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# Injured party versus insurer: new article 60(1 bis) of Federal Act on Insurance Policies

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- Introduction
- Background
- Article 60(1 bis) of IPA
- Comment

## Introduction

The revision of the Federal Act on Insurance Policies (IPA) entered into force on 1 January 2022. Among the newly introduced provisions is article 60(1 bis) of the IPA, which allows injured parties – under certain circumstances – to choose between pursuing their claim for compensation either against the liable party or, instead, directly against the latter's insurer. During the law-making process, it was extensively debated in Swiss Parliament and among practitioners in the field of insurance law whether such a regulation would be, all things considered, superfluous, beneficial or rather detrimental to the processing of claims for compensation. While it is decidedly too early to come to a conclusion in this regard, this article depicts the prerequisites of article 60(1 bis) of the IPA and points out certain possible issues.

## Background

There already exist similar provisions to article 60(1 bis) of the IPA in other Swiss laws – most notably, article 65 of the Road Traffic Act (RTA). Such provisions only exist in relation to compulsory liability insurances.[(1)] They aim at better protecting the rights of the injured parties to make sure that they can more easily enforce their rights, and especially to prevent that their claims for compensation are reduced by defences arising from the insurance contract.[(2)] With article 60(1 bis) of the IPA, the legislature now has extended this mechanism to all of private liability law. Parliament justifies the amendment by arguing that, in practice, claims are already often processed between the injured party and the insurer rather than between the injured party and the insured, and that the new provision will strengthen the position of the injured parties and relieve the insureds as well as the courts.[(3)]

## Article 60(1 bis) of IPA

### *Prerequisites*

Article 60(1 bis) of the IPA is placed in in the law's second section of the second chapter, titled "liability insurance". Article 60(1 bis) IPA states as follows (unofficial translation from German into English):

> *The injured third party or his legal successor shall have a direct right of claim against the insurance company within the scope of any existing insurance coverage and subject to the objections and defences that the insurance company may raise against him on the basis of the law or the insurance contract.*

*Injured third party or their legal successor*

If the injured party decides to file a claim against the insurer, the insured is not a party to the court proceedings. They might, however, participate in the proceedings as an accessory party (articles 74 et seq of the Swiss Civil Procedure Code (CPC)), or the insurer might draw them into the proceeding by filing against them a third-party notice (articles 78 et seq of the CPC) or a third-party action (articles 81 et seq of the CPC).

*Within framework of existing (liability) insurance coverage*

In order for the injured party to act directly against the insurer, it is first required that there is, in fact, an existing insurance policy, and that the event is covered by said policy.

As the title of the section in the law suggests, article 60(1 bis) of the IPA only applies to liability insurances. The law itself, however, does not define what constitutes a liability insurance. According to literature, liability insurance is an insurance that protects the insured person's assets by assuming liability claims made, and, depending on the coverage, defending against unjustified claims.[(4)] There should be no issue in classifying standalone liability insurances as such. However, with complex policies that combine, for example, liability insurance with fidelity insurance, detecting whether the liability party of the policy is triggered can be difficult.[(5)]

To the advantage of the injured, it is not required that the insured reports the claim to their insurer (however, see "Obtaining information about existence and extent of liability insurance policy" below).[(6)]

*Subject to objections and defences on basis of law or insurance contract*

When an insured demands coverage from their insurer, the granting of their demand will depend first and foremost on the stipulations of the insurance contract, as well as on the law. Given the circumstances, the insurer might raise objections or deny coverage if, for example, the insured is in default of payment of their premiums or if they have intentionally caused the insured event.

The insurer's right to object is maintained in article 60(1 bis) of the IPA – that is, even when the insurer is confronted with a claim of the injured party, instead of the insured to whom they are bound by contract. This seems fair, as otherwise the insurer could be obliged to compensate the injured third party even if the policy grants no coverage of the claim. The legislature did not aim at interfering with the policy coverage, rather than facilitating its legal enforcement.[(7)]

However, there is an exception to the insurer's right to object in relation to compulsory liability insurance. Article 59(3) of the IPA states

as follows (unofficial translation from German into English):

> *In the case of compulsory liability insurance, pleas of gross negligence or intentional causation of the insured event, breach of obligations, failure to pay premiums or a contractually agreed deductible may not be risen against the injured party.*

This provision is similar to article 65(2) of the RTA, which prevents the insurer from raising any objections from the insurance policy or from the law against the injured party. Article 63 of the RTA dictates that no motor vehicle shall be publicly put in use until liability insurance has been obtained. It is the most notable compulsory liability insurance in Switzerland. The main purpose of this – and other – compulsory insurance is to protect the injured party from the insolvency of the insured.(8) This purpose can only be achieved by excluding any possible objections or defences arising from the policy.(9)

Accordingly, article 59(3) of the IPA should ensure that a person injured in the realm of compulsory liability insurance will be compensated even if the injurer has neglected their contractual obligations towards the insurer – for example, by not paying their premiums or having caused the damage by gross negligence, and therefore forfeiting coverage.(10)

***Obtaining information about existence and extent of liability insurance policy***
As mentioned above, it is not required that the insured reports the claim to their insurer in order to trigger article 60(1 bis) of the IPA. This does, however, not eliminate the injured party's paramount obligation of finding out if and with which insurer an insurance policy exists and whether the claim might be covered by that policy and to what extent.

