neither of these factors should serve as a reason to discriminate against policyholders. Gender, however, was a different story because there is clear statistical evidence indicating that men and women pose different risks, for example, when it comes to health insurance. The original version of Section 20(2) therefore allowed different treatment of policyholders based on their gender under the condition that a risk assessment based on precise actuarial and statistical data revealed that gender had a decisive influence on the insured risk.[78] However, in a landmark decision issued of 2011 the European Court of Justice[79] decided that insurance companies were not allowed to discriminate against policyholders based on their gender and held that national provisions allowing exemptions from the rule of unisex premiums and benefits would violate the principle of equal treatment of men and women incorporated in the European Treaties and the Charter of Fundamental Rights. The German legislature, therefore, modified Section 20(2) in 2012 and deleted any reference to the policyholder's gender. In addition to race and ethnic origin, the insurer may, therefore, not ask the policyholder to reveal his or her gender. If he does ask, the policyholder may refuse to answer without having to fear any consequences.

(ii) Fundamental rights: Predictive genetic tests

In addition to the General Law on Equal Treatment, fundamental rights may set substantive limits to the policyholder's pre-contractual duty of disclosure.[80] From the many issues that one could discuss in this context, I want to highlight one that has received a lot of academic and political attention

78 BRAND, *supra* note 63, 718.

79 European Court of Justice, 30 April 2011, C-236/09, ECLI:EU:C:2011:100 – Test-Achats, ECR 2011 I-00773.

80 BRAND, *supra* note 63, 718 f.; LOOSCHELDERS, *supra* note 63, para 36.

during the last decade. It relates to genetic defects and the results of predictive – or presymptomatic – genetic tests that allow the identification of genetic mutations increasing a person's risk of developing disorders having a genetic basis, such as certain types of cancer. May the insurer ask the prospective policyholder to take such a predictive test or to disclose the result of any such test already taken? Or does any such duty violate the policyholder's fundamental right to control the use of his personal data *(Recht auf informationelle Selbstbestimmung)*?

For a long time, the answer to these questions was unclear. The majority of academics, however, took an insurer-friendly view. Pointing to the legitimate information interests of the insurer and the community of policyholders at large as well as the dangers of an adverse selection process, they found that the insurer was allowed both to ask the policyholder to take a predictive test and to require the policyholder to disclose the result of any such test already taken.[81] The German legislature, however, did not share this view and settled the matter with the adoption of the Act on Genetic Testing in Humans in 2009.[82] Under Section 18(1) of that Act, insurance companies may not require predictive genetic testing as part of their risk assessment, and they may not ask applicants to disclose the results of any such tests.[83] Exceptions apply to life insurance for an insured sum of more than € 300,000.00 or to a disability insurance carrying an annual disbursement of more than € 30,000.00. As a result, German law effectively bans the use of predictive genetic tests for most insurance contracts and releases the policyholder both from taking any such tests and from revealing the results. It should be noted, however, that other genetic tests, notably those that serve to find a genetic cause for existing disorders or clinical symptoms are not covered by Section 18 of the Genetic Testing Law. Insurers may, therefore, ask for the results of such tests, and the policyholder will be required to reveal them.[84]

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81 See, for example, S. KUBIAK, Gendiagnostik bei Abschluss privater Versicherungsverträge (Baden-Baden 2008) 149 f.; E. LORENZ, Zur Berücksichtigung genetischer Tests und ihrer Ergebnisse beim Abschluß von Personenversicherungsverträgen, Versicherungsrecht 1999, 813 ff.

82 Act on Genetic Testing in Humans of 31 July 2009 (Federal Law Gazette I, p. 2529, 3672), as amended.

83 See for a more detailed discussion P. PRÄVE, Das Gendiagnostikgesetz aus versicherungsrechtlicher Sicht, Versicherungsrecht 2009, 857 ff.

