

**Response to the Questionnaire on Preventive Measures
by the AIDA German Chapter**

GERMAN NATIONAL REPORT

ON

PREVENTIVE MEASURES

QUESTIONNAIRE

(1) The concept and the different sorts of measures of prevention

General concept: a provision in a law, or a clause in the insurance contract, requiring the policyholder or the insured, before the insured event occurs, to perform or not to perform certain acts to avert or prevent the occurrence of the insured event, to avoid aggravation or extension of the risk or to mitigate loss should the insured event occur.

In Germany *Obliegenheiten* are the systematic equivalent to insurance warranties under the common law and are thus also the systematic equivalent to the function oriented term *preventive measures*. Though the term *Obliegenheit* etymologically stems from the same source word as the English term *obligation*, the two may not be confused. An obligation is in Germany denoted as a *Pflicht*, i.e. a duty which must be performed and the breach of which will result in a claim for specific performance or damages. *Obliegenheit*, in return, is a collective term that groups together behavioural duties that are not legal obligations. The non-observance of an *Obliegenheit* will not result in a claim for specific performance or damages, but rather – if specific criteria are met – may lead to a reduction of the benefits or it may relieve the insurer of its obligation to indemnify altogether or it may transfer to the insurer the right to cancel the contract.

(a) Please, give examples, thereby distinguishing:

- **Between insurance branches (e.g. life and non-life / property and liability)**
- **According to the nature and timing of the measures that must be taken (immediately, constantly, successively)**

German insurance law, as regulated within the German Insurance Contract Act (*Versicherungsvertragsgesetz* (hereinafter referred to as VVG), differentiates between (statutory) preventive measures **for all branches** and such **for special branches**:

- Preventive measures for all branches
 - o sec. 23 VVG (aggravation of risk)
 - o sec. 30 VVG (notice of insured event)
 - o sec. 31 VVG (information concerning the insured event)
- Preventive measures only for damage insurance
 - o sec. 82 VVG (obligation to avoid or to mitigate the damage)

- Preventive measures only for liability insurance
 - o sec. 104 VVG (notice of the insured event and information concerning the insured event)
- Preventive measures only for life insurance
 - o sec. 158 VVG (aggravation of risk)

There is also a differentiation concerning **the timing of the measures**:

- Pre-contractual
 - o sec. 19 VVG (pre-contractual duty to disclose)
The pre-contractual duty to disclose – which is despite its name considered an *Obliegenheit* and not an obligation – is not regarded as a *preventive* measure. More precisely the pre-contractual duty to disclose is considered to serve the purpose of enabling the insurance undertaking to correctly evaluate the risk.
- Before the insured event occurs
 - o sec. 23 VVG (duty to disclose an aggravation of risk)
- After the occurrence of the insured event
 - o sec. 30, 31 VVG (notice of the insured event and information concerning the insured event)

(b) Statutory duty, common law or contractual duty. Give examples, thereby distinguishing between:

- **Legislative rules or common law obligations that require an insured to take such preventive measures;**
- **Contractual provisions (prescribed by the insurer, or by a professional entity)**

German insurance law distinguishes two types of *Obliegenheiten*: the statutory *Obliegenheit* and the contractual *Obliegenheit*.

Statutory *Obliegenheiten* require the policy holder *ex lege* to act in a certain way without there being a need for further contractual stipulation. Such *Obliegenheiten* imposed on the policy holder by law are manifold and may be taken from the examples given in the answer to question 1.a. The **legal provisions** which are stipulating such preventive measures may be found in the German Insurance Contract Act (*Versicherungsvertragsgesetz* [VVG]). For the most part, they are drafted in very broad terms, since they are applicable to all branches or to all contracts of special branches, and not only to a specific contract. It is, however, common practice of German insurers to include such statutory *Obliegenheiten* into their contract – they are in fact under a supervisory duty to include them into the contract. As long as the insurer does not alter the constitutive criteria or the legal effects of a breach of such a statutory *Obliegenheit* they nevertheless remain to be regarded as statutory in nature. If, however, an alteration is effected, prevailing opinion regards the *Obliegenheit* – under most circumstances – to now be contractual in nature (which is of great importance since it now needs to conform with sec. 28 VVG [cp. *infra*]).

