

Final Test Sept. 2014

1 hour working time. Since all questions are supposed to be equally difficult, you should take about 25 -30 minutes for each. Please write your name on top of each page and answer in English as far as possible. One or more proposed answers can be correct. Do not answer simply yes or no, but always explain some reasons why and refer to legal authorities as much as possible. Answers in German will be accepted by half value, if they do not exceed 50% of the full text.

- I. Are insurance agents obliged to give advice to the potential customer?
1. Yes, if no exceptional circumstances are given making adequate advice in time.
 2. It depends on the kind of contract. In B2C cases as in answer I.1; in B2B the agent can decide himself whether to give advice or not, provided that he gives correct notice to the customer.
 3. It does not depend on the kind of contract. In both cases the agent can decide himself, provided that he gives correct notice to the customer.
 4. In B2C cases the agent must give correct notice as in I.3, but in cases of B2B he is not obliged to do so, if the contract is not on life insurance with essentials comparable to an investment contract.
 5. As far as advice is requested by law, which two different kinds of examination the agent has to do? (some comparative remarks to German law).

Possible Answers:

1. *Wrong, because there is no general rule providing for a duty of suitable advice to the customer. Even in B2C the relevant duties of advice provide for an explicit notification of whether or not the agent will give advice.*
2. *Also wrong, because the obligation to give notice applies to B2C only, not to B2B. Here a duty of advice is provided for in cases of investment policies, only (see below to no. 4).*
3. *Partially correct, because the obligation to give notice applies to B2C and – in parts – to B2B also, as said before and under no. 4.*
4. *The advisory duties in B2B apply to contracts which are similar to investment contract, because the so called suitability doctrine has been developed in the investment law and is generalized for insurances as far as they resemble investments, e.g. life insurance on funds basis.*
5. *The advice must be suitable in subjective and objective sense. First the agent has to ask for the individual needs and wishes of the customer, e.g. is he married, has he children, what job he has etc. for finding out how his risk tolerance is. Risks taken by the investment or insurance contract shall be adequate to the typical personal situation of the customer. It can differ, but only in cases in which the customer has declared that he wants to be treated exceptionally.*

II. What is meant by the main subject rule in the law of standard terms control?

1. Some general remarks;
2. Some economic purposes of the rule;
3. Does the rule apply to warranties?
4. Can main subject clauses become controlled in respect of plain and intelligent language?
5. Some comparative remarks to German law.

Possible Answers:

1. *The control cannot refer to the focus of the contractual promise, as to the price and the quality of the "sold product", be it a material good or a service like an insurance risk cover as such.*
2. *One thinks that the forces of effective competition care for justice on the level of the main subject, because the consumer will know best what equivalence of price and quality means in the concrete market situation. With respect to the duties on the side, however, typically provided for in the standard terms, competition works imperfectly, only. It must be completed by the standard terms control of courts and/or of the UK Office of Fair Trading.*
3. *Yes, there is some case law taking warranties as main subject. The binding force of these court decisions is restricted, however, to similar cases. Otherwise the actual case can be differentiated from the precedent case. More generally one can say: warranties are main subject if they are really basic to the contract. However, the fact that they are called as basic to the contract by the explicit wording of the terms is not enough reason for regarding them basic in the sense of the main subject rule.*
4. *Yes, because if they are not understandable, the competition forces, as mentioned under no. 2 supra, cannot function, when the average customer does not understand sufficiently what is meant by the respective clause.*
5. *German law provides for applicability of Transparenzgebot expressis verbis (§ 307 III.2 in connection with subsec. I.2 BGB).*