84 ARMBRÜSTER, *supra* note 75, para 20; LANGHEID, *supra* note 68, para 13; LOOSCHELDERS, *supra* note 63, para 32.

bb) Open questions

The second – very obvious – problem that comes with the new version of the policyholder's duty of disclosure is whether the insurer, at the end of the proposal form, may ask "open questions" such as: "Is there anything else that we need to know"? Or: "Are there any other material facts that you wish to disclose"?[85] The problem with open questions is obvious: they shift the burden of assessing the materiality of a certain fact to the policyholder and re-create the spontaneous duty of disclosure that the reform of 2008 meant to abandon. Since open questions may defeat the very purpose of the newly phrased Section 19(1) ICA and amount to a de facto return to the old law, one might be inclined to prohibit open questions.[86] The problem with this view, however, is that insurers – even in the standardized mass insurance sector – may not always be in a position to precisely name the facts that might affect the risk for which coverage is offered.[87] In addition, completely prohibiting open questions would lead to extremely long, complex and most likely intransparent and incomprehensible proposal forms.[88] Therefore, there is broad agreement that even under Section 19(1) ICA, insurers must not be completely banned from asking open questions.[89] However, open questions must not result in a return to the old law, and they must be sufficiently precise to allow a correct and complete answer by the average policyholder.[90] In this vein, the Court of Appeals in Frankfurt in a 2011 case approved of – and required the policyholder to answer – a question in the proposal form which asked the applicant to list "other illnesses, sicknesses, etc. he suffered from during the last five years […]".[91]

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85 ARMBRÜSTER, *supra* note 75, para 36 ff.; BRAND, *supra* note 63, 717 f.; LOOSCHELDERS, *supra* note 63, para 23.

86 See, for example, E.B. FRANZ, Das Versicherungsrecht im neuen Gewand – Die Neuregelungen und ausgewählte Probleme, Versicherungsrecht 2008, 306; T. LANGHEID/GOERGEN, Auswirkungen der VVG-Reform auf die D&O-Versicherung, Die Versicherungspraxis 2007, 162; P. REUSCH, Die vorvertraglichen Anzeigepflichten im neuen VVG 2008, Versicherungsrecht 2007, 1314; R. RIXECKER, VVG 2008 – Eine Einführung, Zeitschrift für Schadensrecht 2007, 370.

87 BRAND, *supra* note 63, 717.

88 BRAND, *supra* note 63, 717.

89 ARMBRÜSTER, *supra* note 75, para 37; BRAND, *supra* note 63, 717.

90 KNAPPMANN, *supra* note 2, para 22a. In a similar vein FRANZ, *supra* note 86, 306; RIXECKER, *supra* note 86.

91 Court of Appeal (Oberlandesgericht) Frankfurt a.M., 19 January 2011, Beck online Rechtsprechung (BeckRS) 2011, 28322, para 31.

cc) Actual knowledge

A third problem revolving around the policyholder's duty of disclosure relates to the question of whether the policyholder is under any obligation to do research to comply with his duty or whether he can rely on his (current) knowledge.[92] On the face of Section 19(1) ICA the answer seems to be straightforward: According to the provision's clear wording, the policyholder only has to disclose those facts that he actually knows. In contrast to other European legal systems as well as the Principles of European Insurance Contract Law,[93] he is not required to disclose facts which he is not actually, but ought to be aware of. As a result, Section 19(1) ICA does not seem to impose any duty on the policyholder to do more than just answer the insurer's question to the best of his actual and current knowledge.

This reading of Section 19 ICA, however, comes with problems because it may, in real life, honour the lazy and oblivious policyholder. In addition, it increases the risk that the insurer in the end will not get the information that he needs for assessing the risk even though the policyholder could, with some effort, provide the necessary information. German courts have therefore long held that the policyholder must try to remember and that he is – to a certain degree – obliged to refresh his recollection with documents.[94] It is, therefore, not enough to sit back and answer the form over a cup of tea. Rather, he must focus on the questions and seriously try to remember all facts that might be relevant.[95] He may even be asked to check available records or documents in his possession or look into other easily accessible sources of information.[96] As a result, policyholders are under a limited obligation to undertake reasonable steps to correctly and comprehensively comply with their duty of disclosure.[97]

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92 BRAND, *supra* note 63, 717; KNAPPMANN, *supra* note 2, para 45 ff.; LANGHEID, *supra* note 63, para 60, LANGHEID, *supra* note 68, para 28.

