British Insurance Law – Preparatory Script 8/2016

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The preparatory script is not a perfect book and should be read for preparation of the lessons, only (for book recommendations see ch. I.3). Nonetheless I apologise for minor typing faults and errors. – Further apologise is necessary in respect of the most recent Insurance Act 2015 (IA, as in appendix 3, below) and the current changes after the BREXIT. The new IA will come into force in August 2016, and a further Bill on late payment damages is going to be passed. Despite the fact that one can expect much reaction from the side of the insurance industry, mainly by adaptation of their standard terms, I believe the following information will be correct, still. As far as basics will be changed during August or later, however, the relevant correction will be made by the charts used during the seminary.

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I. Introduction.

British insurance law not only has a long and well established tradition, but is being subject to far reaching developments. Each time I try to update this paper, I am surprised how much has become new since the last edition. Certainly, the reforms are not so much fundamental as the German VVG 2008, but already the Consumer Insurance (Disclosure and Representations) Act 2012 (CIA) was a historical step into the future of more consumer protection, and the forthcoming Insurance Contracts Act 2015, which was passed in Febr. 2015,[1] and has come into effect in August 2016, will bring an even more drastic amendment of long standing traditions in old England. More and more one gets the impression that British insurance law does not only develop European structures,[2] but is going to proceed in its specific way of world wide market orientation. Much more than other legal systems,[3] the UK law takes the focus on information concepts of consumer protection and market regultation. It is the main subject of this paper to present the most eminent parts of the case law and the recent statutory reforms to the German reader in this respect.[4]

1. London Market and International Mergers before and after BREXIT. While the focus will be on legal questions, some introductory information on the economic importance of the London market and the merger trends of international enterprises can be useful for underlining its practical background. After the BREXIT-referendum of June 2016, much will be changed (see below under b.), but the general conditions seem to stay as they used to be (below under a.).

a. General Conditions. The London market is constituted mainly by the Lloyds organization (64 syndicates[5]) and the IUA-insurers (117 in 2002), both of which have realized a premium volume of 18.1 mrd. BPS. While more than 60 % of the underwriters are

[1] 2015 c.4, http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted (cf. appendix 3, below); for the draft of Jan. 2014 see http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm (download of 5/14).
[2] Which often have its origins in UK law, e.g. the provisions of cooling-off periods (see below II.2); for public law in this respect see the risk management provisions of SYSC (as below, under VI.2 and appendix 4).
[3] Also the EU-Commission has revived its former plans of European harmonization (see communication from the Commission to the European Parliament and the Council – A more Coherent European Contract Law – An Action Plan, COM (2003) 68 (12th Feb.), no. 49-9 and 74); for scientific comparison s. *Rühl*, Common Law, Civil Law, and the Single European Market for Insurances, 55 (2006) ICLQ, 879 ss. with further references; for further comparison see *J. Burling* et al.(ed.), Research Handbook on Int'l Insurance Law and Regulation, 2011.
[4] As to the scientific issue, it seems to be like in most areas of modern commercial law: there is some regulatory competition between the countries, which leads to a kind of learning process on both sides; see *R. van den Bergh*, in Ehlermann et al. (ed.), European Competition Law Annual 2004, 2006, p. 155, 170 ss.; *H. Herrmann*, ibid. 103, 110 ss.
[5] For the cut-back from 75 syndicates in 2002 to 64 in 2006 cf. Handelsblatt of 7/9/06. p. 22 and *Lechner*, Der Londoner Markt im Umbruch, SIGMA, ed. Swiss Re, 3/2002.; for latest figures cf. Handelsblatt 4/4/2008, p. 25.

American (38 %) and British names and firms (25 %), about 18 % come from the European continent, Munich Re (Apollo) and Gerling Global Re6 are the most important ones. The internationally integrated big insurance groups (iii) dominate the Lloyds market. In 2001/2, a Swiss Re-research team has concluded that a Lloyds market share of 46 % was held by iii-groups.7 The iiis control 21 out of 49 managing agents act for the names which underwrite the insured risks. The most important iiis are:

Name (managing agent)	Capacity	Underwrit./ managed underwrit.
ACE Ltd., Bermuda/Switzerland[8] Takes over Chubb (2015) (now no. 4[9])	900 mrd. BPS 28 mrd. $	99.5 %
QBE Int'l Ins. Ltd., Australia (since 2000 merged to London Market Investment Trust (LIMIT)	830/1.017	78 %
St. Paul, USA	542	100 %
XL Capital, Bermuda	440	100 %
Liberty Mutual, USA	422	100 %
General Cologne Re (Faraday); USA (Warren Buffet)	400	97 %
Western General (Catlin/Wellington, UK/USA) (Catlin taken over by XL Group Plc, 2015)	350/1.094 (biggest 2006/7)	78.5 %
Trenwick (Chartwell), USA	205	99.5 %
Markel, USA	200	100 %
Munich Re (Apollo), Germany[10]	184	100 %
AEGIS, Bermuda	140	100 %
AIG (Ascot), 2nd biggest	118	100 %
Danish Re, USA	113	100 %
Berkshire Hatherway, USA (*Warren Buffet*) BH Specialty Insurance (since 2013)[11]	110	100 %

London market capacity went back from 1997-2000 by around 1/3, but it has stabilized since then. According to *Lechner* et al.[12], the main reasons for the come-back are:

- reforms of the Lloyds market that improved access by iii-groups;
- market advantages (good will of Lloyds);
- the world wide licences of Lloyds' insurers and advanced forms of conflict regulation;
- the British law system.[13]

[6] Name changed to Revios; overtaken by the French re-insurer SCOR since 2006.
[7] The following is based mainly on *Lechner*, op. cit.
[8] Without the take-over of *Chubb* in 2015, cf. HBl. of 7/2/2015, at 32.
[9] Behind AIG, Axa and Alliance, as no. 1-3 in size.
[10] Biggest re-insurance, followed by Swiss Re and the US-competitor *Partner Re*, Bermudas (taken over by *Agnelli* in 2015, cf. HBl. 8/4/2015, at 31).
[11] *A. Dörfner*, HBl. of. 7/6/2015, at 32.
[12] Op. cit., fn. 8.
[13] *Lechner*, op.cit., p. 7.

The Lloyd's business is going to be opened to direct access by German brokers. Until now the syndicates of Lloyd's can only deal with one of the 160 British Lloyd's brokers, who are specially admitted in London. If a German broker, like the market leader Aon Jauch&Hübener, wants to place business at Lloyd's, a London Aon partner must be taken under contract, and an additional brokerage must be paid to him. Some time ago plans have been published to make direct foreign Lloyd's broker business possible.[14] Lloyd's realizes an annual business of 22 mrd. €, only 400 million of which coming form Germany. While Lloyd's brokers do not seem to be amused by the reform, Lloyd's representatives think the German-British market can be broadened remarkably by such modernization.[15] Evidently there would be a big need for good knowledge of British insurance law.

Also the big international mergers can provide an opportunity for German insurance experts to participate in the London market. In 2014/5 the worldwide take over activity is estimated to 64 mrd.$ (58,7 mrd.€)[16], which is more than 200% of the year before.[17] The following list is not complete, but tries to indicate some characteristic data of the participants in the London market.

Big Mergers in the UK (since 1985)	
Royal Insurance/ Sun Alliance Zurich Insurance Group/RSA	Merger of 1996: Royal & Sun/Alliance (**RSA**) take-over offer 8/2015 (7.7 mrd.€)
Commercial Union/ **Aviva** (take over of Friends Life, 2015)	Mergers of 1998/2000: CGNU; since April 02 "**Aviva**" (biggest in UK) (8,3 mrd. $)
Guardian Royal Exchange	taken over by AXA, 1999
Eagle Star	taken over by Zurich Financial Group, 1998
Cornhill	taken over by Allianz/ later by Britannic[18]
Eagle Star	taken over by Zurich
Royal&Sun Alliance (**RSA**)	The take over by the investor Resolution Group of 2004[19] will be outdated by the one of Zurich Group
Life Assurance Holdings	taken over by Swiss Re[20]

[14] Please, see Handelsblatt 7/9/06, p. 22.
[15] *Ibid.*
[16] Even without the planned merger of RSA by Zurich Insurance Group of Aug. 2015, having an estimated value of 7.7 mrd. €, see Handelsblatt of 8/26/15, p. 30 s.
[17] See Fonds Online of 8/7/2015, www.forndsprofessionell.de/news... (download of 8/10/2015).
[18] Please, see Handelsblatt of 12/27/04, p. 18.
[19] *Ibid.*
[20] *Ibid.*

Abbey Life	by Resolution[21], in 2007 by Deutsche Bank
Friends Provident	by Resolution Group (2009)
AXA Life	by Resolution Group and merger with ex-Friends Provident, in 2010[22]
Also 2010: Attempt of take over of AIA Hongkong (AIG-Group)	by Prudential, but FSA interdiction
(Nordea Bank (Sweeden)	by Sampo Insurance, 2011 (Finnland, 21.3%))[23]
Legal&General (biggest life Irer, GB)	by Hannover Rück (HBl., Jan.2012)

The British biggest insurer, Aviva[24], has an all-finance co-operation with the Royal Bank of Scotland (combined in 2008 with FORTIS/Netherlands[25]) and bought the automobile club RAC in March 2005.[26] It realized more than half of its new business of 2004 in continental Europe[27] and about 40 % of its profits from outside the UK.[28] The insurance group has joint ventures with strong banking institutions in many European countries, like France, Italy, Spain and the Netherlands, where ABN Amro has sold 51 % of its insurance business to the Aviva daughter Delta Lloyd and ranked in the Netherlands at no. four.[29] Formerly, Royal&Sun Alliance had the second British ranking in size, but it has suffered a lot as a result of the US asbestos claims in 2004[30] and is going to be taken over by Zurich Insurance Group, if the announced offer will be accepted.[31] of Nowadays no. 2 is Prudential, which has a lot of business in the USA, and is very strong in the Chinese life insurance business. Its total assets were estimated to be about 424.6 billion US dollars in 2013.[32] In spring 2010, Prudential tried to take over the Asian daughter of the state owned AIG Group, AIA in Hongkong, but was

[21] Handelsblatt of 6/8/06, p. 28
[22] Handelsblatt of 7/15/2010, p. 35.
[23] Handelsblatt of 2/11, p. 25.
[24] Total Assets about 48.5 billion $; cf. Prudential with ca. 42.5 billion (Wikipedia download of Sept. 2014); in 2011 Prudential was the leading company in Europe.
[25] See www.de.fortis.com/presse/aktuelles/detailansicht/artikel/gemeinsame-mitteilung...v. 11.10.2007 (download v. 20.8.2008. In 2010 RSA tried to take over Aviva and planned a capital augmentation of 5 mrd. PSt. After dissent with Aviva, however, the take-over was postponed, but not finally given up (Handelsblatt 8/17/2010, p. 32).
[26] Please, see Handelsblatt of 3/10/05, p. 24.
[27] Please, see Handelsblattt of 1/26/05, p. 23.
[28] Please, see Handelsblatt of 5/26/04, p. 20.
[29] Please, see again Handelsblatt of 5/26/04, p. 20; an equivalent can be seen in the German Bank's plan to buy the life insurance business of General Electric UK (Handelsblatt of 4/9/06, p. 31).
[30] Please, see Handelsblatt of 3/12/04, p. 22.
[31] Please, see Handelsblatt of 8/26/15, p. 30 s.
[32] Please, see supra fn 22; Prudential has licenses for 10 Chinese cities, which is even more than the biggest US insurer American International Group (AIG) has.

hampered by the FSA, which interdicted a big capital augmentation Prudential planned for this purpose.[33]

Standard Life Insurance used to be the biggest European mutual insurer, but under the new solvability standards of the Financial Services Authority (FSA), it seems to have been forced to change its legal form to a listed business company.[34] In 2006 it was demutualized and became a public limited company (plc) listed at the London Stock Exchange. The biggest in life risk insurance business is Legal and General (L&G) with global assets of 400 mrd. €.[35] In 2000, the oldest mutual insurer Equitable Life was at the edge of insolvency and had to close its new business because it had promised revenue guaranties for certain pension products but did not care for a solid financial background. Around 800.000 people lost 5,9 mrd. BPS and were not compensated by the UK government, because the internal management allegedly had failed to control the situation early enough, and the former insurance supervising authority, the Ministry of Finance, had been given deceptive information.[36]

b. After BREXIT. The exit referendum of 23rd of June 2016 has been of some surprise, even to well informed people. It seems, however, that it was a foreseeable answer of a majority of British people to the migration policy of the EU since the big movement of Syrian emigrants in 2015/16.[37] While the protest may be against the participation of migrants in the public health care and other instruments of social help, it probably is not against the system of private insurance law and the influences of the EU law, which have been developed since the beginning of the EC membership of GB. As far as these reforms have been transformed into British law, the main structure will be untouched. Nevertheless, some few remarks must be made here.

First of all, the referendum itself is not more than a starting point. Nothing can be changed before the EU-membership will come to an end. This takes some time, at least one year; and one can expect a lot of weakening measures, which will be contracted by the upcoming treaty of exit between the EU and GB (Art. 50 subsec. 2 EU-Treaty), despite the fact that the Commissions president Juncker meant there should not be to much selection of EU-

[33] Handelsblatt 5/6/10, p. 37.
[34] Please, see Handelsblatt of 1/14/04, p. 26 and 1/9/04, p. 20.
[35] Handelsblatt of 8/5/2010.
[36] This was one of the reasons why the more reactive system of the former supervisory law was abandoned by the new Financial Services and Markets Act, s. below V.1, cf. Handelsblatt of 3/9/2004, p. 23.
[37] See *H.W. Sinn*, Das Prinzip Brechstange, HBl. v. 8.8.2016, p. 38.

advantages without taking part in the disadvantages of the full membership.[38] Most interesting will be whether the so called home country principle (HCP) of insurance permission law will be upheld after the BREXIT. Once an insurer has gotten a licence to sell insurance contract in one member country, it can do such business in each further EU-state (passporting principle). The original HCP is part of the European law and cannot apply without an ongoing membership. However, it is possible to contract the HCP in by the separate exit treaty; and this would not be a disproportional selection of advantages, because equal effects will follow for both sides, the UK and each other member country.

Secondly, most of the European private insurance law, which has been transformed to British law, is done by implementation of EU-directives. As shown below, directives need to be implemented by separate national legislation. From this follows that the transformation, once it has been enacted, does not depend on an ongoing membership of the country in which the new law has come into force. It will be shown in the following chapters that BREXIT does not have direct impact to such implementation of EU-directives.

Nevertheless, there will be other harmful consequences like tariff barriers and non-tariff barriers. London will no more be the seat of the EU insurance supervisory body. Many think that the planned London/Frankfurt-merger of the two stock exchanges will no more be feasible. The HCP for EU-marketing protection by registered industrial brands will be finished.[39] All together, the expectations are not very positive, but the UK-insurance market will stay to be an attractive business for Germany as for most of the other EU-membership countries.

2. Why and how to Study British Insurance Law? The mentioned data show still that there is a remarkable need for German practitioners with special knowledge of British insurance law. Additionally one can expect similar developments in other EU-countries. If German experts become successful to offer their service for entry into the UK-market, they will be asked for help by interested enterprises from all over Europe, and especially form the new member states.

The fundamental didactic principle applied here is basing all information on comparative aspects between German and British insurance law. However, basics of constitutional law, procedural law, law of torts and of general contract law of both legal systems have to be fully explained beforehand as an average German insurance practitioner might not have comprehensively studied the relevant German law in the past. This is why chapter 1 contains a more concise version of comparison of German and British law.

A short paper by the author on German insurance contract law in German can be found in the internet under http://www.assurances.de. The paper can be used as a review for having a solid basis for understanding British insurance law, which is dealt with in chapters 2 and 3.

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[38] See *Juncker* verbietet EU-Kommissaren Gespräche mit Briten, Die Welt 6/28/2016.
[39] Cf. London Calling, Ein Votum und seine Folgen, HBl. 6/21/2016, p.12.

The focus of studying should be placed on the subjects of general insurance law explained in chapter 2. The reader will easily detect that chapter 2 neither contains a detailed explanation of the special types of insurance policies, nor gives a comprehensive overview. It is only intended to show some typical characteristics and, by doing it, to give an opportunity to review the subjects of chapter 2 from some aspects of special insurance law.

3. Books, Journals and Case Reporters.

a. General Introduction. The following gives some bibliographical information on the books that relate to chapter 1. For passing the final DVA-test it is not absolutely necessary to read one of those books completely; however, the books can be very helpful in answering questions, which may arise by reading this paper.

Black's Law Dictionary, 6th ed. 1991, and later editions
(special law terms, but not restricted to insurance law)*;*
Blumenwitz, Einführung in das anglo-amerikanische Recht, 6. Aufl. 2003
(best explanation of case law reference systems)*;*
J. Burling et al.(ed.), Research Handbook on Int'l Insurance Law and Regulation, 2011
W. Ebke/M. Finkin (Ed.), Introduction to German Law, 1996
(not written for German students, but some of the following introductory remarks are quoted from this work)*;*
Stevan Gifis, Law Dictionary, New York, 1975 or more recent edition
(short and good for *the* US equivalents)*;*
Heinrich/Huber, Einführung in das englische Privatrecht, 3. Aufl. 2003
(good for making sure that there are no misunderstandings that are caused by a language barrier) ;
F. Lyall, An Introduction to British Law, 1994, 2nd ed., 2002.
(especially recommended for reading in whole or being quoted in the following)*;*
McKendrick, Contract Law, 4th ed. 2010 (for the chapters on general contract law).
K. Purvis, English for the Insurance Industry, 2nd Edition, 2000
(a dictionary that contains legal as well as special insurance business terms);
Websters Collegiate Dictionary, 11th. Ed., 2003, similarly available online under
http://www.m-w.com (best for checking if a term is still commonly used abroad, especially in the USA).

b. Insurance Law. A good student always reads a script or a book by his/her professor and at least one additional book by another author. Only by this strategy one can avoid becoming influenced by only one side. This wisdom is even more important in the field of comparative law because there it is a must to have read at least one book of a native speaker, who is originally educated in a respective foreign legal system.

***J. Birds*, Birds' Modern Insurance Law, 10th ed., 2016** (ca. 59 PSt, best to be read for further preparation; earlier editions are quoted Birds et al.)*;*
(also Birds, Insurance Law in the UK, 2nd ed., 2014, 83 €)
Collinvaus's Law of Insurance. 10th ed. , Vol.1-3, 2014 (ca.1.300 PSt.);
O. Gurses, Marine Insurance Law, 2015;
Lowry/Rawlings/Merkin, Insurance Law, Doctrines and Principles, 3rd.ed., 2011;
MacGillivray, Insurance Law, 12th ed. 2014 (873,- PSt.; e-book 324 $)
Mac Gee, Modern Insurance Law, 3rd ed. 2011;
G. Rühl, Common Law, Civil Law, and the Single European Market for Insurances, 55 ICLQ

(International and Comparative Law Quarterly, 2006), 479;

German Books for Comparison:

G. Rühl, Vereinigtes Königreich und Republik Irland, in: Basedow/Fock (Ed.) Europäisches Versicherungsvertragsrecht, 2002, p. 1377-1520 (in German)*;*

P. Schimikowski, Versicherungsvertragsrecht, 5th ed. 2014 (for a short and clear brush-up of German insurance law)*;*

Wandt, Versicherungsrecht, 5th ed. 2010*;*

Beckmann et al., Versicherungsrechts-Handbuch, 3. Aufl. 2015

c. Case Law Reports, Statutes' Publications and Law Encyclopedia. While statutes have to be published before coming into force, British judges are not required to write down their decisions. They do, however, very often have manuscripts of it, which they leave to the barristers of the case. The publication lies in the hands of the private institutions.[40] The following contains an alphabetic list of common publications of case law as well as of statutes and statutory instruments.

All England Law Reports, abbreviated All E.R.
(contains court decisions of all levels; best general source beside Law Reports; please, see below);

M. Brown (ed.), Butterworths Insurance Law Handbook, 14th ed. 2013 (fully revised)
"Current Law" Statutes Annotated (since 1948) (contains more recent statutes but not decisions);

Halsbury's Statutes of England, 4th ed. 50 vol., 1989 (also online)
(the best source; good for special introductory information to nearly every field of British law)

Lexis via Internet, available at the FAU Erlangen-Nuremberg as in many other libraries.

Law Reports (best general source beside All E.R.)*;*

Lloyd's (List) Law Reports, abbreviated Lloyd's Rep. (best source especially for insurance law).

d. How to Quote Court Decisions? For a better navigation through an abundance of quotations in the British case law, the following key of abbreviations may be useful[41].

AC	Law Reports, Appeal Cases
All E.R.	All England Law Reports
Ch.	Law Reports, Chancery Division
Fam.	Law Reports, Family Division
KB	Law Reports, Kings Bench Division
Lloyds' Rep.	Lloyd's (List) of Law Reports
P.	Law Reports, Probate, Divorce and Admiralty Division
Q.B.	Law Reports, Queens Bench Division
W.L.R.	Weekly Law Reports

4. Anglo-American Law Family and Cultural Aspects. The distinction of legal families gives an overall explanation to certain particularities which are common in a group of some countries, while they are unknown or essentially less performed in others.

[40] Please, see *Wegerich*, Law Reporting in England, ZEuP 1996, 610.
[41] For further abbreviations see *Derek French*, How to Cite Legal authorities, 1996.

a. Legal Family Characteristics and Historical Background. For the purposes of law comparison, it is, of course, extremely helpful to know about the family connections and differences. While there are much more detailed family distinctions, a dual division of law systems of the Western countries is a basis for comparing German and British insurance law.

Roman	Anglo-American
France	UK (exceptions in Scottish law)
Spain	USA (exceptions in Louisiana)
Italy	Canada (exceptions in Québec)
Portugal	New Zealand
(Germany, Austria, Switzerland, etc: a so-called German legal family)	Australia, Ireland
	Hong Kong
Shaping of law principles and dogmatic systems	Case by case reasoning
Binding force of court decisions inter parties	Precedents/stare decisis rule and distinguishing
Academic law professions	Law professions of practitioners
Prevailing legislation by Acts of Parliaments	A relatively small field of statutes (precedents are still binding)

First of all, one has to understand that the Anglo-American law family has developed mostly on the cultural basis of principles of legality, which have it's origins in the famous magna charta libertorum of 1215 and it's key provision of nulla poena sine lege (no punishment without legal basis).[42] The punishable action must have been forbidden in written form before the time of violation. The liberal effects are evident, since punishment did no more depend on the power of the punishing person only, but on a legal document, which contained a general regulation, and which had to be published before the time of the alleged criminal action.

Of course, the feudalism remained unbroken[43], and the lack of power of the poor people became so much unbearable that the desire to leave the country for reasons of freedom became more and more important, until the famous Mayflower left old England and went to North-America in 1620. There a long struggle for independence had to be fought, which finally led to the war of independence and to full autonomy from the dominance of the English crown. While the declaration of independence of 1776 in Washington, D.C. is a milestone in the development of liberalisation, the nulla poena principle became renewed in England in 1679 by the Habeas Corpus Act, when religious freedoms where to be protected. The basic conflict between the Catholic Church and the Protestants spread to the Netherlands already in the 16th century, when the Spanish Duke Alba ordered an assassination of all Protestants in most countries of the modern Netherlands. His famous political counterpart William of Orange the Silent (*Wilhelm der Schweiger*) not only cared for the liberalization of the Spanish government but also founded a famous philosophical advisory group, which developed into the Habeas Corpus Act in England of 1679.[44] The further development to the Bill of Rights in Northern America of 1776[45] cannot be explained but by the liberty protection purposes of Habeas Corpus.

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[42] Art. 39; further principles are the liberty of the Church of England (Art. 1) and the proportionality of criminal punishment (Art. 24).

[43] Cf. *J. Joffe*, Bibel der Freiheit – Vor 800 Jahren entwarf die Magna Charta den heutigen Rechtsstaat, Die Zeit 6/15/2015. p. 10.

[44] Being based on the English *Magna Charta Libertorum* of 1215; please, see *Fikentscher*, Zwei Werteebenen, nicht zwei Reiche: Gedanken zu einer christlich-säkularen Wertontologie, in: id. et al. (ed.), Wertewandel, Rechtswandel, 1997, S. 121, 125 ff.; *Herrmann*, Das wertphilosophische Leitbild persönlicher Verantwortung und Toleranz im internationalen Kartellrecht, in: Herrmann/Voigt (ed.), 2004, p. 63, 66.

[45] For further reaching influences until the emergence of competition principles of economic law see U.S. vs. Topco Assoc., 405 U.S. 596 (1972): "Antitrust laws…are the Magna Carta of the free enterprise. They are as

As to the constitutional law, the English Parliament, existing even since 1066, got a second representation board, recruited by citizens and with far reaching powers besides the one representing certain privileged nobles, already in 1341. The House of Commons was constituted as a counterpart of the House of Lords, despite the fact that the "upper" House was still the dominating part. As different from France and Germany, it did not need a revolution in England to transform the Parliament into a democratic legislator, and to change the political system into a real democracy. One still has a crown instead of a president, and it was as late as 2008 that one separated the jurisdiction from the House of Lords by constituting an independent Supreme Court of the UK, but the roots of democracy and of liberalism reach back to the middle ages, and it might be this why the attitudes of traditionalism are much more popular in this country than in any other state of the developed western world.

Last, not least, the economic federal system of the Common Wealth is much older than the one of the EU. While the European Economic Community (EEC) has been built up in 1957, the Common Wealth treaty is of 1926. Instead of the former colonies the treaty regulated equal rights for each member state; and the principles of equal cooperation of autonomous member countries reached from Australia and New Zeeland to Canada and from Scotland to South Africa. It is probably not untrue to say that the practice of globalism has it's origin in the British Common Wealth. And here one can see the most important origin of the constitutional pluralism of globalisation, the concepts of which unanimously aim to constitute a legal framework for the growing transnational business relationship of enterprices.[46] May the detection of America be the onus of the Spanish Columbus in 1496, and may the invention of the freedom of world trade have it's origin in the Netherlander's Hugo Grotius' work on De Mare Liberum of 1609, the British law tradition must be understood as an organisational cornerstone for the development of global commercial relations and the beginning of transnational constitutional pluralism.[47]/[48]

b. Unwritten Constitution and Fundamental Rights. Unlike most western countries, Britain does not have a formal written constitution; put differently, British Constitution does not exist. But, although there is no formally adopted document or documents that can be defined as a 'constitution', there is clearly a UK constitution within a broader meaning of the term.

(1.) There is a **system of separated government powers**, i.e. a set of rules that regulates the government of the country and provides for the working of the main and subordinate legislation, the executive of the UK in general, England, Scotland and Wales, and the court

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important to the preservation of economic freedom…as the Bill of Rights is to the preservation of our fundamental personal freedoms"; cf. *A.J. Meese*, Liberty and Antitrust in the Formative Era, 79 B.U.L.Rev. 1 (1999), also published under www.scholarship.law.edu.

[46] For deeper analysis of the variety economic and sociologic law perspectives see *N. Walker*, in Modern L.Rev. 65 (2002) p. 317-359, as quoted in *G. Teubner*, Verfassungsfragmente, 2012 at 62 ss.; to the view of societal constitutionalism see *D. Sciulli*, Theory of Societal Constitutionalism, 1992 and *Teubner*, op.cit., at 14 and 67 ss.

[47] Cf. again the references of the fn. before, despite the fact that law history aspects are lacking. While there is a lot of research on the roman roots of European law tradition (see *H. Coing*,), the importance of the Anglo-American law family to constitutional pluralism seems to be relatively unscrutinized (but see – for the constitutional law in the sense of public law – *O. Höffe*, Vision Weltrepublik, in D. Ruloff et. al. (ed.), Welche Weltordnung?, 2005, p. 33 ss.; for aspects of "Global Governance" see *I. de la Rasilla del Moral*, Internat. J. of Const.L. 8 (2011), p. 580 ss.).

[48] The actual referendum of Scottish independence of Sept. 2014 must also be seen in this context, because it does not only touch the federal system of the UK and the EU, but also the membership of Scotland in the Commonwealth. It is one of the most interesting questions of these developments, how the reactions to the growing economic interest of autonomy will be, without loosing the advantages of belonging to certain federal systems.

structure of England/Wales and Scotland. These rules are contained in a numerous constitutional material and is now enacted formerly by the Human Rights Act 1998. It is important to remember that the British constitution has never been 'adopted', rather it has grown over the centuries, with few major or 'catastrophic' alterations. It has evolved rather organically than logically, dealing with problems as they arose with a minimum of fuss. The result is a constitution, which is neither elegant, nor rational, but one that has the merit and is adaptable to the changing requirements of the years without much fuss or anxiety. In short, it is 'pragmatic' and functional.

(2.). Why does the UK not have a written constitution? The British constitution has not had the benefit of being framed or adopted as a deliberate act of policy. The UK had no people responsible for officially negotiating and settling the terms of the constitution. This is due to the British history or a lack of an element common in other countries that have a written constitution. The modern notion of a 'constitution' came on the scene with the American Independence and the French Revolution; but, even before, and certainly since that period, the UK has not experienced a sudden change in its political tradition, which has been influenced by a conquest, a revolution or an independence movement. The British 'revolution', such as it was, came in the middle of the 17th century, when the Westminster Parliament established its dominance over the Crown. Thereafter matters were adjusted from time to time but had never been a deliberate and a wide-ranging act of policy.

To put differently, to say that the British Constitution is unwritten means there is no single document or even a group of documents that one can study. Thus, one does not refer to 'Article I of the Bill of Rights' which is appended to 'The Constitution of the United Kingdom'. In fact, it is wrong to say 'the UK constitution says ...' in the UK context. Rather, the UK constitution is made up of a number of rules that are contained in statute and other legislation, together with the decisions of courts in particular cases, traditions and other practices.

But things are changing. Important constitutional developments have already taken place in Scotland and Wales. Reference may now be made to the European Convention on Human Rights and its Protocols as incorporated into British Law by the Human Rights Act 1998, and the devolutionary statutes in cases where previously in Britain one had to burrow, synthesise and generalize from cases and legislation, practice and custom in instances where in other countries one would look to a constitutional provision on a matter of human rights (e.g. providing for freedom of assembly or from arrest, or freedom to practice one's religion),

That mentioned, not having a formal constitution has several important corollaries, which can be useful. One is that the amendment or change of a rule of constitutional importance is often a simple matter in law. What in another country would involve an amendment to a constitution and (perhaps) a special and/or complicated procedure, can usually be simply achieved by an ordinary statute in the UK. However, although change is thus legally simple, it can be difficult in practice because non-legal factors, such as tradition and history, play an important role, to say nothing of prejudice and parochialism. Additionally, the Human Rights Act 1998 has established that senior courts may declare legislation to be incompatible with the rights granted under the European Convention on Human Rights as incorporated by that Act. It is important to note that this is not the same as declaring legislation invalid; in fact, government notifies the Parliament that the matter should be considered, and, if deemed desirable, be rectified. Parliament, however, is a final arbiter. The possibility of such 'incompatibility' will be a deterrent to the easy change of the UK law.

(3.) Significant statutes within the British constitution. The Human Rights Act 1998 has been already mentioned. There are other historical points of major constitutional significance where legal arrangements have been made to cope with particular matters. The (English) Magna Carta of 1215 is famous. The Petition of Right 1628, the Act of Settlement 1701, the Acts of the English and Scots Parliament that arrange for and implementing the Treaty of Union between England and Scotland of 1707, the Roman Catholic Relief Act 1829, the Reform Act 1832, the Supreme Court of Judicature Act 1873, the Parliament Acts 1911 and 1949, the Statute of Westminster 1931, the Crown Proceedings Act 1947, the European Communities Act 1972, the Supreme Court Act 1981, the Scotland Act 1998, the Government of Wales Act 1998 and the House of Lords Act 1999 - all these, as well as many other statutes, are of great constitutional importance. Nonetheless, they remain ordinary statutes, enacted by the appropriate and non-special legislative process and susceptible in law at least to amendment or repeal like any other statute that is subject to what has just been stated regarding the Human Rights Act 1998.

(4.) Fundamental Rights – Idea and Functions. In most legal systems fundamental rights are guaranteed, and their list is provided; often in a form of a catalogue that is a part of the constitution. The legislature, executive and judiciary branches of the government are not allowed to infringe upon these liberties. Additionally, some provisions are made for the court(s), or a particular court to have jurisdiction over determining and deciding disputes as well as declaring actions or legislation, which contravene fundamental rights invalid. Within Britain, fundamental rights are protected by the Human Rights Act 1998 (this issue is discussed below). But first let's outline the discussion that led to the UK passing of the Convention only in 1998 after having ratified it back in 1953. It should also be noted that the rights that were under the 1951 Convention, as amended, have been incorporated into the British law. The 1998 Act, however, does not incorporate the European Social Charter, nor a move that seems to be very unlikely.

As mentioned above, the UK does not have a formal written constitution and therefore does not have a catalogue of fundamental rights and freedoms as part of such a constitution. For many years, there were (mainly academic as well as ones led by some pressure groups) discussions whether, in the absence of the constitution, a statutory Bill of Rights could be competent and effective. Difficulties were catalogued. It was argued that the principle that no parliament can bind its successor militated against the enactment of the Bill of Rights. Were such a Bill made into law, and the courts given the right to measure later legislation against its standards, the judicial oath of office would result in the departure of courts from, or undermining, the widest view of the parliament's sovereignty. On the other hand, statutory Bills of Rights had been enacted in parts of the Commonwealth. For example, it has been enacted into various Canadian provinces (notably Ontario) prior to the Canadian Constitution of 1982, so there was some precedent for such a step within the Common Legal family.

For many years, therefore, statute and case law in Britain dealt with and protected matters which were classified as human rights and fundamental freedoms elsewhere. That tradition ante-dated catalogues of human rights, which were adopted elsewhere during periods of substantive constitutional and political change. Increasingly, however, voices of dissatisfaction were raised, and the Labour government incoming in 1997 determined that incorporation of the Convention rights should be one of its aims. This has resulted in the Human Rights Act of 1998.

(5.) Human Rights Act and Particular Fundamental Rights. The Human Rights Act 1998 incorporates into municipal law articles 2 to 12 and 14 of the 1951 European Convention on Human Rights and Fundamental Freedoms, articles 1 to 3 of the First

Protocol, and articles. 1 and 2 of the Sixth Protocol as read with articles 16 to 18 of the Convention. The incorporated provisions are set out in Schedule 1 to the 1998 Act. The Act came into force generally on 2 October 2000.

Although the enforcement of fundamental rights may now involve the application of the Human Rights Act 1998, the fact remains that many rights, now categorized as fundamental, were and are protected under the ordinary law of the land. However, time may prove that in some areas the rights under the Act are more extensive than those under common or statute law.

Personal freedom is assured in both England and Scotland through statutory requirements and case law dealing with its infringement. Powers of arrest are largely codified for England in the Police and Criminal Evidence Act 1984, but in both jurisdictions these powers remain difficult to understand completely. Police have slightly greater powers of arrest than do ordinary citizens. Bail is normally granted, except in the most serious cases. In England habeas corpus proceedings can secure the release of someone unlawfully detained. A similar result can be obtained in Scotland through an appeal to the inherent powers of the superior courts.

Privacy is not a recognized category in law, although various remedies can be used to defend against some invasions of privacy. Defamation, trespass, nuisance, breach of confidence are typical common law actions that could be used, and one or two recent cases have indicated a willingness on the part of courts to protect media personalities from undue publicity. Evidence of criminal conduct obtained in breach of privacy is, however, often admissible. However, specific rules exist in the Interception of Communications Act 1985 under which mail or telecommunication facilities may be scrutinized by officials only in terms of a warrant granted by a Secretary of State, a change to the law following upon a case under the European Convention.

Freedom of speech and expression is limited by the remedies available to others by a defamation action, by the rules regarding contempt of court, and by the law on obscene publications. Sedition and treason remain criminal, but no trials on such grounds have taken place in times of peace for decades. Controls on the media exist, but cannot be commentated here in detail.

Freedom of association is subject to little regulation, save in political matters in that the organization of a quasi-military association is banned under the Public Order Act 1936, and membership and support of named organizations can be proscribed under the procedures of the Terrorism Act 2000, the successor of legislation first enacted in 1974 specifically to deal with Northern Ireland terrorism, but now available on a world-wide basis. There are also some restrictions on trade unions and similar associations in areas of employment where there is a national security interest.

Freedom of meeting and assembly is subject to rules concerning trespass, obstruction and some local regulations. Processions were first regulated before the Second World War in the Public Order Act 1936, passed to give power to control fascist marches in the east end of London, and are now further dealt with by legislation enacted in recent years. The Public Order Act 1986 extends the 1936 Act and provides for the giving of advance notice of certain processions and a police power to give directions as to route and other conditions. Where a chief police officer fears the police ability to cope with a notified procession is insufficient a banning order may be sought from the local authority. In Scotland similar provision is contained in the Civic Government (Scotland) Act 1982. There notice is given both to the police and to the local authority, and on the advice of the police the authority can ban a procession or impose conditions. In Scotland there is an appeal to a Sheriff against a banning order. In England the local authority or the police would be subject to judicial review.

Freedom of conscience and religion is extensive, although in England a prosecution for blasphemy of the Christian religion may still occur. Other religions are not similarly protected. A Bill to deal further with terrorism, introduced following the attacks on New York and Washington DC in September 2001, included a clause prohibiting the incitement of religious hatred. After much debate between the Houses, this clause was dropped on the grounds it restricted freedom of speech, but the topic may be the subject of separate legislation. Civil restrictions based upon religion are obsolete. The practice of religion is unhindered, save that some rites and ritual requirements may contravene other laws - e.g. cruelty to animals.

