

IBA Insurance Committee Substantive Project 2014

The Duty of Utmost Good Faith

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I - Definition of the Principle of Utmost Good Faith

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

No, there is no *direct* equivalent to the principle under Swedish law. Nevertheless, general references to *uberrimae fidei* or *utmost good faith* are made in Swedish insurance law literature and imply an extended duty of loyalty between the parties. Although expressed as being mutually applicable to the parties, *uberrimae fidei* is mainly referred to in connection with the policyholder’s/insured’s¹ obligations/duties towards the insurer which are mainly manifested in the insured’s pre-contractual and post-contractual duties of disclosure stipulated in the Swedish Insurance Contracts Act ((Sw. *försäkringsavtalslagen*), the “ICA”). However, the insurer’s obligation to provide information under the ICA may also be regarded as an expression of the parties’ extended duty to act loyal towards each other.

In addition to the ICA, general contractual principles apply to a contractual party’s unethical behaviour, such as actions in conflict with good faith etc.

Thus, although there is no direct equivalent to the principle of *utmost good faith* under Swedish law, the questions below will be answered with reference to the ICA and to general contractual law.

At times references are made to *utmost good faith* in insurance and reinsurance terms and conditions, due to the international nature of many insurance contracts. When such a condition provides no definition of *utmost good faith*, an interpretation would be dependent upon e.g. foreign law.

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

N/A (please see Section 1 above).

¹ Below the term *insured* refers to both policyholder and insured, unless otherwise specified.

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

N/A (please see Section 1 above).

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

N/A. However, the ICA applies to most insurance contracts, with the exception of reinsurance contracts. The provisions on the insured’s duty of disclosure and the duty for the insurer to provide information differ depending on whether the relevant insurance is a consumer insurance (Sw. *konsumentförsäkring*), a business insurance (Sw. *företagsförsäkring*) or a personal insurance (Sw. *personförsäkring*) as defined in the ICA (personal insurance will below be referred to as “life insurance”).²

General contract law applies to reinsurance contracts, although some provisions of the ICA may be analogically applied to such contracts (please see Section 27 below).

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

N/A. However both insured’s duty of disclosure and the insurer’s duty to provide information apply both pre-contractually and post-contractually (see Sections 6, 7, 12, 16 and 19 below).

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

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

The duty of disclosure under the ICA applies to the policyholder (in relation to consumer insurance, business insurance and life insurance) and the insured³ (in relation to life insurance) but not to the

² Please note that the ICA contains further provisions on disclosure and the duty to provide information in relation to group insurance that will not be accounted for in this questionnaire.

³ Please note that *insured* refers only to the insured in this context and not to both insured and policyholder (see footnote 1 above). Under the ICA, an insured in conjunction with life insurance is a person whose life or health the insurance shall apply to.

insurer. Nonetheless, under the ICA, the insurer has a duty to provide the insured with information about the insurance and its coverage during the pre-contractual stage.

A - For the Insured

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

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

Under the ICA, a potential policyholder seeking consumer insurance has a duty to disclose information, upon request of the insurer, which may be material to the insurer's decision to issue the insurance. The duty includes providing true and complete answers to the insurer's questions. The aforesaid is also applicable to life insurance,⁴ but the duty of disclosure also applies to the insured.

A prospective business insurance policyholder shall, in addition to the aforesaid, provide information which is of material significance for the insurer's risk assessment notwithstanding the absence of inquiry by the insurer.

A Swedish Supreme Court ruling that is often referred to in Swedish legal literature is NJA 1940 s. 280 II, where the policyholder had, upon request of the insurer, incorrectly stated that there were four mechanically driven machines in the insured building. However, there were in fact five machines in the building. The building was later destroyed in a fire and the insured claimed compensation. The insurer contested the claim, stating that the policyholder had not provided the insurer with correct information and that the insurer would not have issued insurance if the policyholder had provided correct information (because, as it may be understood, the risk of fire increased with the number of mechanically driven machines). The Supreme Court held that the insurer would not have issued the insurance had the policyholder provided correct information. Thus, the insurer was released from its liability to indemnify the insured.⁵

In a case from the Göta Court of Appeal, RH 1995:3, that concerned an insured's duty of disclosure when entering into a *life* insurance contract, the insured had, upon request of the insurer, provided incorrect

⁴ Please note that *insured* refers only to the insured in this context and not to both insured *and* policyholder (see footnote 1 above).