*Compulsory liability insurance*
Article 60(3) of the IPA grants the injured party the right to be informed by the insured or by the regulatory authority about the name of the insurer. Federal, cantonal or communal law will inform whether a compulsory liability insurance needs to be concluded. However, there are instances where the authorities do not verify the conclusion of such insurance beforehand.(11) Accordingly, certain parties may practice a profession or carry out an activity without the necessary liability insurance. Such circumstances remain a problem.

*Voluntary liability insurance*
The legislature decidedly refrained from implementing an equivalent solution as the one found in article 60(3) of the IPA. It was argued that this would not be practical, as the injured party would not be able reach out to a regulatory authority as with compulsory liability insurance, but would have to enforce their right to information in front of state courts.(12)

This reasoning as to the practicability of implementing such a solution may be considered unconvincing for the following reasons:

- First, the insurer may not give out data about their customers without their consent or without a contractual or legal basis (see article 12 of the Federal Act on Data Protection). As a consequence, the decision of whether to inform the injured party about the existence and the details of a liability insurance policy lies strictly with the insured. If the insured refuses to demand coverage from their insurer and to give out any information, the injured third party is forced to proceed in front of a court to obtain the necessary data on the insurance policy.
- Second, the absence of a provision equivalent to article 60(3) of the IPA weakens the injured third party's position in doing so, as they now cannot rely on substantive law in order to obtain the necessary information, and because the procedural possibilities under the Swiss CPC seem to hold little promise of success with regards to the issue at hand.(13)
- Third, even if the injured party is successful and the insurer is obliged to hand out the necessary information about the policy, they can only then assess the risk to further proceed their claim for compensation. It may very well turn out that there is no or only limited coverage, rendering the efforts and costs to obtain this information futile, as the injured party is left to proceed against the insured after all.

Consequently, it appears that the lack of a provision equivalent to article 60(3) of the IPA for voluntary liability insurance results in an opposite effect than the desired one. Court proceedings against the insurer entail considerable risks for the injured party. Time will tell whether injured parties will take these risks upon them and how successful they will be in doing so.

Because of these risks, and due to the legal obligations regarding data protection, it currently appears advantageous for the insurer to maintain a strict position when faced with requests for the release of information about insurance policies by injured third parties in cases where the insured does not demand coverage.

**Comment**

The aim of the new article 60(1 bis) of the IPA is to strengthen the position of the injured parties in pursuing their claims for compensation and to relieve the insureds as well as the courts.

In relation to compulsory liability insurance, article 60(1 bis) of the IPA in combination with article 59(3) of the IPA appears to be in line with the legislature's intention.

Regarding voluntary liability insurance, on the other hand, article 60(1 bis) of the IPA could after all very well turn out not to offer a viable solution to the (apparent) problem as identified and addressed by the legislature. If the insured refuses to report the claim to their insurer and at the same time does not give out any information about an existing policy to the injured third party, it remains for the latter to obtain the necessary information. In order to do so, the injured third party will rather likely have to take legal action, which entails considerable risks. It therefore appears not unlikely that article 60(1 bis) of the IPA will not bring the advantage to injured third parties envisioned by the legislature after all.

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**Endnotes**

(1) Benjamin Schuhmacher, Patrick Dummermuth and Lukas Bubb, Das direkte Forderungsrecht im revidierten VVG – ein praxistaugliches Instrument?, HAVE 2021 p 355, 356.

(2) Philippe Weissenberger in: Kommentar Strassenverkehrsgesetz und Ordnungsbussengesetz, Mit Änderungen nach Via Sicura, 2 Aufl, Zürich/St Gallen 2015, article 65 point 1.

(3) See Official Bulletin of the Federal Assembly 2019 N 773, special session of the Council of States, 9 May 2019, 15h00, proposal of

Müller Leo; Benjamin Schuhmacher, Patrick Dummermuth and Lukas Bubb, Das direkte Forderungsrecht im revidierten VVG – ein praxistaugliches Instrument?, HAVE 2021 p 355, 356 et seq.

(4) Stephan Fuhrer, Schweizerisches Privatversicherungsrecht, Zürich/Basel/Genf, 2011, point 20.2.

(5) See Benjamin Schuhmacher, Patrick Dummermuth and Lukas Bubb, Das direkte Forderungsrecht im revidierten VVG – ein praxistaugliches Instrument?, HAVE 2021 p 355, 359.

(6) Marco Forte and Stephan Kinzl, Der neue Art. 60 Abs. 1 VVG – direktes Forderungsrecht der geschädigten Person gegen (alle) Haftpflichtversicherungen?, in: Anwaltsrevue 2021, p 421, 423.

(7) See Federal Council Dispatch of 28 June 2017, SR 17 043, p 5139.

(8) Heinz Rey, Ausservertragliches Haftpflichtrecht, 4. Auflage, Zürich/Basel/Genf 2008, point1335.

(9) Karl Oftinger/Emil W Stark, Schweizerisches Haftpflichtrecht, Band II/2, Zürich 1989, p 426.

(10) Official Bulletin of the Federal Assembly 2020 p 13 et seq, session of the Council of States, 3 March 2020, 08h15, vote of Bischof Pirmin for the commission.

(11) For example, with regards to physicians in the Canton of Zurich, see Marco Forte and Stephan Kinzl, Der neue Art. 60 Abs. 1 VVG – direktes Forderungsrecht der geschädigten Person gegen (alle).

(12) Federal Council Dispatch of 28 June 2017, SR 17 043, p 5128.

(13) See Benjamin Schuhmacher, Patrick Dummermuth and Lukas Bubb, Das direkte Forderungsrecht im revidierten VVG – ein praxistaugliches Instrument?, HAVE 2021 p 355, 364 et seq.