Discrimination against a person on ground of race is unlawful under the Race Relations Act 1976, which replaces legislation of 1965 and 1968. Treating a person less favorably on ground of race directly, or indirectly, for example by imposing some requirement which is racially connected, is dealt with. Employment, education, qualifications, access to clubs, the provision of goods and services are all examples of areas under which race discrimination is proscribed. Enforcement is through a complaint procedure to a court or, in appropriate cases, to an industrial tribunal. In addition a Commission for Racial Equality is established to administer the Act and in necessary cases to assist someone bring a complaint to the court system. Discrimination on grounds of sex is dealt with under two Acts which are congruent with the EC requirements on discrimination. The Equal Pay Act 1970 is self-explanatory; women are to be paid the same as men for similar work, or for work that has been officially rated as equivalent to work following a full evaluation, or where collective bargaining has so agreed. The Sex Discrimination Act 1975 (as amended) is of broader ambit, and conforms with the Equal Treatment Directive, Council Directive 76/207/EEC. Treating a woman less favorably than a man on account of her other sex, or the converse (except for maternity provisions), treating a married person less favorably than an unmarried, and victimization of someone invoking the legislation, are all unlawful. Indirect discrimination, for example, by imposing a requirement that only a man (or a woman) can fulfil, is also unlawful. An Equal Opportunities Commission is established under the 1975 Act to investigate possible breaches of the law, and with power both to take action itself through serving a notice on someone to cease discriminatory practices, and in certain cases to bring matters to court. The Commission can deal with a matter, whether or not a complaint has been made to it.

The Disability Discrimination Act 1995 both brought together earlier patchy legislation, and more generally prohibits discrimination on ground of disability from employment, access to financial services, and the like. A National Disability Council, now a Commission under the Disability Rights Commission Act 1999, both advises and now can investigate and take action to combat discrimination based on disability. The Special Educational Needs and Disability Act 2001 now deals with disability matters in relation to schools, higher education and universities.

(6.) The legal protection of fundamental rights. Prior to the incorporation of the Convention rights specified in the European Convention on Human Rights by the Human Rights Act 1998, British law did not contain a list of fundamental rights to which appeal might be made. It was not competent for a court to decide a case on the ground that it contravened any such list, nor on the ground that a person or public authority had acted in a illegal manner of such a list. That has changed with the 1998 Act. However, as noted in the immediately preceding section, a court may, however, deal with a question of right or duty arising either under the common law or under statute. A public authority was and is under a duty to comply with the law, including any relevant statutory provision requiring observance of what we now label as a 'human right'. That remains the case. And if the matter is not dealt with to the satisfaction of parties, the procedures under the European

Convention on Human Rights can still be invoked. As the UK recognizes the right of individual petition, and the compulsory jurisdiction of the Court, it has been a party to many cases, as well as involved in proceedings which did not go as far as the Court. As a result of such proceedings and cases UK law has been amended, as indicated during the discussion of individual rights above. In addition, as also noted above, such bodies as the Commission for Racial Equality and the Equal Opportunities Commission have investigative and enforcement functions.

In addition, however, one could note again that fundamental rights and freedoms are now protected by the Human Rights Act 1998, which both requires public authorities to act in accordance with its protection of those rights and freedoms (s. 6), and provides a mechanism through which that requirement can be enforced. As already indicated above, the 1998 Act incorporates into municipal law articles 2 to 12 and 14 of the 1951 European Convention on Human Rights and Fundamental Freedoms, articles 1 to 3 of the First Protocol and arts. 1 and 2 of the Sixth Protocol as read with articles 16 to 18 of the Convention. The incorporated provisions are set out in Schedule 1 to the 1998 Act. The Act came into force generally on 2 October 2000, but was in force for Scottish authorities from the inception of the Scottish Parliament and Executive eighteen months earlier.

One mechanism for enforcement of the Act is contained in s.7 and consequent provisions. A person who is or may be the victim of an act unlawful under the Act may bring proceedings in an appropriate court or tribunal, or rely on the Convention right in a legal proceeding (e.g. a criminal trial). In an appropriate case damages may be awarded (s.8). More importantly, a court may consider whether legislation is compatible with a Convention right. By s.3 of the Act a court is required 'so far as possible' to interpret primary and subordinate legislation so as to give effect to Convention rights. But by s.4 of the Act, in an appropriate case a higher court may make a declaration that primary legislation (i.e. an Act of Parliament) is incompatible with the Convention rights, the Crown having been given opportunity to be heard on the matter. In the case of subordinate legislation, a higher court may make a declaration of incompatibility in relation to the statutory provision which is the basis of that subordinate legislation. In the case of both statute and statutory instrument the power of a higher court to make a declaration of incompatibility is permissive - the court does not have to make such a declaration, and obviously is likely to do so only in important instances. However, the effect of such a declaration is merely to draw the matter to the attention of the legislature. It does not affect the decision in the case under consideration (s. 4(6)). It therefore is possible for someone properly to complain of a breach of a Convention right, and that to be agreed to be a breach by a court, but to lose the case itself. In an appropriate case the legislation will be altered, by ministerial order in the case of subordinate legislation, and by Act of Parliament in others. Where the European Court of Human Rights gives a decision in a case, not necessarily involving the UK, as to the content of a Convention right, and UK law differs, the government may take appropriate steps to amend UK law.

Another mechanism that is contained in the 1998 Act and deserves a mention is the requirement under s.l9 that in introducing a bill in Parliament a Minister of the Crown must, before the Second Reading, make a statement either that the bill is compatible with the Convention, or that, while it is not so compatible, the government wishes the House to continue with the legislative process on the bill. In short, the Human Rights Act provides no basis for the judicial system to strike down, quash or hold unconstitutional a piece of legislation on the basis that it contravenes a fundamental right. In the UK the Westminster Parliament remains supreme.

(7.) Comparative Aspects of German Law. German law, in contrast to the British one, has a written constitution, the Grundgesetz (GG), and a Federal Constitutional Supreme

Court, the Bundesverfassungsgericht. Before summarizing some of the basic regulations of both legal systems, let's take a look at a practical example, which is taken from insurance law and its constitutional basis.

Example: Under the Insurance Companies Act of 1982, insurance agents had to register with the Secretary of State, and for this purpose they had to prove a certain educational background in insurance economics and insurance law. An equivalent to this regulation has been discussed in Germany since the European Community enacted the Insurance Mediation Directive of 2002. This regulation has now been enacted by an amendment of the VVG (since May 2007) which implements a European directive (deadline Jan. 2005). While in Germany many scholars have raised the question of constitutional conflicts, the British Act of 1982 has never been discussed under constitutional aspects. The same is true regarding the more recent provisions on agents of the ICOBS 2008[49] and the Consumer Insurance (Disclosure and Representation) Act, 2012.[50] Insurance contract mediators have been burdened by far reaching duties of information and warning obligations, but the question of violation of the constitutional right of free profession has not been brought to the SC.

The first Basic Law of Germany was the Weimar Constitution (Weimarer Reichsverfassung) of 1919, which was replaced by the Basic Act (Grundgesetz) after the Second World War. It was adopted by the parliaments of the member states (Bundesländer) and came into force on May 24, 1949, which was only shortly before a separate East German State, the German Democratic Republic (GDR), was established with the support of the USSR on October 7, 1949.

According to the Constitutional Court, the right to freedom of a person, as guaranteed in Article 2 I GG in connection to Article 1 I GG, functions "to secure the narrow personal sphere of life and the maintenance of basic needs which are not conclusively guaranteed by the traditional concrete rights to freedom. This need arises also in view of modern developments and the consequent new dangers for the protection of the human personality." Thus, the protection of human dignity, the copyright in one's own image, right of self-determination and spoken word also fall into category.

A further fundamental right is the general equality principle, which is contained in the Art. 3 GG. It does not mean, however, that all people are always to be treated the same; rather, it is the duty of the public authorities to differentiate only on material grounds. Thus, the prohibition of Article 3 I GG can be formulated as follows: Like is to be treated alike, and unlike is to be treated unlike according to the differences and characteristics. The equality principle is breached when there is no sensible ground arising from the nature of the matter in question or other materially evident ground for the differentiation or unequal treatment, or when a ruling must be described as arbitrary.

Several legal principles are derived from the principle of equality. It is valid for the entire law, and its effects in criminal law, tax law, civil law, labour law, social welfare law or procedural law cannot be considered in detail here. Instead, some of fundamental rights are explained, beginning with the freedoms of opinion and press.

Art. 3 sec. 1 GG promulgates the freedom of opinion and protects the free expression of a "statement." The Constitution protects every opinion, conviction, comment, evaluation, judgment, whatever subject or person may be concerned. Also the freedom of press is protected by Art. 3 sec. 1 GG and includes all printed works intended for circulation.

[49] See below III.2a and 3.
[50] See Appendix, at p 97, as discussed in ch. III.5.

Indirectly it protects auxiliary activities important for the functioning of the press, though the Federal Constitutional Court usually limits it to internal press activities, i.e., those organizationally integrated with the press business. External activities are generally protected by other fundamental rights, particularly the right of free profession under Article 12 sec. 1 GG (please, see below).

Individual property as well as all vested rights and goods is protected under Art. 14 I GG. Even the right to run a commercial enterprise has been held by the Federal Constitutional Court to fall under the concept of property, and subjective public rights are included (BVerfGE 53, 289). While Art. 14 GG protects the existence but not acquisition of property rights, the acquisition is protected by the provisions listed in Art. 12 GG. Additionally, Article 14 GG protects the use as well as the existence of property so that the expropriation is only possible by a legislative act of parliament for the good of general public only when compensation is provided.

c. Sources of Law and Precedents. In a case legal system, like the British one, court decisions are the main source of law. However, statutory law also exists and, in principle, has a higher authority. Legislation is the creation or an amendment of the law through a formal process of enactment which is acknowledged as law-making within a state or an association of states. While parliaments legislate, ministers can issue decrees (statutory instruments in the UK). The European Community also makes legislation through its forms (directives, regulations etc.), which is effective within Britain. Within Britain the supreme legislature is Parliament, that meets at Westminster; however, there is also a Parliament for Scotland, which assembles in Edinburgh and has evolved its legislative powers after the implementation of the Scotland Act 1998. Its legislative powers will not be explained in more detail here.

The Parliament of the United Kingdom, composed of the House of Commons, House of Lords and the Crown, is a supreme legislative body within the UK. A piece of legislation produced in accordance to its procedures is known as an Act of Parliament, or a Statute. In constitutional terms, an Act or a Statute is a piece of primary legislation. A public general statute is presumed to apply throughout the UK. Statutes applicable only to England and Wales, or only to Scotland, usually state this in their terms, or are restricted by necessary implication - thus, an Act amending a previous Act that applies only to Scotland may be presumed to apply only to Scotland.

Most Acts of Parliament come into force on the date that they are prescribed. If, however, the Act gives no such date, it comes into effect on the day it receives the Royal Assent. Increasingly, however, practice is that the whole or parts of an Act are brought into effect by the issue by a minister’s Commencement Order that has power to make the order contained in the Act. This is particularly convenient when the Act requires some additional action or an event to occur before the law can be altered.

Secondary legislation has the same statutory force as a statute. This form of legislation is made under parliamentary authority. A major difference, however, is that secondary legislation can be challenged as to vires in courts. In Britain, government ministers or civil servants have no intrinsic power to legislate; so, authority must be given to them for each instance. A statute, which delegates such power, is known as a Parent or an Enabling Act. An exercise of delegated power which does not conform to the terms of the delegation either by faulty procedure, or by not corresponding to the purpose for which the delegation was made, can be struck down by the courts as being ultra vires. Where the delegation is to a minister of the Crown, or to the Crown itself, and the Enabling Act requires the delegated power to be exercised by statutory instrument and may be subject to special parliamentary controls under the Statutory Instruments Act 1946.

There is a hierarchy of legislation. Statute is superior to statutory instrument, unless the statute provides differently. No statute is protected from repeal or alteration by special legal requirements. Delegated legislation cannot lawfully transgress the limits of the power delegated or procedure required for its making. A later statute will repeal an earlier one. The position is the same in European Community law, so that later Community law overrides an earlier statute. However, an earlier European Union’s law can override an Act of the UK Parliament in the British statute.

Case law is very important in both British legal systems. It has two major aspects, a first one in the application of legislation and second one in the development of the Common Law. Legislation has to be applied by the courts in individual cases. The elaboration of the concepts of law by the courts as well as it is presumed to be known to Parliament and use words in the sense in which the courts have determined their meaning. Thus, interpreting a word or a phrase in a statute is authoritative in determining the meaning of the statute. While interpreting legislation, the court regards the literal meaning of the words used, the issue that is dealt with, or a general trend of the legislation that uses the plain meaning of its words (provided that an absurd result is not produced). Aids to interpretation internal to the legislation, such as a 'definition section' are necessary. A previous determination by a higher court as to the meaning of legislation binds a lower one (judicial precedent).

In cases where a case involves determining a question of Common Law, a court has a greater freedom. Thus, the court looks at previous cases and the exposition by judges of the principles of the Common Law upon which that case was decided. It may also refer to other authority, including one of scholarly discussion. Questions of judicial precedent will arise where the matter has previously been considered by a court. An earlier (precedent) case

discussing the same question of law is said to be 'in point', and its effect on a later case will depend on a number of factors. Where the earlier case was decided by a court superior to and within the same court hierarchy as the later court, its decision forms a precedent binding' on the later court.

In case the earlier decision was made by a court of equal or lower status, the earlier decision is merely persuasive. Where the earlier court is not within the same hierarchy, the earlier decision is also persuasive. The degree of persuasion varies according to the personnel of the earlier court, and the degree to which their opinions are well-thought out and convincing. The decisions of the European Court of Justice on matters of Community Law, however, are binding on British courts. Under the Human Rights Act 1998, the jurisprudence of the European Court of Human Rights is to be applied by the UK courts in appropriate cases and in determining rights and duties under that Act.

A logical question arises, whether a court binds itself. Until 1966, the House of Lords considered itself bound by its own decisions in English, but not in Scots appeals. Now, prior decisions of the House are persuasive but are not bound in either English or Scots cases.

If a court considers a 'precedent,' it is important to consider the 'ratio decidendi. The ratio is the reason for the decision, the point of law essential to the decision. Comment on other related points by the court is said to be 'obiter dictum'. Obiter dicta are ex hypothesi that are not binding because they are not rationes, but a well-expressed obiter statement of law can be highly persuasive. Usually, a court faced with an unwelcome precedent can 'distinguish' the earlier case from the one before it, either by perceiving a difference of fact or by construing the ratio of the earlier case in a manner not inconvenient to the decision it wishes to make in a later case.

Example 1: If the SC, e.g. would have held in an earlier decision on disclosure duties of a customer of a health insurance contract, that migraine had to be mentioned, because migraine is a sickness, lower courts are bound to this opinion as a strict authority. Occasional headache, however, can be taken as not to be a sickness, because there are factual differences (so called differentiation from precedents).

Example 2: A further kind of differentiation is possible if circumstances have historically changed. An example can be seen in the development of internet contract law. The overriding principle is that the so called consumer information must be given in textform. Let us imagine that a SC decision has held a telefax as textform without further preconditions. Later decisions seem to be possible providing for download requirement, just as the German SC has done,[51] because a telefax is different from an e-mail in technical circumstances.

5. State Authorities. The next step in comparing the British and the Roman (German) legal families is to provide an institutional overview, beginning with some aspects of the governmental organization and the financial constitution (a.), the actual reform of the financial market stability control (b.), the national health and social security law (c.) and the constitution of courts (d.).

[51] BGH v. 15.5.2014, Az. III ZR 368/13.

a. Governmental System and Financial Constitution. As there is no formal written British Constitution, there is no document where one observes the nature of constitutional assertions and their girding principles. From this one can see that Britain is not a republic in classic sense. Instead, it is a unitary democratic state with a constitutional monarchy. However, one might point out that it is a prototype of an “elective dictatorship” because after being elected the governmental dominates the legislature at least while holding office with a clear majority. Although certain concessions are made to Wales and Scotland within the governmental structure, Parliament at Westminster and the government in Whitehall remain the central law-making and executive branches of Great Britain. That the UK is a democracy is clear, although only one of the Houses of Parliament at Westminster is elected. According to the Parliament Act 1911, a parliament has a life of five years, unless it is dissolved before that period or prolonged by its own legislation. The 1910 Parliament was prolonged until November 1918, and that of 1935 until June 1945, both under the special circumstances of armed conflict. Since the 1911 Act no parliament has been dissolved by operation of law. Practice is that the Prime Minister requests the Crown to dissolve a parliament and for a general election to be held either because he has lost a vote of confidence in the Commons, or because he thinks his party is likely to win at a particular point during the life of that parliament. In the latter case, since 1945 Prime Ministers have been right as to the outcome of the election in more than half the instances.

Three major aspects to the financial constitution of the UK shall be explained, the role of the Treasury as a department of government, the position and function of the Bank of England, and the area of investment regulation and investor protection. The function of the Treasury, headed by the Chancellor of the Exchequer, is to deal with the economic and financial policy of the country. He controls public expenditure, and the Budget is the annual statement of the way in which he proposes to raise the income to finance that expenditure. From Autumn 1993, the Budget and the Annual Statement as to expectations for the following year are unified, and a single statement is made on expenditure and income plans, rather than making one statement on income in the Spring and another one in the Autumn as previously.

The Bank of England, founded in 1694, was nationalized by the Bank of England Act in 1946 and now operates under the 1987 Banking Act and the Bank of England Act 1998. By the European Communities (Amendment) Act 1993, the Bank makes an annual report on its activities to Parliament, which has to be approved by a Resolution of each House. Thus, the Bank controls the issue of bank notes in the UK, acts as a bank for other banks, is the government's banker, advises the government on monetary policy, is a lender of last resort to the commercial banks, and is the body through which sterling currency values are manipulated in the interest of the country in international markets. Directors of the Bank of England are appointed by the government, which may (but never yet has) instruct the Bank as to how it performs most of its duties. Formerly, an exception was the matter of interest rates, the Chancellor of the Exchequer instructing changes in interest rates. Under the Major Government, Chancellor Kenneth Clarke said that he would leave the exact timing of the announcement of an interest rate change to the Bank. This was taken further immediately after the 1997 General Election, Chancellor Gordon Brown passing monetary policy to the Bank, and this change is enshrined in the 1998 Bank of England Act. Interest rates are determined by the Monetary Policy Committee of the Bank (a body which includes academics) in order to meet inflation targets set by the Chancellor. The Minutes of the Committee are published six weeks after a meeting.

The Bank of England also had a supervisory role in the authorization and supervision of banks throughout the UK under the Banking Acts 1979 and 1987.[52] The 1979 Act was passed to implement obligations under the EC First 'Banking Directive (EC Council Directive 77/780: OJ L322, 17.12.77 p.30) as to supervision of the banking system. The 1987 Act remedied defects in the 1979 system, defects brought to light in the secondary banking system which had been left largely to self-regulation. By the Bank of England Act 1998, these matters have been passed to the Financial Services Authority, a body first set up under the Financial Services Act of 1986 and now operating under the new Financial Services and Markets Act 2000. Many of the functions of the FSA, especially the supervision over system relevant financial institutions, are going to be shifted over to the Bank of England (more details later, sub b.).

There are a number of banks of different types in Britain. The categories are not mutually exclusive, and most banks fall into more than one group. Clearing banks are called so because they are members of a clearing house through which cheques are processed. Savings banks were established historically for the smaller saver. Deposit-taking banks accept deposits from clients. So do merchant banks, although these are more active in finance and investment for commercial undertakings and usually act only for the richest individuals. Some former Building Societies, are now privatized and operate as banks, and there are also the Trustee Savings Bank, privatized in 1986, the National Savings Bank (formerly operated by the Post Office prior to privatization), and the National Giro Bank (also an offshoot from Post Office activity). A number of foreign banks also operates in the UK and is subject to British law and Financial Services Authority supervision in doing so.

b. Reform of the Financial Market Stability Control. As to the financial market crisis of 2008/9, some structural reforms have been worked out by government. In summer 2009 an official White Paper has been published, on which the Financial Services Act of 2010 is based mainly. The Act was worked out by the Blair-government and has got the Royal assent in April 2010, shortly before the election. Despite the fact that the new government has different plans, some essentials of the Act seem to have been effective for the actual practice.

The White Paper recommended empowering the FSA to order special tests for banks and other financial institutions, which are of systematic impact to the basic functions of the markets. Also the Council of Financial Stability (CFS) – comparable to the German Council of Governance (Lenkungsrat) – was created, which shall decide on state guaranties and further instruments for banks, which apply for such help to prevent serious dangers of insolvency. Different plans of the Conservatives to restrict the FSA-powers, or even to abandon the authority as such, because it seemed to have been unsuccessful to prevent the crisis, and to shift the market control powers to the Bank of England have not been followed up.

After the election and the new majority of the Conservatives and the Liberals, the government came back to their mentioned plans of depowering the FSA, but – as a first step – let the FSA-Act 2010 untouched as such.[53] More recent press releases of 2011, however, gave report of dramatic restrictions of the FSA-powers.[54] Already in 2010, the Financial Policy Committee (FPC) was instituted being an independent branch of the Bank of England (BoE).[55] Also the central bank became the central authority of information and documentation of commercial paper transactions, an additional task by which it is respected

[52] For it's functions of market stability control see below (b).

[53] See the Financial Services Act of 4/8/2010, c. 28 with the regulation of 10/11/2010, No. 2480, c. 120, with different delays of enforcement.

[54] Handelsblatt 2/18/19.2011, p. 37.

[55] Cf. Handelsblatt of 7/27/2010, 34.

the most powerful financial supervisory institution in GB as well as worldwide.[56] In cases of crisis events, the ministry of finance kept to be the decisive instance of decision making, following the statement of the Minister of Finance, *Hoban*, who was in office since the 2010 change of government in London. In the following time, the powers of the FSA have been reduced drastically, but there was much dispute on that development, because the BoE should not become to much a super power institution of the financial system, and loose its independence by getting too many political tasks.[57] The head officers of the FPC, however, should be the top managers of the FSA.[58]

Finally, the Financial Services Act of 2012 was enacted and is now in force since 4/1/2013. The attempts to depower the FSA were successful. The Financial Conduct Authority (FCA) replaced it and is now a quasi-governmental agency under the roof of the BoE. Also the Bank of England's Financial Policy Committee (FPA) and the Prudential Regulation Authority (PRA) were instituted, both with additional functions of regulation and advisory tasks.

c. National Health and Social Security Law. The Health and Safety at Work Act of 1974, as amended, sets out the general duties and responsibilities of employers, employees, and the self-employed. Acting under the supervision of the Secretary of State a Health and Safety Commission is charged with issuing codes of practice and other recommendations and guidance as to how the purposes of the legislation are to be accomplished in practice. The enforcement of the statutory provisions is in many instances a matter for the Health and Safety Executive operating under the Control of the Commission.

Particular legislation is designed to secure that the work-place is as safe as it may be. The construction of some premises is closely regulated. In addition, a series of statutory provisions deal with certain risks, including electricity, noise, asbestos, lead, fumes, other substances hazardous to health, radioactivity, fire and dangerous gases and fluids. There is a requirement that employers instruct employees in the dangers, give such training as is required to reduce the risks, supervise, have a satisfactory surveillance system and monitor (by medical examination and other means) the health of employees engaged in such dangerous activities, in places where employees do engage in work that may negatively affect their health.

Separate legislation deals with the Health Service in England, where it is under a Secretary of State, and with Scotland, where it used to be dealt with by the appropriate minister of the Scottish Executive. Naturally, there was a considerable degree of uniformity between the two systems, but the future of this legislation is open, since the membership of Scotland in the UK may be finished in Sept. 2014.

The National Health Service caters for all persons requiring its service. Non-citizens and non-residents may be required to contribute, depending on the nature of international agreements with their home states and any relevant European Union rules. The Service is financed both through general taxation and contributions made to the National Insurance system, which is regulated by the social security law (please, see below).

The National Health Service Act 1946, coming into force on 5 July 1948, introduced a governmentally provided general national health service and transferred most hospital property to the Minister of Health. Doctors and physicians were brought into a contractual

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[56] Ibid.; cf. the separation of powers by the German BAFin. and the Lenkungsrat; for details s. *Herrmann*, in ders./Emmerich-Fritsche (ed.), Europ. Law of Finance, 2010, p. 72, 81 ss. As to the EU-Regulation, s. the most recent draft of a directive on EU financial supervisory authorities of 8/16/2010, which shall institute a European Banking Authority (EBA) and a European Insurance and Occupational Pensions Fund Authority (EIOPA), cf. Handelsbaltt 8/17/2010, p. 32.

[57] Handelsblatt 2/18/19.2011, p. 37; ebd. 1/18.2012, p. 35.

[58] E.g. the independent experts of the State Bank, Cohrs, Clarc, s. again Handelsblatt 2/18/19.2011, p. 37.

relationship with the new National Health Service, as were ophthalmologists, pharmacists, and dentists. District health authorities were established, and doctors in general practice were entered into lists of those practicing within a particular district. New practitioners could be added to the list only after review by the appropriate family practitioner committee.

Doctors and partnerships of doctors operating as general practitioners are now listed, and patients are either accepted by doctors, subject to a limit, or assigned by the local family practitioner committees to particular medical practices. Patients may be removed from a doctor's list by the doctor, by request of the patient, or following a lapse of time including absence from the UK for more than three months, or detention in prison for more than two years. A doctor can normally have not more than 3500 persons on his list although there are circumstances which allow that limit to be breached for a period. The salary of a doctor in part depends on the numbers of patients on the list. Doctors in general practice must provide all services which a patient would normally require, including the reference of appropriate cases to other sections of the health service, including hospital services. Within the last few years, certain practices have been, on application and suitability, made 'budget holders;' that is they have been allocated sums within the budget of the local health service and can direct these sums towards the health of their patients as they think fit. In such circumstances, the doctor can choose to send a patient to one hospital rather than another and secure services for a lower cost than it might otherwise be possible. The device is partly justified on grounds of cost effectiveness, competition, and efficiency.

Hospitals and hospital services are provided within the National Health Service, although private hospitals can exist outside that Service. In addition, health is an area, within which public-private partnerships and/or private finance initiatives have been used to pay for new developments. As originally envisaged, the National Health Service provided all hospital Services required by the generality of the population, although private hospitals could continue, and consultants within the Health Service were allowed to continue a limited degree of private practice in private establishments additional to their Health Service commitments. The introduction of private sector requirements as to financial stability and accountability has been furthered by the introduction of Trust status for particular hospitals. Under this device, a trust is established for a particular hospital or complex of establishments and operates that hospital or complex within an agreed budget. Patients are still National Health Service patients, but, it is said, a degree of control over medical costs is attained by such devices.

Social security has two aspects, contribution and benefit. In an ideal world, the function of contribution would exactly meet the benefit paid out to recipients, but, in common with all other legal systems which operate such a system, usually general taxation has to provide a balancing contribution.

Compulsory insurance against unemployment and against sickness was introduced in Britain by the National Insurance Act 1911. State pensions and their necessary contribution were introduced in 1925. Over the years, further schemes have been introduced and modified, expanded and systematized. The present system very broadly follows that established by the Labour government after the Second World War, which was further consolidated in 1965 and 1975. The Social Security Act 1998 has amended the decision-making process and appeals in social security matters, as well as altering some national Insurance rules to increase revenue and combat avoidance. The Welfare Reform and Pensions Act 1999 made various changes in detail in those areas.

Broadly, the social security system is mainly operated by the Department for Work and Pensions, which was created in June 2001and placed under a Secretary of State, who is a member of the Cabinet. Within the Department, its social security arms are responsible

within Britain as a whole for national insurance (health and employment), state pensions, family credit, and child benefit and supplementary benefit. The administrative system of the Department for Work and Pensions directed towards benefits is extensive and includes a Benefits Agency and a new Pensions Service, which is just being brought into being. The Department also operates job-finding services for the unemployed. State benefits and the National Health Service are partly financed by contributions from those in employment and their employers and by required contributions from the self-employed. Contributions are related to income.

Benefits available to the community include the National Health Service outlined above. Other benefits paid directly to recipients include unemployment benefit, sickness benefit, disability and industrial injury benefit, family benefit, housing benefit, and retirement pensions. Some of these benefits are available for a long-term; others are subject to restriction. Each area of benefit is separately regulated, with an administrative structure for the determination of whether benefit is payable and (in appropriate cases) the determination of amounts. Certain benefits are dealt with by ministries other than the Department for Work and Pensions. In all cases, a system of administrative tribunals provides for appeal against initial determinations and correction of errors.

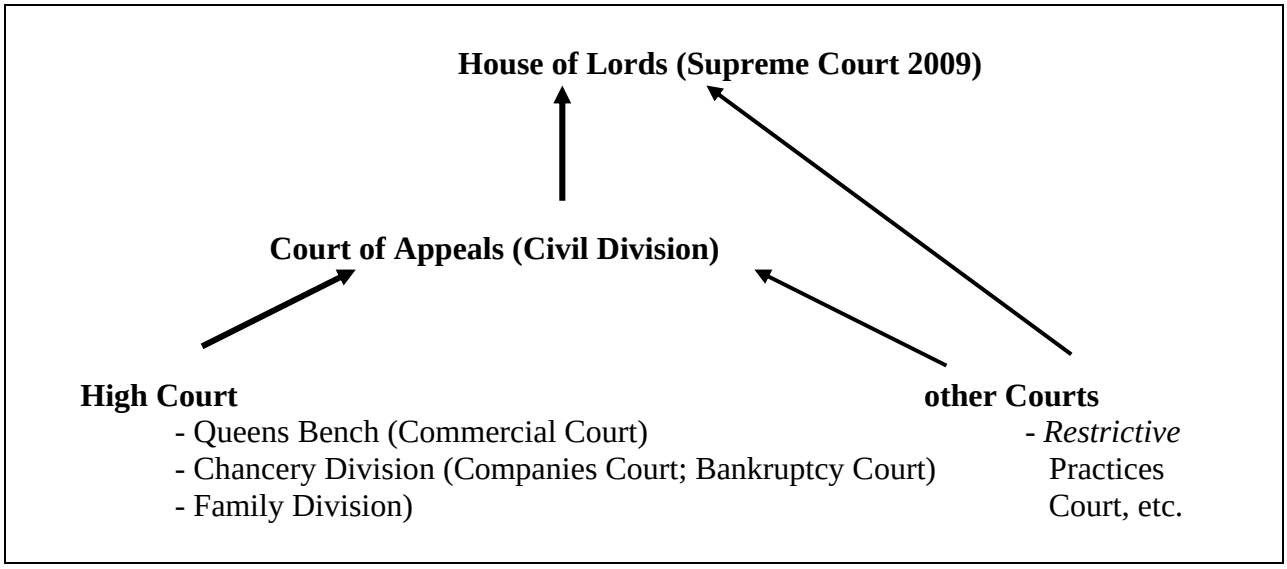
For comparison only two aspects shall be noted:

- there is a factual independence of the Bank of England from the government as opposed to a legal one in Germany
- the German social health insurance system is much more comprehensive than the British one. While the British law only provides for a minimum protection by the health care program, the German social health insurance is compulsory for everyone who has a monthly salary of not more than 4.000 €;

social insurance	*individual insurance*
compulsory by law	not compulsory
until ca. 4.000 € salary	more
premium in relation to salary*	premium in relation of individual risk**

** so called solidarity principle (Solidarprinzip) ** e.g. relation to former sicknesses/ habitants of the home city, etc.*

d. Courts and Appeal Paths. In England, there is a hierarchy of civil courts. County courts, operating under the County Courts Act 1984, deal with lesser matters, and there is a complex set of rules for determining which cases must start before that court and for transferring cases between the lower and higher courts, and vice versa. Broadly, the County Court can give the same remedies as the High Court, save that it cannot issue certain orders which are means through which the Queen's Bench Division of the High Court supervises inferior tribunals. The main higher civil court is the High Court, now organized in three Divisions by the Supreme Court Act 1981. These Divisions are the Queen's Bench Division (which itself has a specialized divisions, that includes a Commercial Court and a Technology and Construction Court), the Chancery Division (which includes a Companies Court, a Bankruptcy Court and a Court of Protection for the affairs of those unable for mental reasons to look after their own affairs) and the Family Division. Appeal lies from the High Court to the Court of Appeal (Civil Division), and thence to the House of Lords.



Significant steps have been taken in 1999 by the adoption of new Civil Procedure Rules and Related Practice Directions for the English civil court system. High Court and County Court procedures have been assimilated and simplified as well as a 'fast track' procedure made available in suitable instances and a 'case-conference' system adopted to allow management of the progress of cases, and so on. Language in court documents has also been simplified, though the abandonment of Latin has not been entirely welcomed by practitioners - phrases (jargon) whose content was known has been replaced by other phrases whose content is not yet fully established in the mind.

The House of Lords that sits as an appellate court, is technically a Committee of the Upper House of Parliament. By convention, only judges appointed to the House so as to act as judges in the Lords, or retired Lords judges, or the Lord Chancellor, sit on judicial cases in the House.

Compared to German law, the most fundamental difference seems to be that as it has been already mentioned, the separation of powers is less strict. Supreme Court judges sitting in the parliament, and even being members of the House of Lords, seems to be in conflict with the high ranking democratic principle of independence of the jurisdictional power. Such democratic reasons have led to the Constitutional Reform Act 2005, which will transfer the jurisdictional powers of the House of Lords to an independent “Supreme Court” (SC) until fall of 2009. Law Lords will no longer have their seats in Parliament, and act as nobles of their country. The SC will also get new important powers of final appeal decision within the Commonwealth countries, as far they have not constituted their own Supreme Courts.

As to the powers and the hierarchy of courts, a very important difference of German law is the distinction between appeals by factual and legal dispute. While an appeal against judgments of the first level, which is called Berufung, includes factual and legal questions, the second appeal, called Revision, can only be done by questioning the legal opinion of the lower court.

Another contrasting aspect is more of sociological and cultural nature. Lawyers do not have to pass a university education of 3 ½ years, like German lawyers do: instead, academic studies of one year only are provided, and law school exams are also good for this part of

education.[59] For becoming a barrister, so-called vocational courses of 2 years at one of the 4 Inns of Court[60] are compulsory, before being able to get a "call for the Bar". For becoming a judge, practice as barrister for a number of years is required. Reasons for these differences are often seen in the less scientific and more practice-oriented tradition of UK law system as well as prevailing political functions of British court judgments. However, German court decisions also have political functions quite often. For the purposes of this book, one can leave this question open; suffice it to know the mentioned differences of lawyers' education.

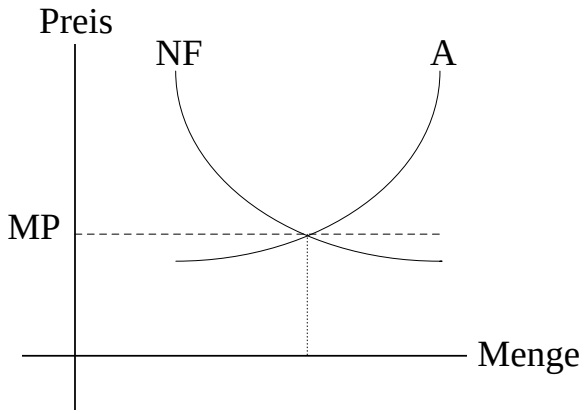
[59] There are even provisions for non-law degree students, who can have access to the pupillages and the Bar vocational courses. They only have to study one year longer at the Inns of Court.
[60] Gray's Inn, Inner Temple, Linconln's Inn, Middle Temple; so called pupillage.

II. General Law of Contracts: The Basics.

Most important for the functioning of contract law in a market economy is the principle of free making of contracts (freedom of contract).

1. Right to Make Contracts. This can be best illustrated by the freedom of bargaining prices, since without it, prices must be set by a state authority, like it has been common in classic communistic regimes, where central economic decisions are supposed to serve the general interest best. The general idea of market economy, however, is different: the self-interests of Decentralist organized organisations, the enterprises, hypothetically know best what is good for them, AND they will find the economically efficient solution by the bargain. Still the offer/demand diagram of the classic competition theory is relevant.

Offer/Demand-Diagram*



Preis/price; A=*Angebot*/offer; MP=marketprice; NF=*Nachfrage*/demand; *Menge*=quantity

The freedom of contract can be *distinguished* into 3 sub-freedoms:
- freedom of conclusion
- freedom of form
- freedom of content

All three are acknowledged in German and English law to a certain extent. The following chart shows the similarities and differences:

German Law	British Law
Freedom of conclusion: - right to decide on the contract partner - exemption: public utilities; other monopolists	same
freedom of form: - also a concluded declaration is possible - exemptions: sale of land and *real estate*; transfer of shares of closed corporations	generally the same also notary acts are required in some cases; deed as a special form: - personal signature and - witness must also sign (a seal is not compulsory any more)
freedom of content: - contract parties know best what is good for them; - functioning competition is best for economic functions	generally the same but doctrine of consideration: - s. sec. 1 Life Insurance Act of 1774; this principle has been generalised; the interest of either party is required. Example: the insured has died before the conclusion of the life insurance contract (further details Chap.2 I.2)
same for insurance contracts, in principle, but: - the form of policy is not only declaratory, but also creates a presumption of consent (warning provided, § 5 VVG 2008); - the policy cannot be endorsed like a check (only assignment under § 409 BGB)	same, - but no warning provided (instead: policy clause must be common) - policy can be endorsed like a check

2. Offer and Acceptance: Declaration, Effectiveness, and Interpretation. The fundamental requirement of a contract is that there have to be an offer and an acceptance.

An offer is the expression of a willingness to contract on certain terms, as different from the mere “invitation to treat,” which is an expressed willingness to negotiate the terms of a contract. Invitations to treat include the display of goods with a price ticket attached, auctions, tenders and quotations for work, and most advertisements. Thus, a shop is not obliged to sell goods at the price indicated on them.