⁵ It should be noted that this case concerned business insurance. If the case would have concerned consumer insurance, it is likely that the outcome would have been different (please see Section 10 below where the remedies for breach of the duty of disclosure are further explored).

information about his health condition. When later claiming insurance indemnification, the insurer contested the claim arguing that it would have issued the insurance on different terms and conditions had the insured provided correct information. The Göta Court of Appeal held that if the insurer had received correct information about the insured's state of health, the disease which actually had affected the insured and thus formed the basis of the claim for compensation, would have been excluded from the insurance coverage. The insured's claim was therefore dismissed.

The Supreme Court case NJA 1949 s 786 concerned a business insurance policyholder's failure to provide the insurer with information of material significance for the insurer's risk assessment. The policyholder had insured two barges but had not disclosed to the insurer that the insured barges in fact consisted of parts from a wrecked barge, why the insured barges' seaworthiness could be questioned. The barges sank and the insured claimed indemnification under the insurance. The Supreme Court stated that it could be assumed that the insurer would not have issued any insurance, or, at least, that the insurance would have been issued on different terms and conditions had the policyholder disclosed the information about the barges' seaworthiness. Moreover, that the policyholder should have realized that the withheld information was relevant to the insurer's risk assessment and that it was negligent not to provide the insurer with this information. The insurer was therefore released from its liability to indemnify the insured.

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

N/A (see Sections 1 and 7 above).

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

N/A (see Sections 1 and 7 above).

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

The remedies for a breach of the duty of disclosure differ depending on whether the insurance is a consumer insurance, a life insurance or a business insurance.

If a policyholder of a *consumer* insurance has intentionally or negligently disregarded the duty of

disclosure, the insurance indemnification may be reduced in respect of each insured in accordance with what is reasonable taking into account: the significance which the fact would have had for the insurer's risk assessment, whether such disregard was intentional or negligent, and other circumstances.

If a policyholder or an insured of a *life* insurance has intentionally or negligently provided incorrect or incomplete information of significance for assessment of the risk, and any negligence was not insignificant, the insurer shall be released from liability for all insured events where the insurer can show that it would not have issued the insurance had the duty of disclosure been fulfilled. Where the insurer can show that the insurance would have been issued for a higher premium or would have otherwise been issued on other terms and conditions than those contracted to, its liability shall be limited to the amount reflected by the premium (*pro rata*) and other terms and conditions agreed to. The insurer's liability may also be adjusted if the insurer has not acquired reinsurance which otherwise would have been acquired. However, the aforesaid described in this paragraph shall not apply to the extent that it would lead to an unreasonable result in respect of the policyholder or his successor in interest.

What is described in relation to life insurance in the paragraph above, applies also to the policyholder of a *business* insurance. However, the exception for unreasonable results does not apply to business insurance. Moreover, insurance terms and conditions may in certain situations stipulated in the ICA, provide that the insurer shall be liable only to the extent that it is shown that the incorrectly described circumstance was insignificant in respect of the occurrence of the insured event or scope of the damage.

The insurer's liability in relation to the aforementioned types of insurance, shall not be limited pursuant to the above if the insurer knew or should have known, at the time that the duty of disclosure was disregarded, that the information provided was incorrect or incomplete.⁶ The aforesaid applies also where the incorrect or incomplete information lacked significance or subsequently ceased to be of significance to the contents of the agreement.

If a policyholder has acted fraudulently or contrary to good faith in conjunction with fulfillment of the duty of disclosure, the insurance contract (regardless whether it concerns a consumer insurance, life insurance or business insurance) is void pursuant to

⁶ In conjunction with a death insured by a life insurance policy, the insurer may claim that the duty of disclosure has been neglected only if the death has occurred within five years from the time at which the information was provided or where the insurance company has provided notice of assertion of limitation of the insurer's liability within the same time.

the provisions of the Swedish Contracts Act (Sw. *avtalslagen*), and the insurer shall be released from liability for insured events which occur thereafter.

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

N/A (see Sections 1 and 7 above).

B - For the Insurer

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

Under the ICA, an insurer shall, prior to the issuance of a consumer insurance policy or a life insurance policy, provide information which facilitates the insured's assessment of the need for, and choice of, insurance. The information shall reproduce, in a simple manner, the primary content of the applicable insurance terms and conditions of which the insured needs to be aware in order to assess the cost and scope of the insurance policy. Important limitations of the insurance coverage shall be emphasised separately.

