Final Test 4/10

I. 1. What is meant by the term letter of confirmation (loc; to be explained by mentioning the legal consequence in cases in which the receiver of a loc does not give an answer to it (a.));

Contract is assumed to be concluded by silent acceptation of the content of the loc., provided that nothing against good faith is integrated into the loc., because the principle behind the loc-construction is good faith during the time of contract bargaining and conclusion. E.g. it would be impossible to mention a different annual premium in the loc., once a certain price for the insurance has been bargained between the parties of the pre-contractual meeting. Also unexspected risk exclusions will not be acknowledged.

b. …and by telling some preconditions of a loc)?

The negotiations must have come to a point, that only saying yes or no would have created a perfect (insurance) contract, despite the fact that some points have been left open for different stipulations after having discussed the matter with further people in the enterprise of the future contract partners.

2. Can one avoid the legal consequences of a loc, and if possible, by which legal principle can it be done?

Yes, by the principle of contract content liberty. However, unchangeable in some respect, mainly with regard to the good faith provision, because this is a basic precondition of contract. This is why one cannot provide for binding effect of silence, if the loc. contains unfaithfully new prices or other clauses.

3. Can the sender of a loc mention contract conditions which never have been discussed in the course of the pre-contractual communication, and which principle is decisive for this question?

First see above no. 1. The good faith principle cannot be used to the advantage of a contract partner, who did not follow it himself.

4. Some comparative remarks of German law.

Totally equivalent under § 242 BGB, and despite the fact that § 362 HGB restricts the fiction of silence to merchants having relations in business conducting services. The provision of § 362 HGB has been extended by the courts for a long time, and is now applicable for all merchants and non merchants, who take part in business for longer time. This has become common law.

II.1. What is the main sense of the transparency provision of the law of standard terms control?

Provisions of standard terms (st) have to be understandable for the average persons of the business area, provided that they are willing to be informed by lissening and/or reading, what has been published in relevance to the contract (principle of adult consumer). Even footnotes might be necessary to be read.

2. Can you give an example of a clause, which has been held to be illegally intransparent?

Best known is the German case law on “Zillmerungsklauseln” which have been struck down by the BGH as illegally inunderstandable, provided that they have not been exemplified by calculation models for the first couple of years. British case law shows that even warranties can be judicially reviewed by the provision of transparency, despite the fact that they can belong to the main subject of the contract.

3. What is the main difference from the contra proferentem rule?

Intransparent clauses can be unambiguous, but incomprehensible.

4. Some comparative remarks of German law.

Quite equivalent in §§ 307, 305 II BGB, because the legal basis is a EU-directive of the mids of the 90s which had to be transformed in both countries, in the UK last in 1999 by the regulation of unfair consumer contracts. Examples of the British case law show, that the principle of adult consumers is applied even more strictly than in Germany (e.g. warranties clear enough).

III.1. What is meant by the legal term counter-offer?

An acceptance which differs from the application. Such a counter-offer is a new offer and must be accepted by the other party for conclusion of a legally binding contract.

2./3. Insurer (Irer) accepted a health insurance application form of the insured (Ired) by sending back a letter with modifications of the premium instalments. Before the Ired has paid the first premium, he fell mortally ill. Irer wants to deny cover for medical costs of the Ired, because no disclosure of the sickness was made by him. Can you give some legal reasoning for both parties?

This has been regarded as a counter offer by a British court, which had the consequence that the contract still was not concluded, and that the pre-contractual information duty came into play for Ird. If one takes the instalment provision only as a minor point of the contract, the contract would have become binding already. Hence, no duty of risk increase would have been owed.

4. Some comparative remarks of German law.

§ 23 VVG provides for information of risk increase during the course of a contract. § 24 provides for the opportunity of cancellation in cases of grossly negligent non-information by the insured. The principle of counter offers, however, is also applicable (§ 150 II BGB).