An offer needs not to be in words, spoken or written, but also may be inferred from the actions. For example, in a self-service store goods are taken by the intending buyer to the sales –assistant operating a cash till. Money is handed over. Nothing needs to be said, but a contract of sale will have been constituted by this.

Acceptance is more than an acknowledgement of receipt of an offer. It is the expression of assent to the offer, which has been made, and must exactly meet the terms contained in the offer. If offer and acceptance do not match, there is no contract. However, the 'acceptance' may itself constitute an offer, open to acceptance by the originally offering person. Or it may

be a prelude to a lengthy negotiation as to terms and conditions. An offer, which is ambiguous as to its terms, - for example, by proposing alternative conditions - cannot be made the foundation of a contract by a simple acceptance: precisely what terms are being 'accepted' must be clear. Since a valid acceptance constitutes a contract, an acceptance can not be withdrawn. However, in the case that an acceptance is withdrawn and that withdrawal reaches the offerror simultaneously with or ahead of the acceptance, no contract will exist.

Obviously, it is best that acceptance is expressed in words. Verbal or written communication would appear to be necessary. However, there is a body of case law on such matters. An unheard oral acceptance will not suffice. The normal rule as to the postal service is that notification of acceptance is timed at the point, at which the letter is posted, but this rule is based on *a* need to have a uniform rule rather than a particularly compelling reason for that timing. Telex, fax, and electronic mail can present other problems, particularly, if there are some technical problem*s*.

Formal acceptance of an offer is, then, the best way of constituting a contract. However, as in the case of the offer, the acceptance of an offer can be indicated by actions. In the example of the self-service store given above, the sales-girl's taking of the money constitutes an acceptance of the offer to buy made by the purchaser. Again, the dispatch of goods in response to an order will constitute acceptance of the offer to buy, which is implicit in the order. Normally for the contract to be constituted, an acceptance must be communicated to the offering person. The reason is that the offering person should be aware of his/her obligations. But communication of an acceptance is not always necessary for a contract to exist. This is particularly true where an offer is made to an indeterminate or unknown party.

One famous case, *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256, shows many of these elements.' The Company advertised its product as inhibiting influenza and offered to pay £100 to anyone who contracted the disease after having properly used the Smoke Ball. Mrs. Carlill did so and was held entitled to the payment of £100. There had, in the particular circumstances, been an offer although to someone unknown, and acceptance by Mrs Carlill's compliance with the requirements as to the use of the Smoke Ball, although she had not expressly intimated her acceptance. That she thereafter fell ill with influenza meant she had met the condition under which the cash was payable. That the Company did not know they had contracted with Mrs. Carlill was due to their own method of making the offer.

For comparison, in the German law:

- advertisements are typically not regarded as offers (*ad incertas personas*) but invitations to treat;
- offer and acceptance can be drawn from preceding actions;
- offer and acceptance must both be received, in principal, for coming into effect (exemptions in special cases);
- an acceptance is regarded as a new offer if it is not completely in accordance with the first offer;

- a sender can withdraw his/her declared intention before it has been received by the other party

The particularities of contracts based on sale over distances follow from the EU-directive on this matter from 1999, which was implemented *in Germany as well as in the UK in the* summer of 2000. The right to step back from the offer/acceptance exists for 2 weeks. This law is, however, not applicable for insurance contracts because a particular EU-directive from 2001 has been implemented by the national UK legal system.[61] The conclusion of an insurance contract is possible by telecommunication via internet, see §§ 48a,c VVG 07, §§ 7 I.3, 8 I, 152 I VVG 08: 14 days normally and 30 day in cases of life insurance.

3. Doctrine of Consideration. *Carlill* was an English case and suitably introduces the English doctrine of consideration. For the constitution of a contract valid under English law normally consideration must pass between the parties. On one view the origin of the rule was evidential, the passing of consideration being evidence of the intention of the parties to be contractually bound. Another theory is that a contract requires reciprocity for its enforceability, showing that the parties were entering *into* an agreement of substance and not merely into an informal and perhaps gratuitous arrangement.

Whatever the theoretical basis the fact remains that consideration is normally required for an enforceable contract in English law. Consideration is not required for the validity of a promise in a properly executed deed, that is one intended to be a deed, which is signed by the person granting the deed, and is attested by one witness (two if the person making the deed does not sign it but has it signed at his/her direction), and is delivered to the person in whose favour the promise is made.

Consideration is the passing of some value between the parties, or more accurately, the passing between the parties of some thing, which the law considers to be of value. The matter is still analyzed in terms of promise and performance. Benefit to the person promising or detriment to the promisee will count as mutual consideration. In sale the promisor will suffer detriment to his/her wallet, but benefit from the gain of goods: the seller will suffer the loss of the goods but benefit to his bank account. But the matter is not necessarily one of such simple economic value. Consideration need not be adequate for the matter involved in the contract: it is enough that some consideration passes. Nominal consideration will suffice. A contract for the sale/purchase of a *Van Gogh* painting for UK £1 would be valid. Consideration passing

[61] FSMA 2000, Statutory Instruments 2001/2511.

prior to the contract concerned is a difficult area. In general, such alleged consideration is ineffective. Consideration must be of economic value but need not be in money, or precisely reducible to monetary terms. Illusory consideration is ineffective. A promise to waive or not to enforce a different obligation is effective if that obligation is actual. On occasion, the performance of an existing obligation will count as consideration. In short, the area of consideration is complex and is a minefield, which is better to be negotiated only with professional help.

4. Forms, Standard Clauses and Adhesion Contracts. Standard contracts are used by enterprises for the purpose of defining the risk taken over by the enterprise on the one side, and left to the consumer on the other hand. They are usually in a printed form, and a person contracting with the enterprise normally has no option to accept the terms of a contract offered. For this reason, such contracts are sometimes called "adhesion contracts," under which the other party has the option of "adhering" to the terms of the contract or not entering into the contract at all.

Competition may result in contracts differing as to price or quality or service, but individual negotiation of a particular contract of carriage is very unusual. For this reason, and to prevent unfair business practices, legislation for the protection of customers has been passed (see annex 1). There is no legal principle that the supplier must send a copy to the customer, provided that the proposal form mentions them expressis verbis;[62] but the standard terms must be made reasonably accessible for the consumer at the place of conclusion of the contract.[63] While this is quite important for the general contract law, the insurance contract provisions are much more strict and require pre-contractual transfer of the so-called consumer information, as explained below (III.2).

As to the standard terms control, the EU-directive on the Misuse of Unfair Terms in Consumer Contracts of 1993[64] became implemented by the Unfair Terms in Consumer Contracts Regulations 1994[65] and further amended by a regulation of 1999 (Reg. 99).[66] While insurance contract terms used to be excluded from the standard terms control of an elder Act of 1976, they became regulated by the 1999 regulation and its predecessor of 1994. Both regulations have provided for the contra proferentem rule and the so-called transparency

[62] Col.1-21 8th ed.; *Nsubuga v. Comercial Union Assurance Co. Plc*. (1998) 2 Lloyd's Rep. 682; cf. § 310 BGB.
[63] See **schedule 2** para.1 to Reg. Cons.Contr. 1999: "reasonably accessible"/"available for inspection", Col.8th, 3-19 for cases of private consumers; cf. § 305 II BGB).

[64] ECDir. 93/13.
[65] SI 1994/3159.
[66] Statutory Instrument 1999 No. 2083, The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), as published in www.hmso.gov.uk/si/si1999/19992083.htm, please see annex, p. 94 ss.

control was enacted, which became more and more important (Sec. 7 (1) and (2)). As different from the fairness control, these control concepts of plain and intelligible and clear language (transparency) are applicable not only to the contract conditions of lower importance, but also to the main subject clauses as prices, quality terms etc.[67] Even in cases of regular terms control, the courts repeatedly have expressed their opinion that a term can stand the fairness test only under the precondition that it is "clear".[68] The more recent case law stresses the priority of clearness tests before the test of material fairness.[69] Since it is in close connection with the mentioned consumer information provisions and other specialties of the insurance law, it shall also be explained below.[70]

5. Overview of the German Law and Comparative Remarks.

(1.) Freedom of Contract. In the German legal system, the principle of freedom of contract *(Vertragsfreiheit)* is an unwritten constitutional right as in the British law. Freedom of contract, again, does not only mean the freedom to contract or not to contract but also the freedom to shape one's own contract. The parties can choose not only between the different types of contracts provided for by statute but are also free to change them or even create new types of contracts that are unknown to the statute. While strongly dominating the original BGB of 1900, the principle of freedom of contract has been modified substantially in the last twenty years in the field of the consumer protection. Today, compulsory provisions from which the parties cannot depart, at least not at the expense of the consumer, are especially found in the law of leases, contracts for the rendition of travel services, and consumer credit contracts. The principle of freedom of contract is specially limited in the field of standard form contracts (please, see above 2b/bb and infra 3a/aa).

(1.) Offer, Acceptance, and Contract Interpretation. Like all other legal systems German law requires an offer and an acceptance for a contract validly to be concluded. An offer is a declaration of the intent of the offerer to be bound by a contract with specified contents should the offeree accept the offer. It must be sufficiently precise that the other party can declare acceptance through consent simply by saying 'yes.'

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[67] See para. 6 IIa/b UTCCR as quoted before; cf. § 307 I.2 BGB.
[68] See – e.g. – Cassel vs. LancashireYorkshire Accident Insurance Company, (1885) 1 T.L.R. 495; Adamson vs. Liverpool London&Globe Insurance Company, (1953) 2 Lloyd's Rep. 355, as quoted in *Birds*, op. cit., 283.
[69] See – e-g- *Bankers Insurance Co. Ltd. Vs. South* ((2004) Lloyd's Rep. JR 1, as discussed below (under III.2).
[70] See II.5 and III. 2.

Example: In a contract of sale the object sold and the price have to be indicated or at least be determinable.

The offer must be distinguished from a mere invitation to make an offer *(invitation ad offerendum),* where intent to be bound is lacking. Advertisements, catalogues, or exhibited goods are in general considered to be an invitation to make an offer.

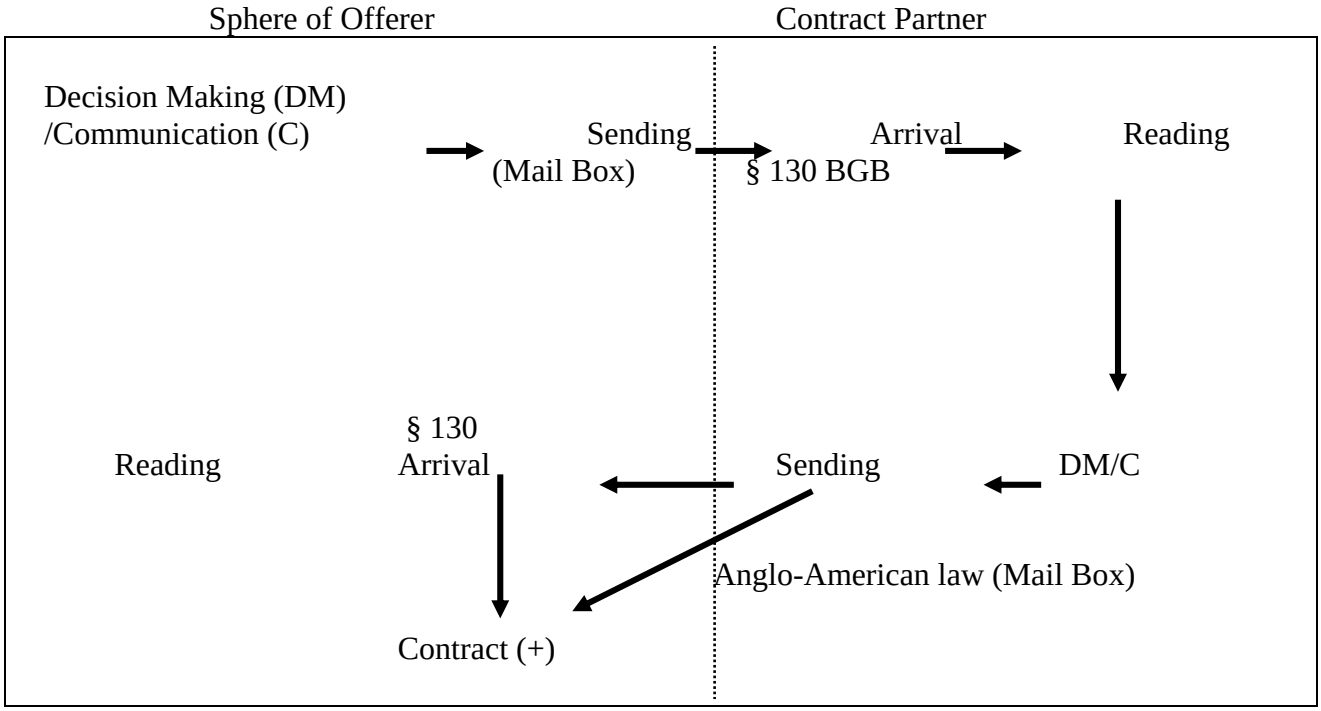
In contrast to Anglo-American law, under German law the offer is binding (§ 145 BGB). The commitment lasts until the end of a period for acceptance set by the offerer or – if there is no such period – for a reasonable time (§§ 147, 148 BGB). The offering person may, however, express his/her intention to reserve his or her right to revoke the offer.

The acceptance must be in full accordance with the offer. A modification of the conditions of the original offer is deemed to be a counteroffer. However, the courts have developed special rules regarding the 'battle of forms.' To the extent that offer and acceptance are corresponding the contract is formed; as for the rest, dispositive statutory rules apply.

The acceptance may be express or implied in fact. Mere silence, however, does not constitute an acceptance; but if the offeree does not reply after having received a commercial letter of confirmation *(kaufmännisches Bestätigungsschreiben),* a contract is concluded on the terms contained in the commercial letter of confirmation.

In German law, the contract is concluded when the acceptance reaches the offerer (§ 130 BGB), not upon dispatch of the acceptance. UK-law, however, has developed the letter box rule, which only provides for having the letter been put into the postal letter box.[71] For better understanding two spheres of communication can be distincted, the one of the sender and the one of destination. If the sender only decides to offer resp. to accept, his/her counterpart cannot know about it. This, however, is the basic precondition for having a legally binding decision, as well of the offering person as of the acceptor.

[71] *Adams v. Lindsell* (1818) 1 Barnewell & Aldersons Rpts. 681; for trends to widen the exceptions to the general rule s. *McKendrick*, Contract Law, 4th ed. 2010, p. 107 ss.



The difference between the arrival provision of German law and the British letter box rule can be very important in cases of fire insurance, e.g. if the insured object burns down after the acceptance letter of the insured has been put into the letter box, but before it *has* arriv*ed to* the insurer. No cover under German law; but cover under British case law. The rule seems to be antiquated o a certain extent, because it seems to be unsound that a casualty in the post can be decisive for a consensus of contract parties.[72] Standard terms, therefore, have been held to restrain the letter box rule successfully, e.g. by an express provision that the final arrival must be proven by the designated party.[73]

<u>Further example</u>: After having sent away his letter of acceptance for a long term credit contract with fix 7.5% nominal interest rate, the sender (S) gets an offer on 6.5% of a competitor (B) of the offerer (A). He sends e telefax or an e-mail for withdrawing his acceptance and accepts the offer of B. A claims an expected interest income of the stipulated term of the credit.

Under the postal rule of UK law the sender would be bound to the contract and hence would have to pay the expected interest income to A.[74] Under German law, the acceptance could be withdrawn as long as it has not arrived at the place of A. Also here, the Europeanization is incomplete.

[72] See McKendrick, as quoted, p. 111.
[73] *Holwell Securities Ltd. V. Huges* (1974) 1 WLR 155, CA.
[74] However, the recipient rule can be preferred by the reason, that the parties have consented it implicitly (cf. *Chwee Kin Keong v. Digilandmall.com Pte Ltd* (2004) SGHC 71, no. 101 with international comparative law reflections (no. 98) and further distinctions in B2B cases, again no. 101.

Some particularities of contracts based on sale over distances follow from the EU-directive on this matter from 1999, which has been implemented in 2000, in Germany as well as in the UK.

- Right to step back from offer/acceptance: 2 weeks
- Not applicable for insurance contracts.

A special EU directive of 2001 has been implemented by national German (§§ 312b-f BGB) and UK law.

- The conclusion of insurance contracts is possible by telecommunication and via internet.

(An adverse opinion has not been published by any of the state regulatory bodies, like it was done by the German Insurance Supervision Authority).

Contracts have to be interpreted in good faith and according to the common usage (§ 157 BGB). To begin with, it is decisive what the parties actually wanted, no matter what the wording might suggest. If the actual intentions cannot be ascertained, - or if the intentions of the parties do not coincide - then it is crucial to know what a reasonable person in the shoes of the person addressed by the language would have understood. These principles serve as a guideline not only to answer the question of whether a contract between the parties has been formed at all but also to determine the contents of the contract.

(3.) Standard Terms Control and Letter of Confirmation. There is a considerable body of mainly statutory law, which establishes general terms and conditions of trade and is directed towards fair trading and the protection of the interests of customers in particular and the public in general. The clarifications and protection afforded by the Sale of Goods Act 1979 would fall under this category, although not all of the Act is reckoned to be as useful as it was intended - notably the concept of merchantable quality. In other respects, British law conforms to the requirements of European Union Law, in particular articles 81 and 82 of the Treaty of Rome as to competition within the Union.

Apart from the matter of cartels, monopolies, and price fixing of Competition law, another body of case law and legislation imposes certain restraints upon doing of business that are directed towards the protection of the customer. (In the UK, this area of law is known as consumer protection rather than customer protection.) Among common law elements, perhaps the most famous principle is that *of Donoghue* v *Stevenson* [1932] AC 562, under which a supplier of goods owes a duty of care not merely to the retailer buying from him/her but also to persons purchasing from the retailer.

In general, common law has been insufficient to protect consumers, partly because of the frequent imbalance in strength between a single purchaser of goods and a manufacturer

leading to an unwillingness on the part of the purchaser to complain and partly because of an unwillingness on the part of the judiciary to introduce concepts that would restrict the hallowed right of 'freedom of contract'. Of course, the reality of the first element - the difference in economic and other power between a company and an individual - made a nonsense of the 'freedom' that was so vaunted. The result has been legislation, but most of that legislation is only of the relatively recent past.

An already mentioned regulation of adhesion contract control nowadays includes insurance policies, while the former Act of Unfair Contract Terms of 1977 excluded them. This change goes back to the EU-regulation on the Misuse of Contract Conditions in Consumer Contracts of 1994, which have been further amended by a regulation of 1999 (Reg. 99).[75] Sec. 4 subsec.2 Reg.99 provides for non-application to "mandatory statutory or regulatory provisions" and to "provisions or principles of international conventions," but insurance contracts are no more exempted.

The regulation 1999 contains a long catalogue of clauses, which cannot be used in standard terms. Due to its EU origins, the details are very similar to §§ 307-309 BGB, which have been implemented under the same EU-directive. Also, a so-called transparency provision of No. 6 subsec. 2 is equivalent to § 307 BGB. This even applies to the clauses defining the main subject matter of the contract and the price. Since the regulation is of much importance for insurance risk excluding clauses, the matter is explained in detail below (8d).

Important in practice is the common communication of so-called letters of confirmation (*kaufmännische Bestätigungsschreiben*). As a general rule, the recipient enterprise is taken to have declared its consent if it does not answer any dissent note within a certain time after having received *a* letter of confirmation. In this respect, German and British law are absolutely equivalent.

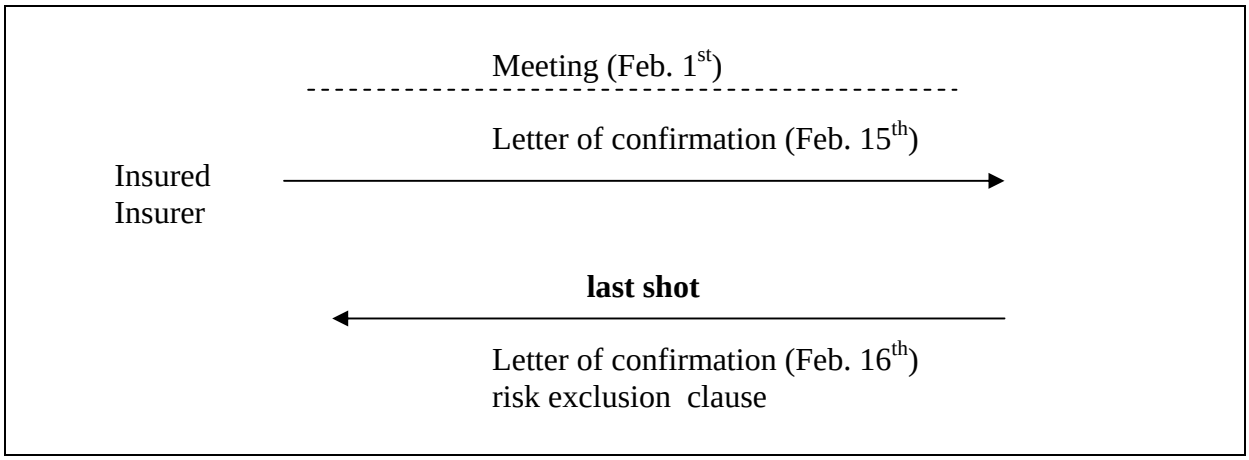
There is, however, a relatively far reaching difference in cases of crossing confirmation letters. One can easily conceive that both parts of a contract bargain feel th*e* need to formulate their confirmation. Normally, they do it within short time after a final meeting, telephone conversation, and the like. If the two letters cross each other on their postal way, both parties might not realize that it could be their part to make correct any of the confirmed details, which they do not agree *on*.

Example: The last shot of an insurer (I) contains a risk exclusion of a fire police in case that the insured (Ird.) makes repairs in the building which increase the risk. Under British law, I could deny cover in case of a fire after such a repair, while under German law the

[75] Statutory Instrument 1999 No. 2083, The Unfair Terms in Consumer Contracts Regulations 1999, as published in www.hmso.gov.uk/si/si1999/19992083.htm, please see annex, p. 94 ss.

hypothetical contract interpretation would lead to the result that cover is due if I offers contracts to other customers for higher premium.

The British case law – as the BGH in former times – has developed a so-called last shot rule, which means that the content of the confirmation letter which has been received last becomes binding between the parties. The reason for this seems to be *a* very simple one: the confirmation letter of the earlier receiving party is taken as an acceptance with modifications. Since such an acceptance is not binding but must be treated as a new offer, this offer has to be rejected by the last receiving party. After not having rejected it, the last receiving party is taken to have accepted the (new) offer of the other party. Thus, the last shot is decisive.



While German case law adopted the last shot rule equally for a certain time, the BGH abandoned it some twenty years ago as it depended on unjust permissions and lead to unforeseeable consequences. Normally, none of the contracting parties can know who of them will have been the latest receiver of one of the letters. It often depends on the postal transport, when exactly a letter will be delivered to its destination. The BGH, therefore, takes the non-consented part of the contract as a so-called hole in the contract, which has to be filled by hypothetical contract interpretation. The decisive question is what the parties would have consented to and whether they have realized the hole in the contract (*ergänzende Vertragsauslegung*). Of course, this can be quite different from the result of the last shot theory.

III. Insurance Contracts.

After having overviewed the basics of British general contract law and its equivalents in German law, the particularities of insurance contracts can be explained in more detail. Of course, the general contract law rules and principles will still have to be analyzed, but now the focus will be on particularities of the insurance contracts. It is important to note that we are not dealing with particularities of special insurance types, like car, fire, or life insurances. This is left to ch. 8-13 of the vocal lesson. Instead, we are focusing here on the general questions and on the inquiries of private law.

1. Formation of Contract and International Law. Regularly insurance contracts, in the mass insurance industry as well as in the b2b world, become consented by the following procedural steps.

a. Offer and Acceptance. First, an application form, used by an agent, broker, or consultant (intermediary), has to be filled out by a customer with help of the intermediary or without. The insurer, after having received the application form in its completed version, will check it in terms of adequateness for his/her own business interests and – as far, as it can be assessed - for the interest of the customer. Normally, the insurer will do this check in a timely manner and will send a written and signed contract document, a policy, to the customer. By having put this into the mailbox, the insurance coverage has become binding.[76]

As in the cases of general contract law, the pre-contract communication of the parties is characterized by building up confidence to an increasing degree. However, only from the very moment on in which the insurer or a representative or messenger has thrown the acceptance note into the letterbox, the insurance promise is legally valid and binding. This is why silence of the insurer, after having received an application form from the customer, normally does not denote consent. Also, advertisements, especially prospectuses of insurers, cannot influence the construction of the contract provision.

Example: Life insurer I published a prospectus stating that loans would be made at the rate of 4 % on an assurance company's policies. Assured A did not want to be charged with 6 % when applying a loan, but I demanded this rate later on.

In *Excess Life v. Firemens's Ins. Of Newark, N.J.*, it has been held that the prospectus could not be constitute an agreement to charge no higher rate, neither as a part of the policy, nor as a collateral contract.[77]

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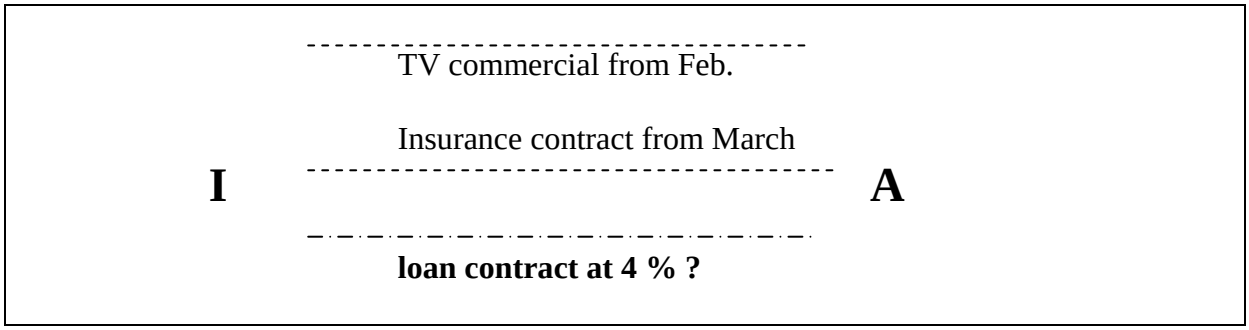
[76] For further conditions if the first premium has not been paid in time, s*ee* below, I.6.
[77] Cf. the example of *Collinvaux*, op. cit., p. 22

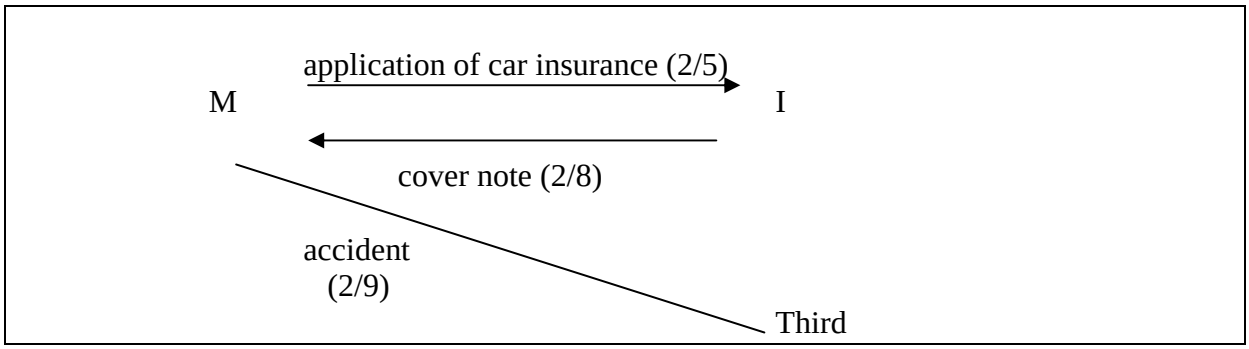


An exemption to the acceptance principle can be seen in the case law of business confirmation letters, which have been explained in sec. 2. For recapitulation, the following preconditions have to be fulfilled:

- insurer and insured must be experienced business persons since only such people are protected in their confidence in a non-verbal commercial communication. This is why the case law of confirmation letters only can apply in the business insurance not in the mass insurance;
- the details of the respective insurance contract have to be bargained and generally consented before, being only few points left open for the final consent decision of one or both parties;
- the letter of confirmation must not contain anything unconfident, e.g. an unexpected risk exclusion clause.

Further exemptions are acknowledged in cases of preliminary car insurances and life insurances.

Example 1: If motorist M, after his application for a car insurance contract, is sent a preliminary cover note by insurer I which he did not ask for when he applied for the car insurance, he may accept this offer by taking the car out on the road in reliance on it.[78]

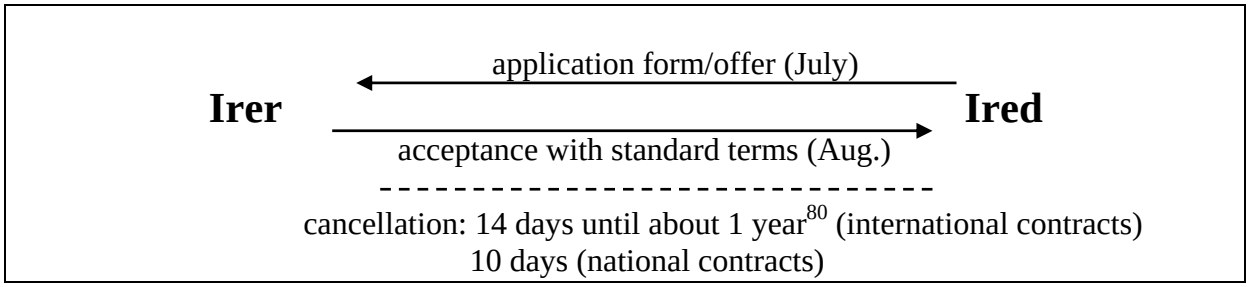


Example 2: Life insurer I sends a policy differing in part from the application of the customer. The differences may be accepted after 7 months of silence.[79]

b. Consumer Information and Cooling-Off Period. In practice, the insurance standard terms and other consumer information is sent with the acceptance of the insurer. The 3rd EC

[78] Cf. the example of *MacGillivray*, op.cit., p. 95.
[79] Cf. the example of *MacGillivray*, *ibid.*

Directives on life and non-life insurance of 1992 provide for a cancellation period of 14 days if no consumer information is handed out to the insured before the contract conclusion. This has been implemented by § 5a VVG in its latest amendment in 2007 and by § 8(2) VVG 2008. While both rules provide for this delay for all insurance contracts, domestic as well as international ones, British law gives a 14 day cooling-off period in cases of European contracts, but only 10 days in cases of British contracts. The difference can be explained by history only. British case law has provided for the 10 days period already before the EU legislation. Since the implementation of the relevant directive was done by state regulation restricted to international contracts, the previous case law has not been overruled.



Both regulations have the same competition functions. The consumer shall be well informed for being able to examine the concurring offers of the market and give preference to the one fulfilling his/her needs best. Some doubts about the underlying principle of well informed consumers in literature exist. A typical non-commercial customer would neither be willing nor able to read and understand the consumer information. Other scholars, however, correctly point out to the fact that market alternatives are normally evaluated by professional analysts, and this kind of intermediary action can be of sufficient help to the insured customers.

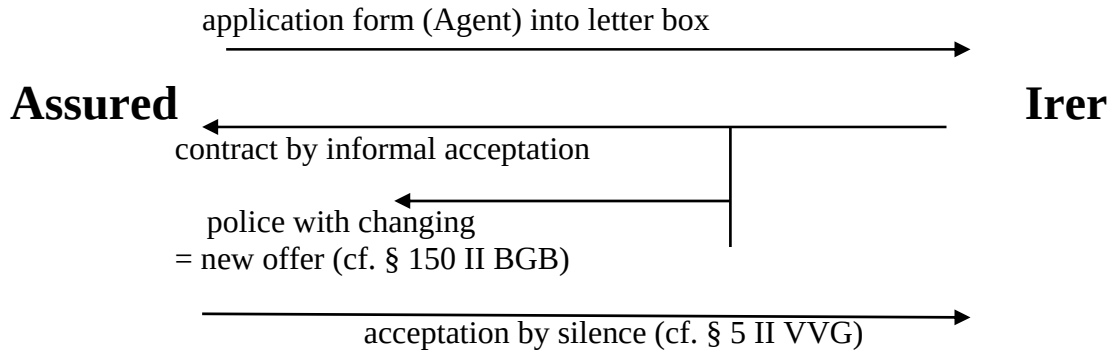
Also special consumer information provisions exist, promulgated by the FCA as Conduct of Business Sourcebook (COBS)[81] on the basis of the FSMA 2000 as amended by the FSA 2012. Before entering into a life insurance contract the Irer must provide the prospective Ird. with certain information in a durable medium or make it available on a website. The information duty is similar to the one provided for by the German InfoV-VVG, but less detailed and less formal, since it is good enough to have published the text on the web site. The German consumer information must be send to the consumer by letter or in textform.[82] – In cases of life insurance, the cooling-off period is 30 days.[83] In case that the Irer has not given the

[80] ICOBS 7 does not provide for a time limit, if the consumer is not told of the right to cancel, but for case law of 7 months of silence after a policy differing from the offer see *Adie vs. The Insurance Corp*. (1898) 14 T.L.R. 544; *General Accident Insurance Corp. vs. Cronk* (1901) 17 T.L.R. 233; *Rust vs. Abbey Life* (1979) 2 Lloyd's Rep. 334.; *Birds*, op.cit., p 89.
[81] As published in *Birds'*, op.cit., at 376 s.
[82] See § 7 I.3 VVG; textform means downloaded on a durable medium, § 126b BGB (cf. also the most recent amendment of § 126b BGB by the Act of June 2014).
[83] See COBS 15 on the basis of s. 139 (4) FSMA 2000; replaced by Financial Services Act 2012.

necessary information the delay for withdrawal does not begin to run. This is why one can step back even years later, without having lost the right of cover in the meantime.[84] The effect is that the Ired can claim back the premium payment with interest, but must make some reduction for having had the advantage of eventual cover within the pending time span of his right to withdraw.[85]

c. Policy and Preliminary Cover. Principally, no written contract is required, but the standard terms must be adequately communicated. By exemption in the law of marine insurance, a policy is made compulsory.[86] Sec. 2 Life Insurance Act 1774 only provides that the policy, if there is one, shall contain a name of the person interested.

If, as normally done, a policy is worked out and adequately communicated, a strong assumption is made that the content of the document has been consented by the parties. The assumption can be proved to be wrong by exceptional circumstances, but the burden of proof lies with the insured as it does under § 5 I VVG. Hence, the insurance cover begins at the moment when the policy has been put into the letter box in most cases.[87] Although, acceptance by telephone can be done earlier because there is no precondition of a written document. The burden of proof for such a promise lies with the insured.



On the Lloyd's market, explained to some extent already (above 1a), the so-called slip takes the role of the policy and – with some particularities – causes an assumption of consent of the parties on what is written in short on it. In cases of loss before issue of the policy, coverage can be denied if no binding contract is consented or can be proved. For reasons of urging time, contracts of provisional cover have been developed in many cases by the practice and

[84] But see BGH of 7/16/2014 (IV ZR 73/13), stating that it is against good faith to cancel the contract under § 5a VVG (of 1906) after having paid premiums for years without making any remonstration; confirmed by BVerfG of 2/2/2015 (2 BvR 2437/14).
[85] See ECJ of 12/19/2013 (C-209/12); cf. BGH of 5/12/2015 (IV ZR 76/11); but limits of withdrawal by good faith principle, see footnote before.
[86] § 186 VVG exempts marine insurance from the scope of application of the VVG, but there is no equivalent provision of compulsory policies.
[87] As *opposed to* § 38 II VVG, there is no requirement of premium payment before the risk occurs (s. Birds, op. cit., p. 77, 167), except *is cases when* it is stipulated in the contract terms, *Canning vs. Farquhar* (1886) 16 Q.B.D. 727, 733.

acknowledged by case law. They are even obligatory in the car insurance business (please, see below in this section).

After the contract has become binding, a mere change in the risk does not dissolve the contract and is commercially disastrous to the insurer.[88] If, however, the insured risk occurs before the policy is given to the customer, there is no more risk to be assured. The risk has become certainty. If the insured knew the truth but did not resolve it, the coverage can be denied on grounds of misrepresentation.[89] If both parties did not know what happened, the policy leads to a void contract on account of mutual mistake as to a matter going to the root of the contract.[90]

Example 1: The assured becomes mortally ill, after the policy is issued.
The consequence is: normal coverage.

Example 2: The assured becomes mortally ill, before the policy is issued.
The case lies between a mere change in risk and the changing from risk to certainty. The risk "begins to run." In Sickness & Accident Assurance vs. General Accident Assurance Corp., it was held that the contract is automatically dissolved since the doctrine of frustration applies. Frustration means more than the mentioned concept of error as to the roots of the contract but also leads to voidances by law.[91]

As already mentioned, provisional insurance contracts, also known as cover notes, can provide the insured preliminary cover while a final contract is prepared. In accordance with the freedom of contract, such an agreement is possible and binding for the time the terms stipulate. The cover notes, however, have to be carefully distinguished from the following final contract as the insured stays to be obliged to dissolve all facts relevant for the conclusion until the final contract becomes concluded.

Example: A claim arising out of an occurrence happening before the issue of the policy falls to be adjudicated by reference only to the contract as expressed in or evidenced by the cover note. Hence, disclosure of material risk changes is owed by the insured until the binding effect of the main contract.