93 Article 2:101 PEICL.

94 See, for example, Federal Supreme Court (Bundesgerichtshof), 11 February 2009, Versicherungsrecht, 2009, 529; Court of Appeal (Oberlandesgericht) Oldenburg, 16 January 1991, Versicherungsrecht 1992, 434; Regional Court (Landgericht) Bielefeld, 14 February 2007, Versicherungsrecht 2007, 636. See also KNAPPMANN, *supra* note 2, para 45 ff.; LANGHEID, *supra* note 2, para 60, LANGHEID, *supra* note 68, para 28; LOOSCHELDERS, *supra* note 63, 35.

95 LANGHEID, *supra* note 68, para 28.

96 LANGHEID, *supra* note 68, para 28.

97 Federal Supreme Court (Bundesgerichtshof), 3 November 1966, Versicherungsrecht 1967, 56; LANGHEID, *supra* note 68, para 28.

b) *Time of disclosure*

As a matter of principle, the policyholder has to fulfil his duty of disclosure prior to conclusion of the contract. This follows naturally from the duty's purpose of allowing the insurer to assess the risk that the prospective policyholder wishes to insure. However, what exactly does this mean? Prior to the reform of the ICA the policyholder was required to disclose any material fact up until the contract had been formally concluded.[98] This was usually the time when the insurer accepted the policyholder's request for insurance, which, in turn, meant that the policyholder was under an obligation to disclose material facts even after completion of the proposal form (the so-called *Nachmeldeobliegenheit*).[99] For many unexperienced policyholders this came as a surprise because they felt that they had complied with any disclosure requirements by filling out the proposal form. Section 19(1) ICA, therefore, makes clear that the policyholder is only bound to disclose facts up until he submits his "contractual declaration", which is normally the submission of the proposal form.[100] After that point the duty of disclosure may only revive if the insurer, after receiving and reviewing the policyholder's documents, asks more questions. Section 19 ICA thus strikes a fair balance between the reasonable expectations of the policyholder and the legitimate information interests of the insurer.

However, the provision raises problems in cases where completion of the proposal form by the policyholder does not qualify as a "contractual declaration" but merely as an invitation to treat *(invitatio ad offerendum)*.[101] In that case the wording of Section 19(1) ICA suggests that the policyholder has to disclose material facts up until he accepts the insurer's offer for insurance and, thus, even after completion of the proposal form. Academic literature has suggested that any such interpretation would defeat the very purpose of the newly phrased provision.[102] However, since this view is not undisputed[103] – and for lack of case law – the precise temporal reach of Section 19(1) ICA remains unclear.

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98 See the wording of Section 16(1) ICA as valid up until 31 December 2007: "at conclusion of the contract" *("bei der Schließung des Vertrages")*. See also KNAPPMANN, *supra* note 2, para 39; (with further references).

99 See, for example KNAPPMANN, *supra* note 2, para 39 (with further references).

100 KNAPPMANN, *supra* note 2, para 38; LANGHEID, *supra* note 68; ROLFS, *supra* note 70, 395.

101 KNAPPMANN, *supra* note 2, para 38; LANGHEID, *supra* note 68; ROLFS, *supra* note 70, 395 f.

102 BRAND, *supra* note 63, 719 f.; P. HÄRLE, § 19 Anzeigepflicht, in: Schwintowski/Brömmelmeyer (eds.), Praxsikommentar zum Versicherungsvertragsrecht (Münster 2008) para 100; KNAPPMANN, *supra* note 2, para 38; ROLFS, *supra* note 70, 395 f.

103 LANGHEID, *supra* note 68, para 48.

c) *Effects of non-disclosure*

Prior to the reform of the ICA, non-disclosure resulted in potentially devastating effects for the policyholder: Any slightly negligent non-disclosure of material facts gave the insurer the right to avoid the insurance contract *ab initio,* i.e. with retrospective effect.[104] The policyholder, therefore, was at risk of losing his entire coverage for non-disclosure even if the insurer had not even made inquiry as to the non-disclosed fact. This result was widely considered to be too harsh and not in line with the enormous socio-political function of insurance contracts. The German legislature, therefore, decided to completely overhaul the effects of non-disclosure. The result has been described as "overly complicated",[105] "incoherent",[106] "curious"[107] and "incomprehensible".[108,109] In the remainder of this contribution I will nonetheless do my best to describe the rules that have been in place ever since the reform of the ICA in 2007.