In addition to the legal provisions the contractual parties may agree on **preventive measures in the contract**. For the many kinds of insurance contracts, the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft* [GDV]) has developed model general terms and conditions of insurance (*Allgemeine Versicherungsbedingungen*). From this can be taken some typical examples of contractual *Obliegenheiten* as widely utilised in practice:

- D.1.3. AKB 2008 [car insurance] (the utilisation of the insured car is only to be allowed to holders of a valid driving licence)
- D.2.1. AKB 2008 [car insurance] (prohibition of drunk-driving)
- 7.1 AUB 2010 [accident insurance] (duty to consult a doctor after an accident)
- A § 16 Nr. 1 VHB 2010 [contents insurance] (duty to heat and control a flat during frost periods [below 0° C])
- B § 8 Nr. 2 a) ff) VHB 2010 [contents insurance] (duty to provide a list of stolen objects to the police).

It should, however, be noted that the model-GCI developed by the GDV, though often used as a form of blueprint by some insurers, are in no way binding on insurers. German insurers are insofar absolutely free to independently develop their own GCI and are not forced to even give the model-GCI of the GDV any consideration. Since many have done so, there is quite a variety in the contractual *Obliegenheiten* used by individual insurers.

The differences between the preventive measures requested by individual insurers should, however, not be overstated. In Germany *all* contractual *Obliegenheiten* must fulfil certain standards in order to be lawfully included into the insurance contract and binding on the policyholder (or the insured). In this context it is especially important that the German courts assume jurisdiction concerning such clauses under the general regime applicable to general terms and conditions (sec. 305 et seqq. German Civil Code). Since the deregulation of insurance supervision, German courts have hence held an ever mounting number of contractual clauses within the general terms and conditions of insurance to be invalid. Other than these requirements of general contract law, which must be observed by insurance contracts equally, German insurance contract law provides for a special standard to be met by each and every contractual *Obliegenheit*. If the standard set out by sec. 28 VVG is disregarded by the contractual clause providing for the preventive measure, then the provided legal effects (i.e. refusal to pay benefits or cancellation) cannot be enforced against the policyholder (for more detail see *infra*).

2) The ways and degrees of cooperation between insurers and insureds

How does the insurer encourage the insured to take the required measures:

- **influence on the premium**
- **payment of the expenses (eg by sharing them between the insurer and the insured)**
- **other**

The insurer has to **inform** the insured about the preventive measures he has to accomplish. For preventive measures to be observed after the occurrence of the insured event, the undertaking, moreover, has to inform the policyholder again after the insured event occurs (cf. sec. 7 subsec. 1 VVG; sec. 28 subsec. 4 VVG).

The **expenses** which are caused by the obligation to avoid or to mitigate the damage after the insured event occurs are to be refunded by the insurer. They are part of the insurance benefits (cf. sec. 83 VVG). Expenses which are caused by preventive measures before the insured event occurs

are regularly borne by the policyholder. In property insurance, however, the insurer also has to refund the policyholder such expenses which he incurred in an attempt to avoid an immediately imminent insured event or to minimize its impacts (sec. 90 VVG)

In some (restricted) instances the agreement of certain contractual *Obliegenheiten* may also have an influence on the premium. If the policyholder opts for a product which provides for more encompassing preventive measures than the “normal” product, such as e.g. the installation, maintenance and operation of an alarm system in property insurance, such will usually have a positive effect on the premium.

3) The techniques that are used, or required by law, to implement the preventive measures

- **Declaration of risk, insurance conditions, exclusions, “Obliegenheiten”, warranties, etc.**
- **The question whether there is a requirement of a causal relation between the breach of duty by the insured and the occurrence of the event**

The German VVG uses *Obliegenheiten* to implement the preventive measures. *Obliegenheiten* are no real legal obligation. They are unenforceable, but the insured may – fully or partially - lose his claim, if he did not comply with his duties.

Regularly there must be a **causal relation** between the breach of duty by the insured and the occurrence of the event. The insurer shall be liable insofar as the non-observance of the obligation neither caused the occurrence or the establishment of the insured event nor the establishment or the extent of the insurer's obligation to effect payment. This causal relation is presumed by law. The burden of proof is on the policyholder who has to claim and submit proof that there was no causation (sec. 28 subsec. 3; sec. 21 subsec. 2, sec. 26 subsec. 3 no^o 1, sec. 82 subsec. 4, sec. 120 VVG). Only in the case of a fraudulent infringement of the obligation the insured loses his rights without the necessity of a causal relation (cf. sec. 28 subsec. 3 VVG)

Even more importantly the breach an *Obliegenheit* may only result in negative effects to the policyholder (insured) if the breach was caused by the policyholder's (resp. insured's) fault. Sec. 28 for example provides for all contractual *Obliegenheiten* that the contract may only provide for the negative effects to take place (i.e. power of cancellation or power to reduce the benefits) if the breach was caused by intent or gross negligence (and even in the case of gross negligence the insurer is not always allowed to decline performance altogether but is held to reduce its performance in accordance to the severity of the breach). Gross negligence is refutably assumed if the insurer has sufficiently proven that the policyholder breached the *Obliegenheit* in question.