As under German law, cover notes are obligatory for motor insurance contracts. If the insurer or his/her representative gives a deposit receipt, the document can be interpreted as a

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[88] Lord *Sumner*, 1923, cited after *Colinvaux*. op. cit., p. 20.
[89] *Canning vs. Farquhar* (1886) 16 Q.B.D. 727, 733.
[90] *Colinvaux*. op. cit., p. 20; root of contract is similar to the German *Geschäftsgrundlage* of § 313 BGB.
[91] Please, see *Amalgamated Investment & Property Co. vs. John Walker & Sons* (1977) 1 W.L.R. 164; *Kötz*, Europäisches Vertragsrecht Vol. 1, 1996, p. 289 with comparative remarks.

cover note combined with a receipt of the premium. The underlying rational here is that the premium is referred to a certain time period of insurance cover. If this period, as regularly, begins with the payment, both parties seem to agree to a preliminary cover.

d. Particularities of Contracts at Lloyd's. The formation of contracts, in general, is identical in cases of contracts at Lloyd's, but some particularities must be regarded. Most important is the fact that the acceptance is not done by a single act of one person only, but by signing the slip by different "names" and at different times. Regularly all names sign their part of the risk at the same preconditions, which are provided by the terms of the contract. If a later underwriter, by reasons of whatsoever, accepts on different terms some courts held that the amended contract terms have legally binding effects to the other underwriters. In 1983, however, it has been authoritatively decided by the Court of Appeal[92] that the underwriter is bound from the moment he initials the slip, despite the fact that other contract partners do not accept the same contract terms. Strictly therefore the insured may have separate contracts with different underwriters rather than the one whole insurance contract, so that the insured may be only partially covered. In cases like this, it seems from the leading decision of the Court of Appeal[93] that the insured even does not have a right to cancel the contract.

Example: Insured Ird. of a fire insurance wants cover for a risk of 5.000.000. Irers1-5 sign Lloyd's slips for 1 Mio. each. When Ird. was late with the payment of the premium instalments due to July 1st, Irer1 cancelled the contract, while Irers2-5 did not. 1 month after payment by the Ired to Irer1-5, the building was destroyed by a fire.

1 .Can Irer1 deny cover?

2.Can Irers2-5 do so, too?

3. Can Ired cancel the contracts of Irers2-5 with the argument that he does not get insurance cover supplementing the contract with Irer1, but has an offer to take over the whole risk of 5 Mio. by Irer6?

(1) *Yes, independent partial debts (cf. General Reinsurance vs. Forsakringsaktienbolaget Fennia Patria* (1983) Q.B. 856).

(2) *No, same reason.*

(3) No, same authority.

- Comparative remark: German law of the so called offene Mitversicherung is similar. The BGH held that § 351 BGB is applicable only in cases in which a **common intent** of strict dependence of the participating contracts is proved (BGH NJW 1976, 1931, 1932; *Schaloske*, Das Recht der sog. offenen Mitversicherung, 2007, S. 115 with further references, also to diff. opinions of the literature).

[92] *General Reinsurance vs. Forsakringsaktienbolaget Fennia Patria* (1983) Q.B. 856: contra *Jaglom vs. Excess Insurance Co. Ltd.* (1972) Q.B. 250.

[93] See last fn.

> Compared to British law, the "well established customs of the London insurance market" (Birds, op. cit. p. 89) are an equivalent to the **common intent** of the contract parties.

e. Jurisdiction and Choice of Law. In cases of international insurance contracts, questions of jurisdiction and choice of law must be analyzed. International cases occur if one party is not a British citizen, or in cases when the insurance company or the company of the insured is not registered in the UK. First of all, the claim has been brought before the court, which has to decide on its power to open up a procedure and a case (jurisdiction). After having accepted the case by holding to have jurisdiction, the court must analyze on substantial law that shall be applicable in this case.

The legal basis for the question of jurisdiction is the Brussels Convention on Jurisdiction in Civil and Commercial Matters of 1968 (BC) and its applicability to the UK Civil Jurisdiction and Judgments Act 1982/1987. The BC was amended by the Brussels I Regulation of 2002 and – to some extent – by the EU Roma I Regulation of 2008, which provides for some changes in cases of big risks.[94] The general rule, however, still gives courts power to take the case and, as a first step, sanction the issue of a writ against the proposed defendant, if

- individual person's domicile is in England;
- mere temporary physical presence is sufficient;
- company is registered in England: e.g. authorization under the FSMA 2000.

If the company is registered in another EU member state[95] but has an office in GB, the British court has jurisdiction, provided that there is no different jurisdiction agreement of the parties. Such a contract provision must be in writing and have clear consensus of the disputed parties (Art. 17 BC).

The national legal basis for the question of applicable substantial law is the Contract (Applicable Law) Act 1990 in combination with the FSMA (Law Applicable to Contracts of Insurance) Regulations of 2001.[96] The BC and the Brussels I Regulation, however come into play insofar as there is direct impact of the European regulatory law, and the national law does not contain a different provision.

Despite the fact that the UK will terminate its EU-membership, the mentioned law will keep being applicable. The UK Civil Jurisdiction and Judgments Act 1982/1987 as well as the Contract (Applicable Law) Act 1990 in combination with the FSMA (Law Applicable to

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[94] Cf. VersR 2011, 1 ss.

[95] This is possible on the basis of the foundation theory of UK companies law and of the home country principle of the 3rd EC Dir. of 1992, as explained in *Herrmann*, Versicherungsvertragsrecht, http://www.assurances.de, ch. I.1.

[96] Since Dec. 2001, please, see Handbook Insurance Law, op. cit., p. 355 ss., LawApplReg.

Contracts of Insurance) Regulations of 2001 are transformations of international legislation to a far extent. They will, however, not be touched by the ending membership of the UK, since they are autonomous acts by the national Parliament.

For the material decision of the international private insurance law one has to make a further distinction: claims of the insured against the insurer and claims of the insurer against the insured:

The insurer, on principle, has to make his claim at the domicile of the insured (Art. 12 I Brussels I Reg.). For claims of the insured there is not such a basic principle. In cases of life insurance, the law of the EEA State of the commitment is applicable (Rule 8 (2) LApplReg). In cases of a non-life insurance, as liability insurance, the law of the place of the damage can be applicable (Art. 10 Brussels I Reg.). For claims based on insurance contracts of immobiles the place in which the risk is situated[97] is decisive.[98] The parties are also free to choose some other law (LApplReg., as cited), provided the choice is not against public policy (order public). The test does not imply that the choice is to be justified by reasonable arguments of the contracting parties. This would result in a kind of contract control by state authorities, which clearly is not intended by the international private law. It is, e.g., not against public policy to choose a law none of the parties has a special relation to. No argument and proof of a neutrality intention is necessary, but an allegation of circumvention can be made if avoid of special protection regulation seems to be intended.

In cases that specific provisions of consumer protection shall be avoided, the choice of law can be inadmissible (see Reg. No. 593/2008/EG, cf. Art. 29 EGBGB (overruled by the EU-Reg. in 2010)).

Example: The household insurance contract provides for a warranty and makes choice of UK-Law for avoiding §§ 19, 28 VVG 2008.

2. Insurable Interest and Standard Terms' Fairness/Transparency. The insurable interest doctrine is a consequence of the theory of consideration under common law, which has been already explained above (2b/aa). As the public policy test, just mentioned, the insurable interest test is not an instrument of state contract control over adequateness of prices. Hence, the court cannot test the commercial equivalence of the exchanged goods of a contract, but at least, some significant interest of either party is required. Commercial value is not necessary; it is sufficient to see any advantage of social reputation, political engagement, etc.

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[97] *A* concept of "situs of the risk" is unknown to the British law itself (s. Birds, op. cit., p. 26); however, it is derived from the international law in this context.

[98] E.g., place of the insured building, place of registration of the insured vehicle, etc. (Rule 4 (2) LApplReg.).

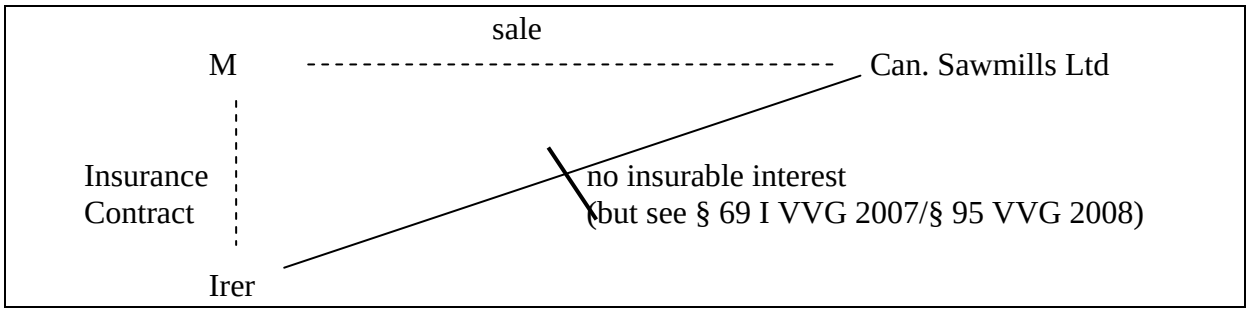
The legal basis is sec. 1 of Life Insurance Act of 1774, which the case law has generalized for all other types of insurances. Indeed, a different provision of life insurance law and the law of any other type of insurance would be unjustifiable under the principle of equality, which is well acknowledged in constitutional law (s. above 1d/bb).

Example 1: The insured has died before the definite conclusion of the life insurance contract by letter of acceptance sent to the house of her husband.

No insurable interest is acknowledged in such a case because it has ended before the beginning of the contract.

Example 2: Macaura, who owned an estate in Ireland, sold all the timber on the estate to a newly-formed company, Irish Canadian Sawmills Ltd, in which Macaura effectively owned all of the shares. He had inured the timber in his own name with the respondent company.

When the timber was destroyed in a fire, it was held that he could not claim on the policy because he had no insurable interest in it.[99]



As to the risk determination of an insurance contract, it has not only to be an insurable one, but a test of plain and intelligible language is also acknowledged. First, the Unfair Terms in Consumer Contracts Regulation (CCR) of 1994 contained such a test, which was succeeded by the 1999 regulation attached here (for the reach of the term consumer including small business, s. Fn. 230). Hence, any risk determination and risk exclusion clause must be clear and understandable. Also, warranties can belong to the terms defining the subject matter of the contract.[100] No standard term control of good faith is possible, but plain intelligible language is required.[101]

Example 3: *A travel policy excluded cover for the assured's liability incurred "involving your ownership or possession of any…**motorised waterborn craft**". The assured injured a third person in jet-ski collision.*

The risk exclusion is held not to be subject to the fairness test under the Unfair Terms in Consumer Contracts Regulation, 1994/1999 (UTCCR) because it belongs to the **main subject** of the contract (sec. 6 (2a) UTTCR). It can be seen, however, as an unclear or non-

[99] *Macaura vs. Nothern Assurance Co* (1925), AC 619, House of Lords.
[100] CCR 1999, No. 6(2)(a), s. *Rühl*, op.cit., p. 1421.
[101] CCR 1999, No 5 and No.6 (2)(a).

understandable provision. In *Bankers Insurance Co. Ltd. Vs. South* ((2004) Lloyd's Rep. JR 1.) the waterborn craft clause was taken as clear enough (cf. § 307 II 2 BGB **plain and intelligible language** (*Transparenzgebot*).

The requirements of transparency have been influenced much by EU-regulation. Within the field of the insurance law the deregulation directives of the so called 3rd generation[102] have been the beginning of a new method of market information policy. Since 1991, the elder law of ex-ante control standard terms by state authorities, which was enacted in Germany and other EU-member countries, has become overruled by the new European concept of market control combined with the ex-post control of courts over standard terms. The underlying principle was to open the insurance markets for European wide competition forces, as it has been done on industrial markets since the foundation of the ECC in the 50ies, already. This has made it necessary to stress market functions of standard contract terms, because insurance products are defined by standard clauses much more than industrial products sales are (insurance as so-called legal product).

As a first step of the new de-regulation concept, the directives of 1991 have provided for ex-ante consumer information. The customer must be given key information about the insurance product, including the standard terms, before the formation of the contract.[103] The purpose of it was to give the contract partner the opportunity to compare alternative offers of the market before making his decision to prefer the one which seems to be most adequate for his purposes. Once the preference is made, however, without sufficient understandable wording of the contract clauses, it does not lead to acceptable market results. The ECJ[104], therefore, has stated repeatedly that market efficiency within the uniform EU-insurance market is the main purpose of the deregulation directives of 1991/2. The consumer must be informed about the key facts of the product and of essentially disadvantageous consequences of certain clauses of the contract and its standard terms.

While the EU-directive only contains minimum provisions in this respect, the member states can make stricter regulation, as far as it seems to be necessary for the "factual understanding of the essential components of the insurance police".[105] In the life insurance business, e.g., the Netherland law can provide for written information about the consequences of costs and

[102] See – e.g. – Dir. 92/96/EEC Art. 31 subsec.3.
[103] Dir. 92/49/ECC of 6/18/1992 (O.J 1992, L 228, 1), implementation by ICOBS 6, as explained under III.2a, below.
[104] ECJ of 4/29/2015 (C-51/13), VersR 2015, 702, no. 23; see ECJ of 3/5/2002 (C-386/00), VersR 2002, 1011 "Axa Royal Belge".
[105] ECJ of 4/29/2015, as quoted before.

deductions for the disadvantage of the Ired.[106] The German BGH has provided for exemplifying calculation of the consequences of life contract cancellation and the so called Zillmerung of the redemption value, which has to be payed-out by the Irer after the termination of the contract.[107] The British law, however, has not gone so far, in the past. Implementation of the pre-contrac information provisions of the EU law was done by ICOBS 6.1.5 with Annex 2, which requires a policy summary containing the key features of the standard terms.[108] While the main risk exclusion clauses have to be highlighted, here, no special warning ore even calculation examples are made compulsory by the key feature regulation. The case law of standard terms transparency and the EU-regulation on the Misuse of Contract Conditions in Consumer Contracts of 1994, which have been further amended by a regulation of 1999 (Reg. 99)[109] seemed to be sufficient for further implementation of EU-law.[110]

A further step is taken by sec. 17 II InsA 2015: "Irer "must take sufficient steps to draw the disadvantageous term to the Ird's attention before the contract is entered…; and by subsec. 3: "The disadvantageous term must be clear and unambiguous as to its effect." Since that is a kind of a warning duty of the Irer, not of his agent, one can compare the provision with § 6 subsec. 1 VVG. There is, however, no documentation duty, which is provided for in § 6 subsec.I.3 VVG. Also, a provision on violation consequences is missing. In cases of agents' violation of their duty under the suitability doctrine, the Ird. can step back from the contract and has a damage claim. § 6 subsec.5 VVG gives such a damage claim also in cases the Irer violates a warning duty, but sec. 17 InsA does not. One will have to wait if the case law will provide for a damage claim in analogy to the agency law.

The transparency provision must be distinguished from the similar contra proferentem rule, despite the fact that they are very similar. "Contra proferentem" means that any doubt of what a clause of an adhesion contract means goes to the disadvantage of the party having introduced the term into the contract. The rational for this principle is very easy since the introducing party is the one being best able to avoid any doubt. By the consequence of bearing the disadvantages of misunderstanding the party shall be given an incentive to care for a better wording. The case law of this kind of standard terms control is much elder than the transparency control provision of plain and intelligible language.

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[106] Art. 2 Regeling informatieverstrekking… as quoted in ECJ of 4/29/2015 no. 8.
[107] BGH NJW 2001, 2012, 2013; for further of minimum and maximum principles of EU-direcitves see. *H. Herrmann*, VersR 2009, 7 ss.
[108] For details see III.2a below, cf. § 4 InfoV-VVG.
[109] Statutory Instrument 1999 No. 2083, The Unfair Terms in Consumer Contracts Regulations 1999, as published in www.hmso.gov.uk/si/si1999/19992083.htm, please see annex, p. 94 ss.
[110] As explained above (II.5).

Example:A motor policy covered the liablity for injuries to all persons except "injury to any member of the assured's household". Ired negligently injured his sister when she was his passenger. Irer denied liability, because the sister belonged to the household.

In English vs. Western,[111] *the SC held that the Ired was liable the exemption clause being narrowed to members of the household the Ired was the head of. It was stated that both constructions were possible, but the one to the advantage of the Ired has to be preferred by reasons of the contra proferentem rule.*

Further example: Six people were involved in an accident in a car designed to seat five. The insurance policy contained a provision excluding liability for damage "arising whilst the car is conveying any load in excess of that for which it was constructed." The insurer sought to deny liability, but the court held that the clause was ambiguous and should be construed as referring only to a weight load (contra proferentem rule).[112]

Other case law stresses the argument of ambiguity of the wording of the clauses.[113] However, there is further case law, which simply prefers the more narrow meaning of the relevant clause by applying the method of literal interpretation. Warranties, e.g., sometimes are taken as non-promissory but descriptive only[114] ore as promise for the presence, not for the future.[115] While these cases will explained later in detail, one can state here, already, that the SC tends to give preference to the concept of information control of contract terms, rather than to material fairness control. Quite the same is true with regard to the so-called basis to the contract rule. Such rules became null and void under sec. 6 subsec. 2 of the new Consumer Insurance (Disclosure and Representations) Act 2012 as well as they will become under sec. 9 subsec. 2 of the upcoming Insurance Act 2015.

2a. Consumer Protecting Regulation: ICOB 2005 and ICOBS 2008. Some further consumer protection has been effectuated by special insurance regulation and self-regulation, which – to farer reaching extent – will be treated below (under no. III.4 and 5), and which contain regulations of public law explained under VI and VII. Also, in cases of non-compliance by insurance enterprises or their representatives, the rules can be actionable under sec. 150 FSMA 2000, which provides for an action for breach of statutory duty for private persons who suffer loss.[116] One can argue, hence, that the regulation of ICOB and ICOBS, in its dogmatic nature, belongs to the private law.[117]

ICOB was promulgated under the FSMA 2000, and enlarged in its scope in 2005. ICOBS followed in 2008[118] and is not outdated by the Consumer Insurance (Disclosure and

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[111] (1940) 2 K.B. 156.
[112] *Houghton vs. Trafalgar Insurance Co Ltd* (1954) 1 QB 247, Court of Appeal.
[113] See *Adler vs. Moore*, (1961) 2 Q.B. 57, as quoted in Birds', op. cit., at 13.3.4.
[114] See *De Maurier (Jewels) Ltd. vs. Bastion Insurance Co*., (1967) 2 Lloyd's Rep. 550 ; *Birds'*, op. cit., at 9.8.
[115] *See GE Frankona Reinsurance Ltd. vs. CMM Trust No 1440, (2006)* EWHC 429 (Admlty), (2006) Lloyd's Rep. I.R. 704; *Birds'*, op. cit., at 9.8.
[116] See Birds' Ins. Law, op. cit., p. 37, fn. 63 with further references.
[117] Cf. the older theory of private law of the attachment of the German VAG, which has been transformed to genuine private law rules since 2008 by regulation of the VVG-InfoV, cf. *Herrmann*, in Bruck-Möller, VVG, 9th ed. 2009, § 7 no. 2, with further references.
[118] As published in the Encyclopedia of Insurance Law, and in the internet under www.

Representations) Act 2012.[119] The particular impetus for this was the need to implement the EU-Insurance Mediation Directive[120], requiring the statutory regulation of insurance intermediaries, which will be discussed in the following chapter. The ICOB-rules, however, went further and applied generally to the conduct of the insurance business as such. The following catalogue of rules can be summarized:

- general matters, including rules of communications with customers and prohibiting unfair inducements (no.2);
- rules regarding distance communication, implementing the relevant EC-Directive (3);
- general requirements for insurance intermediaries, including disclosure of their status and regarding the disclosure of fees and commissions (no. 4);[121]
- rules of identifying client needs and advising (no. 5);
- rules on product information to ensure that customers have the necessary information to make an informed choice about whether or not to buy a specific insurance contract and whether a contract continues to meet their needs (no. 6);
- rules conferring cancellation rights on retail customers (no. 7);
- and regarding the handling of claims (no. 8).

Most of the mentioned subjects are comparable to § 6s. VVG and the VVG-InfoV 2008 and §§ 60ss.VVG 2008. For better understanding, the details of no. 6 are quoted verbally, as follows:

"The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services;

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see ICOBS 3.1.14 R)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when."

In cases of non-compliance, and the consumer suffering a loss caused by that, the rules can be actionable under sec. 150 FSMA 2000. Further legal remedies are possible, some of which will be considered in the following (below no. 4/5).

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[119] See Appendix, at p 97, as discussed in later chapters.
[120] 2002/92/EC; implementation of the Directive o distance marketing of financial services (2002/65/EC) was intended, too; for this and the following cf. *Birds*, op. cit., p. 36 ss.
[121] For further details see infra, ch. III.3.

3. Agency Principles and Particularities of Insurance Law. For a long time, UK law has been distinguishing three categories of insurance intermediaries in a similar way to the Insurance Brokers (Registration) Act of 1977:

- brokers (formerly authorized and registered),
- agents (formerly authorized and registered),
- consultants, advisors (unregistered).

a. Groups of Professionals The FSMA abandoned the IBRA, but still all independent intermediaries must be authorized ((s. FSMA, sched. 2(2)(2): "offering…either as a principal or as an agent")). Consultants and advisors, who do not directly act on the part of a "buyer" or "seller" of an insurance contract, do not have to be authorized. Until Jan. 15th 2005, the EU-Directive on Insurance Intermediaries (DII) of Dec. 9th 2002 – with similar regulations – had to be implemented. The FSMA has introduced a definite statement on what is due to agents or brokers. Among different ideas, the basic regulation is that the intermediate has to provide reasonable summary of the insurance contract he recommends and show that his recommendation is suitable to the needs of the consumer as documented in a detailed statement ((statement of demands and needs) know your customer)).[122]

There is no definition of a "broker" in English case law. However, the following elements have been generally accepted as essential:

- the professional activity as intermediary directed towards the creation of an insurance or reinsurance coverage between people to be insured and insurance or reinsurance companies chosen by the intermediary;
- as well as preparing the conclusion of insurance contracts and if necessary the participation in their administration and realization, especially in cases of damage.

In contrast to many insurance agents, brokers normally carry on their profession as a full-time job. As also different from agents, the broker is empowered by the customer and acts as a representative for him not for the insurer. While an investment broker can be compared with the German Kommissionär (§§ 383 ss. HGB), the insurance broker's German equivalent is the Makler (§§ 93 ss. HGB in connection with §§ 652 ss. BGB).

The profession of an agent is generally defined as an activity of people who are empowered to offer, propose, prepare, or conclude insurance contracts in the name and to the account or only to the account of insurance companies and to participate in the administration and realization of the contracts, especially in cases of damage. Agents act primarily on behalf of the insurance companies and not of the insured.

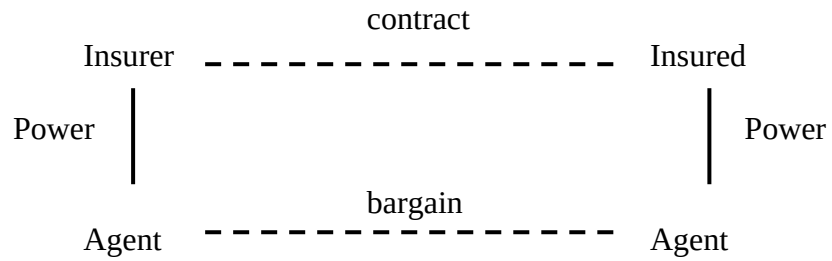
There are different types of insurance agents that are not easily differentiated in daily business. Numerically, the biggest group consists of part-time agents who offer insurance

[122] No. 6.1.10 ICOBS and the annex no.2 thereto, as considered above III.2a; for details and comparison *please,* see infra at 81; *Wilkens*, in Wambach/Herrmann (ed.), Solvency II Vermittlerrichtlinie, 2005, p. 111, 127 s.

contracts which are related to their main profession (eg. a car dealer who offers car insurances). They can work for several insurance companies and are paid by the insurance companies on commission. Besides this group, there are full-time agents, employed insurance agents, who are paid a regular salary or are commission based. They are mainly work for Canadian or Australian life-insurance companies in England. Industrial life insurance agents are employed by industrial-life-insurers and offer industrial-life-insurance contracts "door-to-door." They collect outstanding premiums on a weekly or monthly basis. Finally, the so-called own-case agents have to be mentioned. They enter into a contract directly with an insurance company and normally receive a reduction on the premium.

Besides the officially registered insurance brokers, there are insurance consultants and insurance advisors, who perform the same activity but do not meet the requirements necessary for registration. From a legal perspective, it is difficult to distinguish them from insurance agents.

b. General Law of Agency. According to the general law of agency, an "agent" is a person who is authorized to act on behalf of someone else ("the principal"). In this sense, insurance agents as well as insurance brokers are considered "agents." While the bargain is negotiated between the agents as natural persons, the contractual legal relation is created between the principals, who often are so-called moral persons as business companies or other legal entities. Since moral or legal persons are mere constructs of law, they cannot act as such and need natural persons as agents to act for them.



The principal is liable for every act of the agent which is taken by the latter to perform his/her tasks for the principal. The range of the agent's power to represent follows primarily from agreements made on granting the power, but additionally, it often develops due to the specific circumstances (implied authority). If the agent exceeds his/her power to represent, the principal is normally not made liable if one does not declare one's consent. This principle, however, is restricted by the doctrine of apparent authority, which is comparable to the case groups of *Anscheins-* or *Duldungsvollmacht* in German law. While in the cases of a *Duldungsvollmacht,* the principal knows about the agent's activities but does not want them to be done; in cases of *Anscheinsvollmacht,* the principal does not know and does not want the

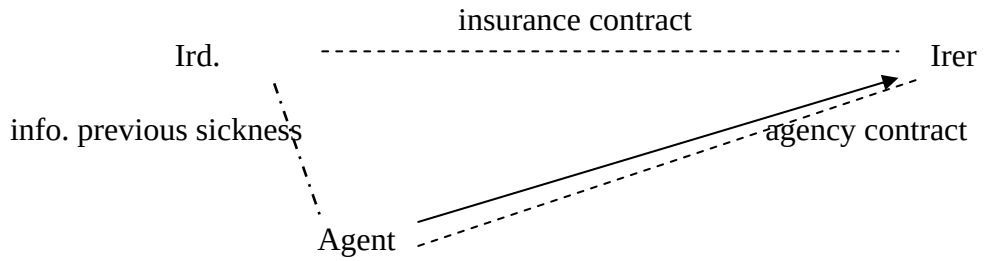
agent's activities, but he/her should have known of. Courts have stated strict pre-conditions to these kinds of agency, but cases of implied or apparent authority include both types.

Example 1: Agent A works as an "inspector" in an insurance company. It was held that he had authority to vary the terms of a proposal form.[123]

Example 2: Insurer I has handed out to agent A blank policies.
Apparent authority has not been derived from the mere fact the agent is armed with forms and frequently completes them.

c. Attribution of Knowledge and Responsibility. There is some case law that states that the insurer cannot refer to his/her agent's absence of knowledge. On the other hand, the knowledge of the latter is attributed to the principal if the agent obtained that knowledge while he/she was carrying out his/her profession and complying with his/her duties towards the principal.[124]

Example 1: Broker B fills put the offer form for the insured Ird. Not knowing about the leukemia of the insured, he writes "no serious illness." If the insured was aware of his sickness, he cannot refer to the absence of knowledge of the "agent" B.



Example 2: Ird. tells the agent A of his illness, but A, acting for of the insurance company I, does not mention it in the offer form because he wants to get the provision for the contract conclusion. In such cases, it is held that the knowledge of A has to be computed to I and that I can not reject to pay because a serious breach of contract duties by A.[125]

Other decisions differentiate in cases of serious breach of contract of the insured. In German law, the case law of Auge und Ohr can be compared. However, also there is also a strong discussion to restrict the computation of knowledge to I if the Ird. is aware that the wrong information was written down by the agent in the offer form.[126]

Sometimes, the agent has special power to vary the terms of a written contract. If he does so, knowing about circumstances under which Ird. himself would not have accepted an offer to renew the insurance contract, the changed contract becomes binding. Apparent authority,

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[123] Please, see *Stone vs. Reliance Mutual Ins. Society Ltd*., 1972, 1 Lloyd's Rep. 469.
[124] Cf. Auge und Ohr-Rspr. of BGH, e.g. BGH NJW 1993, 2807; now § 70 VVG.
[125] *Newsholme Bros vs. Road Transport&General Insurance Co.* (1929) 2 K.B. 356; please, see next chapters on misrepresentation and warranties.
[126] Cf. Römer/*Langheid*, Kommentar VVG, 2. Aufl. 2003, §§ 16,17, Rdn. 40.

however, has not been derived from the mere fact that the agent is armed with forms and frequently completes them.[127]

The responsibility of broker and agent, meaning their duties towards the principal, differs substantially: Agents are not required to be technical experts in the insurance business but have to act with good faith and with appropriate care when acting out their instructions. If they are not able to comply with these instructions, they have to inform the principal about it.

Example: A does not work out an insured's profile before giving information to customers. Liability of A and P (cf. §§ 42c, e VVG 07; §§ 61, 63 VVG 08).

Brokers, on the contrary, can be seen as "expert agents" and are expected to have a special professional knowledge for their clients' benefit. Any failure in this respect makes them liable for their client's damage.

Example: Broker B was held liable to his client because he had received and transferred payments of premiums for insurance companies about whose insolvency he should have known.

The legal position of a broker at Lloyd's is determined by the Lloyd's Acts and the specific commercial practices in Lloyd's markets. The "broker at Lloyd's" is also seen as an agent of the insurance company in general; however, he often acts as agent of the underwriter as well (especially in connection with the settlement of an insurance claim). The Lloyd's broker is liable himself to the underwriter for the premium.

d. Consultation Duties and Suitable Advice. In UK as well as in US case law, the so-called suitability doctrine has been developed, the provisions of which are very similar to the ones for German insurance agents under §§ 60 ss. VVG. Intermediates of investment contracts have to care for subjective and objective suitability of their recommendations by analysing the personal needs of the client and the actual market offers, which fit for them.[128] There was, however, no general transfer of these provisions to the agents' and brokers' duties in insurance business of intermediaries as in §§ 60 ss. VVG, except the duties to disclose their fees, to announce the insured of representing conflicting interests[129] or of lacking market analysis and to work out a paper in d "durable medium" showing the essentials of the recommended insurance contract.[130] While this can be compared to the Produktinformationsblatt of § 4 VVG-InfoV, duties of suitable pre-contractual information were not provided by general insurance case law. Only some exemptions were made in certain cases of capital life-insurance and similar cases of consumer business.[131]

In ICOBS 2005/2008,[132] however, a regulation was done by the FCA[133], which implemented the EU-Insurance Mediation Directive von 2002 (IMDir.):[134]

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[127] Cf. *Birds*, op.cit., p.183 ss.
[128] *In FNCB Ltd. V. Barnet Devanney (Harrow) Ltd.* (1999) Lloyd's Rep. I. R. 459; cf. *Birds'*, op. cit., ch. 12.6.2.
[129] *Boardman vs. Phipps* (1967), A.C. 46.
[130] FSMA 2000 (Regulated Activities) (Amendment) (No.2) Order 2003, SI 2003/1476, which came into force in Jan. 2005; cf. *Birds*, op.cit. ch. 12.1.
[131] *In FNCB Ltd. V. Barnet Devanney (Harrow) Ltd.* (1999) Lloyd's Rep. I. R. 459; *Harvest Trading Co. Ltd. Vs. Davis Insurance Services* (1991), 2 Lloyd's Rep. 638.
[132] Cf. supra no. III.2a.

Sec. 4.1.6. "Prior to the conclusion of a…contract of insurance…, a firm must tell the customer whether:

(a) it gives advice on the basis of a fair analysis of the market; or

(b) it is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings…"

Sec.4.1.7 Prior to the conclusion of a…contract of insurance…, a firm must state whether it is giving a personal recommendation or information."

The provision is in accordance with Art. 12 IMDir., but seems to be less strict than § 61 VVG. While the IMDir. and ICOBS care for transparency only whether the broker or agent wants to give advice to his customer, the German law provides with compulsory effect that the agent must ask for the needs of the insured an must base his information on adequate objective analysis.[135] The difference is important for the consequences in cases in which the agent does not say whether he wants to give full or restricted advice. Under § 60 subsec. 1 sentence 2 VVG full advice is necessary, if the agent does not declare expressis verbis that he restricts himself to offers of one insurer or a selection of certain offers. ICOBS also let the agent the choice to declare this or that alternative, but does not provide for consequences once the choice is not declared before contract advice. So the question is left open, whether full advice is owed in cases of doubt or if the customer needs to find out himself, what is wanted by agent. Since ICOBS-law is public law, and the FCA has indicated, that the case law should be unchanged by the ICOBS-provisions on agency,[136] one cannot argue that full market analysis is owed in doubt.

The CIA 2012, additionally, broadened the duties of suitable advice to a certain extent by sec. 9 and schedule 2 (see infra, Appendix 1, at p. 102). The provision makes distinction of agents typically acting for the insurer from such persons acting for the insured. If being taken as intermediaries on the side of the insured, the duties of the case law apply, which are provided for brokers, originally. Hence, they have to advise and warn about particular insurers, not just as to their financial stability but also as to the effective cover and the suitability of particular terms.[137]

In 2016 a new **EU-Directive on Insurance Distribution** (IDD) has been enacted (Off.J. L 26/41). Art. 20 provides for „Advice, and standards for sales where no advice is given", as follows:

"(1) Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obained from the custormer, tehe demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form[138] Any contract proposed shall be consistent with the customer's insurance demands and needs."

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[133] Fin. Conduct Authority, as supra I.5.

[134] Dir. 2002/92/EC.

[135] Further provisions are on registration of intermediators in the Financial Services Register (Sec. 4.1.2 (2)) and on the duty to inform the customer, "whether it has a direct or indirect holding representing more than 10% of the voting rights or capital in a given insurance undertaking…" (cf. § 11 subsec. 1 no. 5 VersVermV).

[136] See FCA as published in www.out-law.com/page-8927 (download of 8/29/2014).

[137] See again *In FNCB Ltd. V. Barnet Devanney (Harrow) Ltd.* (1999); *Harvest Trading Co. Ltd. Vs. Davis Insurance Services* (1991), both as quoted in last fn.

[138] Cf. Produktinformationsblatt

Comment: Distributor can still deny to make detailed market analysis, but must meet the needs (suitability-D). The directive will come into force in Febr. 2018, once GB will be an EU-member state, still.

Also warning duties can arise, as in cases of under insurance and of a breach of a condition precedent to keep the alarm on its premises in working order.[139] Unexpected warranty clauses, which will be explained later, can be required to be subject of clear information before contract conclusion. Since the contract partners can contract-out certain preconditions of a warranty, the insurer and his agent is bound to take sufficient steps to draw such a disadvantageous term to the insured's attention before the contract is entered into or a variation agreed.[140] In *O'Connor vs. Kirby*[141] the defendant broker of the insured failed to give information of a warranty of a proposal form relating to the garaging of the insured car. Following, the form was not completed properly, and the Irer denied liability because of a breach of a warranty. A damage claim is the legal consequence of such a kind of misrepresentation. The broker, in cases like that, must pay the sum which the insured would have recovered from the insurer had the latter been liable.[142]

As to the remuneration by fees, ICOBS 4.3.1R contains the relevant provision. The broker has to provide the client with details of any fee (or the basis of calculating any fee) before the client incurs any liability to pay, or before the conclusion of the insurance contract, whichever is earlier. This extends to all fees charged over the lifetime of the contract, but not to premiums or commissions. ICOBS 4.4 only requires a broker to disclose his commission to a commercial customer if the customer "requests" it; and in consumer business ICOBS 4.4 is not applicable at all,[143] which leaves serious open questions. Wrong answers of the broker, however, will be in conflict with the general good faith principle. Much stronger regulation will have to be enacted by implementation of the EU-directive on financial markets of 7/3/2014, which must be implemented until 2017. Commissions will still be possible, but not for intermediaries who are called independent.[144]

4. Utmost Good Faith, Non-Disclosure and Misrepresentation. The "utmost good faith" doctrine applies according to the common (insurance) law. While for the conclusion of other contracts only "ordinary good faith" is applied, insurance contracts need to be bargained and agreed upon by both parties being more faithfully to each other. Every party is obliged to

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[139] *J.W.Bollom&Co. Ltd. Vs. Byas Mosley&Co. Ltd*, (2000) Lloyd's Rep. I.R. 136.
[140] See *Birds*, op. cit., 10th ed., no. 9.7.2, at 183.
[141] (1972) 1 Q.B. 90.
[142] See *Birds*, op. cit., at 226 s.; cf. *Jones vs. Environcom Ltd.* (2010) EWHC 759 (Comm); (2010) Lloyd's Rep. I.R. 676; *Synergy Health (UK) Ltd. vs. CGU Insurance Plc*. (2010) EWCH 2583 (Comm); ; (2011) Lloyd's Rep. I.R. 500; for indirect comparison of German law see the warning duty of § 61 ss. VVG.
[143] See FCA, as quoted: "Consumer customers are not covered by industry guidance. There is currently no provision in ICOBS for the disclosure of commissions to consumers and FSA sys it has no intention to change this situation…"
[144] Same under HonoraranlageberatungsG of 7/15/2013, BGBl. I, 2390, in force since 8/1/2014 (applicable for commercial paper service enterprises only); but see case law of kick-backs, leading case BGH of 12/19/2006 (generalised for life insurance business by *Schwintowski*, VersR 2009, 728, 732; *S. Michaelis*, www.v-aktuell.de/newsletter/newsletter_10_01_5.html, download 8/29.2014).

provide the other with all information that is relevant for the conclusion of the contract no matter if the information has been asked for or not (duty of disclosure).