The effects of non-disclosure are now regulated in Section 19(2) to (4) ICA. The provision is exclusive, which means that any recourse to other contractual or quasi-contractual remedies available under the Civil Code is excluded.[110] There is only one exception to this rule: Under Section 22 ICA the insurer may always avoid the contract in accordance with the general rules of the Civil Code in cases of fraudulent non-disclosure. Other than that, the effects of any form of non-disclosure are governed by Section 19 ICA, which provides for no less than three different remedies, namely avoidance of the contract *ab initio (Rücktritt),* prospective termination of the contract *(Kündigung)* and modification of the contract *(Vertragsanpassung).* Which remedy the insurer may exercise in a given case and which effects this remedy has in terms of the insurer's obligation to make payments under the contract depend on a variety of factors, including the policyholder's fault, the nexus between the non-disclosed fact and the for-

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104 BRAND, *supra* note 63, 716; T. LANGHEID, §§ 16, 17, Anzeigepflicht, Unrichtige Anzeige, in: Römer/Langheid, Versicherungsvertragsgersetz mit Pflichtversicherungsgesetz (PflVG) und Kraftfahrzeug-Pflichtversicherungsverordnung (Kfz-PflVV) (2nd ed., Munich 2003) para 4; RÜHL, *supra* note 67, 76 ff.; RÜHL, *supra* note 63, 500; RÜHL, *supra* note 23, 898 f.

105 BRAND, *supra* note 63, 715, 721.

106 BRAND, *supra* note 63, 715, 721.

107 T. LANGHEID, Die Reform des Versicherungsvertragsgesetzes, NJW 2007, 3665, 3668.

108 K.-J. NEUHAUS/A. KLOTH, Praxis des neuen VVG (2007) 49.

109 In a similar vein LANGHEID, *supra* note 63, para 4; REUSCH, *supra* note 86, 1322; RIXECKER, *supra* note 86, 369.

110 P. SCHIMIKOWSKI, § 19 Anzeigepflicht, in: Rüffer/Hallbach/Schimikowski (eds.), Versicherungsvertragsgesetz (3rd ed., Baden-Baden 2015) para 2.

mation of the contract as well as the nexus between the non-disclosed fact and the occurrence of the insured event.

aa) Avoidance of the contract

Under Section 19(2) ICA the insurer's first – and arguably most important – remedy in a case of non-disclosure is retrospective avoidance of the contract. If the insurer chooses to exercise this right, the policyholder loses all entitlements under the contract and must reimburse the insurer for all payments previously disbursed under the policy.[111] Naturally, he also loses his right to claim money for any future events. Thus, obviously, avoidance of the contract may have severe consequences for the policyholder, which is why the new law limits the insurer's right to avoid the contract in several ways: First, pursuant to Section 19(3) ICA, the insurer will only be allowed to avoid the contract in cases of intentional or grossly negligent non-disclosure. In cases of simple or normal negligence, by contrast, the insurer will only have the right to terminate the contract prospectively. Second, in cases of grossly negligent non-disclosure the insurer will not be allowed to avoid the contract if the non-disclosed fact did not affect the insurer's decision to enter into the contract because the insurer would have nonetheless agreed to cover the risk. The same holds true if the insurer would have agreed to cover the risk, but on different terms. In that case, however, the insurer may request that the contract be governed by these terms. Third, even if the insurer is entitled to avoid the contract (because non-disclosure was intentional or grossly negligent and because the insurer would have refused to conclude the contract in the event of proper disclosure), Section 21(2) ICA stipulates that the policyholder will not lose his right to receive and keep payments under the contract if the non-disclosed fact neither caused the insured event nor influenced the amount to be paid. It follows that even grossly negligent non-disclosure will not always leave the policyholder without insurance coverage. On the contrary: If the non-disclosed fact neither influenced the insurer's decision to enter into the contract nor caused or influenced any insured event, the grossly negligent non-disclosure will remain without any effects.