Insofar, the fact that these preventive measures are to be enforced by providing for an *Obliegenheit* are seen also as a protection of the policyholder since the insurer may only cancel the contract and may only decline performance (or reduce its performance) if the requirements as to previous information of these behavioural duties, fault and causality were met.

It is insofar seen with some reserve if insurers try to enshrine such behavioural duties into risk-description/risk-limitation clauses since here cover is not granted irrespective of questions of fault and causality. There has been a long-standing dispute in Germany about how to treat such so-called

cloaked Obliegenheiten (verhüllte Obliegenheit). Without wanting to go into too much detail, there has been a tendency by German courts and scholars to treat clauses providing for a preventive measure even if they are phrased as a risk-exemption clause as an *Obliegenheit*, if the clause's material conception seems to primarily want to influence behaviour of the policyholder.

4) Sanctions

- Relief from liability of the insurer for the occurred event? Or reduction of the insurance money? Or termination or avoidance of the insurance contract? Other?

- Are such sanctions imposed (or prohibited) by law, by the contract, or controlled by the judge?

The insurer has no claim for performance of *Obliegenheiten*. The sanctions of a breach are that the insurer may, under certain conditions, cancel the contract and is fully or partially discharged of his liability towards the policyholder (resp. insured).

In the case of a contractual *Obliegenheit* the contract itself not only has to provide for the behaviour to be expected but also for the sanctions to be attached and the conditions under which they occur. These contractual stipulations have, however, to be in line with the mandatory legal requirements provided by sec. 28 VVG. Pursuant to this provision the contract may provide for the insurer to have the right to terminate the contract and to reduce the insurance benefits in proportion to the degree of fault. Only an intentional breach of the *Obliegenheit* may automatically lead to a total exemption of the insurer from liability. In the case of a grossly negligent non-observance of the *Obliegenheit*, the insurer shall be entitled to reduce any benefits payable in accordance with the severity of the policyholder's fault. According to sec. 32 VVG insurer and policyholder are not allowed to deviate from sec. 28 VVG to the detriment of the policyholder/the insured.

In the case of a statutory *Obliegenheit* the sanctions may be provided for by the legal provision or in the case of a regulatory gap (some statutory *Obliegenheiten* [e.g. secc. 30, 31 VVG] are so-called *lex imperfecta* since they only provide for the behavioural duty but not for the legal consequences of a breach) by the contract. In the latter case, where it is the contract that provides for the first time for the legal consequence of a breach (or if the contract provides for a different legal consequence than the statute) the statutory *Obliegenheit* becomes a contractual one and must thus observe the properties requested by such a clause as set out above. To give an example of legal consequences provided for the non-observance of truly statutory *Obliegenheiten* see as follows:

- sec. 23 VVG (aggravation of risk)

In case of infringement the insurer has the right to terminate the contract (cf. sec. 24 VVG). Instead of termination, the insurer may ask for a higher premium or for an exclusion from cover of the aggravated risk (cf. sec. 25 VVG). In case of an insured event after the aggravation of risk has occurred, the insurance benefits may be reduced in proportion to the degree of fault (cf. sec. 26 VVG).

- sec. 82 VVG (obligation to avoid or to mitigate the damage)

In case of infringement, the insurance benefit can be reduced in proportion to the kind of fault (cf. sec. 82 subsec. 3 and 4 VVG)

5) Burden of proof

- **Does the insured have to prove that he has fulfilled his duty; or**
- **Does the insurer have to prove breach by the insured?**

Concerning contractual *Obliegenheiten* the **insurer** has to **prove the breach** of *Obliegenheit* in question. In addition the burden of proof follows a complicated system:

- There is a rebuttable presumption for the breach to have been caused by gross negligence. In this respect the burden of proof is on the policyholder to substantiate that he acted either diligent or at most with “normal” negligence. If the insurer, however, wants to be relieved in full of his obligation to perform – which is only automatic in cases of an intentional breach – it bears the burden of proof concerning intent.
- If the policyholder is incapable of submitting such proof rebutting gross negligence (or if the insurer has even proven intent), there is also a rebuttable presumption for causation. If the policyholder is, however, able to rebut the presumption, the insurer may invoke that in the case at hand causality is irrelevant and not to be given regard. Such is the case if the policyholder (resp. The insured) acted fraudulently. Insofar the insurer has to prove fraudulent behaviour of the policyholder/insured.
- In case of (presumed) gross negligence – which enables the insurer to reduce any benefits payable in accordance with the severity of the policyholder’s fault – prevailing opinion regards the insurer to be burdened with proving the precise degree of gross negligence in order to be discharged from its liability. It should, however, be said that this question is far from conclusively settled.

For more detail, we would invite the reader to also see the references to German law in Basedow/Birds/Clarke/Cousy/Heiss (eds.), *Principles of European Insurance Contract Law (PEICL)*, Munich 2009.

Appendix – legal regulations

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

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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 23 - Aggravation of risk

(1) After submitting his contractual acceptance the policyholder may not aggravate the risk insured or permit its aggravation by a third party without the consent of the insurer.

(2) If the policyholder recognises after the fact that he has aggravated or permitted an aggravation of the risk insured without the consent of the insurer, he must disclose the aggravation of the risk insured to the insurer without undue delay.

(3) If, after the policyholder has submitted his contractual acceptance, an aggravation of the risk insured occurs notwithstanding his intention, he must disclose the aggravation to the insurer without undue delay as soon as he has learned thereof.

Section 24 - Termination of the contract due to aggravation of the risk insured

(1) If the policyholder breaches his duty under section 23 (1), the insurer may terminate the contract of insurance without prior notice, unless the insurer has breached the duty neither intentionally nor by acting with gross negligence. If the breach is based on ordinary negligence, the insurer may terminate the contract subject to a notice period of one month.

(2) If an aggravation of the risk insured in accordance with section 23 (2) and (3) occurs, the insurer may terminate the contract subject to a notice period of one month.

(3) The right of termination in accordance with subsections (1) and (2) shall lapse if it is not exercised within one month after the insurer learns of the aggravation of the risk insured or if the state of affairs which existed prior to the aggravation is re-established.

Section 25 - Increase in insurance premium due to aggravation of risk

(1) Rather than terminating the contract of insurance the insurer may, from such time as the aggravation of the risk insured occurred, demand an insurance premium commensurate with the aggravation of the risk insured in

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accordance with his business principles, or may exclude insurance cover for the aggravated risk. Section 24 (3) shall apply mutatis mutandis in respect of the lapse of this right.

(2) If the insurance premium increases by more than 10 per cent in consequence of an aggravation of the risk insured or the insurer excludes insurance cover for the aggravated risk, the policyholder may terminate the contract without prior notice within one month of receipt of the communication from the insurer. The insurer must inform the policyholder of this right in his communication.

Section 26 - Release from liability due to aggravation of risk

(1) If the insured event occurs after an aggravation of the risk insured, the insurer shall not be liable if the policyholder intentionally breached his duty under section 23 (1). In the event of a grossly negligent breach, the insurer shall be entitled to reduce his benefits payable commensurate with the severity of the policyholder's fault; the burden of proof that there was no gross negligence is on the policyholder.

(2) In the cases of aggravation of insured risk in accordance with section 23 (2) and (3), the insurer shall not be obligated to effect payment if the insured event occurs later than one month after the time when the insurer should have received notification, unless the insurer was aware of the aggravation of the risk insured at that point in time. He shall be liable if the breach of the duty of disclosure in accordance with section 23 (2) and (3) was not intentional; in the event of a grossly negligent breach, subsection (1), second sentence, shall apply.

(3) Notwithstanding subsections (1) and (2), first sentence, the insurer shall be obligated to effect payment

1. if the aggravation of the risk insured was not the cause of the occurrence of the insured event or of the extent of the liability, or
2. if at the time of the occurrence of the insured event the insurer's termination period had expired and the contract was not terminated.

Section 28 - Non-observance of an incidental obligation

(1) In the event of the non-observance of an incidental obligation which the policyholder must fulfil vis-à-vis the insurer prior to the occurrence of an insured event, the insurer may terminate the contract without prior notice within one month after learning of the non-observance, unless the non-observance was not intentional or based on gross negligence.