While this principle is still in force, the Consumer Insurance (Disclosure and Representations) Act 2012 (CIA) has modified it to some extend. The Act has removed the obligation to disclose all material facts, and the consumer would no longer be required to volunteer information but only to respond honestly and with reasonable care to questions asked. This consequence is drawn from sec.3 (2) (a) of the Act, which stipulates that reasonability of information depends on "how clear, and how specific, the insurer's questions were".[145] The new Insurance Act 2015 (InsA), however, has not fully taken over this modification of the utmost good faith principle for the industrial business. Sec 3 subsec. 4 InsA rather restricts the duty of disclosure to "material circumstances which the insurer knows or ought to know" (lit. a) and restricts the information duty to "information to put a prudent insurer on notice that it needs to make further enquiries". Some scholars take this for an abandonment of the utmost good face doctrine also in the field of business insurance law.[146]

(1.) Information asymmetry. The concept is based on evident economic reasons, called information asymmetry. While the insured knows best about specific risks covered by the future insurance contract, the insurer is not informed and cannot be sufficiently aware of such information. The difficulties for the insurer to evaluate the specific risk can be partially compensated by the information duties of the utmost good faith concept.

The information duties also are intended to prevent the insured person from using the advantage of having more information on the risk to the disadvantage of the insurer. If he gives wrong information or does not give the information required, he has to bear the risk of cover avoidance by the insurer.

(2.) Materiality Test and Causality. In every case of utmost good faith duties, a materiality test is necessary. Principally, the duty of disclosure only relates to circumstances being material to material to the decision of the insurer whether to take the risk or not. The materiality test does not necessarily depend on whether the insurer has asked for the fact.

Example 1: Woolcott's house, which was insured with the Sun Alliance, was destroyed in a fire. The company refused a payment to W because when he had applied for the insurance cover he had not disclosed the fact that he had convictions for robbery and other offences some 12 years previously. He was not asked any questions about his character on the application form, although the judge accepted that he would have answered such a question truthfully if he had been asked. Caulfield J. held that the company was entitled to deny liability.[147]

Example 2: Dawsons insured a lorry with Bonnin and others, underwriters at Lloyd's, under a policy which recited that the proposal, which Dawsons had completed, should be

[145] Also, if an applicant clearly refuses to answer a question and the Irer nevertheless accepts the proposal, the omission would not be taken as a misrepresentation.
[146] Cf. – but misleading – sec. 14 I InsA: "utmost good faith… is abolished".
[147] *Woolcott vs. Sun Alliance and London Insurance Ltd* (1978), 1 WLR 493, Queens Bench Division.

the basis-of-the-contract and be held as incorporated in it. In reply to a question in the proposal, they stated that the lorry would usually be garaged at their ordinary place of business in Glasgow; but in fact, it was normally garaged at a farm on the outskirts of the city. The lorry was destroyed by a fire at the latter address. - The House of Lords held that the statement was not material on the basis of the regular utmost good faith duties.[148] *(However, the case was decided in favour of the defendant because the insurers were entitled to rely on the basis-of-the-contract provision to avoid liability).*[149]

In principle, the duty of disclosure exists only in the circumstances are known to the insured. Therefore, the insured is not obliged to make inquiries on his/ her own initiative (the exemptions are dealt with later). Comparing this German law, also § 16 I VVG 07 – with exemptions of bad faith ("Arglist") – only requires to reveal known circumstances ("*alle bekannten Umstände*"). Hence, there is no investigation duty of the insured, in principle, but the insurer can also deny cover if the insured is unaware by intentionally closing his/her eyes before the truth (§ 16 II VVG 07). Also "utmost good faith," being more than „good faith", provides that the injured, while not having investigation duties in principle, must provide information of relevant risk-determining facts. Sec. 18 (1) of the Marine Ins. Act (MIA) provides that an assured is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him" (constructive knowledge). This provision has been applied by analogy in cases of other than marine insurance. e.g. relevant facts known by employees of the assured will be held to be in his constructive knowledge.[150]

Example: The insured was sent to a specialized doctor for tests of an unknown medical condition. If he does not disclose this (known) fact, he can be held to have shut his eyes to the truth.[151]

Some commentators argue that in this case law obliges the insured to make enquiry if a "prudent" or "reasonable" contract partner would do so. In comparison to German law, the case law of *Repräsentantenhaftung* or *Wissenszurechnung* seems to be quite similar.[152]

Disclosure is only due to the insured for purposes of the conclusion of the insurance contract, as far as it is relevant for the decision of the insurer to agree to the contract. For the later performance of the contract, the mentioned "ordinary good faith" is sufficient. However, the duty is revived for every amendment to or change of the contract. As

[148] *Dawsons Ltd vs. Bonnin* (1922) 2 AC 413, House of Lords.
[149] Please, see below I.5.
[150] But no duty of special enquiry, *MacGillivray*, op. cit., ch. 17-10.
[151] See *Keating vs. New Ireland Ass. Co*. (1990) 2 I.R. 383.
[152] Cf. *Schimikowski*, Versicherungsvertragsrecht, No. 276 ss., 283.

insurance contracts only cover a one-year-period in the normal case, it annually gains importance (restrictions later).

*Example: Glicksman and his partner had insured the stock of their tailoring business against burglary (*Einbruch*) with the respondent company; but the company declined liability when a burglary happened, on the ground that Glicksman had not disclosed at the time when he applied for the cover that another insurance company had once declined to grant him insurance.*

An arbitrator found as a fact that this information was material, and in consequence the House of Lords (albeit with reluctance) held that the insurer's refusal to accept liability was justified.[153]

Disclosure duties of utmost good faith only exist when a contract is going to be concluded. If the risk increase occurs after the conclusion, the insured, under case law, is not obliged to give notice of it.[154] If the contract is going to be renewed, the duty of utmost good faith comes into play. The insured has to give information and – within the limits of reasonability –make enquiry. The House of Lords, however, held in a decision of 2001 that this duty of disclosure refers to new circumstances only, which are relevant to the renewal of the contract.[155]

(3.) Consequences In case of misrepresentation, the insurer can make use of the right to declare the insurance contract void, no matter whether the risk has occurred already or not. If the insurer has paid for a certain damage, and later became aware of the misrepresentation, he can still declare the contract void and has a claim against the insured on the basis of unjust enrichment of getting paid back the money.

In former times, the insurer was given the right to deny coverage but to keep the contract.[156] The House of Lords, however, denied this option in its more recent decision[157] and held that the insurer can only declare the contract void. If the insurer keeps collecting premiums from the customer, although he got to know of the non-disclosure or misrepresentation through the customer himself or by other means, the right to declare the contract void is lost.

As compared to German law, the law of utmost good faith seems quite old-fashioned to some commentators. Even the Royal Commission, in its report of 2009, argued, that "the

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[153] *Glicksman vs. Lancashire & General Assurance Co Ltd* (1927).

[154] But see the standard terms in fire insurance practice, mentioned below, in ch. X.2, and § 23 II VVG; for aspects of warranty law in this respect see infra, ch. III.5.

[155] *Manifest Shipping Co. Ltd. Vs. Uni-Polaris Insurance Co., Ltd*. (2001), 2 W.L.R. 170, 1888 s.; cf. *Rühl*, op. cit., p. 1455.

[156] *Black King Shipping Corp. and Waynang (Panama) S.A. vs. Massie (The "Litsion Pride")* (1985), 1 Ll.L.R. 437, 517; *Continental Illinois National Bank & Trust Co. of Chicago vs. Alliance Assurance Co. Ltd.* (The "Captain Panagos") 1986, 2 Lloyd's Rep. 470, 512.

[157] *Manifest Shipping Co. Ltd. Vs. Uni-Polaris Insurance Co., Ltd*. (2001), 2 W.L.R. 170, 1888 s.

harshness of current UK law cannot be justified as compared much fairer law in other EU countries".[158] It is especially this why the Consumer Ins. (Disclosure and Representations) Act 2012 (CIA) became enacted and modified the utmost good faith principle.[159] This will be explained in further detail at the end of the next section, because the provisions include the law of warranties. – Also, there are recommendations on the law of post contract duties of good faith, made by the LCs in July 2010 (see http://lawcommission.justice.gov.uk/areas/insurance-law.htm, download Febr. 2012). Since the general structure is the same as the one of the proposals of the LC on the law of non-disclosure and warranties, the details shall be given in the context of the following, too.

5. Warranties' Case Law and Statutory Reforms. The warranty provision is a promise which, if broken, also empowers the other party with the right to declare the contract void, but the effects of warranties even reach beyond the "duty of disclosure" provided for by common law.

a. Basic Provisions. The insured guarantees that something shall be or not be done, or that a specific agreement shall be fulfilled, or he insures or excludes the existence of a specific act. Warranties have to be fulfilled in a strict manner according to the letters. The consequences of a breach of warranty come into effect, no matter if the warranty refers to material facts or not, and no matter if the breach of contract was causal for the insurance case and committed by the insured or not.

Warranties often are called as such in the contract, but the term "basis-of-the-contract" clause is as usual.[160] Application forms with warranties usually contain that the applicant (insured person) guarantees to be the information given is true and complete; by this, the form is the "basis-of-the-contract." The effect of this is that all representations obtain the legal nature of warranties, which means they have to be complied with strictly, and every deviation gives the right to the insurer to annul the contract.

Example 1: One of the oldest cases is De Hahn vs. Hartley[161], where a marina policy was involved covering a ship and its cargo from Africa to its port of discharge in the West Indies. The insured warranted that the ship sailed from Liverpool with 50 hands on board.

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[158] As quoted in *Birds*, op.cit., at p. 150; cf. above, at III.5.
[159] Practically most important are sec. 2 subsec. 4, replacing utmost good faith by the principle of reasonable care, and sec.4 (1) (b) CIA, providing that the Irer must show that, without the misrepresentation, it would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms; cf. § 19 (4) VVG.
[160] No more, however, in consumer contracts; see below.
[161] (1786) 1 T.R. 343.

In fact it sailed with only 46 hands for a short distance but it took on an extra six hands very soon, and continued to have 52 hands.

It was held that the insurer could avoid liability for breach of warranty, even though it was obvious that the breach had no connection with the loss that subsequently occurred. The authority of this and other decisions being 250 years old and based on the rationale of "paramount freedom of contract" of this time has been questioned, "particularly when the insured is a consumer".[162] Despite the fact, that there are still other recent decisions being based on quite the strict rational, [163] others seem to follow a trend of more reasonable construction. In *Pratt vs. Aigaion Ins*. Co. SA (2009) Loyd's Rep. I.R. 225, a warranty, in a marina policy, provided for the owner or skipper to be "on board at all times". The court held the clause to be relevant only when the vessel was being navigated, and that no breach was done by the fact that skipper was not on board while the trawler was safely tied up in harbour.[164]

Example 2: Conn's nine year old taxi was badly damaged when it ran off the road as he was driving it at 2 am – probably because he had fallen asleep at the wheel. The defendant insurance company declined liability on the ground that he had failed to comply with a (warranty-) term of the policy, which required him to take reasonable steps to maintain the vehicle in an efficient condition. In particular, the taxi's two front tires were entirely bad – the canvas (Leinwand) was showing through in places – and there was also some evidence that the brakes were defective. However, the defective state of the vehicle had not caused or contributed to the accident.

The Court of Appeal, reversing the trial judge, held that the company could disown liability.[165] The causality question was held unessential.

Example 3: Farr owned two taxis, which he insured with the defendant company, on the basis of a proposal in which he stated that the vehicles were to be driven in only one shift per 24 hours. Six months later, one of the taxis was driven for two shifts in 24 hours for one or two days in August while the other was being repaired. Thereafter, each cab was once again used for only one shift per day. When a claim was made in respect of an accident to the former of these taxis, the insurer claimed that its use on a double-shift basis during August was a breach of warranty, which discharged it from liability.

The court held that the statement was not a warranty but is merely a descriptive of the risk, and that the insurer was liable.[166]

Other less strict constructions of warranties make the difference between warranties of present or past facts on the one hand and warranties as to the future, so-called continuing warranties, on the other hand. If no promise for the future is given the insurance company cannot deny liability in cases of present conformant actions of the insured.

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[162] *Birds*, op. cit., at 152, fn. 8; id. (1991) 107 L.Q.R. 540.

[163] See Genesis Housing Ass. Ltd. vs. Liberty Syndicate Man. Ltd (2013) EWCA Civ 1173, as quoted by Birds, op. cit 10th ed. p. 168.

[164] Decision agreed by Birds, op. cit. 10th ed. at 172.

[165] *Conn vs. Westminster Motor Insurance Association Ltd* (1966), 1 Lloyd's Rep 407, Court of Appeal.

[166] *Farr vs. Motor Traders' Mutual Insurance Society* (1920), 3 KB 669; cf. the decision of the House of Lords in *Provicial Insurance Co. vs. Morgan* (1933) A.C. 240, where a clause of a vehicle insurance, stating that the insured lorry will be used for delivery of coal, was violated by an occasional transport of timber. The court held that the clause had to be interpreted "strictly though reasonably", which meant that only the general use for carrying coal was warranted.

Example 4: The insured company warranted when its representative completed a proposal form for employers' liability insurance that its machinery, plant and ways "are …properly fenced and guarded and otherwise in good order and condition".

The court, in *Woolfall & Rimmer vs. Moyle*[167] relied on the present tense of the proposal form (are) and rejected the argument that the warranty was continuing. Similarly, a warranty was held to relate simply to the past and the present time, which read: "I am a total abstainer from alcoholic drinks…".[168]

There are court opinions, however, holding that, despite using present time, a warranty clause should be read prima facie as a continuing promise, on the ground that otherwise it would be of little or no value to the insurer.[169] In *Hussain vs. Brown*[170], on the other hand, the court held that prima facie reading of such clauses cannot be generally accepted. Also, it is in this line, that courts preferre the construction of warranty to be an opinion clause, which means that the insured states certain circumstances being true to his best knowledge only. This alternative shall be adequate especially in cases of consumer contracts.[171]

Another possibility to mitigate the harshness of the law of warranties[172] and for avoiding the strict consequences of warranties[173] is to assume that the insured might have waived his rights of a violated warranty.

Example 5: In West vs. National Motor and Accident Insurance Union[174] *the insured was alleged to be in breach of a warranty as to the value of property insured. The insurer purported to reject his claim while relying upon a term of the policy to enforce arbitration.*

It was held that, by relying on the term, the insurers had waived their right to avoid the policy.[175] Although the opinion was criticised in the literature[176], it is in line with the mentioned decisions, which try to avoid the strict consequences of the principles of warranties.

More recent court decisions restrict the meaning of warranty clauses to one of more sections of so called multi-section policies. A policy, e.g., which protected against losses by theft or fire, and having a warranty clause on burglar alarm correctly installed and properly maintained, will be applied only for the section on fire insurance.[177]

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[167] (1942) 1 K.B. 66.
[168] *Kennedy vs. Smith*, 1976 S.L.T. 110.
[169] See *Hales vs. Reliance Fire and Accident Insurance Co.*,(1960) 2 Lloyd's Rep. 391.
[170] (1996) 2 Lloyd's Rep. 627, 629 per *Saville* L.J, as quoted in *Birds*,op. cit., at 158.
[171] See *Birds*, op. cit., at 159; but see also *Kler Knitwear Ltd. vs. Lombard General Insurance Co. Ltd.* (2000) Lloyd's Rep. I. R. 47.
[172] See *GE Frankona Reinsured Ltd. vs. CMM Trust No. 1440* (2006) Lloyd's Rep. I.R. 704 (*Morland* J. calling it a "trend"); *Pratt vs. Aigaion Insurance Co. SA* (2009) Lloyd's Rep. I.R. 225; cf. *Birds*, op. cit., at 181 s..
[173] *West vs. National Motor and Accident Insurance Union* (1954) 1 Lloyd's Rep. 461.
[174] As quoted before.
[175] Ibid., at 463.
[176] See *Birds*, op. cit., at 156.
[177] *Printpak vs. AGF Ins. Ltd*. (1999) Lloyd's Rep. I. R. 542, as quoted in *Birds*, op. cit., at 172 s. with further references.

Because of the over-strictness and uncertainties of the case law on warranties, and to prevent the industry from becoming subject to the rules of the Unfair Contract Terms Act of 1977, the associations of the insurance business have issued "Statements of Insurance Practice". These are not binding, but show trends of consumer protection, which are quite similar to modern provisions in Germany. While British law compared to German VVG of 2008 is far on behind, one can say that the self-regulations have had some very progressive tendencies.[178] The following points are essential:

- declarations made on application forms are only to be made to the best of the applicant's knowledge or belief, which means that instead of a "*basis-of-the-contract*" clause solely the guaranty of the applicant's honesty is required;
- relevant circumstances (material facts) shall be made subject to explicit questions on the application form (cf. § 19 I VVG)[179];
- the duty of disclosure according to common law and the consequences of a breach shall be stated clearly on the application form (cf. warning duties in § 19 V VVG). Especially at the signing of the contract the clients shall be advised in writing which consequences will result from false or hidden information, and that the duty of disclosure is revived with every renewal of the contract:
- special attention is called to the fact that the insurers renounce the right to claim a warranty – with exception to cases of fraud, deception or negligence – if there is no causal connection between the case of damage and the violation of an obligation.

Another instrument of consumer protection, which can be helpful at present time, is the Ombudsman Scheme of sec. 225 ss. FSMA and Sched. 17. The opinion of the ombudsman is also to be based on a very vague fairness and reasonability test (see sec. 228 (2) FSMA), which is very similar to the mentioned ABI-Statement. In many cases of private insurance contracts, the Ombudsman has compulsory jurisdiction.[180]

b. Actual Developments of Consumer Protection. The recommendations made in the Statements of Insurance Practice were not considered to be sufficient by the consumer protection movement (to reach of the term consumer for small business, s. appendix 1, fn. 230.) because they had no legally binding character and, therefore, the insured could not draw legally enforceable claims from it. It is mainly for this reason that the General Insurance Standards Council Rules (GISC Rules) 2000 stated information duties, esp. to inform the insured about duties of disclosure, restricting them to "material circumstances." The GISC Rules existed parallel to the ABI Statements, but have now become a part of the

[178] See in more detail below lit.b; insofar correct *Rühl*, 55 (2006) ICLQ, 879 ss.; cf. *id*. in Basedow et al. (ed.) op. cit.
[179] This seems to be an example to what is said above, text with the fn. before.
[180] Sec. 226 FSMA, and below IV.3.

FSMA-Regulation of 2000 and, hence, must be treated to a far reaching extent[181] as binding law. In 2005 the Insurance Conduct of Business Rules (ICOB) were made by the FSMA, sec. 7.3.6 providing that an "insurer must not:

> (1) unreasonably reject a claim made by a customer;
> (2) except where there is evidence of fraud, refuse to meet a claim made by a retail customer (Endverbraucher) on the grounds:
> (a) of non-disclosure of a fact material to the risk that the retail customer…could not reasonably be expected to have disclosed…"

This seems to have been a step towards consumer protection, as distinct from protection of commercial insured[182], a separate development which also is initiated in other European member countries, and esp. in Germany.[183] Some details shall be dealt with, despite the fact that commercial insurance contracts are focussed in this book. Especially live insurance contracts are consumer contracts, and some case law extends the consumer term to small business, also (see fn. 230).

Unfortunately the provision of reasonability is not very clear and needs to be decided on a case to case basis. This is why further amendments have been proposed by a government commission's "first" report of 2009, which has been followed by further ones.[184] The Commission's opinion was based on the argument, that "the harshness of current UK law cannot be justified as compared much fairer law in other EU countries".[185]

Further reforms seemed to be necessary. In May 2011 a Parliamentary Bill was published, following most of the proposals of the Law Commission (see www.hm-treasury.gov.uk/8932htm, download of March 2012). After the Parliament has passed the act in March 2012 with most of the details the Commission proposed, Royal Assent was given 8 March 2012. The Act is called Consumer Insurance (Disclosure and Representations) Act 2012 c.6 (cited here as CIA). Finally, in February 2013, a commencement order was published as statutory instrument in exercise of sec. 12 (2) of the act, under which the CIA has come into force definitely on 6th April 2013.[186]

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[181] Application by the Financial Ombudsman Service (FOS) being compulsive in cases with awards of no more than 100.000 PSt. (*Birds*, 7th ed., p.150). Non-binding warning duty, because para. 1 (a) of the Statement is not repeated in the ICOB; cf. *Birds*, ibid, at
p.cit., p 148 fn. 195.

[182] Not applicable in a commercial context, *James vs. CGU Insurance plc* (2002) Lloyd's Rep. I.R. 206; but s. infra, Fn. 230.

[183] Stressed by *Rühl*, 55 (2006) ICLQ, 879 ss.; cf. *id*. in Basedow et al. (ed.) op. cit.; *Birds*, op. cit., p. 15, 148.

[184] Law Com. No. 319, Scot Law Com. No 219, Cm 7758, December 2009; for expectations of parliamentary consequences s. *Birds*, op. cit., p. 150 with further references; for more details see infra (next section).

[185] As quoted in *Birds*, at p. 150. However, one has to include comparison with the law of risk increase (see supra no III.4), since warranties provide for keeping the risk unchanged, to a far extent. This function of protection of the insurer from negligent risk increase by the insured seems to be legitimate.

[186] 2013 c.6, as published www.legislation.gov.uk/uksi/2013/450/made (download 3/11/2013).

The new act has taken over the suggestions of the Commissions, especially

- the utmost good faith principle is developed to a kind of reasonability doctrine (materiality test abandonned[187]);
- the proportionality test has replaced the former all or nothing principle; and
- in case the insurer knows of the facts being not dissolved by the insured, he has no right to step back from the contract.

The relevant provisions are very short:

Sec.2 (2) CIA: "It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer."

Schedule 1 Part 1, no. 7: "…if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may ***reduce proportionately the amount to be paid on a claim****".*[188]

Sec. 3 (4): "If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account."[189]

As to the proportionality test[190], the amount of cover will be quoted with respect of the difference of the premiums including or excluding the additional risk of the undisclosed matter.

Example: Police inspector P renewed a private car insurance he used to have at an annual police service premium reduction of 100 PSt., the regular premium being 120 PSt. When concluding the actual contract, he did not mention that he had cancelled his job and was employed as a private detective. After an accident he caused with slight negligence, and which the damage of was 1.000 PSt., the insurer I denied cover relying on the wrong information about his job, correctly?(Please compare case law to the regulation of CIA 2012)

I. Case Law: I can deny the total cover of 1000 PSt., because of a negligent violation of the pre-contractual information duty. The pre-contractual disclosure duty was applicable, since the car insurance had to be renewed every year, and P was out of service of his old job. His new occupation with a private detective service does not qualify for the rebate. The violation of the information duty was causal for the conclusion of the insurance contract with the rebate clause, and P knew about his new job, which had to be indicated to I. Under the current principle of "all or nothing" the whole amount of 1000 PSt. can be refused.

II. CIA regulation: It is a private contract, which the CIA provision would apply for. The utmost good faith duty is restricted to reasonable care of the insured to make correct announcement of his job change. P's violation of the information duty, however, was unreasonable, since the reduction clause was or should have been known and understandable to him. As to the legal remedies, one must see, that only 1/6th can be deducted, since the regular contract would have been concluded with P as a private detective, the premium for which was 16,6% higher. I has to pay 833,40 PSt.

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[187] While the former materiality test was in the perspective of the Irer, the reasonability test is more from an objective point of view, see *Pinsent Masons*, Legal news and guidance, www.out-law.com/page-11391.

[188] Highlighted words added, HH.

[189] Additionally see *Pinsent Masons*, op.cit.: in non-life cases the Irer "…can chose to treat the contract as subsisting and give the consumer notice of the amended terms" (but see § 19 IV VVG: no choice of the Irer).

[190] As different from the so called principle of "all or nothing", meaning that total cover of the insurer can be denied, if the insured violates a material information duty and causes a contract conclusion, the insurer would not have decided for, if he would have known about the fact not dissolved by the insured.

The proportionality principle seems to be accepted, generally. This is why it has become enacted by the new Insurance Contracts Act 2015 (ICA), the Bill of which has been published in January 2014 (consultation closing date 21st March).[191] As different from the CIA 2012, which is for consumer contracts only, the ICA 2015 will also be applicable for b2b-contracts. With regard to the example of the car insurance case above, the judgement would not be different, if it would not be insurance for a private car, but for a car owned by state. By reason of proportionality the due payment of I would be 800 PSt. Insurers will still be able to avoid a policy for deliberate and reckless breaches as under CIA. [192]

As to German/British comparison, it must be mentioned that the proportionality principle differs in respect to the relation. While UK law relates the premium difference to the amount of the covered damage, § 19 IV VVG excludes the cancellation right of the Irer totally, but gives him a right to the higher premium for the full time of the past of the insurance contract,[193] provided only that the wrong risk disclosure was done with slight negligence. In this respect it is interesting to see that the general line of the legislator seems to have been given up to a certain extent. The intent was to provide for disadvantages of the consumer only in cases of gross negligence.[194] In § 19 IV however, slight negligence is sufficient for the claim of higher premiums for the past. From the viewpoint of the international law comparison this can be welcomed, despite the fact that it means some systematic inconsequence. – In cases of fraud the insurer would have the option to terminate its liability to pay out in respect of losses after the fraud, but would remain liable for legitimate losses before the fraud.

Warranty clauses, even in consumer contracts, are still possible, but must be worded expressis verbis and clearly understandable (sec. 6 II). However, the wording of the contract that it will be "void" or '"voidable" after the insured failed to fulfil a certain provision, can be taken as a complete warranty.[195] The Act is applicable for contracts being concluded after the enactment date of the CIA in April 2013.[196] Renewals and variations after 6 April 2013 can fall under the CIA, also, as far as the old contract is not to be separated as independent from the new parts.[197]

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[191] Internet version available under http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm.

[192] Same where the breach was innocent if the underwriter would have refused to write the policy at all.

[193] Different only if the violation of the information duty was without negligence; than higher premium only for the running period, see '§ 19 IV.2 VVG.

[194] For the purpose of the legislator to harmonize the negligence standard in the law of disclosure duties and the law of Obliegenheiten, see §§ 24 I, 28 II, 82 III VVG; for critical aspects in this respect see *Herrmann*, VersR 2003, 1333-1342; ibid, in: Herrmann/Wambach (Hrsg.), Reform des Versicherungsvertragsrechts, Herrmann/Wambach (Hrsg.), IF-Verlag 2003, S. 101-137.

[195] See AC Ward & Sons Ltd. vs. Catlin (Five) Ltd. (2008) EWHC 3585 (Comm), upheld (2009) EWCA Civ 1098; Lloyd's Rep. I.R. 301, as quoted in Birds, op. cit. 10th ed. p. 170.

[196] As different from Art. 1 EGVVG. Consequence: no adaptation period for the standard terms of running contracts (but see Art. 1 III EGVVG).

[197] See schedule 1 part.2 to the CIA as published with the Act, supra; cf. *Birds*, op. cit. 10th ed., at168 s.; *Pinsent Masons*, Legal news and guidance, www.out-law.com/page-11391.

The law of B2B-contracts has not been changed the same way. For summarizing the political discussion of the new Insurance Act 2015 the internet article of June 2012[198] shall be quoted, as follows:

> UK insurance law reform of B2B could raise insurance claims to an unintended extent.
>
> Insurers could face higher claims under a proposed legal reform aimed at making it harder for the industry to avoid paying out to its business customers.
>
> A law under which companies' insurance is invalid unless they volunteer all relevant information when taking out the policy gives insurers too much scope to turn down claims.
>
> Instead, companies should provide a **fair description of the risk** they want to be covered against, and insurers should be responsible for finding out any additional information they need by asking questions.
>
> Example: *Ired of a credit insurance gives information to Irer telling that certain claims insured, which were against company A, become involved in a taken over of A by company B. B and A went insolvent after the merger.*
> Irer could have made his own investigation in the new financial situation.

A more recent update of the Law Commissions reforming paper[199] made an end to the discussion of the idea of causal connection within the law of warranties, but replaced it by a proposal treating warranties as "suspensive conditions". This suggestion seems to have been followed up by sec. 10 subsec. 5 (b) of the Ins. Act 2015. Such suspensive conditions clauses absolve the insurer from liability to pay claims, but only until the breach is remedied, and only for the duration of the breach.[200] A wrong warranty of burglar alarms or sprinkler systems, e.g., promised to be in function from the beginning of the contract on, can be remedied by later repair. If so, insurer cannot rely on breach of warranties when the damage occurs later.

The strictness of warranty clauses can also be weakened by excluding duties of disclosure or limit them to a certain extent. The utmost good faith principle neither is jus cogens nor does it belong to binding public policy. That is why one can provide for exemptions, if the parties agree upon. Even standard terms are allowed to do so.[201] The (blanc) "conversion" of

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[198] http://uk.reuters.com/article/2012/06/25/uk-insurannce-law-idUKBRE8501D420120625 download 9/10/12

[199] See www.out-law.com/en/topics/insurance/insurance-law-and-liability/reforming-insurance-law.warranties/ (download 3/14/2013).

[200] Sec. 10 subsec. 5: "…breach of a warranty is to be taken as remedied -(b) in any case, if the insured ceases to be in breach of the warranty".

[201] See *HIH Casualty & General Insurance Ltd. Vs. Chase Manhattan Bank* (2003) UKHL 6 (2003) Lloyd's Rep. I.R. 230; *Birds*, op. cit. p. 140.

an utmost good faith duty into a warranty is not possible, be it by a basic to the contract clause or otherwise (CIA no.6 subsec. 2). As it seems, some space is left open for clauses which do not "convert" the representation duty but adopt it to a more or less extent, e.g. providing that certain misrepresentations shall be treated as prima facie (gross-) negligent.

Also the case law on "basic to the contract" clauses, as explained earlier, was proposed to be abandoned.[202] In January 2014 a New Draft Insurance Bill was published by the Law Commission, which contained first draft clauses of what should become the Insurance Contracts Act 2015.[203] Finally the UK Insurance Act (InsA) has been passed in Febr. 2015.[204] Now, no. 9 subsec. 2 of the passed Act follwows the mentioned proposal. This leads to the consequence that warranties law consequences cannot be applied by simply declaring them as "basic". But making stricter preconditions, as requirement of special wording and/or warning duties. While warranty clauses can be part of standard terms under case law still, the agent has to give a warning comment in consumer cases.[205] Since in B2B-cases no warning duties exist, the standard terms must be more clear to the point of warranties than declaring the relevant promise as "basic to the contract". There is, however, no actual case law abandoning the interpretation of clauses to be "basic".

Sec. 11 InsA further weakens the warranty law by modifying the causality preconditions. Normally there is no causal link provision, once a warranty is violated. Sec. 11 InsA, however, requires the warranty clause to "tend to reduce the risk of… (a.) (the) loss of a particular kind…". And subsec. 3 completes it by clarifying, that the Ired can show that his non-compliance "could not have increased the risk". So, the warranty law is not abandoned, but weakened. As one can see, the UK law tries to change the hardness of its warranty provisions step by step and not by an all or nothing strategy. This has the big advantage that it is much more a proportionality approach than what hardliners want.

The case law, however, still seems to be somewhat confusing. First of all, there are attempts of the case law to extend the duty of good faith to the insurer's decision of avoidance because of a misrepresentation or an offence of the insured's duty of disclosure. While some

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[202] See the 2007 consultation paper of the Reform Commissions, as cited in www.out-law.com/en/topics/insurance/insurance-law-and-liability/reforming-insurance-law.warranties/ (download 3/14/2013).

[203] Internet version available under http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm.

[204] UK Insurance Act 2015, c. 4, http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted as printed out in appendix 3.

[205] Cf. below II.6 to the suitability doctrine.

recent decisions have rejected such a duty[206], the Court of Appeal, in a more recent decision[207] has accepted it with the consequence that the insurer must enquire whether there were good grounds for seeking avoidance. In the literature the consumer protective point of view was commented positively, because the duty of good faith must have consequences for both parties.[208] On the other hand, the good faith argument was no clear view on exactly when an insurer would be in breach by avoiding[209], and it does not allow to distinct between commercial and consumer contracts.

Example (for further illustration to music fans): The promoters of the singer and guitarist Gery Garcia of the band The Greatful Dead obtained life cover under the clause "good health", while being mortally ill.

The clause was taken as a warranty[210] and would be done so, if the contract would have been concluded today. The warranty law is still alive in cases of elder contracts, and in cases of recent industrial insurance contracts.[211] As to the Garcia case, it was clear that the contract partner was the defendant *Poligram Holdings*, which took the insurance for the musician. In other cases of life insurances and non-life contracts, it might be doubtful whether the CIA as comsumer law is applicable, since the contract partner can be a commercial entity acting formally for a private person on formal reasons, and for avoiding the consequences of the consumer law.[212]

Other case law shows that warranties obligations of the past cannot lead to reject liability, once the violation has been given up before the damage occurrence. In Kler Knitwear Ltd. vs. Lombard General Insurance Do. Ltd. (2000) Lloyd's Rep. I.R. 47, a warranty provided for an inspection of a sprinkler system within 30 days after the renewal. After the inspection was done about 90 day later a storm damage occurred. The court, in this case, held that the clause was only a "suspensive condition". Despite the fact that warranties don't depend on materiality and causality tests, the violation could not at all have caused the damage after the inspection had been done correctly. That is why the warranty clause, as being

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[206] See *Strive Shipping Corp. vs. Hellenic Mutual War Risks Association,* (2002) EWHC 203 (COMM); Lloyd's Rep. I.R. 669; *Brotherton vs. Aseguradora Colseguros SA* (No. 2), (2003) EWCA Civ. 705, (2003) Lloyd's Rep. I.R. 758.

[207] See *Drake Insurance plc vs. Provident Insurance plc*., (2003) EWCA Civ 1834, (2004) Lloyd's Rep. I.R. 277.

[208] See *MacGillivray*, 1st supplement to the 10th edition, para. 17-90A; *Clarke*, The Law of Insurance Contracts, 5th edn., 23-181.

[209] See *Birds*, op. cit., at 145.

[210] *Gerling-Konzern General Ins. Co. vs. Polygram Holdings* (1998) 2 Lloyd's Rep. 544; MacGillivray, Suppl. 1998, 21.

[211] See also *Genesis Housing Association Ltd. vs. Liberty Syndicate Management Lt*d. (2013) EWCA Civ 1173, as quoted in Birds, op.cit., 10th ed., p. 168 fn. 7.

[212] See Art. 1 lit.a CIA: "…wholly or mainly for purposes unrelated to ehtir trade, business or profession"; for circumvention cases of consumer law in general and for case law of "dealing as consumer" see Feldaroll Foundry Plc vs. Hermes Leasing (London) Ltd (2004), EWCA Civ. 747; Kendrick, Contract Law, op. cit., p. 440 ss. The main criterion of differentiation seems to be: contracts being concluded in the curse of action of a business (professions included) cannot be consumer contracts.

suspensive, seemed not to be violated. The decision has been commented as a "trend to mitigate the harshness of the law on warranties".[213]

Additionally, sec. 10 (1) InsAct 2015 abolishes the rule of automatic discharge and s. 10 (2) provides instead that a warranty will not be enforceable after it has been breached but before the breach has been remedied. Sec. 10 (3) InsAct provides also, that the insurer waives the breach of a warranty after it has been remedied.[214] Under sec. 11 (2) the insurer "may not…discharge liability" under subsec. 3, stating that the non-compliance with the term "…could not have increased the risk".[215] However, in non-consumer contracts, this provision can be excluded, if done in plain and understandable language.[216] One can see from this, again, that the legislator takes the transparency provision for weakening the harshness of the law on warranties, and the insurance industry is expected to make use of it as much as possible under conditions of competition.[217]

Finally, warranties could be exempted from the fairness control under the Unfair Terms of Consumer Regulation1999 (UTCCR)[218], because they belong to the main subject of the contract. Actual case law, however, cannot be taken as authority.

Example: A clause of a travel policy, obligating the assured „…to notify as soon as possible all incidents that may result in a claim…", was controlled under the UTCCR.

The court in *Sirius*[219], 2006, rejected the suggestion that the condition precedent element of a clause was automatically wiped out as leaving the clause as a bare condition.

In comparison to the German law, the difference between the warranty principles and the provisions of §§ 19, 28 VVG 2008 still seems to be substantial. Mainly the fact that, in German law, only gross negligence leads to consequences of avoiding liability, has no equivalent in British law.[220] The necessary protection of the insured, in cases of industrial insurance, is done by transparency provisions much more than by absolute abolishment of warranty clauses.

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[213] *Birds*, op.cit. 10th. ed., at 176 s., with further reference of *Sugar Hut Group Ltd. vs. Great Lakes Reinsurance (UK) plc.* (2011) EWHC 2636 (Comm) at 41).

[214] Also, the insurer can loose the right of avoidance by later affirmation, e.g. by collecting the premium while refusing to pay a claim. This can be taken as affirmation, despite the fact, that there is no verbal communication to this point. If the insurer has actual, not constructive, knowledge of the non-disclosed fact and knows that he has the right to avoid the contract, an affirmation will be assumed, provided that a reasonable person in the position of the insured would interpret the insurer's conduct as consent; see *Scottish Coal Co. Ltd. Vs. Royal & Sun Alliance Plc.* (2008) Lloyd's Rep. I.R. 718; *Birds*, op. cit. 140 s.

[215] For commend see Birds, op cit. 10th ed. p. 180.

[216] See ss. 16 (2) (3), 17 InsAct 2015.

[217] Cf. *Birds*, op. cit. 10th ed., no. 9.7.2, at 183.

[218] See below, appendix 1.

[219] *Friends Provident vs. Sirius* (2006) Lloyd's Rep. I.R. 45; Colinvaux's Law of Insurance, op. cit., at 71.

[220] Important also: there is no equivalent for § 19 IV VVG taking the avoidance right away from the insurer, once he knows of the breach of a warranty or the wrongful dissolvence.