bb) Termination of the contract

The second remedy, foreseen by Section 19(3) ICA, is prospective termination of the contract. It will be available if the policyholder fails to disclose material facts as a result of simple or normal negligence. If the insurer chooses to exercise his termination right, the policyholder will not lose his

111 KNAPPMANN, *supra* note 2, para 93; LANGHEID, *supra* note 68.

entitlements under the contract for past insured events.[112] And he will not be required to reimburse the insurer. However, just like the right to avoid the contract, Section 19(3) ICA excludes the insurer's right to terminate the contract prospectively if the non-disclosed fact did not affect the insurer's decision to enter into the contract, i.e. if the insurer would have agreed to cover the risk even upon proper disclosure. And, again, the insurer may request that the contract be governed by different terms if he would have accepted the risk only on different terms.

cc) Modification of the contract

The third remedy of the insurer in cases of non-disclosure is modification of the contract. It is available where the insurer may neither avoid nor terminate the contract and, thus, in cases of negligent non-disclosure where the non-disclosed fact did not influence the insurer's decision to enter into the contract. If in such a case the insurer would have accepted the risk only on different terms, Section 19(3) ICA allows the insurer to request a modification of the contract. In cases of innocent non-disclosure the modification takes effect prospectively only. In all other cases any modifications will apply retrospectively.

dd) Exclusion of rights

It goes without saying that the just described system is extremely complex. And, unfortunately, it becomes even more complex when looking at Section 19(5) ICA. Under Sentence 1 of Section 19(5) ICA, the insurer may not invoke any of the rights just described if he has not previously informed the policyholder of the consequences of any breach of the duty of disclosure in writing and in a stand-alone document. And pursuant to Sentence 2 the insurer is not entitled to avoidance, termination or modification of the contract if he was aware of the non-disclosed fact or the incorrectness of the disclosure. The policyholder, thus, has a good chance not to lose insurance coverage at all even if he has violated his duty of disclosure.

V. CONCLUSION

As indicated at the beginning, information are key for both the insurer and the policyholder. The role of the law, therefore, is to incentivize the parties to provide all necessary information in a way that allows the other party to act upon it. Unfortunately, it is unclear whether German law as it currently stands lives up to this expectation: On the one hand it imposes heavy in-

112 KNAPPMANN, *supra* note 2, para 108; LANGHEID, *supra* note 68, para 91.

formation duties on insurers which are unlikely to actually improve the policyholder's decisions but that nevertheless trigger severe sanctions if violated. On the other hand it substantially limits the policyholder's duty of disclosure and very often refrains from sanctioning violations. Against this background, it does not take a clairvoyant to predict that the current design of information duties under German insurance contract law will not stand the test of time, but be subject to further reform in the future.

ANNEX: EXCERPTS FROM THE GERMAN INSURANCE CONTRACT ACT[113]

Section 7 – Information provided to the policyholder

(1) The insurer shall inform the policyholder in writing of his terms of contract, including the general terms and conditions of insurance, as well as the information set out in a statutory ordinance referred to in subsection (2), in good time before the policyholder submits his contractual acceptance. This information shall be provided clearly and comprehensibly in keeping with the means of communication employed. If, upon the request of the policyholder, the contract is concluded by telephone or using another means of communication which does not permit the information to be provided in writing prior to the policyholder's contractual acceptance, that information must be provided without undue delay after the contract is made; this shall also apply if the policyholder explicitly waives the right to information by a separate written declaration prior to submitting his contractual acceptance.