The insurer's duty to provide information also applies to business insurance. However, the duty does not apply if the potential policyholder of a business insurance may be deemed to have no need of the information.

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

To the best of our knowledge, there are no relevant Swedish court cases concerning this issue. However, the Swedish National Board for Consumer Disputes (Sw. *Allmänna reklamationsnämnden*), a governmental board that issues non-binding recommendations in consumer related disputes, has in a matter (2006-3407) held that an insurer, in connection with the issuance of a travel insurance, had not clearly emphasised an important limitation of the insurance coverage, whereby, with reference to general principle of contract law, the limitation was disregarded (see Section 15 below regarding the insurer's duty to provide information).

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

N/A (see Section 1, 6 and 12 above).

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

Under the ICA, if an insurer of a consumer insurance policy or a life insurance policy has failed to

separately emphasise important limitations of the coverage – either before or after execution of the contract – such limitations may not be relied upon by the insurer. Moreover, if an insurer fails to comply with the duty to provide information, the insurer may be sanctioned and/or required to disclose the information in accordance with the Swedish Marketing Act (*Sw. Marknadsföringslagen*); this also applies to business insurance.

Please note that all types of insurance contracts may also be challenged with reference to general principles under Swedish contract law.

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

A - For the Insured and Third Party Beneficiary of Cover

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

Under the ICA, the insured of a consumer insurance has a duty to comply with any terms and conditions of the insurance policy regarding the obligation to report insured events to the insurer within a specific time. Also, the insured shall comply with terms and conditions or instructions from the insurer pursuant thereto regarding the obligation to participate in the investigation of the insured event or the investigation of the insurer's liability. Failure to comply with the abovementioned obligations may entail that the indemnification that would otherwise have been paid to the insured may be reduced in accordance with what is reasonable under the circumstances if such failure has caused loss to the insurer. Under third party liability insurance, the compensation to the injured third party may not be reduced by the insurer even if the insured has acted in breach of the abovementioned obligations. Instead, the insurer has a right to recourse against the insured a reasonable amount of which the insurer has paid to the injured third party.

Further, under the ICA, if an insured or a third party seeking indemnification from an insurer following an insured event, intentionally or recklessly incorrectly provides or keeps secret or conceals information of significance for the assessment of the right to insurance indemnification, the indemnification which otherwise would have been paid to him may be reduced in accordance with what is reasonable under the circumstances.

The above also applies to life insurance, with the exception for what is stated in relation to liability insurance.

What is stated above regarding consumer insurance also applies to business insurance. However, please note that the ICA stipulates that if a claimant fails to comply with a term of a contract of a business insurance stipulating that an insured event must be

reported to the insurer within a certain period of time, not less than six months from the date on which the claimant acquired knowledge of its claim, the claimant may lose its right to indemnification.⁷

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

As mentioned in Section 16 above, a third party beneficiary seeking insurance indemnification must not provide incorrect information or keep significant information secret or concealed during the claim stage – otherwise the indemnification may be reduced.

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

To the best of our knowledge, there is no relevant Swedish case-law concerning this issue.

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

Under the ICA, an insured completing a proposal for a life insurance policy shall, upon request of the insurer, disclose information which may be of significance as to whether the policy shall be issued. This entails that if the insured is asked by the insurer whether he/she is or has been engaged in criminal activities and such information is deemed relevant for the insurer's risk assessment, a concealment of such activities would be a breach against the duty of disclosure under the ICA, which would allow the insurer to cancel the policy or amend it, either by charging a higher premium or change the terms and conditions of the policy. However, the insured has no obligation to inform about his/her criminal activities if he/she has not been asked to disclose such information by the insurer.

B - For the Insurer

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

N/A. However, under the ICA, an insurer has duties when dealing with a claim that may be regarded as an expression of the parties' extended duty to act loyal towards each other.

Under the ICA, an insurer that has been advised of an insured event under a consumer insurance policy shall, without delay, take the measures necessary to settle the claim. Settlement of claims shall take place quickly and in observance of the legitimate interests

⁷ It may be noted that from 1 January 2015, this period of time will be extended to one year.

of the insured and other affected parties. After an insured event has been reported, the insurer shall inform the claimant about which information the insurer needs to settle the claim. Generally, insurance indemnification shall be paid within a month after the claimant has provided the insurer with all the information required to settle the claim. If payment is not made in a timely manner, the insurer shall pay penalty interest.