5a. Assignment and Trust. Trusts must be provided for in the form of a written contract or a written collateral agreement.

Rights of the insured can be transferred to other persons like other legal claims can be done. This occurs very often in the case of life insurances, because the future duty of payment is foreseeable, no matter if it is an endowment policy (auf den Erlebensfall) or not. Most often, they are used as credit securitisation. The assignor gets the rights of the insured under the condition of the occurrence of the insured event (life at the time provided in the contract in the case of an endowment policy, or at the death of the insured).

One must make the distinction of statutory assignments and equity assigments. While statutory assignments must be in written form (see Policies of Assurance Act 1867 (PAA), equity law provides for formless assignments. Equity assignments have no further difference to others concerning the act of declaring, but partially have different consequences. The assignor cannot claim in his own name. Once a statutory assignment is to be denied, e.g. on formal reasons, it can be taken as an equitable assignment. Both kinds of assignments can be constituted by contract between the assignor and the assignee, and without asking the debtor for his assent (cf. § 398 BGB). This is why the Irer does not have to be asked.

Life policies can be assigned by endorsement on the policy (sec. 7 of the PAA 1867), but they are not transferable as negotiable papers.[221] Sec. 136 of the Law of Property Act 1925 requires a written form for legal assignments. Very often, however, policies are given to banks as deposit without a written word. In this case it can be an equity assignment, as allready said. The bank gets a lien on the policy, which is for securitisation of a certain debt.

Possession of the policy by a previous assignee amounts to constructive notice to the later. If the (legal) assignee passes the whole interest in the policy to the other assignee, he/she has the right to sue the insurer when the policy matures or to sell the policy (sec.101-106 of the Law of Property Act 1925). If the assignation serves as security for a credit, the mortgage money must have become due, and the debtor must be *three* months in default after *a* notice to pay. An equity of redemption is reserved to the assignor. The proceeds of the sale are to be held in trust by the mortgagee to be applied first in payment of his/her own claims, the residue being payable to the mortgagor.

The assignee stands in the same position (“shoes”) as the assignor (cf. §§ 398 BGB: “…*an die Stelle des Schuldners*).

Example: Before the assignment the assignee failed to disclose a certain illness. The insurer denied the claim of the assignee arguing that the contract was void.

In British case law, it was held that the non-disclosure precluded the assignee from recovery of the policy money.[222]

For further details of assignments see infra XI.1. For constituting a trust see III.6a.

6. The Premium, Delay in Payment of Premiums. While it has been already pointed out that there is no principle of coverage by payment only[223], the coming into force of the individual contracts is normally made dependent on the previous payment of the premium.

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[221] *Colinvaux*, op.cit., p. 352; but refer to § 4 VVG.

[222] *Equitable Ins. Co. vs. GWR* (1869) 38 L.J.Ch. 314; cf. (*Colinvaux*, op- cit., p. 352).

[223] As different from § 38 II VVG 2007 (§ 37 II VVG 2008); *Birds*, op. cit., p. 84, 177, except that this is stipulated in the contract terms, see *Canning vs. Farquhar* (1886) 16 Q.B.D. 727, 733.

It is possible on the basis of the liberty of contracts, even if the clause is part of the standard contract terms. Hence, if the insured risk occurs before the payment, the insurer can deny the coverage.

In cases of consumer contracts, the Law Commission and Scottish LC have published a paper, as is done for the law of utmost good faith and warranties (see above), and the Government has introduced the Consumer Insurance (Disclosure and Representations) Bill in May 2011 (accessible under www.hm-treasury.gov.uk/8932htm). Also there are LC-papers on law reforms of good faith duties after conclusion of insurance contracts and of late payments

In cases of contract prolongation, late payment will also lead to a right of the Irer to avoid liability, provided that there is no different clause in the general contract clauses. The insurer can set up a time limit until which the payment has to be made by the insured. During this period, the prolongation premium has to be paid. If the insurer permits the use of a bank account, and the insured has ordered the payment in time, the insurer would be held to bear the risk of any default by the bank.[224]

In other cases, the insured is not protected as long as he has not paid the insurance premium. A damage, which occurs during this period of time is not covered. German case law has developed a warning duty of the insurer,[225] and the reform of the VVG has enacted such a duty.[226] Since British case law has not provided such a precondition of non-coverage, there is no difference between delayed payments of first and follow-up premiums. – For cases of consumer contracts, the Law Commission and Scottish Law Commission have published a proposal that provides for warning duties of the Irer. Until now (March 2012), however, no binding statute has been promulgated.

There is, however, a general stipulation for the life insurance cases. As one is dealing with "continuing policies" (permanent contracts), the payment of the premium during the "days of grace" is effective even if the "damage" – meaning the death of the insured – has already occurred. The payment only must be made within the delay stipulated in the contract.

Example: A life insurance policy was annually renewable by payment of the appropriate premium, but instalments of the premium were payable quarterly, and the policy was liable to forfeiture on non-payment of such quarterly instalments within the days of grace allowed. The assured died within the days of grace, and a quarterly instalment was duly paid later by an assignee of the policy.

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[224] Cf.*Weldon v. GRE Linked Life Assurance Ltd*., QBD, Aprill 14, 2000, as quoted in *Birds*, op. dit., p. 178. BGHZ 44, 178 ff.).

[225] BGHZ 47, 352 ss.

[226] § 37 II sentence 2 VVG 2008, cf. *Hübner*, ZVersW 2002, 87, 99.

It was held that he was entitled to recover.[227]

The particularity of "continuing policies" also leads to the consequence that the insured can enforce a prolongation of the contract by offering the payment during the "days of grace" to the insurer. Of course, this is important especially in cases of life insurances where a termination of the contract would mean that the customer only gets paid the surrender value of his/her policy. This value will normally be very low in the first years because the contract costs, mainly the commission of the broker, are deducted from to the surrender value of the beginning time period of the life insurance contract.

Particularities have to be seen in cases of Lloyd's insurance contracts, which have been analysed already in the chapter on contract conclusion. Here, only the example on delay of premium payments may be repeated:

Example: Insured Ird. of a fire insurance wants cover for a risk of 5.000.000. Irers1-5 sign Lloyd's slips for 1 Mio. each. When Ird. was late with the payment of the premium instalments due to July 1st, Irer1 cancelled the contract, while Irers2-5 did not. 1 month after payment by the Ired to Irer1-5, the building was destroyed by a fire.

1 .Can Irer1 deny cover?

2.Can Irers2-5 do so, too?

3. Can Ired cancel the contracts of Irers2-5 with the argument that he does not get insurance

cover supplementing the contract with Irer1, but has an offer to take over the whole risk of 5

Mio. by Irer6?

1. Yes, independent partial debts (cf. General Reinsurance vs. Forsakringsaktienbolaget Fennia Patria (1983) Q.B. 856).

2. No, same reason.

3. No, same authority.

Comparative aspects: German law of the so called offene Mitversicherung is comparable. The BGH held that § 351 BGB is applicable only in cases in which a **common intent** of strict dependence of the participating contracts is proved (BGH NJW 1976, 1931, 1932). Compared to British law, the "well established customs of the London insurance market" (Birds, op. cit. p. 89) are an equivalent to the **common intent** of the contract parties.

6a. Payment to wrong Person. If payment is done to somebody not being entitled, he will not get a right to keep the money, normally. The money can be claimed back on the basis of unjust enrichment. It should be noted, though, that in life insurance cases, there are very important exemptions. If the third person is taken as a "beneficiary", he will normally be entitled to keep it, even if he is not being entrusted legally. The only situation where this

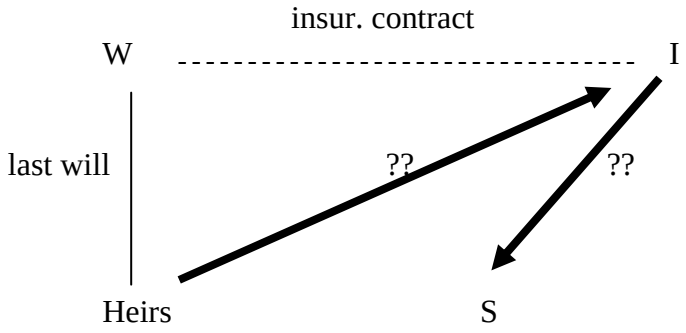
[227] *Stuart vs. Freeman*, (1903) 1 K.B. 47.

would not be the case is if the policy compels the conclusion that he was to receive it merely as a nominee or agent for the insured.[228]

Example (1): An English life insurance contract with company C in London was intermediated by a German broker, who did not act as a representative of Irer. The contract is on the life of a German policy holder, a rich elder woman (W) living in Germany.

Some years later, W made her last will providing the rights of her insurance policy to be transferred to her three adult children. Shortly after having written the will she declared to one of them, here son S, that he shall have the right to claim the money of the insurance after her dead. The right was called Bezugsrecht within the sense of § 328 I BGB. S sent a letter to the insurer announcing that he is the beneficiary of the "Bezugsrecht". Irer answered that British law does not provide for a perfect equivalent of the German Bezugsrecht, and it could be taken as a trust only. After death of W the money was paid to S.

Can S keep the money? (Applicability of British law).



No, S would have to be a trustee, because there is no "Bezugsrecht" in British law, and the equivalent would be an entrustment, which is not declared by sending the letter by S. The letter contains information by S, not a declaration of W. Only W would have been able to change the insurance contract; and an entrustment must be declared clearly, not by information of a vague German equivalent of a trust. – S did not act as heir, but as Bezugsberechtigter, expressis verbis. While payment to heirs would be possible, payment of the whole amount to one of more heirs would be against the contract.

However, after payment to the wrong party (S), the receiver can keep the money, under certain circumstances (see above). On the other side, the payment must be given back, if there is somebody else who must be seen as beneficiary, and if that is evident for the Irer. as debtor of the insured money. Evidence of heirs is given, since Irer knows that the "Bezugsrecht" does not constitute a trust (see the answer of Irer to S). In case that no other person seems to have a right of payment of a life insurance, the heirs of the insured have to be taken as being authorised to get the money. This, and not a trust of S, is evident for the Irer. S cannot keep the money.

Example (2)[229]*: An English life insurance contract with company C in London was intermediated by a German broker, who did not act as a representative of Irer. The contract is on the life of a German policy holder, a rich elder woman (W) living in Germany. Applicability of British law was provided for in the contract, also.*

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[228] *Shebsman Re* (1944) 1 Ch. 83; approved in *Beswig vs. Beswig* (1968) A.C. 58; cf. *Birds'* Ins. Law, op. cit. at p. 371 (but with doubts that a court will conclude this noadays, unless the wording of the policy compels it clearly).

[229] For deeper understanding, and only for experienced lawyers.

Some years later, W made her last will providing the rights of her insurance policy to be transferred to her three adult children. Shortly after having written the will she declared to one of them, here son S, that he shall have the right to claim the money of the insurance after her dead. The right was called Bezugsrecht within the sense of § 328 I BGB. S sent a letter to the insurer announcing that he is the beneficiary of the "Bezugsrecht". Irer answered that British law does not provide for a perfect equivalent of the German Bezugsrecht, and it could be taken as a trust only. After death of W the money was paid to T acting as Testamentsvollstrecker of S. When T paid the full amount to S the two other heirs claimed for payment of the money against the Irer and against T and S, because it were paid to the wrong person, allegedly.

1. *Which law is applicable?*
2. *Can S keep the money, if Irer calls it back from him?*
3. *Can the two heirs claim the money from Irer*?

1. For the claim British law is applicable, since the contract provides for applicability of the law of the insurer Irer having it's seat in London. To the relevant exemption for life insurances with Germans see Art. 9 IV VVG. I does not do business in Germany by own representatives, but the broker turned to Irer by occasion only. Under these circumstances the option of Art. 9 IV VVG comes into play. The parties have made use of it.

2. S can keep the money and cannot. One must differentiate the question in terms of legal relations, the one of S and T to Irer (see following to this no.), and the one of the heirs to Irer (see no. 3). In relation to the Irer, S can deny paying the money back, since T was acting as Testamentsvollstrecker. The equivalent of British law is called executor, whom the law takes as trustee.

3. In the relation of the heirs to Irer one must take into account that an insurer performs the life insurance contract correctly, if the money is paid to T (see above no. 2). After performance, the payment duty of Irer no more exists (cf. § 362 BGB. A claim of the heirs against Irer would be to reject by the court.

7. Adaptation and Termination. Since UK law contains no legal rules concerning the duration of insurance contracts, this is a matter of the conditions stated in the contract. Except from life-insurance contracts, a limited duration, which normally lasts one year, is agreed upon in insurance contracts. There is no legal obstacle which prevents a shorter or longer period of time. Again, the legal basis for that is the liberty of contracts, and British insurance contracts very often provide only for short time.

Prolongation or renewal means the conclusion of a new contract. Hence, the duty of disclosure, with all its consequences analyzed above, becomes important once again every year. The insured must give a notice of an eventual risk increase if he/she has become aware of it. Also circumstances which clearly show that there might be a risk increase must be noticed to the insurer.[230]

In the case of a life insurance contract, it is assumed that the contract lasts without interruption until the death of the insured (in case of an endowment insurance[231]) or a

[230] Please, see the case of blood analysis infra at 2a/bb.
[231] Versicherung auf den Erlebensfall.

specific date (in case of an insurance for a specific span of time). The consequence is – if the premiums are punctually paid– that the insurer cannot confront the insured by referring to a “non-disclosure of material facts,” if one is dealing with facts that occurred after the closing of the contract.

Many of the non-life insurances contain a clause which entitles every party to annul the contract within seven or fourteen days through adequate notification of the other party. A clause, which enables the immediate nullification of the contract, is valid as well. In this case, no reason for annulling the contract has to be given. In life-insurance policies, it is generally agreed upon – with exception to contracts with limited duration – that the insured has got the possibility to hand over the policy and receive a certain surrender value for it. Furthermore, it can be agreed that the insured has the possibility to convert the insurance into a premium-free insurance with an accordingly reduced insurance sum (so-called paid up insurance). In such cases, the amount of the sum insured is dependent on the terms of the contract, and there are no legal rules concerning minimum amounts.

Except life-insurance contracts, the insured cannot insist on a prolongation of the contract if no other agreement has explicitly been made between the parties. Moreover, the insurer does not need to state reasons for refusing to prolong a contract. There is also no general obligation for the insurer to inform the insured about the up-coming necessity of prolonging the contract.

IV. Void and Prohibited Insurance Contracts.

1. Types of Invalid Contracts. Void and illegal insurance contracts can be divided into 2 groups:

- cases in which the insurer can keep the premiums already paid by the insured; and
- cases in which the premium have to be paid back to the insured.

Misrepresentations of facts, as analyzed above, belong to the first group of cases; lack of insurable interest belongs to the second one.

Example: Barr took a loaded shotgun to Gray's house to look for his wife, who had been committing adultery with Gray. During an altercation with Gray, the shotgun went off, and Gray was killed. His dependants claimed damages from Barr under the Fatal Accident Acts, and Barr sought an indemnity against the Prudential Assurance Co. under an insurance policy, which covered him against his legal liability to pay damages in respect of injuries to third parties caused by accidents.

It was held that his conduct amounted to manslaughter (although a jury had in fact acquitted him when he was charged with this offence in a criminal trial), and that it would be against public policy to allow him to claim on the policy.[232]

2. EU-Gender Directive 2004. More recently, the EU-Commission rendered a Directive on Gender Differentiation, which has been transformed by the German Act of General Equalization of 2006.[233] For British transformation and the recent discussion after the ECJ-decision in the case of Test Achats of 1st March 2011[234], see Glen James of Slaughter and May, BILA Journal 121, 2011, p. 1 ss. The court has struck down the directive as far as it made gender differentiations possible in the insurance economy, provided that they have been based on careful statistic data analysis. From 2012 on, strict equal treatment of men and women has to be performed by standard insurance contract conditions in GB as well as in Germany.

While former discussion on the general discrimination interdiction has become outdated by the mentioned ECJ-decision, important questions, as to the reach of the single case argumentation of the court, are open still. Has the equal treatment to be performed by amendment of contracts, which have been concluded before March 2011 or before the date of transformation in 2012, despite the fact that the insurers have calculated such contracts on the basis of the differentiating statistics? What will be the consequences to other anti-discrimination provisions, such as against age differentiation, etc.? Since case law does not exist to these points, and the opinions of the literature are much different, until now, no further comment will be undertaken, here.

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[232] *Gray vs. Barr* (1971) 2 QB 554, Court of Appeal.

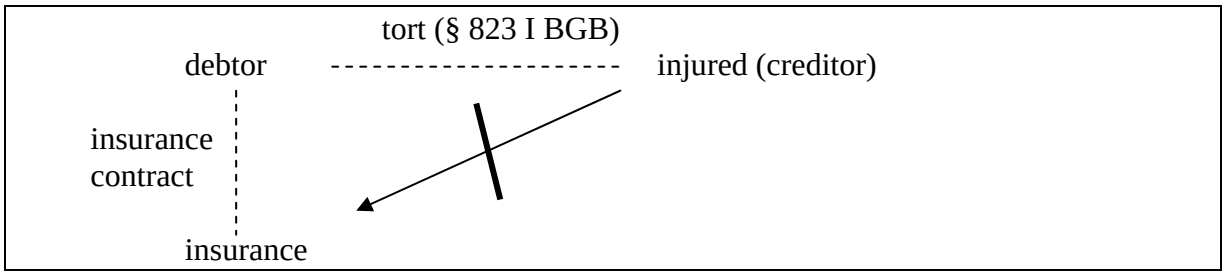
[233] Of 8/2006, BGBl. I, 1897, 1919; see *Herrmann*,Privatrecht BGB/HGB für Bachelor-Studiengänge BWL/VWL, DVD 2010, at V.1.

[234] See NJW 2011, 907.

V. Insurance Claims.

British law of liability insurance, in principle, does not give a direct claim to the injured, which could be raised against the insurer.

1. Actions (In-) Direct and Period of Limitation. First, the injured (creditor) must turn to the person who caused the damage (debtor) and make a claim on the basis of the law of torts, no matter whether he/she is insured or not. If the debtor is insured, he/she can care for coverage by his/her insurance (action indirect). Thus, German and British law are totally equivalent on this point.



The basic legal reason for the indirect action is the contractual nature of the insurance relation. The insurer does not have a legal relation with the injured; hence the contractual claim of coverage can only be raised by the insured. Also, some economic reasons can be argued for the action indirect. The parties of the tort relation can assess best who is responsible for the damage and which is the best/cheapest way of compensation. Also, the debtor and creditor know best about eventual actions for damage prevention. Hence, the conflict of damage compensation shall be left to these parties, not to the insurance company.

Both legal systems have developed exemptions from the principle of action indirect, especially in the law of car insurance. Sec. 148(1) of the Road Traffic Act 1988 provides for action direct just as § 3 Nr. 1 PflVersG does. Major reasons for this are the mass problem of traffic accidents and the standardization of damage prevention by the rules of motor traffic law.

Already in the German discussion about the insurance law reform, the opinion prevailed that the action direct should be extended to all types of liability insurances.[235] The following major arguments were discussed. The insurer can care more professionally for the regulation of the damage than an average insured. Also, it is he, finally, who has to bear the damage. Hence, the insured would have most incentives to care for damage prevention. And last but not least, the injured will be best protected if he/she can directly turn to the insurer

[235] *Hübner*, ZVersW 2002, 87, 100; Abschlussbericht of Reformkommission, 2004, p. 84 s.

with its financial resources. Now § 115 (1 No.1) VVG 08 has enacted the action direct for compulsive liability insurances.

The inaction seems to lack careful international legal comparison and economic reasoning. Despite the fact that there is a legal assignation of the claim of the insured if he falls bankrupt[236], there is no equivalent discussion in UK law. One cannot say that the legal assignation is the same as an action direct.[237] Of course, the protection of the injured in the extreme case of bankruptcy of the insured is a good argument, but the action direct would give the direct claim to the injured even in cases in which he/she does not need such a protection. Interestingly, sec. 83 of the Fires Prevention (Metropolis) Act of 1774 gives a kind of action direct to persons who have a justified interest in the resurrection of a building, which has been destroyed by a fire. However, this regulation follows very special legal intents, which cannot be compared to the German debate on the VVG reform.

The insured must claim before the period of limitation of 6 years expires (sec. 6 Limitation Act). § 12 I VVG 07 sets a time span of two years in non-life insurance cases and of five years for life insurance claims. § 12 III VVG 07 is totally different. The injured has to sue the insurer within 6 months after his/her claim has been definitely denied. The VVG reform commission has proposed to abandon the limitation period of 6 months and to extend it to three years uniquely for life and non-life insurance.[238] The VVG 08 has followed by abandoning § 12 VVG 07 and thereby making the general rule of § 195 BGB applicable, which provides a three years period. At least the abandonment of the 6-month period seems to be reasonable by comparison to the UK rules.

2. Notice of Proof and Loss As different from § 33 I VVG 07, the common law does not stipulate a duty of notice of loss. Especially, such a duty does not follow from the demands of the principle of utmost good faith since this rule only relates to the special situation of the contract conclusion. However, most standard terms provide for “due notice” and proof duties. In the case of fire insurance notice given 11 or 18 days after a fire have been held too late, but notice given five days after the fire has been held in time.[239]

Such duty can be regarded as a warranty, e.g. once it is called as “basic to the contract.” If the insured, in such a case, fails to give due notice, the insurer has the right to decline indemnity, no matter whether the offence is causal for any difficulties of the insurer to examine the circumstances of the damage, etc.[240]

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[236] Sec. 1 Third Parties (Rights Against Insurers) Act 1930.
[237] But see *Rühl*, o.cit., p. 1489.
[238] Please, see also *Hübner*, op. cit., p. 97 s.
[239] *Colinveaux*, op. cit., p.194.
[240] For the basics of warranties, *please* see supra at 3e.

§ 30 (2) VVG stipulates that the insurer cannot decline indemnity if it knows about the necessary facts of the insurance case from other sources. The same is true under the UK rules of equity.[241] In case law one can argue the Irer loses the right of avoidance by affirmation of the contract knowing of the relevant facts.[242] Affirmation, however, seems to be more than simply knowing about certain circumstances. Any kind of wilful acceptation must be proved in addition.

2a. Damages for Late Payment. While § 14 (2) VVG gives the insured the remedy of instalments after one month since the notice of proof and loss, British law leaves it to the single case to decide on unreasonably late payment. Additionally, late payment by the Irer. is without any sanction of damage claims. For understanding it one must step deeply into the dogmatic structure of the contract law.

General contract law provides for damage claims in all cases of breach of contract. This principle is even more important in British than in German law, because there is no claim of natural compensation as in § 249 BGB (Naturalrestitution), and claims of performance in natura are excluded, while in German special contract law the buyer, customer of a repair service etc. can sue his contract partner for doing, what he promised to do under the contract, and for doing it correctly (§§ 433, 631 BGB), and money payment as damage claim is possible as an alternative only (§ 280 BGB). Since British law, on reason of liberty of contract partners (!), provides for damage payment, exclusively, this claim is the only remedy for sanctioning the duties of the parties.

As to insurance law, it seems to be a logical consequence to regard the claim for insurance cover as a damage claim.[243] The promise of the contract is to prevent the insured from sustaining loss, so that the action for damages for breach of contract arises upon the occurrence of the loss.[244] There is, however, a further general principle that damages are not awarded for a failure to pay damages.[245] Hence, late payment of insurance cover cannot be sanctioned by a further damage claim. This used to be binding case law since *Sprung vs. Royal Insurance*[246]. The claimant owned a small business dealing in animal waste products. In April 1986 vandals entered the claimant's premises and wrecked his machinery. The

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[241] *S*ince the Judicature Act of 1875, *it* became predominant if in conflict with common law. For an overview of the history and the main maxims of the equity law, please see *Henrich/Huber,* Einführung in das englische Privatrecht, 3. Aufl. 2003, p. 36 ff.
[242] *Smith Coal Co. Ltd. vs. Royal&Sun Alliance Plc.* (2008) Lloyd's Rep. I.R. 718 (dissenting vote)
[243] *Jabbour vs. Custodian of Israeli Absentee Property* (1954) 1 W.L.R. 139 at 143.
[244] See *The Italian Express (No. 2)* (1992) 2 Lloyd's Rep. 281; *Birds'*, op. cit., at 297.
[245] President of *India vs. Lips Maritime Corp.* (1988) A.C. 395.
[246] *Sprung vs. Royal Insurance (UK) Ltd.* (1997) Lloyd's Rep. I.R. 111 (leading case).

defendant Irer denied liability on what proved to be wholly spourious grounds and it was not until three and a half years later that the claimant received any substantial payment under the policy. Despite it was found that he should have been paid by Oct. 1986, and that his business collapsed, the SC held, that no compensation claim was actionable against the Irer. The insurance contract seemed to have been calculated to protect against the damage on the machinery, but not against insolvency.

While this decision has been commented very critically, and the Law Commissions, in a paper of March 2010, have recommended to reverse it by Act of Parliament, it is still binding law. The Commissions clearly have stated that *Sprung* was wrongly decided, but only the SC itself or the enactment of statutory law can overrule it. This should be done by introduction of a clear statutory duty of good faith, breach of which would allow the award of damages in addition to the basic measure of an insured's loss. If no such enactment will be done, one can rely on ICOBS 8.1.1 which requires an insurer to settle a claim "promptly". A breach of a statutory duty can be sanctioned by a damage claim on tort instead of a contractual damage claim. But as long as *Sprung* keeps to be the leading case, such decision cannot be made by another court.

The mentioned Draft Insurance Bill of Jan. 2014[247] proposed to create an implied term in every insurance contract that insurers must pay sums due within reasonable time. This provision of the future Insurance Act 2015 (InsAct) can be seen as a legal remedy against the misuse of underwriters to make unreasonable objections against claims of their customers, the only purpose being to cause them to give up on reasons of time and cost. Until now, however, the insurer has an unrestricted right to make examination of the case.

After enactment of InsAct 2015, a new Enterprise Bill has been brought to Parliament, which will overrule the *Sprung* decision. Sec. 13 A and sec. 16 A will be inserted into InsAct providing for an implied term in every contract of insurance that the insurer has to care for payment in reasonable time, depending on size and complexity of the claim. The amendment of the Act has reached Royal assent in May 2016 and will take effect in May 2017.[248]

3. Proximate Cause. Insurance cover of damages, normally provides for causation of certain events (fire, theft, etc.). Not every cause in a natural sense leads to the coverage of a respective insurance but only proximate***** ones (so-called proximity rule). Proximate corresponds to direct, dominant, efficient, etc.

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[247] http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm.

[248] See *S. Cooper*, Insurance Act – late payment of insurance claims, Insurance & Reinsurance 2/16/2016, internet publication download 8/10/2016; cf. *Birds*, op.cit. 10th ed., at 304 s.

Example: Coronary thrombosis after being involved in an accident; artery had been narrowed by disease existing before the accident
SC: Irer. not liable (special proximity contract clause).[249]

The chain of causation" can be interrupted by activities of third persons and of the insured himself, which are not covered by the insurance contract (question: is it of relevant influence).

Example1: Football player's F accidental bodily injury during a match caused end of career. Degenerative condition of the lower spine was second proximate cause.
SC: Irer. not liable (contract clause: exclusion if injury "attributed…artritic or other degenerative conditions in joints, bones…".[250])

Example 2: A stock of cork was insured against fire. A fire broke out within near by, and, in order to prevent it from spreading, local authorities threw some of the cork into the sea.

It was held that the loss of this cork was covered, on the ground that damage by water as a consequence of fire and the destruction of property to prevent the fire from spreading were both proximately caused by the fire. The test is, „Is it a fear of something that will happen in the future or has the peril already happened and it is imminent that it is immediately necessary to avert the danger by action?" It is only in the latter case the insurers are liable.[251]

Example 3: For avoiding millennium *problems of 1999, many business organisations spent millions to improve their software.*

Proximity was denied because the risk had been foreseeable for a longer time.[252]

4. Indemnity, Assignment and Subrogation. Indemnity payments can be made for compensation of total, partial or constructive loss. Total loss may be defined as destruction or damage, which causes

(1) the insured subject matter to lose its identity, or
(2) the assured's irretrievable deprivation of the insured subject matter.

Partial loss is any lesser form of loss. Constructive total loss arises when the subject matter is reasonably abandoned on account of its actual total loss that appears to be inevitable (speciality of marine insurance). When the insurer has paid for a total loss, he/she is entitled to claim whatever may remain of the insured subject matter by way of abandonment. A notice of abandonment leads to a right of salvage of the insurer.

As a measure of indemnity the insurer principally owes money, not repair if nothing like the letter is provided in the contract. If the insurer does not have to pay for a repair but for the acquisition of new goods, some deduction is possible (new for old). There is no fixed standard of one-third being deductible, but many cases show this rate as assumed reasonable by courts.

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[249] *Jason vs. Batten*, (1969) 1 Lloyd's Rep. 281; cf.

[250] *Blackborn Rovers Football and Athletic Club Ltd. vs. Avon Insurance Plc*. (2007) Lloyd's Rep. I.R. 1.
[251] *Symington vs. Union Insurance of Canton*, (1928) 97 L.J.K. 646.
[252] Contributed by *Mr. Sprang*, Münchener Rück, during the lesson of Spring 2003.

Despite the principle that the insured can never recover more than the maximum expressly stated in the policy, provisions of replacement value are valid and common.[253] Also, German contract law practice has developed such provisions of replacement value, which are called *Neuwertversicherung*. The enrichment interdiction of § 55 VVG 07 (*Bereicherungsverbot*) has been overruled for longer time[254], and was abandoned by theVVG 08.

The payment has to be mode after reasonable time of investigation of the Irer about the circumstances relevant to the damage and its cover duty. Case law, however, did not provide for damage claims, if the Irer has delayed the payment unfaithfully. There was no basis for damage claims, even in cases in which the Ird. falls bankrupt during the delayed period, because he became illiquid not having received the damage compensation from the Irer. Despite the fact that the delay in payment would be a breach of contract (Verzug), the insurance contract law was held exempted from the general contract law. In *Sprung vs. Royal Insurance*, Ltd., ((1999) 1 Lloyd's Rep. IR 111), it was held that a special damage claim is possible, provided that the Irer, during the time of investigation of the case, would not have reasonable doubts to be obliged to cover (but see § 14 II VVG, §§ 280, 286 BGB).

Since March 2010, a recommendation of the Law Commission and the Scottish LC is discussed, which proposes to bring the law in line with general contract law (see http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm, download of Febr. 2012). The insurance exemption argument of the court in *Sprung* no more seem ot to be adequate, since insurance cover is an obligation of payment of money, as other contractual duties to pay for securitization are (e.g. banking securities in *Banque Financiere v. Westgate Ins. Co*. (1990) 1 QB 665, CA). The distinction in *Sprung* between obligations not to cause damage to somebody and the insurance duty to cover a damage already incurred seems to be too far from practice. – Some further argument is based on international law comparison, esp. to German law. The details of § 14 II, 83 VVG, however, and its more moderate separation from the general contract law of advance payments in agency law are not reflected. The VVG does not shift the risk of wrong assessment of cover duties to the Ired., totally, but lets it with the Irer. to a certain extent. If finally the preliminary advance payment is proved to be unjust, the Irer has a claim on unjust enrichment. – The ongoing discussion of British law must be left open here, but one can see here again, that law comparison is taken as a useful instrument to modernize insurance law.

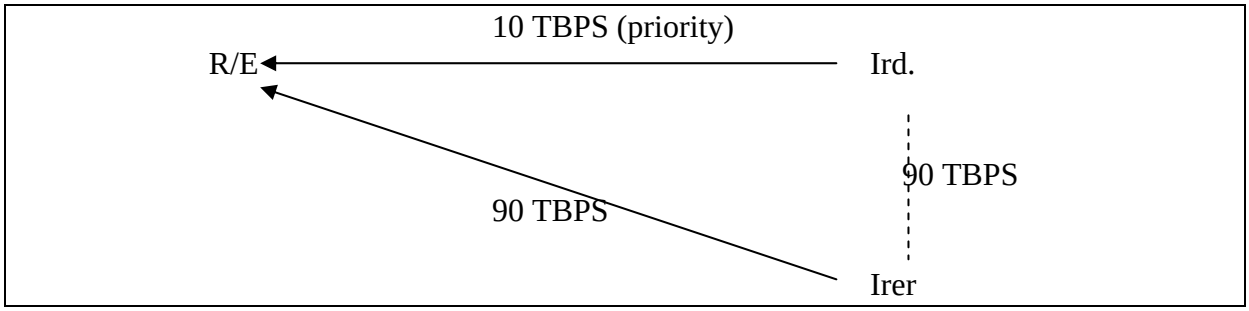
By payment of the damage, the insurer, by assignment of law, becomes creditor of any compensation claim of the insured against anybody who has caused the damage by negligence (cf. § 86 I 1 VVG). The assignment, however, is subrogated to any claim of the insured. Subrogation means the right of regress of the insurer against the person who has caused the damage as well as the subordination behind the residual claim of the insured. The responsible person's liability has priority over the insurance coverage (cf. § 67 I 2 VVG 07, § 86 I 2 VVG

[253] E.g. *Kuwait Airways Corp. vs. Kuwait Ins.Co. SAK* (2000) Lloyd's Rep. I.R. 439.
[254] Please, see BGH LM 9/1996.

08). Hence, the insurer can claim indemnity from the responsible opponent of a car accident, of a fire damage etc. in principle.

Example: An employee (E) of a retailer of household machines (R), when carrying refrigerators into the storehouse of the insured (Ird.), caused a fire resulting in a damage of 100.000 BPS by throwing away a smoked cigarette. The damaged building was underinsured for a replacement value of 90.000 BPS.

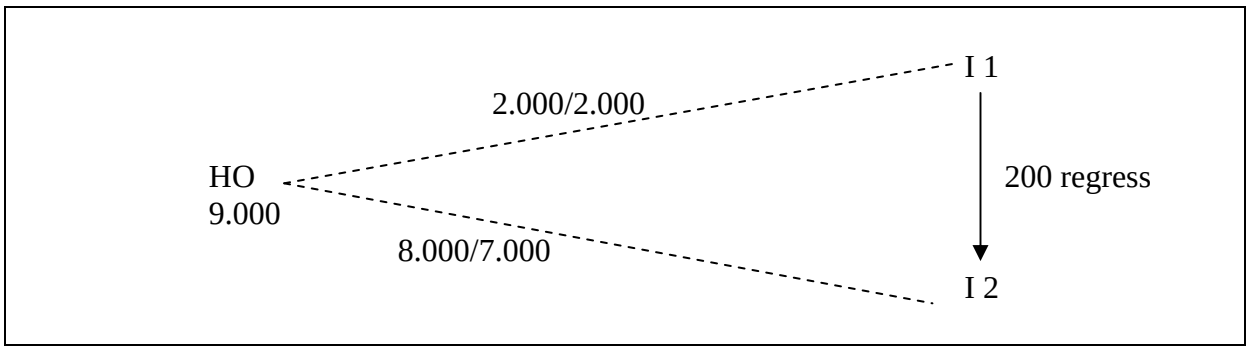
Hence, Ird. has a damage claim of 10.000 BPS against R/E on the basis of tort law, which is ranking before the regress claim of the insurer. Since R/E eventually are financially weak, the ranking can be of great economic importance.



The ranking is also relevant in cases in which the insured has a claim for compensation for pain and suffering being excluded by the insurance contract. Also, the comprehensive car insurance contracts normally do not cover the damage of non-usage during the repair time, while tort law gives such a claim to the insured. Even this claim has priority over the regress claim of the insurer.

5. Double Insurance and Contribution. Subrogation must be differentiated strictly from contribution, the latter being important in cases of double insurance. UK law insofar is a little different from the German rules, but only in terms of legal classification, not in result (§ 59 VVG 07, § 78 VVG 08).

Example: A house owner (HO) has taken two fire insurances for a boats-house having a value at the time of the damage of 9.000 PSt.: The contract with insurer 1 (I1) was on 2.000, the one with I2 on 8.000. If HO first claims against to I1, he will get 2.000.[255]



[255] No case of § 56 VVG (*Unterversicherung*) because "at the time of the insured event" contracts existed with I1 and I2).

The principle of indemnity applies,[256] which means that HO cannot claim more than 9.000. Thus, I2 must pay 7.000 instead of 8.000. I1 has paid too much if one looks to the relation to I2. The compensation in this respect is called contribution as each took the percentage of damage it has covered: I1 had to cover 20 %, I2 not more than 80 %. I1 has a regress claim vs. I2 of 200 PSt., which equals 1/10 of the maximum value insured. German law would also not allow more than 7.000 coverage from I2 since I2 is a so-called Gesamtschuldner with I1, s. §§ 59 I VVG 07, 78 I VVG 08, 426 I BGB. The payment of I2 reduces the debt being owed by I1 and I2 together, and HO cannot claim more than the total debt. This is why I1 can claim from I1 the amount of 200 PSt. as regress claim.

6. Under-Insurance. The regular provision contained in clauses of industrial insurance is called the principle of average (so-called average clause): cover in relation to the over-insurance (cf. § 56 VVG, but never in houshold policies with private consumers)

Example I: value of insured goods 60.000
insured value 40.000
cover of 2/3 of the actual damage.

Also in cases with damages under 60.000 up to the sum insured

Example II: damage of 30.000; cover of 20.000.

(differentiations in cases of Lloyds‘ insurances)

Total rejection of claim can be possible, if the under-insurance should have been indicated to the insurer under the principle of utmost good faith. Here, however, the precondition of negligence is to be applied; and the principle of proportionality can come into play if one follows the proposal of the Law Commission of 2010, as treated with above.

[256] Please, see *Rühl*, op. cit., p. 1447 s.