(2) The Federal Ministry of Justice and Consumer Protection shall be authorized, with the consent of the Federal Ministry of Finance, to determine the following by statutory ordinance without the consent of the Bundesrat for the purposes of providing comprehensive information to the policyholder:

1. which details of the contract, in particular in respect of the insurer, the benefit offered, the general terms and conditions of insurance and the of revocation shall be provided to the policyholder,
2. which other information shall be provided to the policyholder in respect of life insurance, in particular regarding the expected benefits, their determination and calculation, regarding a model calculation, and acquisition and distribution costs and the administrative costs, insofar as these are set off against insurance premiums, and regarding other costs,
3. which other information shall be provided in respect of health insurance, in particular regarding the development and form of insurance premiums, and the acquisition and distribution costs and the administrative costs,
4. what information shall be provided to the policyholder if the insurer has contacted him by telephone, and

113 English translation provided by the German Federal Ministry of Justice and for Consumer Protection at *http://www.gesetze-im-internet.de/englisch_vvg/index.html.*

5. in what manner this information is to be provided.

When determining the notifications in accordance with the first sentence, the information required in accordance with Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (OJ EC L 228 p. 1), Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ EC L 271 p. 16), as well as Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life insurance (OJ EC L 345 p. 1), shall be observed.

(3) The statutory ordinance referred to in subsection (2) shall, furthermore, specify what information the insurer must communicate in writing throughout the policy period; this shall in particular apply in the case of changes to information previously supplied, further in respect of health insurance in the event of increases in insurance premiums and regarding the possibility of changing tariffs, as well as in respect of life insurance with surplus sharing regarding the development of the policyholder's entitlements.

(4) The policyholder may at any time throughout the policy period demand that the insurer send him the terms of contract, including the general terms and conditions of insurance, in the form of a document; the costs of the first dispatch shall be borne by the insurer.

(5) Subsections (1) to (4) shall not apply to insurance contracts covering a jumbo risk within the meaning of section 210 (2). If under such a contract the policyholder is a natural person, the insurer shall inform him in writing prior to the conclusion of the contract of applicable law and the competent supervisory body.

Section 8 – Policyholder's right of revocation

(1) The policyholder may revoke his contractual agreement within 14 days. The policyholder shall declare his revocation to the insurer in writing, but need not state any reason; timely dispatch shall suffice for compliance with the time limit.

(2) The revocation period shall begin at such time as the policyholder receives the following documents in writing:

1. the insurance policy and the terms of contract, including the general terms and conditions of insurance, as well as the other information in accordance with section 7 (1) and (2), and
2. a clearly worded instruction regarding the right of revocation and the legal consequences of the revocation which makes clear to the policyholder his rights commensurate with the requirements of the means of communication employed, and the names of the person to whom the revocation is to be declared, with an address at which documents may be served, as well as a note making reference to the commencement of the revocation period and to the rules set out in subsection (1), second sentence.

Proof of receipt of the documents in accordance with the first sentence shall be incumbent on the insurer.

(3) The right of revocation shall not apply

1. to contracts of insurance with a term of less than one month,
2. to contracts of insurance for provisional cover, unless they are distance contracts within the meaning of section 312c of the German Civil Code,
3. to contracts of insurance with pension funds based on the provisions set out in a contract of employment, unless they are distance contracts within the meaning of section 312c of the German Civil Code,
4. to contracts of insurance covering a jumbo risk within the meaning of section 210 (2).

The right of revocation shall cease to apply if the contract has been wholly fulfilled by both sides at the explicit request of the policyholder before the policyholder has exercised his right of revocation.

(4) Notwithstanding subsection (2), first sentence, the revocation period in e-commerce shall not commence until the obligations set out in section 312i (1), first sentence, of the German Civil Code have also been fulfilled.

(5) The instruction to be given in accordance with subsection (2), first sentence, no. 2. shall be deemed to meet the requirements stipulated therein if the model of the Annex to the present Act is used in text form. The insurer may deviate from the model in terms of format and font size, subject to subsection (2), first sentence, no. 2, and may insert addenda such as the firm name or a mark of the insurer.

Section 9 – Legal consequences of revocation

(1) If the policyholder exercises his right of revocation in accordance with section 8 (1), the insurer shall only be obligated to repay that share of the premiums paid for the period after receipt of the revocation if the policyholder has been instructed in accordance with section 8 (2), first sentence, no. 2 about his right of revocation, the legal consequences of revocation and the contribution to be paid, and he has agreed that the insurance cover commences prior to the end of the revocation period; the duty to reimburse shall be fulfilled without undue delay, at the latest 30 days after receipt of the revocation. If no note was provided as required under the first sentence, the insurer shall in addition reimburse the insurance premiums paid for the first year of insurance cover; this shall not apply if the policyholder has claimed benefits on the basis of the insurance policy.