(2) Where the contract provides that the insurer is not obligated to effect payment in the event of the non-observance of an incidental obligation on the part of the policyholder, he shall be released from the liability if the policyholder intentionally breached the obligation. In the case of grossly negligent non-observance of the obligation, the insurer shall be entitled to reduce any benefits payable commensurate with the severity of the policyholder's fault; the burden of proof that there was no gross negligence shall be on the policyholder.

(3) Notwithstanding subsection (2), the insurer shall be liable insofar as the non-observance of the obligation neither caused the occurrence or the establishment of the insured event nor the establishment or the extent of the insurer's obligation to effect payment. The first sentence shall not apply if the policyholder fraudulently breached the obligation.

(4) The condition on which the insurer's entire or partial release from liability in accordance with subsection (2) is based shall, in the event of a violation of an existing duty to provide information or duty of disclosure after

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the occurrence of an insured event, be the fact that the insurer instructed the policyholder in separate correspondence and in writing of this legal consequence.

(5) An agreement based on which the insurer is entitled to withdraw from the contract in the event of the non-observance of an incidental obligation shall be void.

Section 30 - Notification of the occurrence of the insured event

(1) The policyholder shall notify the insurer of the occurrence of the insured event without undue delay after he has learned thereof. If a third party is entitled to the right to the insurer's benefit, the third party shall also be obligated to notify the insurer.

(2) An insurer may not invoke an agreement according to which the insurer is not obligated to effect payment in the event of the breach of the duty of notification in accordance with subsection (1), first sentence, if he learns about the occurrence of an insured event in good time by other means.

Section 31 - Policyholder's duty to disclose information

(1) After the occurrence of an insured event, the insurer may demand that the policyholder disclose to him all the information necessary to establish the occurrence of the insured event or the extent of the insurer's liability. The insurer may demand proof to the extent that the policyholder may be reasonably expected to obtain such proof.

(2) If a third party has the right to receive benefits from the insurer, he must also fulfil the obligations under subsection (1).

Section 82 - Loss avoidance and minimisation

(1) The policyholder must, upon the occurrence of the insured event, ensure that the loss is avoided or minimised wherever possible.

(2) The policyholder must follow the instructions of the insurer, where reasonable, and obtain instructions, circumstances permitting. If several insurers involved in the contract of insurance issue different instructions, the policyholder must act at his own proper discretion.

(3) In the event of the breach of an incidental obligation under subsections (1) and (2), the insurer shall not be obligated to effect payment if the policyholder intentionally breached the incidental obligation. In the event of a grossly negligent breach, the insurer shall be entitled to reduce the benefits payable commensurate with the severity of the policyholder's fault; the burden of proof that there was no gross negligence is on the policyholder.

(4) Notwithstanding subsection (3), the insurer shall be liable insofar as the breach of the incidental obligation is the cause neither of the establishment of the occurrence of the insured event, nor of the establishment of the extent of the liability. The first sentence shall not apply if the policyholder has fraudulently breached the obligation.

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Section 90 - Extended reimbursement of expenses

If the policyholder pays expenses in order to avoid an immediately imminent insured event or to minimise its impacts, section 83 (1), first sentence, subsections (2) and (3) shall apply mutatis mutandis.

Section 104 - Policyholder's duty of disclosure

(1) The policyholder shall be obligated to disclose to the insurer within one week those facts which could give rise to his responsibility vis-à-vis a third party. If the third party asserts a claim against the policyholder, the policyholder shall be obligated to disclose that fact to the insurer within one week after the claim is asserted.

(2) Where a claim is asserted against the policyholder in court, legal aid is applied for or a third-party complaint is filed against him in court, he shall be obligated to disclose that fact to the insurer without undue delay. This shall also apply when investigative proceedings have been initiated against the policyholder on account of the occurrence of the loss giving rise to the claim.

(3) Timely dispatch of the notice of disclosure shall suffice for compliance with the time limits under subsections (1) and (2). Section 30 (2) shall apply mutatis mutandis.

Section 158 - Change in risk

(1) An aggravation of the risk insured shall only be deemed to be such change in the risk factors deemed to constitute an aggravation of the risk insured by explicit agreement; the agreement must be made in writing.

(2) An insurer may no longer assert an aggravation of the risk insured once five years have elapsed since the increase. If the policyholder has intentionally or fraudulently breached his obligation under section 23, this time limit shall be ten years.

(3) Section 41 shall apply with the proviso that a reduction of the premium may only be demanded on account of such a reduction of risk factors deemed to be so by explicit agreement.