VI. State Regulation.

1. Financial Services Authority Replaced by Financial Conduct Authority. The supervision of insurance companies used to be a task of the Secretary of State for Trade and Industry, Department of Trade and Industry (DTI) as responsible ministry. Within the DTI, the Insurance Division (ID) was established. Since December 2001, the Financial Services Authority (FSA) became the successor of the ID by statutory power of the Financial Services and Markets Act 2000 (FSMA). Since April 2013 the new Financial Services Act is in force. The FSA is now replaced by the Financial Conduct Authority (**FCA**). For better understanding the reform, the structure of the former FSA is explained first.

The FSA was an independent non-governmental body, which exercised statutory powers under the FSMA. Its board was composed of one chairman, three executive directors, and eleven non-executives, who are all appointed by the Treasury.[257] Until 2000, the regulatory powers were concentrated on "Self Regulatory Organizations" (SRO) and the "Securities and Investment Board" (SIB).[258]

The powers of the FSA had been broadened substantially by the Insurance Companies Regulation 1994 and – again – by the FSMA. Despite the fact that the Financial Services Act 2012 overruled the FSMA to far intent, the structure of powers is still the same and can be summarized in the following way:

- protection of policyholders against the risk that the company may be unable to meet its liabilities (sec. 37 (2)(2)(a));
- control of criteria of sound and prudent management of the company (subsec.(a)(aa));
- control of fulfillment of obligations of the companies under the Act (subsec. 2(2)(c));
- control whether the directors, managers or controllers of the company seem to be a fit and proper persons (sec. 56 (1) FSMA);
- sec. 118 FSMA provides for penalties for market abuse (misleading activities; behavior likely to distort the market, etc.);
- the FA had to prepare a code on typical form of market abuse (sec. 119 FSMA).

Insurers must be a body corporate (other than a limited liability partnership), which means that a company is limited by guaranty, financed by levies on the industry, a registered friendly society or a member of Lloyd's. In principle, insurers are interdicted to carry on non-insurance activities (versicherungsfremde Geschäfte, cf. § 7 II VAG), but banks are exempted if they carry on credit and similar types of insurance and do this solely in the course of carrying on banking business.[259]

2. Financial Services Act 2010/2012 and SYSC. Already in 1994, the home country principle came into force because the EC directives of the 3rd generation had to be implemented. The principle abandoned the requirement of the insurance license for insurance companies, which were admitted in their home country. Only notice and proof of the admittance was necessary. This deregulation of the financial markets in 1994, which also was

[257] *This* is one of three so-called central government departments.
[258] Please, see www.fsa.gov.uk at 15.
[259] Please, see *Birds*, op. cit., p. 28.

effected for banks and other financial institutes, became criticised very much after the crises of the markets since 2003 and 2008, but one did not follow the call for reregulation, neither in the UK nor in Germany. Rather the existing control mechanisms of the deregulated markets were examined and scrutinized to a certain extent.

Before going into some further details of the UK-law, the future of the home country principle (HCP) is to be explained. As already pointed out (I.1b), the BREXIT referendum and the following exit treaty could lead to abandoning the HCP, but not before a certain exit treaty is consented between the EU and GB. The special treaty would lead to the termination of the EU-membership of GB and can be concluded under Art. 50 subsec. 2 EU-Treaty. Since one would not effectuate any disproportional selection of advantages for GB by such a treaty, an agreement like that can be expected during the next year. If so done insurance business between the two countries can go on as usual. This is why, in the following text, the existence of the HCP is assumed.

As a consequence of the financial crisis of 2008/9, and on the basis of an official investigation of the main reasons, a White Paper was published in 2009, which recommended the enhancement of the powers of the FSA with respect to financial institutions being of substantial importance for the functioning of the financial markets. Also the creation of a Council of Financial Stability was recommended, which can be compared to the Finanzmarktstabilisierungsanstalt, as described above. After an exhausting discussion of the matter, a Parliamentary Bill was published, which led to the first enactment of the Financial Services Act[260] with Royal assent of 4/8/2010.[261]

Main issues of this version of the act were:

- special stability objectives of the FSA;
- no abolition of the FSA until 2013; than take-over of the power by the Bank of England and a „Financial Policy Committee“ (conservatives‘ plans);
- creation of the Council of Financial Stability (CFS);
- FSA had special supervision objectives until 2013. CFS decided on state guaranties, etc.

The reforms of FSA and BoE for getting more control over system relevant financial institutions were going on still, until 2012. More recently, the political discussion focused on questions of power balancing between the two supervisory boards and on how to preserve independence of the BoE (see supra, ch.I.5b). In 2011, FSA published a White Paper, which proposed the establishment of a new authority, which became the Financial Conduct Authority (FCA). The main objective of the FCA is to control miss-selling of financial products as mortgage endowment policies, split capital investment trusts etc. for purpose of generating more “confidence” in the markets.

The regulation, as said expressly, shall not be in conflict with competition purposes, as far as it is possible within the general objectives of the FCA. Especially, the method of regulation, proposed in the paper, is called a “new approach”, because it combines the supervisory objectives with powers of product intervention, and being aimed to cause “good outcome” (e.g. publication of warning notices, when disciplinary matters have been issued).

Still, the general powers of supervision of market behaviour of banks and insurers was left to FSA, as far as it is not of impact to the market stability as such. Only the reform of 2010, mentioned above, which has shifted the stability control to the FSA, was to be overruled. Further on the White Paper provided for the establishment of a “Financial Policy Committee”, which as planed became a branch of the BoE.

The final version of the Financial Services Act 2012, being in force since 1 April 2013, did not abandon the whole FSMA, but modifies and adds some provisions only. First of all, the FCA takes over most of the supervisory powers its predecessor, esp. the powers to interdict market misuse of insurers, as explained above. The authority is a branch of the Bank of

[260] Financial Services Act of 4/8/2010, c. 28 with the regulation of 10/11/2010, No. 2480, c. 120.

[261] But see the Act of 2012 as explained below.

England[262], as the two other authorities are, the act has set on the side of the FCA: the Financial Policy Committee (**FPA**) and the Prudential Regulation Authority (**PRA**).

The FPA's powers are provided in

Sec. 9C (1) (a) Contribution to Financial Stability Objective of the BoE;

(2) „…identification of, monitoring of, and taking of action to remove or reduce, systemic risks…of the financial system"

(3) (a) „…structural features of financial markets, such as connections between financial institutions

(b) systemic risks attributable to the distribution of risk within the financial sector, and

(c) unsustainable levels of leverage, debt or credit growth.[263]

The PRA is the third entity of the Bank of England acting in concert with FCA and FPA, and established by FSA 2012 also. Its main power is based in

Sec. 2B/C of the Act as „general/insurance objective": to care for safety and soundnesss of authorised persons/protection of (potential) policy holders. Risk management is not regulated so much in detail as the German MaRisk does. Much more is left to competition forced, e.g. to market entry provisions for medium seize enterprises vs. the big four, Lloyds/HSBC/Barclays/RBS.[264]

In comparison to German law, the powers of the FSA seem to be "extremely wide"[265] but are more adequate to the market functions. While the current misuse control is comparable to the Missstandsaufsicht under § 81 VAG, the general focus on market aspects is different. Also, the following differences exist:

- elements of self-regulation by participation of practitioners;
- focus on market abuses;
- less regulation of investment risks (e.g. British insurers can invest in equities as much as they want);
- reinsurers are not exempted from the supervision of the FSA.

Only the future will decide on the question whether it is preferable to have insurers supervised by an authority with strong and protective powers – like in Germany – or to trust market forces.

The most important operative provisions to prevent repetitions of the essential market crises phenomenon were the Senior Management Arrangements, Systems and Controls (SYDC), which were promulgated in the Financial Services Handbook on the basis of Sec. 9 C and E FSA 2012. The basic provision is SYSC 2.2.1 (1):

"A firm must make a record of the arrangements it has made to satisfy SYSC 2.1.1 R (apportionment) and SYSC 2.1.3 R (allocation) and take reasonable care to keep this up to date."[266]

For this purpose, SYSC 2.2.2 allows the firms to rely on the records which they keep for their own purposes "provided these records satisfy the requirements of SYSC 2.2.1 R…". The details of SYSC are related to the risk management system of the insurance company law that is not part of this paper. However, they seem to be quite similar as the German MaRisk, which has been published by the supervisory authority on the basis of § 64a I.4 VAG.[267]

3. Solvency II and Financial Services Compensation Scheme (FCSC). Since 2002, the Commission has worked out its plans of Solvency II by which the financial supervision shall

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[262] But still being a "quasi-governmental agency".

[263] Sec. 9D (1)Treasury may…specify…what the economic policy of..Government is to be taken (until 4/30/13 and every year); Sec. 9E (1) Treasury recommendations to FPO (cf. MaRisk 2005/13, § 64a I.4 no.3a: „Risikotragfähigkeitskonzept); for comparison see the SYSC regulation below.

[264] Newcomers, e.g., have to have 4,5 % 1st tier target capital, as different from established market participators, who must have 7.5% under Basel III (but 4,5 % for newcomers only if saving accounts insured, cf. Einlagensicherungsfonds).

[265] *Birds*, op. cit., 5th ed., p. 30.

[266] For the full text see appendix 4, below.

[267] Rundschreiben BAFin 18/2005; amendments Rdschr. 10/2012 (BA) of 12/14/2012; for details see *H. Herrmann*, VersR 2015, 275,278 f.

be changed from the former regime of state intervention and control into a regulatory culture of governance.

The basic principles are:

- insurers shall be obliged to follow an external risk evaluation model or to develop an internal one, which has to be certified and to be announced to the state supervisory body;
- beyond the minimum capital and the solvability span, the target capital must be related to the external or internal evaluation;
- the accounting principles (IAS/IFRS) shall be amended for more adequate evaluation of the special insurance risks;
- in 2004, the Commission began to work out a framework directive (a so-called Lamfalussy-procedure).

In case that the regulatory structure established to ensure the solvency of insurers fails, part XV of the FSMA of 2000 provides for a compensation scheme, which replaced the provisions of the Policyholders Protections Acts 1975 and 1997. Like the two preceding acts, it does not, however, apply to Lloyd's policyholders as Lloyds are still relatively independent organization.

The scheme is funded by the levies of authorized firms in accordance with the detailed rules in ch. 1.3 of the Compensation Rules. Main subject of the regulation is its obligatory nature, which nowadays is comparable to § 124 VAG in the version of December 2004.[268] While the German securitization funds (Sicherungsfonds) is restricted to financial problems of life and health insurance, the British compensation scheme applies to long-term insurance as well as to the general insurance business.

The FCSC must take measures to safeguard insured on the terms it considers appropriate. These measures may, first of all, assist the insurer in difficulties in order to enable it to continue to effect or carry out contracts of insurance; however, they may also amount to transferring the insurance business to another insurer. § 125 II VAG seems to be similar in regard to the fact that the transfer of the insurance contracts to the securitization fund is only possible if other measures of protection of the insured interests are insufficient. If the resources of the fund do not suffice for the continuation of the insurance contracts, the supervisory authority has to reduce the obligations by 5 %. Then, the contracts can be transferred to another insurer (§ 125 VI VAG).

As far as the amount of compensation in British law is concerned, 100 % of the whole claim must be paid in respect of a liability subject to compulsory insurance. In most other cases of general insurance, 100 % of the first 2.000 BPS and 90 % of the remainder of the claim must be paid. In respect of long-term insurance, 100 % of the first 2.000 BPS must be paid together with at least 90 % of the remaining value of the policy.

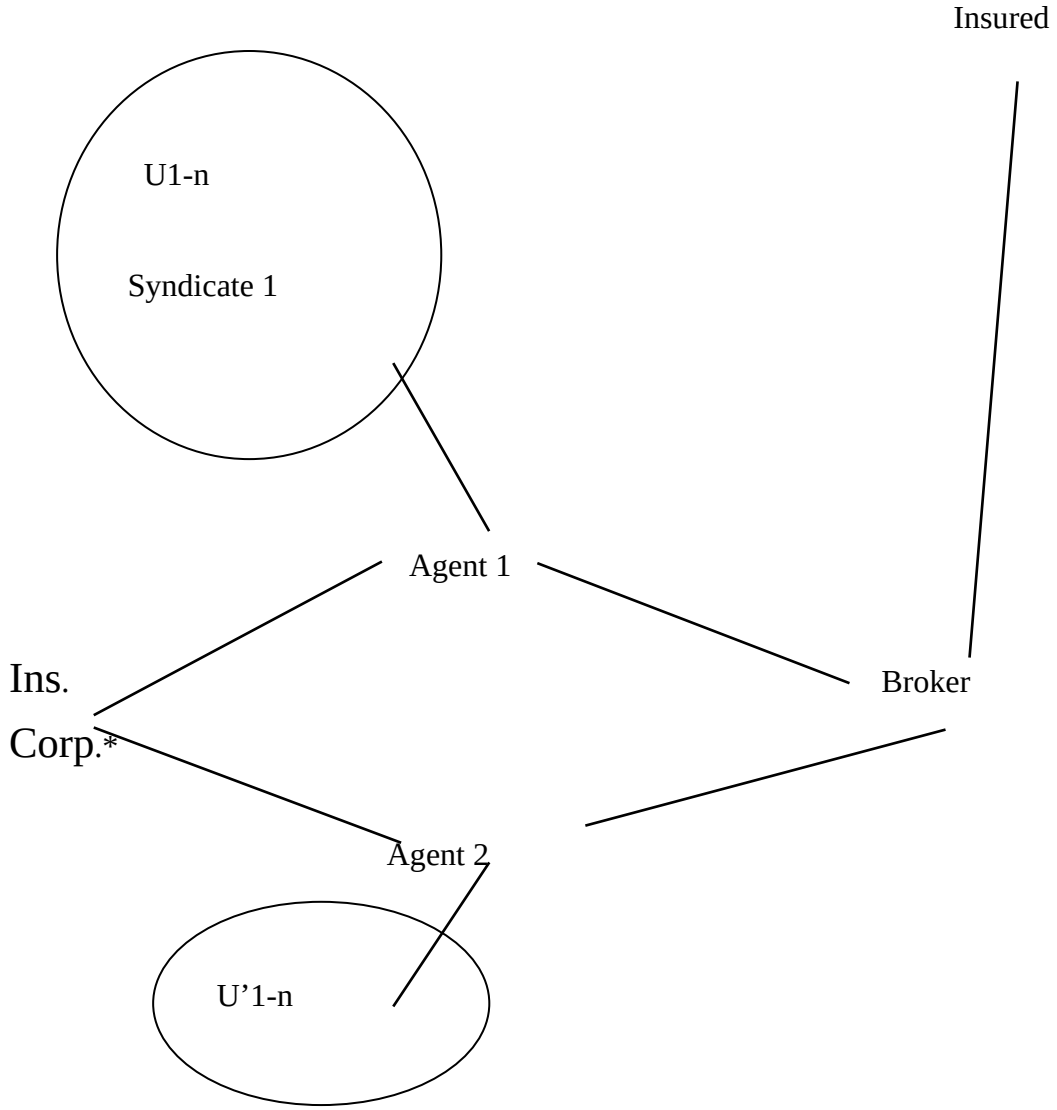
The German Ministry of Finance is empowered to transfer the tasks of the securitization fund to a legal person established under private law (§ 127 I VAG), e.g. the Protector Insurance, which used to manage the securitization before the new German legislation was enacted. There is no equivalent of that in British law.

4. Relation to Lloyd's Underwriters and Friendly Societies. Lloyd's is a unique insurance market organization, which developed in its basic structure in the 17th century. Since 1993/4, some fundamental changes have been effectuated, but most of the basic structure stayed untouched even after the enactment of the FSMA in 2000. Lloyd's has insurance licenses in more than 60 countries and 50 US states. The risk diversification is still unique despite the fact that corporate capital has been admitted since 1993/4 (please, see below). As pointed out at the beginning (1a), it is also due the well acknowledged quality of British insurance law that Lloyd's has a worldwide good will.

[268] In the version of. 7/5/2007, BGBl. III/FNA 7631-1.

Members of Lloyd's are the so-called underwriters ("names"). Traditionally, they were subject to unlimited personal and exclusive liability for the risks they insured in their own names. This principle, however, has been changed to a certain extent by a statutory reform in 1993 so that names can now be liable to a limited degree, and also legal entities that have liability restricted to their stock capital can act as underwriters. But still, insurance is effected with individual underwriters not by the Corporation of Lloyd's itself, which merely provides the facilities within which business is written.

Due to organizational reasons, the underwriters are united in syndicates, which do not have any legal capacity. As pointed out above (1a), they were reduced in the 90s from 400 to 75. Syndicates are managed by an underwriting agent and their representatives (the active underwriter). The insurance deals are brought to market by authorized brokers, the "broker's at Lloyd's," which counted 126 in 2002. Since many of the agents are under corporate control of big international insurers, the risk diversifying effects of Lloyd's are restricted substantially.



The 10 largest brokers of the London Market (Lloyd's/IUA)	**Brokerage in BPS (99/00)***
Marsh&MCLennan UK	1005
Willis Group	728
AON UK Holdings	551

Health Lambert Group	251
Jardine Lloyd Thompson Group	251
Benfield Greig Group	92
Alexander Forbes UK	89
HSBC Insurance Brokers/subsidiary	88
Miller Ins. Group	50
SBJ Group	38

**Source: Lechner, Der Londoner Markt im Umbruch, Sigma Nr. 3/2002, p. 18.*

Brokers use a form (slip), which describes the customer's need for coverage. On the backside of the slip they put down the pro rata coverage of each underwriter, together with their signature until 100 % of the risk are covered.

The Lloyd's Acts of 1871/1982 constituted a supervisory system over Lloyd's, which is similar but somewhat different from the one of the Insurance Companies Act of 1982 and the FMSA of 2000. Only few rules of both acts are especially made for Lloyd's.

Sec. 3 of the Lloyd's Act 1982 established the Council of Lloyd's with 28 members:

- 16 working members,
- 8 external members,
- 4 members who are appointed by the council with consent of the Governor of the Bank of England.

The Council has been equipped with considerable powers. It is not only responsible for the management of Lloyd's, but it also functions as supervisory board for the admission and work of the brokers and underwriting agents. These powers seem to be very similar to the supervisory powers of the FSMA as to Sec. 40 (2) (1) (a) of the Financial Services Act 2012, which provides for Lloyd's supervision as follows:

(a) (1) (b) (1A) „…keep itself informed about…
(b) regulated activities are being carried on in that market"

Lloyd's is treated as an "authorized person" within the meaning of the FSMA, mainly for the purposes of the solvability requirements (ibid. sec. 315). The FSMA leaves the calculation of an adequate solvability span to Lloyd's internal regulations ("adequate resources" in relation to their contractual risks (schedule 6 rule 4 (1))).

Sect. 104 ss. contains certain provisions on insurance business transfer schemes (Bestandsübertragungen). They are applicable to insurance companies as well as to Lloyd's underwriters (s. again sec. 315 and 323 FSMA, FSMA 2000 (Control of Transfers of Business done at Lloyd's, Order 2001, Handbook p. 446 ss.).

The above explained compensation scheme (Feuerwehrfonds) of sec. 213 ss. FSMA does not apply to Lloyd's policyholders.[269] For the differences in respect of liability, please refer to sec. 214 (1) a: "unable … to satisfy claims." The FSA 1986 concerning life-insurance business did not affect Lloyd's (sec. 42 FSA). Also this situation has been changed by the FSMA (see Butterworths Handbook, p. 474 ss.).

The following provisions show that the Authority has supervision powers over Lloyd's, but these are, in general, of indirect nature:

- sec. 314 (1): "The Authority must keep itself informed about
  a. the way in which the Council supervises and regulates the market at Lloyd's; and
  b. the way in which regulated activities are being carried on in that market."

[269] Please, see *Birds*, op. cit., p. 29.

- sec. 318 (1): “The Authority may give a direction under this subsection to the Council or to the Society acting through the Council) or to both.”

As to corresponding German law and practice, one can say that Lloyd’s is unique, but to a certain extent it has an equivalent in Germany: the Hamburger Versicherungsbörse. However, the insurance mergers like ERGO, etc. do not seem to be comparable.

VII. Self-Regulation.

Like most other branches, insurers are organized in private non-profit associations, the membership of which is not compulsory.

1. The Codes of the General Insurance Standards Council and Follow-Up Regulations. The most important association of the British insurance industry is the Association of British Insurers (ABI). The former exemption of the insurance industry from the Unfair Contract Terms Act 1977 was obtained at the "price" of the adoption of voluntary Statements of Practice by the ABI, e. g. the statements on warranty clauses in insurance contracts as analyzed above (3e/aa).

In the late 90s, the ABI Statements were replaced partially by "codes" of the General Insurance Standards Council (GISC). The GISC Code related to domestic insurance tried to bring those insurance intermediaries under an indirect supervision of the Registration of Brokers Commission who were not registered but acted for registered brokers. The registered brokers were responsible to the GISC for seeing that their non-registered agents complied with the code. Rule F 1 GISC stipulated that membership of "intermediaries" is possible. Rule F 42 prohibited that members deal with non-members. The FSA has formulated new rules based on the GISC code.[270]

The following qualification rules have been promulgated by the GISC:

- degree from a recognized institution, or, in case of a foreign degree, its acceptance as equivalent by the former Insurance Broker Registration Commission (IBRC) or the GISC;
- time of practice as insurance broker, agent, etc. for at least five years in the insurance business,
- as employee in the insurance business of at least three years and thereby have the knowledge and practical experience of a broker who had been in business for five years.

2. The Personal Investment Authority Ombudsman. British insurance contract law contained significant hardships for the insured that were in conflict with the consumer protection movement gaining more and more significance in Great Britain as all over the world. This is why the ABI "Statements of Insurance Practice" for life insurance and other insurance branches of 1977 stated with respect to the utmost good faith doctrine the following:

- Declarations made on application forms are only to be made to the best of the applicant's knowledge or belief, which means that instead of a "basis-of-the-contract"-clause solely the guarantee of the applicant's honesty is required.
- The insurers renounce the right to claim a warranty – with exception of cases of fraud, deception, or negligence - if there is no causal connection between the case of damage and the violation of an obligation.

These recommendations, however, were not sufficiently considered by the consumer-protection movement. In any case, a major deficiency is the missing legally binding character and, therefore, the insured cannot draw legally enforceable claims from it. As a consequence

[270] For the replacement of the GISC Code by the regulations of the FSA on disclosure duties, misrepresentations and warranties see above III.2a.

of self-regulation, the Insurance Ombudsman Bureau was founded in 1981. Membership was not compulsory. The Ombudsman had jurisdiction over marketing and administration (but not underwriting) complaints about insurers who were members of the Bureau. The Ombudsman had to seek information from both sides as well seek to conciliate or, if necessary, adjudicate. In case of an adjudication, members of the bureau were bound to the decision, and the insured could sue in court without restrictions.

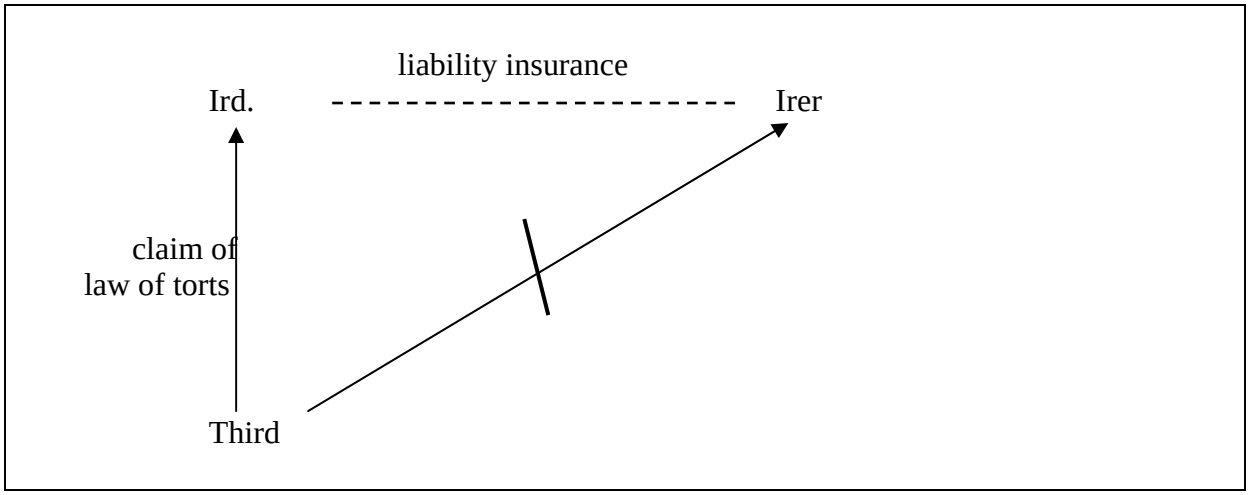
The FSA 1986 established the “Self Regulating Organisations” (SROs), whose members were recruited from the supervised branches. These SROs were entrusted and controlled by the “Securities and Investment Board” (SIB), which ranked between the SROs and the DTI in hierarchy. The “Life Assurance and Unit Trust Regulatory Organisation” (LAUTRO) used to be the respecting SRO for life insurance companies concerned. In 1994, the LAUTRO was replaced by the Personal Investments Authority (PIA). Since 1995, there was a special Ombudsman Authority of the PIA (s. Colinv. 15). However, the membership was not obligatory because it was theoretically sufficient if the company reports to the DTI and SIB. Procedures of admission, control of solvability, and overall responsibility have remained with the DTI in every case.

Since coming into force of the FSMA of 2000, the Financial Ombudsman Service (FOS) functions are regulated by sec. 225 ss., schedule 17 and rules which have been promulgated on the basis of sec. 226 subsec. 7 FSMA. The rules specify certain insurers to be eligible for compulsory jurisdiction of the Ombudsman (subsec. 2 and 6). Still, the general task of this organisation is to control the marketing and selling methods of the insurance industry.

VIII. Liability Insurance

The following texts of No. 8-13 are for repetition mainly. Most of all has already been mentioned in the foregoing chapters, but may be learned easier, when the context of the special type of insurance is seen.

1. Structure and Economic Importance. This type of insurance contracts intends to cover the insured's potential legal liability to a third party. This is why two relations have to be always regarded: the one between the insured and the third party (liability relation, *Haftpflichtverhältnis*) and the one of the insurer and the insured (cover relation, *Deckungsverhältnis*). Both relations have to be distinguished in the way that the liability must be *independently* assessed from the question whether there is an insurance cover. In German law, this is called principle of separation (*Trennungsprinzip*). While the British rules do not have such a dogmatic construction, they are completely equivalent in a final analysis.



There is also no action direct in principle. Hence, the third party must address the insured claim for the compensation for his/her damages. If the insurer pays to him/her directly, he/she may do it to save the insured from an expensive court suit, but still the insured can insist on his/her view not to be debtor of a legal liability. Sometimes, this is important for the assessment of whether the insurer has a right of any deductibles that are being agreed upon in the insurance contract.

The liability insurance has most importance in the fields of employer's liability and the motor vehicle insurance being compulsory by statutory law. However, also those effected by private householders to public liability or professional indemnity policies are important mass insurances. While each of them has its own specialties, the following will only deal with more general questions, which apply to the most types of liability insurance, will be explained.

As a starting point, one can ask about the general purposes of liability insurance. First of all, the insured shall be protected from liabilities, which he/she may incur and which will stress his/her financial capacity unacceptably or only unintended. Additionally, the third person receives the advantage to have his/her damage paid by an insurance company normally being financially strong. This function seems to be a side effect in the field of voluntary liability insurance. As to the compulsory species, however, such purposes must be seen integrated into the legal analysis.

2. Law of Torts in a Nutshell. Since most liabilities covered by liability insurance contracts are of the nature of tort law, a short overview to this field of law seems to be appropriate.

a. Torts Versus Contract Obligations. Tort is a matter arising by operation of law, whether or not the acts grounding liability are voluntary or involuntary. It, therefore, would be entirely logical to include 'tort' as a term here. Indeed, the continental approach to legal classifications and the internal logic of principles would so require. However, readers with a continental legal background may be intrigued to find that, rightly or wrongly so, the Anglo-Americans tend to treat tort as a separate matter. For them, tort remains a major legal area, usually studied apart from the other facets of the law of obligations, although a move is discernible towards the continental practice.

Prior to Hedley Byrne,[271] tort liability was characteristically imposed on persons who caused physical harm by dangerously acting, while liability in contract was incurred by those who caused economic harm by not acting as promised. Hedley Byrne introduced liability in tort where harm was purely economic at least where the relationship of the parties was "equivalent to contract," a ruling that White [272]has now confirmed.

German law is much different in this respect as the tort law requires a violation of absolute rights (§ 823 I BGB). Therefore, pure economic harm is not protected by the law of torts in cases of willful damaging against good mores (§ 826 BGB). However, such economic damage is recoverable under §§ 311, 280 BGB as a quasi-contractual claim.

b. Loss, Breach of Duty, and Strict Liability. Tort arises when someone has sustained injury or loss from the acts of another in breach of a duty owed to him/her by that other or in contravention of a right conferred on him/her by law. The obligation to make reparation for the injury or loss arises not from the agreement of the parties but by reason of law. Were the obligation to stem from agreement, the obligation would stem from contract. Tort must further be distinguished from crime, as both arise, as it were, out of the law's scrutiny of an event rather than agreement. A single act may give rise to both a criminal proceeding and the civil proceeding for the recovery of damages, which is the normal remedy in a case of tort. But the function of the criminal process is the punishment of the criminal, while that of the civil process is the compensation of the sufferer of the loss.

Not every loss, however, will result in a tort claim. Loss or damage can occur for which a person has no remedy in law because his/her legal rights have not been infringed. Where no legal right has been infringed, no legal wrong has been suffered. A business has no legal right not to be competed with so that a butcher's shop, that suffers a loss because of the entry of a new shop, has no right to sue.

For a successful action, the requirements include loss, caused by a breach of duty owed to the pursuer, and the loss results from the act complained of. The requirement that there be a breach of duty owed to the pursuer before an action in tort can be sustained as important. Usually, the duty is one of care, and the breach of that duty is grounded in the negligence of the person sued. The extent of the duty of care has, naturally, occasioned much discussion and many cases. One famous case is the Scottish one, *Donoghue v Stevenson* [1932] AC 562, in which it was held that a manufacturer did owe a duty of care to the ultimate purchaser of his product from a retailer. The matter was argued on the legal principles involved, and the facts were never proved. Nonetheless, it has entered into legal mythology that Mrs. *Donoghue* ordered ginger beer in a cafe in Paisley, beside Glasgow. When her friend poured her a drink from the opaque bottle in which the ginger beer was supplied, the decomposed remains of a snail landed in her glass, and she suffered nervous shock. Scots consider the law in the case unsurprising in terms of the legal development down to 1932, but it was a House of Lords decision, and therefore persuasive in the common law of torts. It was a major development in English thinking to hold that the duty of the manufacturer passed through the retailer to the

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[271] *Hedley Byrne & co. Vs. Heller & Partners Ltd*., House of Lords (1964) A.C. 465; (1963) 3 W.L.R 101.

[272] *White vs. Jones, House of Lords* (1995) 2 A.C. 207; (1995) 2 W.L.R. 187; cf. Weir, A Casebook on Tort, 9th ed. 2000, p. 70.

purchaser. The case was decided by the House of Lords by a bare majority. In it, Lord *Atkin* used the biblical parallel of the 'good neighbour', and this metaphor has affected subsequent consideration of this kind of case. However, it should again be noted that the Consumer Protection Act 1987 has to a degree overtaken the common law on the matter.

Certainly, a point of difficulty in tort is the extent to which a person is liable for the consequences of his /her negligence. The chain between manufacturer, retailer, and eventual purchaser is quite short and is now accepted as reasonable. But, while one can say that 'X owed a duty of care to Y', should that amount to holding that if any act of X causes loss to Y, a duty of care exists. That proposition is obviously false because, as we have already seen above, loss can be caused without infringing upon the legal rights of the loser. But the question remains – as the scribe put it – "Who is my neighbour?" (Luke 10:29). There has been much discussion on this question since 1932. Some proximate relationship is needed, but no finally conclusive rules have been established. Obviously, it exists in certain physical circumstances, as where a person injures another in a car accident. It can also occur in a professional relationship where a surgeon negligently performs an operation. It existed between *Mrs. Donoghue* and *Stevenson*, the ginger beer manufacturers. But are there circumstances in which the act of one injures another by pure accident. Should the person acting be held liable?

c. Causation and Foreseeable Facts. The foreseeable damage is a factor, which has been used to limit the scope of the duty of care. It has also been held that damage caused may be so remote a consequence of the breach of duty that a legal link cannot be established. In *Wagon Mound*[273] there is a major discussion of foreseeable facts and remoteness.

The chain of causation itself may be important in other cases. Certainly, where a factor other than the conduct of the defendant enters into the chain of causation, a question arises whether the person who originally commenced a chain of events should be liable for all its consequences. On the other hand, should the person initiating the chain of events escape liability if there is an intervening cause? This last used particularly to be the case when the injured party was partially responsible for his own misfortune. Under common law the contributory negligence of the plaintiff was a complete defense to an action. Now, by the Law Reform (Contributory Negligence) Act 1945, which applies in both England and Scotland, the contribution of a plaintiff to his/her own misfortune reduces the damages the defender is required to pay, in proportion to the degree to which the plaintiff is held to be the author of his/her own misfortune. In the case where a number of persons contribute to the injury done to a plaintiff, those who contribute to the wrong may be liable in proportion amongst themselves under the Civil Liability (Contribution) Act 1978, but the injured person is not required to choose among them or to sue all of them.

d. Duties of Informing and Warning Customers. Special duties of supplying information have been developed for brokers and banking agents who do business in the capital markets. They also apply, however, to insurance brokers and agents, to a certain extent.

Basic is the so-called suitability doctrine of the Anglo-American law tradition. This doctrine states that a recommendation made by a dealer to a customer for the purchase, sale or exchange of any security has to be in accordance with the information that the customer has given on his/her financial situation and needs.[274] The EU Investment Services Directive of 1993 expanded this doctrine to a double consultation duty:

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[273] [1961] AC 388.

[274] Please, see *Kübler*, in Festschrift Coing, Vol. 2 1982, p 198 s.; *Roth*, in Assmann/Schütze, Handbuch des Kapitalanlagerechts, 2nd ed. 1997, p. 423 ss.

- the bank has to ask the customer already in the initial phase about his knowledge of investment conditions, the reasons for making the investment and the acceptance of certain risks.
- Then, in a second step, the bank must provide all necessary information on the investment in a correct, complete, and clear manner.

This so-called duty of investor- and investment-adequate consultation has been implemented in the UK by the Financial Services Rules (Conduct of Business) (Product and Commission Disclosure) of 1994 passed by the Securities and Investment Board. These rules do not only aim towards banks and banking broker but bind long-term insurers as well. Hence, every life insurance agent or broker has to consult his/her customers suitably with respect to both aims of this term. If a breach of this duty can be proven, the intermediary is liable for foreseeable damages caused by him/her.

Some research has been done on the comparability of this regulation to German law, but most interestingly, the duties of consultation used to be specific to the investment business of insurances. Insofar, however, the new EU-directive on insurance intermediaries, despite the fact that they have their origin in the suitability doctrine, leads to an extension of information and warning duties (s. infra 3a and 3d).

e. Remedies in Tort. In recent years, there has been much discussion about the kinds of losses which the law will take into account. For a long time, some physical loss had to be involved while purely economic loss alone was not recoverable by a tort action. That position was partially altered in *Anns v Merlon London Borough Council* [1978] AC 728, which held that the owner of a building, which had been negligently inspected by the local authority could recover damages so far as undetected faults were a danger to the health or safety of the occupants. In *Junior Books Ltd v Veitchi Co. Ltd.* [1983] 1 AC 520, a floor laid by a subcontractor had to be replaced. It was held that the plaintiffs could sue the subcontractor for the cost of replacement, and financial loss incurred while that was being done. But there has been a retreat from the underlying organizing concept that what was involved in these cases might be characterized as pure economic loss. Indeed, in *Murphy v Brentwood District Council* [1991] 1 AC 398, the Anns case has been overruled.

In the case of damages for personal injury, loss of earnings, loss caused by requirement of medical care, and solatium are compensated. The latter includes pain and suffering, loss of abilities, and shortened life. If the claim is in respect of a death surviving relatives may claim for medical costs, loss of support, and all or any of distress and anxiety from contemplation of the suffering of the deceased prior to death, grief and sorrow caused by the death, loss of companionship, and guidance from the deceased.

The law of tort in Scotland and of tort in England, therefore, continue to provide a remedy for someone who has suffered loss by the action of another done in breach of a duty (usually a duty of care) owed to him/her. Damages for personal injury are important in a variety of circumstances and range from car accidents to occurrences unique in their facts.

f. Overview of German Law and Comparative Remarks. General comparative aspects of interest are as follows:

- Compared to the German § 823 BGB, the basic British tort law provision is held broader. While § 823 sec. 1 BGB states violations of absolute rights, like the “human body, health, life, property etc.,“ it is sufficient under the provisions of British tort law that a loss or damage has been caused.
- The second pre-condition, however, the breach of a duty is more comparable to German law because herewith the liability of a person for the consequences of negligence can be restricted to a reasonable extent.

Example: A's unlawful advertising causes losses to his competitor B and B's clients C and D. While obligations not to harm the business of competitors are acknowledged to a certain extent, C and D as consumers cannot claim damages under the general law of torts. Insofar the situation is completely comparable to German law.