(2) If the policyholder has effectively exercised his right of revocation in accordance with section 8, he shall also no longer be bound by a contract associated with the insurance contract. An associated contract shall be deemed to exist if it is connected to the revoked contract and relates to a service of the insurer or of a third party on the basis of an agreement between the third party and the insurer. No contractual penalty may be either agreed or demanded.

Section 19 – Duty of disclosure

(1) The policyholder shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer's decision to conclude the contract with the agreed content and which the insurer has requested in writing. If, after receiving the policyholder's contractual acceptance and before accepting

the contract, the insurer asks such questions as are referred to in the first sentence, the policyholder shall also be under the duty of disclosure as regards these questions.

(2) If the policyholder breaches his duty of disclosure under subsection (1), the insurer may withdraw from the contract.

(3) The insurer's right to withdraw from the contract shall be ruled out if the policyholder breached his duty of disclosure neither intentionally nor by acting with gross negligence. In such cases the insurer shall have the right to terminate the contract subject to a notice period of one month.

(4) The insurer's right to withdraw from the contract on account of grossly negligent breach of the duty of disclosure and his right to terminate the contract in accordance with subsection (3), second sentence, shall be ruled out if he would also have concluded the contract in the knowledge of the facts which were not disclosed, albeit with other conditions. The other conditions shall become an integral part of the contract with retroactive effect upon the request of the insurer; in the case of a breach of duty for which the policyholder does not bear responsibility they shall become an integral part of the contract as of the current period of insurance.

(5) The insurer shall only be entitled to the rights under subsections (2) to (4) if he has instructed the policyholder in writing in separate correspondence of the consequences of any breach of the duty of disclosure. These rights shall not exist if the insurer was aware of the disclosed risk factors or the incorrectness of the disclosure.

(6) In the case of subsection (4), second sentence, leading to an increase in the insurance premium of more than 10 per cent on account of an alteration of the contract, or if the insurer refuses to cover the risk for the undisclosed circumstance, the policyholder may terminate the contract without prior notice within one month of receipt of the insurer's communication. The insurer shall notify the policyholder of this right in the communication.

Section 20 – Policyholder's representative

If the contract is concluded by a person representing the policyholder, both the representative's knowledge and fraudulent conduct as well as the policyholder's knowledge and fraudulent conduct shall be taken into account in the application of section 19 (1) to (4) and section 21 (2), second sentence, and subsection (3), second sentence. The policyholder may only invoke the duty of disclosure not having been breached intentionally or with gross negligence if neither the representative nor the policyholder has incurred responsibility for intent or gross negligence.

Section 21 – Exercising of the insurers rights

(1) The insurer must assert the rights afforded him in accordance with section 19 (2) to (4) in writing within one month. The period shall commence at such time as the insurer learns of the breach of the duty of disclosure on which the right he is asserting is founded. When exercising his rights, the insurer shall disclose the circumstances on which his declaration is based; he may subsequently disclose further circumstances as grounds for his declaration if the time limit in accordance with the first sentence has not yet expired.

(2) In the event of a withdrawal in accordance with section 19 (2) after the occurrence of the insured event, the insurer shall not be obligated to effect payment, unless the breach

of the duty of disclosure refers to a circumstance which is neither responsible for the occurrence or for the establishment of the occurrence of the insured event nor for the establishment or the extent of the insurer's liability. If the policyholder has fraudulently breached the duty of disclosure, the insurer shall not be obligated to effect payment.

(3) The rights of the insurer in accordance with section 19 (2) to (4) shall lapse five years after the contract expires; this shall not apply to insured events which occurred prior to the expiry of this time limit. If the policyholder has breached the duty of disclosure intentionally or by acting fraudulently, this period shall be ten years.

Section 22 – Fraudulent misrepresentation

The right of the insurer to avoid the contract on account of fraudulent misrepresentation shall remain unaffected.