The above applies also to business insurance unless the contracting parties agree otherwise.

Under the ICA, an insurer which has been notified of an insured event under a life insurance policy shall, without delay, take the necessary measures to pay insurance indemnification. The payment shall be made quickly and in observance of the interests of the party entitled to compensation.

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

The duty described under Section 19 applies also to third party beneficiaries of cover.

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

To the best of our knowledge, there are no relevant Swedish court cases concerning this issue. However, the Swedish Financial Supervisory Authority (the "SFSA") has in a matter (reference number 7445-99-301), where the insurer was issued a remark, pointed out that active claims handling is part of what constitutes good insurance standard (see Section 22 below).

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

Under the Swedish Insurance Business Act (*Sw. försäkringsrörelselagen*), Swedish insurers are obliged to conduct their business in accordance with *good insurance standard*. Good insurance standard covers all aspects of the insurer's business, including the duty to provide pre-contractual and contractual information as well as post-contractual claims handling. The content of good insurance standard can be found in *inter alia* regulations issued by the SFSA and also in supervisory decisions by the SFSA (see Section 21 above). Few regulations and supervisory decisions deal with the insurers' duty to inform and/or handle claims, since these rules are quite clearly set out in the ICA. Nonetheless, SFSA regulation FFFS 2011:39, "Regulations and general guidelines regarding information about insurance and occupational pensions", stipulates e.g. how insurers should inform the insured how complaints can be brought forward to the insurer and where the insured should turn in case there is a dispute over cover

between the insured and the insurer. In addition, the industry organisation for insurers, Insurance Sweden (*Sw. Svensk Försäkring*), has issued a recommendation concerning pre-contractual information. Both the SFSA regulation and the Insurance Sweden recommendation should be considered part of what constitute good insurance standard.

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

Yes, a court can disregard a term of an insurance contract in line with what is set out in Section 15 above. This entails that if an insured has e.g. breached an important security provision under a consumer or life insurance in a way that would make an insurance claim invalid, but the court finds that the insurer did not emphasise this specific security provision in connection with the issuance of the insurance contract (leaving the insured unaware of the security provision), a court may disregard the security provision and rule in favour of the claimant, despite the wording of the contract.

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

Only to the extent set out in Section 23 above.

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

N/A (see Section 1 above).

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

If an insurer is deemed to be in breach of good insurance standard, as described in Section 22 above, the SFSA may issue a remark or warning combined with regulatory fines. In extreme cases, the SFSA may revoke the insurer's licence to conduct insurance business.

IV - Reinsurance

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

Under Swedish law there is no specific legislation concerning reinsurance contracts and issues regarding reinsurance contracts are thus governed by general Swedish contract law. When it comes to incorrect pre-contractual information, a contract can be deemed invalid pursuant to general Swedish contract law, if a party to a contract has been induced to enter into the agreement through fraudulent deception by the other party. A contract can also be deemed invalid if the circumstances in which the contract arose were such that, having knowledge of such circumstances, it would be inequitable to enforce the contract.

Even if the ICA is not directly applicable to reinsurance contracts, when circumstances are similar to those applicable to direct insurance and there is no other legal hindrance (such as the explicit wording of the contract), the provisions of the ICA could arguably be analogically applied to the relevant reinsurance contract. When it comes to errors in pre-contractual information, a reinsurer would typically be in the same situation as an insurer. In both cases, the party that will assume the risk under the contract will typically have a legitimate interest of being correctly informed about the risk before entering into the contract. Therefore, the principle set out in the ICA on the insured's duty of disclosure, which is set out in Section 7 above, would most likely be analogically applicable to a reinsured. The same will most likely apply at the claim stage. Please note that to the best

of our knowledge there is no case-law from Swedish courts where such analogical application has been used. However, in a an arbitration case from 1998 that was made partially public through challenge proceedings in the Swedish Supreme Court, the arbitral tribunal used analogical application of the ICA when settling a dispute over a reinsurance contract (Svenska Kreditförsäkrings AB v. Munich Re, Swiss Re and other reinsurers - Swedish Supreme Court case T 2270/00).

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