- Product liability is based on a relatively old common law tradition (1932), but was not considered strict liability before the Consumer Protection Act of 1987 was passed as an implementation of the corresponding EEC directive. Today, essential differences between German and British product liability do not exist. The same is true with liability for damages caused to the environment , which also has been regulated by a EEC directive and its implementation by an Act of Parliament;
- if certain actions of plaintiff have added essentially to his own misfortune the damages defendant has to pay are reduced (cf. § 254 BGB);
- if more than one person contributes to an injury, proportional liability is provided for by the Civil Liability (Contribution) Act of 1978, but the injured person can sue one of the persons involved for full damages (subrogation, cf. § 426 BGB);
- § 253 BGB with restrictions to non-commercial damages, there is no equivalent in the British law of torts. Consequently, the German exemptions to § 253, like damages for not having been able to use the car after an accident are unproblematic in British tort law.

3. Action Indirect and Insolvency of the Insured. The remarks on tort law do not refer to the questions of insurance directly but to the liability relation.[275] It may be stressed again that there is a strict principle of separation between the claims of tort law on the one side and the ones of insurance cover on the other. The main consequence would be that the third party after being damaged and needing most protection bears the risk of insolvency of the debtor of the tort law obligation. In common law, if an insured went bankrupt after a claim arose against him/her by a third party, any money paid by his/her insurers to indemnify the insured against the claim went towards the general assets of the bankrupt company and could not be claimed by the third party.[276] The latter had merely the right to prove in the bankruptcy as an ordinary creditor along with all the other ordinary creditors because he/she had no rights in respect of the contract between the insured and the insurer.

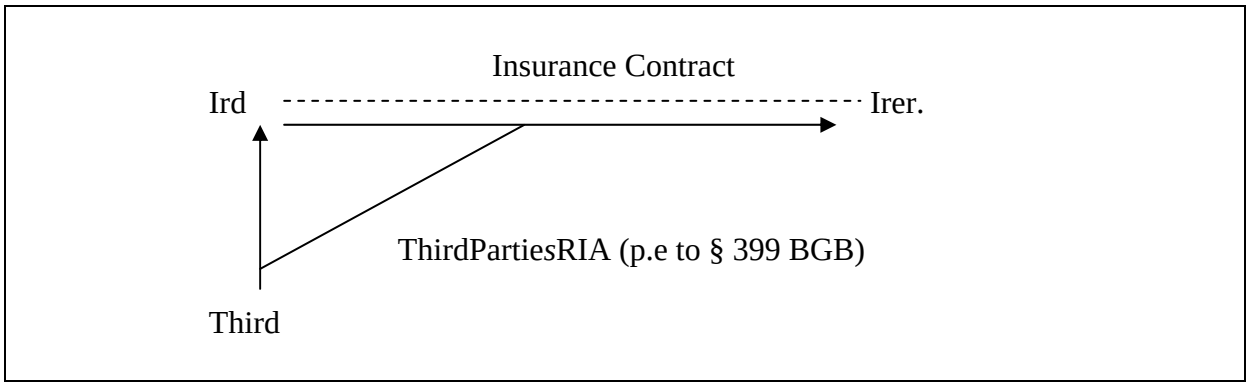
This was acknowledged as unjust in 1930 when the Third Parties (Rights Against Insurers) Act (ThirdPartiesRIA) was passed to remedy the legal situation. Sec. 1 (1) of this Act as amended[277] provides:

"Where under any contract of insurance a person…is insured against liabilities to third parties which he may incur then, (a) in the event of the insured becoming bankrupt…or (b) if…any such liability as aforesaid is incurred by the insured, his rights against the insurer…shall…be transferred to and vest in the third party to whom the liability was so incurred."

The transfer leads to the consequence that all the other creditors of the insured have no right on the claim against the insurer. Hence, the third party has the advantage to become creditor of the liability insurer by legal assignment, instead of only having rights on relation to the insured. Thus, the purpose of the insurance is changed in the already mentioned way: the third

[275] For the *disparities, please*, please, see supra 8b.
[276] Re *Harrington Motor Co*. (1928) Ch. 105; *Hood's Trustees vs. Southern Union General Insurance Co. of Australasia Ltd.* (1928) Ch. 793, cit. after *Birds* et al., op. cit., p. 350.
[277] By the Insolvency Acts 1985 and 1986.

party shall be protected by the liability insurance while only the insured has contributed to it with premium payments.



The ThirdPartiesRIA 1930 is disputed in cases of the so-called pay to be paid clause, which provides that the insurer does not pay an indemnity to the insured until the latter has paid the third party making a claim against him/her. In two cases which the House of Lords heard and decided together, the insureds had been wound up after their liability to third parties had been established but before the third parties claims had been paid. It was held that the third parties did not have direct rights against the insurers under sec. 1 ThirdPartiesRIA 1930, and hence the pay to be paid clause comes into operation with the effect that the insurers were not liable. The plaintiffs relied on sec. 1 (3) ThirdPartiesRIA 1930 that provided that in so far as any insurance contract purports to avoid the contract or to alter the rights of the parties in the event of the insured's insolvency, it shall be of no effect. But the court stated that subsec. 3 strikes down only provisions clearly aimed at affecting the rights of an insured in the event of its becoming insolvent in an attempt to contract out the statutory assignment. However, the pay to be paid clause was not a provision, which applied to the occurrence of an insolvency. Thus, the provision applied equally before and after a winding up order and was not rendered ineffective by sec. 1 (3) ThirdPartiesRIA 1930.

The ThirdPartiesRIA 1930 has an equivalent in German law in so far as the third person, in the insolvency of the insured, is secured and has a preferential claim under § 157 VVG 07, § 110 VVG 08 in conjunction with §§ 49 ss. InsO any amount of money paid by the insurance company or a claim for such payment must be transferred to the third party, like it has to be done under the ThirdPartiesRIA 1930. It must be noted, however, that the British ThirdPartiesRIA 1930 has been amended by a Regulatory Reform Order of 2004 and shall be reformed further in the future.[278] The reform commission recommended that, with limited exemptions, insurers ought not any longer to be able to rely upon pay to be paid clauses, but the draft bill retains the right of the insurer to set off any unpaid premiums against any monies paid to the third party under the policy after a transfer of rights.[279] Pay to be paid clauses do not seem to be common in German practice. The right of the insurer to set off unpaid premiums equally follows from the German law of execution since the third party becomes a kind of successor of the insured, which gives the insurer the defences rights he had before against the insured (§ 406 BGB).

4. Standard Terms. Despite the fact that in the UK an anticipative state standard term control was never provided, many clauses have become very common: the explanation of some follows.

[278] Please, see *Birds* et al., op. cit., p. 357 ss.
[279] Please, see *Birds* et al., op. cit., p. 360.

a. Admission of Liability and Control of Proceedings. The standard terms often provide that the insured shall not make an admission of liability or promise (whether expressed or implied) any payment without the written consent of the insurer. The term is obviously very important and essential for the protection of the insurer's interests. There can be no doubt as to the validity of such a condition[280], German practice has also developed such a clause (§ 5 V AHB).

Another very common clause provides that the insurer shall be entitled at its own discretion to take over and conduct in the name of the insured the defence or settlement of any claim. Most often, the term is worded in conjunction with the one on admission of liability, and so it is done in § 5 IV AHB. While the right to take over is not a duty, the insurer is not allowed to unjustifiably admit liability.[281] Some US decisions have held that after having refused an offer of settlement by the third party an insurer is liable to the insured if the third party later recovers more than the sum insured in a civil action against the insured.[282] There is no English authoritative on this point; however, some dispute the question legal comparison.[283]

b. Precautions Obligations. Common standard conditions require the insured to take reasonable precautions or care to avoid loss. The problem of such clauses is that the insurance contract aims at the protection of the insured in cases of his/her own negligence. This is why the Court of Appeal restricted the precautions obligation to an interdiction of recklessness[284] in *Fraser vs. Furman*. German law is comparable with respect to § 152 VVG, § 103 VVG 08, as it restricts the right of the insurer to avoid liability on the allegation of intentional realization of the insured risk. While § 152 VVG 07, § 103 VVG 08 make the precondition of wilful actions, the UK rules even require recklessness. However, wilful causation of damage most often would seem to be reckless.

On the other hand, warranty clauses are common, which require certain acts of the insured or promise certain circumstances of the insured object, and do not at all provide preconditions of indilligence. Some less strict constructions of warranties make the difference between warranties of present or past facts on the one hand and warranties as to the future, so-called continuing warranties, on the other hand. If no promise for the future is given the insurance company cannot deny liability in cases of present conformant actions of the insured.

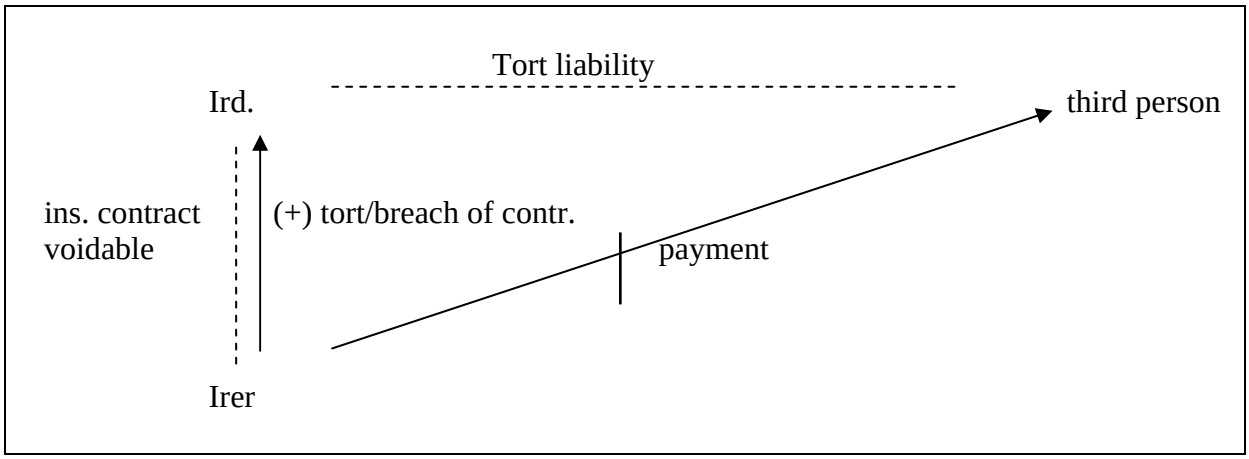
Example 4: The insured company warranted when its representative completed a proposal form for employers' liability insurance that its machinery, plant and ways "are …properly fenced and guarded and otherwise in good order and condition".

The court, in *Woolfall & Rimmer vs. Moyle*[285] relied on the present tense of the proposal form (are) and rejected the argument that the warranty was continuing. Similarly, a warranty was held to relate simply to the past and the present time, which read: "I am a total abstainer from alcoholic drinks…".[286]

5. Payment and Regress. Special questions of payment and regress arise in cases in which the insurer pays damages to somebody its customer is liable for, and, before or after the payment, the insurance company becomes aware of new facts which show that the insured had violated his disclosure duties or other obligations, and that the insurer therefore could have denied liability. First of all: by payment in full knowledge of the

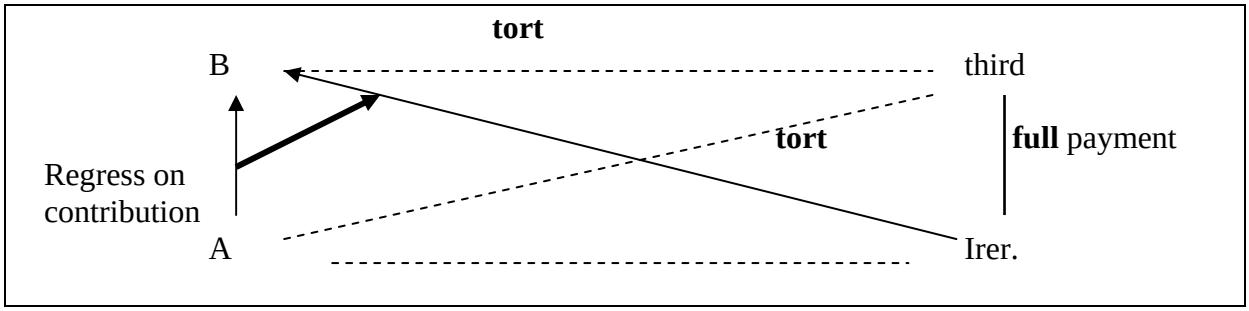
[280] Please, see, e.g. *Terry vs. Trafalgar Insurance Co* (1970), 1 Lloyd's Rep. 524.
[281] *Groom vs. Crocker* (1939) 1 K.B. 194.
[282] Please, see, e.g., *Crisci vs. Security Insurance Co*., 66 Cal. (2d) 425, 426, P (2d) 173 (1967).
[283] Please, see *Birds* et al., op. cit., p. 362.
[284] (1967) 1 W.L.R. 898.
[285] (1942) 1 K.B. 66.
[286] *Kennedy vs. Smith*, 1976 S.L.T. 110.

misrepresentation the insurer waives its right to avoid the contract.[287] Also, payment without knowledge does not give the insurer against the third party a right to repayment. Since the right to deny liability has not yet been exercised by the insurer, the payment has been done on the basis of a valid insurance contract. However, the legal consequence in relation to the insured is different. Either he has violated a pre-contractual duty under the law of torts[288] and hence has caused damage to the insurer; or the misrepresentation has happened after contract conclusion and has caused damage to the insurer which would be recoverable based on a breach of contract claim. However, the insurer would be not entitled to recover its expenses as damages for breach of contract.[289]



Further practically important questions arise if a second person has caused the damage working together with the insured or not. From the general insurance law, as dealt with above, follows that the insurer by paying the damage becomes the successor of all rights of the insured in respect to his liability.[290] As to the rules of liability insurance the questions of contribution in tort law have to be regarded.

First of all, sec. 1 (1) of the Civil Liability (Contribution) Act 1978 provides for contribution from another person who is liable in respect of the same damage. Contribution in this sense means that the entity who has paid the full damage has a regress claim to the contributing person. If the paying entity is a liability insurer, the insurance company becomes creditor of the regress claim of A against B. In the following example, Ird. can claim half the damage from B.



The second question is how much can be claimed in regress. It is generally acknowledged that the amount of the regress claim depends on the quantity of the contributive causation of

[287] Please, see e.g. *Evans vs. Employers' Mutual Insurance Association* (1936) K.B. 505; *Birds* et al., op. cit., p. 363.
[288] Please, refer to generally supra, at I.2a, to tort claims because of pre-contractual information duties.
[289] Please, see *London Assurance vs. Clarke* (1937) 57 Loyd's L.R. 254. An action might lie, though, in the tort of deceit; see *Birds* et al., op. cit., p. 267.
[290] Please, see supra IV.4.

the damage as well as on the comparison of negligence. Both have to be decided on the case by case basis.

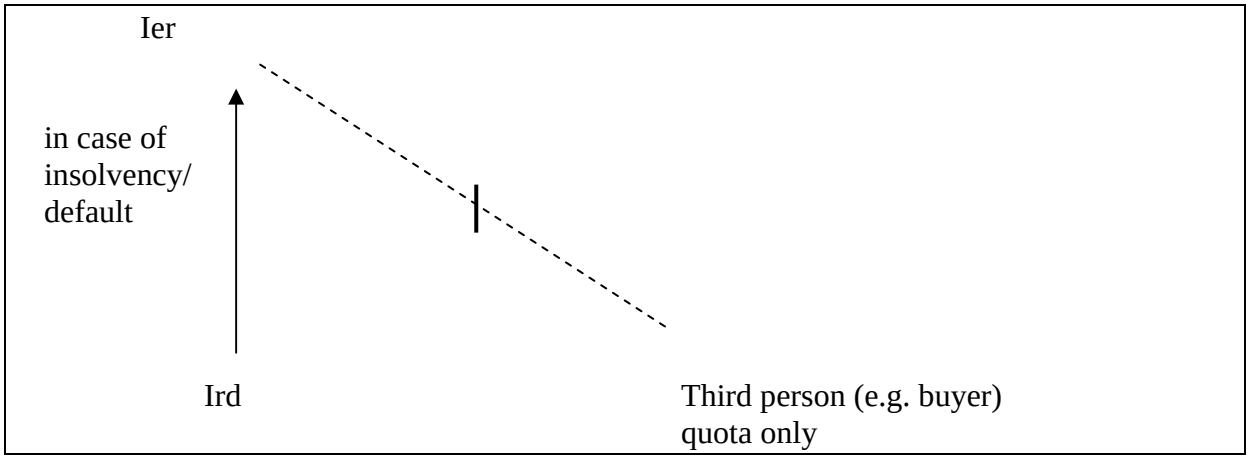
IX. Remarks to the Credit and Guaranty Insurance

The former chapters on fire and property insurance, on marine insurance and motor vehicle insurance[291] have been skipped here, for restricting the repetition subjects.[292] Some remarks on the law of credit and guaranty insurance, however, shall be made in this edition of the paper, still, since some of the participants would not be familiar with this insurance type.

1. Major Market Participants in the UK and Basic Structure. Before analyzing this particular legal structure, some information about the practical importance of credit insurance may be helpful. There are following major market participants in the UK:

- AIG Europe (UK) Ltd., London (New York mother company; federal state aids since 2009);
- Coface UK, London/Paris;
- Euler Trade Indemnity plc., London/Munic*h* (still legally separate: Hermes Credit Services, Ltd., London);
- Lloyds of London, C/O Hiscox Syndicates, Ltd., London;
- NCM Credit Insurance, Cardiff/Cologne;
- Royal & Sun Alliance Insurance plc., Professional & Financial Risks, London.

The major insurable interest can be seen in the fact that creditors insure themselves against failing of their debtors to pay their dept. If the debtor falls bankrupt, the insured has a claim against the insurer to compensate what is lost by the insolvency procedure.



2. Contract Conclusion and Disclosure Duties. As in general contract law advertisements of the insurer, being attended to the general public or to an uncertain circle of potential customers, there are not legally binding offers. The first preparatory step of credit insurance contracting is still not an offer. The later insured makes an announcement of unperformed claims (credits) and includes a gapless listing of credits with some disclosure of serious financial difficulties of certain debtors.

After receipt of the announcement the insurer will examine the situation and prepare the premium calculation. Sometimes, he goes further and proposes certain improvements of the debt management of the customer for being able to offer lower premiums to him. Finally, a so-called “credit limit” (in time) and the annually insured maximum amount will be

[291] See ch. 9-11 of the edition 2009 being available under www.assurances.de.
[292] For the purpose of repetition see the note above, before I.

announced to the customer. This is taken as the contractual offer, which the insured normally accepts by silence.

Of course, the information on financial fitness is subject to the utmost good faith principle but is also the expectation of gapless listing belongs to it because for reasons of risk diversification the insured shall not be allowed to bring only the bad debtors under insurance cover. One can even argue for the gapless listing obligation is a warranty.

Example: Insured (Ird.) sent with his announcement of unperformed claims an incomplete list of debtors to the insurer (I) by e-mail. Due to *unclear technical reasons, the last page of the list was not attached to the e-mail file. When, some time after the credit contract conclusion one of the bigger debtors of Ird. (D) had fallen bankrupt, I denied liability because of the incompleteness of the debtors list. While only two minor debtors of Ird. were not on the list, the big company D was.*

For the decision of the case the question is crucial whether the mistake of the list is a warranty offence or only a misrepresentation. Having a full overview of the creditors is not only very "basic to the contract," but also the difficulties of causality assessment speak for the warranty construction. However, there is no authority in British case law for generally preferring the warranty interpretation, and in many cases, it would seem hard for the insured to be taken as a warrantor who loses the insurance protection, even if a mistake of the list of creditors does not effect a substantial risk increase for the insurer and was caused without negligence. Both, the substantiality test and a testimony of negligence should be provided in regular cases, not withstanding that the insurer can insist on making the correctness of the list announcement a warranty clause.

3. Exclusion Clauses and Alteration of Risk. While for the mentioned reasons of risk diversification all debts of a business become insured, the risk is sometimes restricted to certain limits of the business or some particular debt, like loans, cases of bank deposit and mortgage shall be covered by a special credit insurance contract. Modern forms of so-called cash pooling imply an integration of affiliated companies. Principally, the risk definition is left to the freedom of contract, but risks of misunderstanding and lack of transparency are conceivable, which lead to the applications of the contra proferentem rule or the transparency provision of the standard term control under the Unfair Terms of Consumer Contract Regulation of 1999.[293]

Example: The standard terms of a credit insurer (CI) provide for covering all credits of the "European" affiliated companies of the insured (Ird.), who a credit insurance contract with CI since 1999. After accession of Poland to the EU in 2004, a Polish daughter firm of Ird. fell insolvent. Was *CI denied insurance coverage because of the EU clause of its standard terms lawfully?*

While the EU clause was clear and understandable before the extension to the eastern countries, it became unclear after their accession because it can be doubted whether the reference of the clause to the geographical conditions in 1999 shall be upheld. However, the *contra proferentem* rule comes into play since it lies in the hands of CI to formulate his/her general contract terms in clear words. The rule does not only apply to **confusing** wording at the time of the contract conclusion but refers to later developments, which *require* corrections.

As to risk alteration, special questions of credit insurance arise when the insured makes arrangements with the debtor for avoiding the letter's insolvency. Normally, such reorganization attempts are not undertaken without the credit insurer's consultation, and the

[293] Please, see infra appendix 1.

standard terms provide to do so. Also, it seems to be normal that the parties do not intentionally make the risk bigger than it has been before, but of course, this can happen unintentionally.

If the duty to ask the insurer for consultation is violated, cover could be denied on the reason of a warranty offence because such a duty is phrased as a warranty *rather than* a condition. However, the causation test being relevant under the self-regulation of the insurance industry[294] should be made before avoiding the contract.

If the contract does not provide for consulting duties of the insured, the question of risk changing arises. Under British law, no information duty *that* refers to risk alterations after the contract conclusion exists.[295] Most often, however, the standard terms provide for an obligation of the insured to take reasonable care to prevent the insured damages. Since such a duty leads to possible contract avoidance only in cases of reckless actions,[296] only extreme cases of pseudo rehabilitation will be sanctioned by a care taking clause.

Sometimes, such credit arrangements do not only modify the respective credit contracts but make novations. They may be helpful, but if the insolvency is unavoidable, the insurer can no longer be liable if the creditor's rights are not modified but extinguished by replacement. The case is different when the insured event has happened; for instance, a certain debtor has gone bankrupt. Now, a novation of the outstanding credit of the insured can be helpful to minimize the loss.

4. Indemnity and Subrogation. As opposed to the law of guarantee,[297] there is no obligation of the insured to sue the debtor in advance to any cover of the insurance. However, the insurer becomes creditor of the debt (assignment) by payment and can make his/her claim in the insolvency procedure. The rights of the assignment cannot be claimed to the disadvantage of the insured (subrogation).[298]

Subrogation must be differentiated from the common standard term providing that the insured will be paid for the loss "less any portion… previously received from the debtor when the final dividend in bankruptcy or liquidation is declared." The insured will have to accept a deduction because his/her damage is reduced in so far as he/she has received a part of the payment his debtor owed to him.

All securities for the debt belong to insurer if they follow the secured claim automatically (e.g. chattel, mortgages, etc.) If they don't, the standard terms of credit insurance contracts in most cases provide for special assignments of the insured.

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[294] Please, see VII.1.
[295] Please, see §§ 23, 27 VVG.
[296] Please, refer to *Sofi vs. Prudential Assurance Company Ltd.* (1993) 2 Lloyd's Rep. 559; but also consult §§ 61, 152 VVG.
[297] Cf. § 771 BGB: Einrede der Vorausklage.
[298] Cf. Quotenvorrecht, § 86 I.2 VVG.

X. Fire Insurance and Business Interruption Insurance

1. Risks Covered, Utmost Good Faith and Warranties. The covered risk of fire insurance is damage by fire. As in German law, case law provides for ignition as a strict pre-condition. Great heat by itself will not suffice. The leading case, however, is of 1815, and technical reasons for fire damages have become more complex in modern times. These and other reasons have led to some reconsideration in the literature.[299] On the other side, the border line between an open fire and other phenomenon of heat damages seems to be relatively clear and more useful for risk determination than alternative distinctions, like uncontrolled heat extension, etc. Since there is no overruling stare decisive, until now, one has to take the ignition criterion as continuing case law.

Also, the fire need not be uncontrolled or unintentional, as appears from *Harris v. Poland*[300]*:*

Example: The policy holder hid her jewellery in the fire grate for safe keeping. Later, having forgotten that she had hidden in there, she lit the fire, and the jewellery was destroyed.

The court, in Harris[301]*, held that this was a loss caused by fire within the meaning of the insurance policy. It was an open fire, and the damage was unintended, while the fire was.*

The fire can be caused by negligent or deliberate actions of the insured himself, of his employees or of third persons. If so, one must take into account that the insurance contract is concluded for protecting the insured from unintended risks. This is why the fire insurance must include cover for damages negligently caused by the insured himself or his agents.[302] The authority itself and the comments in the literature do not contain any argument of possible restrictions to simple negligence, as opposed to gross negligence, and as German law provides for in § 81 VVG. For comparison however, one must take care of the law of warranties and obligations after contract conclusion, which is applicable in cases of allegations against representatives of the insured.[303] While the right of the Irer to step back from the contract because of violations of his utmost good faith duties[304], in general, is not given in fire insurance law under the quoted *Berni Inns* decision, case law acknowledges denial of coverage in cases of commercial contracts, which provide for employment of someone specifically to guard against the risk of fire.[305]

Also, certain cases of warranties must be taken into account. The case law for the type of fire insurance and BII seems not to be included into the political discussion of utmost good faith and warranty clauses, which is explained above.[306] One can argue, however, that the reasonability test of the CISG as taken over by the FSMA[307] must apply to these clauses consequently.

Example: The so-called auditorium warranty requires the insured, after the close of business each day, to carry out a thorough examination of the premises for smouldering matches, cigarettes etc., to empty ashtrays and remove the material from the premises. Can Irer deny liability if he can prove that the auditorium clause has been violated?

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[299] See *MacGee*, The Modern Law of Insurance, 2001, p. 575 with further references.
[300] (1941) 1 KB 462; see *MacGee*, op. cit., ch. 47.1, p. 575.
[301] As quoted above.
[302] *Mark Rowlands Ltd. V. Berni Inns Ltd.* (1985 3 All ER 473, CA)
[303] See above, III.3.
[304] For more details see III.5.
[305] *LEC (Liverpool Ltd) v. Glover* (2001) Lloyd's Rep IR 315, CA.
[306] See III.5.
[307] See ibid.

The fact that the clause is named "warranty" does not bind the court to take it as such, but it is an indication to be one.[308]*Since there are no other relevant facts to be seen in the text of the example, one can assume the clause to be a warranty. Under Berni Inns, as quoted, such clauses are accepted as possible in fire insurance cases. Irer can deny liability, no matter whether the violation has caused the fire or not, and whether it has been done in negligence. Even the reasonability test, being required under the CISG and it's transposition into the ombudsman law of the FSMA*[309]*, seems to be positive, because the cleaning and control duties are common, useful and adequate for preventing risks of fire damages and risk augmentation.*

In cases the fire has been caused by deliberate action, one must differ between acts of the insured himself and his representatives on the one side, and of third persons on the other. Only in the latter case insurance cover must be given. Cover after wilful ignition of the Ird. would cause incentives for criminal action, esp. when the Ird. has existential economic problems.

The typical insured risk of business interruption insurance (BII) contracts is determined as "economic loss arising from interruption of business activity through extraneous event".[310] The wording and the economic purpose of this kind of insurance excludes cover of risks resulting from development of market success or intra-organisational effectiveness of the insured enterprise. Most often, BII is taken as completion of fire insurance, because the latter is for damages on the an insured building and the mobile equipment within it, but does not cover economic consequences of the fact that the business must be given up during the time of repair of the destroyed objects. Breaches of contracts against deliverers and customers may become necessary consequences of the interruption of the insured business. Eventual damage claims of these contract partners are covered as well as debts of employment relations, which have to be continued during the business interruption.

2. Quantum and Alteration of Risk. Fire insurance is taken for the costs of reconstruction of the building insured and destroyed by the fire. In former times, the covered damage was accounted as time value of the damaged things at the time immediately before the fire. More recent standard terms allow accounting the value of new buildings, if reinstated in the same style, but according to modern practice. While it allows some enrichment of the Ird., it has been accepted by the CA decision in *Beaumont v. Humbert's*.[311]

In certain context of fire policies it is common to include an express clause requiring the policyholder to notify the insurers of subsequent changes in the risk. Requirements of insurers' consent before allowing any change in the risk are also quite common in practice of fire insurance contracts. If no clause of legal consequences is provided, the insurer would not have a right to step back from the contract or cancel it, because there is no general case law for risk increases.[312] The clauses, however, are possible, provided that the apply only for permanent alterations, not just to temporary risk increases.[313]

Risk increases may be done by modernisation of the building or by improving equipment etc. For cases like that, it may be mentioned that questions of under-insurance can arise.[314]

BII-contracts cover interruption damages within a certain reference time, e.g. 12 months after the fire. The amount of the owed payment is calculated on the basis of the balance sheet of the accounting year before the fire broke out. This practice assumes that the business

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[308] See ch. III.5.
[309] See again III.5.
[310] (1998) LRIR 151, as quoted in *McGee*, op.cit., ch. 50.13, p. 611.
[311] (1990) 2 EGLR 166, CA.
[312] See supra.
[313] See *McGee*, op. cit., ch. 24.14 with further references.
[314] See V.6.

income stays to be unchanged, but if there is proved reason for bad economic development of the business it can be taken as chain (remote) causation within the meaning of general law.[315] Cover can be restricted to a certain extent.

3. Insolvency During Interruption. Most important cases of chain causation in the sense explained before[316] are the ones of the business running insolvent after the fire event. Insolvency before the fire damage is a reason to only compensate the value accounted non-going concern. This will be done on the basis of a special insolvency balance. Once the business falls bankrupt after the fire, and there is no decision of the creditors to continue the business under the guidance of external officers, the average surplus of the former year can be measured for the months the business has been going on after the fire and before the closing caused by the insolvency. Off-course, this gives some incentive for the Irer to pull for business closing during the insolvency procedure, as early as possible, despite the fact that there are good chances for the enterprise to survive. Especially the Irer can be tempted to retard insurance regulation payment to the Ired for the purpose to reduce the amount of his cover duty. This is why the Ired, under German law, has a claim of payment in advance to an extent being owed certainly by the Irer.[317] UK case law seems not to provide for such protection of the Ired.[318], but contracts of compromise are common and legally binding.[319] Any money paid without final basis in the contract can be sued back as unjust enrichment.[320]

[315] Despite some differences – „überholende Kausalität“ of German case law, s. *Herrmann*, BGB/HGB II, 2009, at p.210.
[316] This ch., no. 2.
[317] Cf. § 14 II VVG.
[318] For case law developments and legislative initiatives on damages because of delayed payment of Irers see above III.6.
[319] See *Birds*, op. Cit., § 14.13.1, p. 294 s.
[320] See *Kyle Bay Ltd v. Certain Lloyd's Underwriters* (2006) EWHC 607 (Comm), (2007) Lloyd's Rep. I.R. 460.

XI. Life Insurance

1. Specialties of Contract Conclusion. For further analysis one must differ several kinds of life insurances:

a. Classes and Characteristics The following types or classes of life insurance are common and can be distinguished:

- whole life policy (on death only);
- accident policies (death by accident only);
- endowment policies (on expiry of a fixed period or on death);
- investment contracts (investments being realised on the *insu*red's death).

Statutory definitions of life insurance business are broad. Famous examples *include*:

- insurance on "lives or other events" (Life Ins. Act. 1774);
- "…on the happening of a contingency depending on the duration of human life" (Life Ass. Act 1867).

It seems to be sufficient that the policy is closely related to life or death or to the expiry of a certain period of the insured's life. However, insurance of funeral costs is not a life insurance despite the fact that it is very common in British as well in German practice. The contract either stipulates a predetermined sum for payment after death or after the relevant event, or the sum is realisable from a fixed level of investment. Also surrender value provisions are common, which come into play when the insured cancels the contract before the death of the nominee or before the time stipulated in the contract.

Example: A single premium of 50.000 PSt. was fixed, which could be switched by the policyholder between various investments managed by the insurer. The proceeds of the policy were payable on death or on early surrender by the assured.

*I*n *Fuji Finance Inc. vs. Aetna Life Insurance Ltd.,*[321] *t*he Court of Appeal held the contract to contain a life assurance within the meaning of the Life Insurance Act 1774 because it included clauses of the payable proceeds and surrender value.

No life insurance contract can be assumed in the case that a partnership contract provides for automatic transfer of the property of a *dea*d partner to the others.

Example: Two or more people purchased property as joint tenants with the object of the person living longest getting the benefit of survivorship.

It was held (*Prudential vs. CIR*[322]*)* that such an agreement is not a life insurance contract. If the partners have a common contractual purpose, a partnership contract would be the better legal instrument.

b. Insurable Interest and Contract Conclusion Written form of the policy is not compulsory but seems to be an implied precondition of sec. 2 of the Life Ins. Act 1774, under which a policy shall contain the name of the person interested. Of course, the name of the person whose life is insured, if it is a different person, has to be *also* mentioned in the policy. Hence, if there is a written policy at all, it has to be complete in the mentioned sense.

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[321] (1996) 4 All E.R. 608; cf. *Colinvaux*, op. cit., p. 335.
[322] (1904) 2 K.B. 658; cf. *Colinvaux, ibid.*

*I*n the field of life insurance, the liberty of contract has the consequence that insurers can freely decide on whether or not to contract with a special customer. Hence, no duty to accept exists if the risk increases after the offer of the assured. Problems only arise in cases of acceptance without the insurer knowing about the risk increase (s. supra ch. 2 II.1a). For repetition, the following cases *have to be mentioned once again*.

Example 1: The assured becomes mortally ill after the policy is issued.
The consequence is a normal coverage.
Example 2: The assured becomes mortally ill before the policy is issued.

The case lies between a mere change in risk and the change from a risk to certainty. The risk "begins to run." In *Sickness & Accident Assurance vs. General Accident Assurance Corp.*, it was held that the contract is automatically dissolved since the doctrine of frustration applies. Frustration means more than the mentioned concept of error as to the roots of the contract but also leads to voidance by law.[323]

The insurable interest doctrine is based on the general concept of consideration (please, see ch. 2 I.2). An interest in one's own life, husband's or wife's life is acknowledged. The insured can have as many life policies as he/she wants. A life insurance of unmarried partners is accepted by the specific case law as well as the risk of withdrawal of the partner's capital from the partnership.[324]

The general rule relation to relatives is that where one relative, who effects an insurance on the life of another, is related to that other as to have against him/her a claim for support enforceable by law, the relationship gives an insurable interest. However, important exemptions of the rule exist. First of all, a father has no insurable interest in the life of his son as such. A re-exemption is accepted if a parent has a right to claim aliment from his children. Again, re-exempted is the case that an adult son has no insurable interest in the life of his pauper father, whom he supports.[325]

c. Assignment, and Nomination. As said infra (V.5a) life policies can be assigned by endorsement on the policy (sec. 7 of the Policies of Assurance Act 1867). They are, however, not transferable as negotiable papers, like shares of a company by shares.[326] Written form is required for legal assignments (Sec. 136 of the Law of Property Act 1925). If the insured gives the policy to a bank, e.g. as deposit, it is done without a written word, quite often. Then, an intention to constitute an equitable assignment can be derived from surrounding circumstances because no special form is required. Bank take it for having a lien on the policy under the condition provided for.

By giving notice to the insurer, a *bona fide* assignee for value gains priority over earlier assignees who have not done so, provided that the notice was in good faith, meaning that the assignor had no knowledge, actual or constructive, of prior assignment.[327] Nr. 11 ALB goes beyond *that*. German courts have construed this provision to make the life policy a legitimating paper (*Legitimationspapier*), which gives *an* insurer the right to pay if he/she does not know and does not have to know without serious negligence, that another person is the real creditor. Also, the holder of the policy can cancel the contract.[328]

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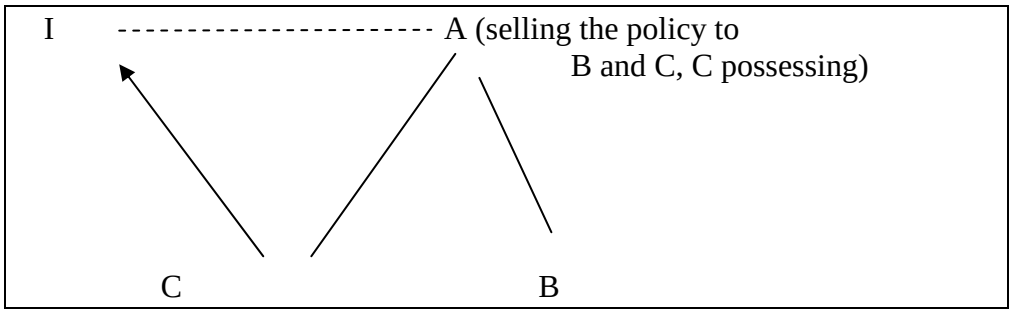
[323] Please, see *Amalgamated Investment & Property Co. vs. John Walker & Sons* (1977) 1 W.L.R. 164; *Kötz*, Europäisches Vertragsrecht Bd. 1, 1996, p. 289 with comparative remarks.
[324] Please, see Vaughan Williams L.J. in *Griffiths v. Flemming* (1909) 1 K.B. 805, 819-821; cf. *Colinvaux*, op. cit., p. 340.
[325] Please, see *Colinvaux*, op. cit., p. 341.
[326] *Colinvaux*, op.cit., p. 352; but refer to § 4 VVG.
[327] Please, see *Dearle vs. Hall*, (1828) 3 Russ. 1, cited after *Colinvaux*, op. cit., p. 349, cf. § 409 BGB.
[328] Please, see OLG Koblenz, 10 U 595/01; but refer to OLG Nuremberg, 8 W 661/00.



Assignment has to be *distinguished* from nomination, *which* is not bound to a contractual acceptance and can be revocable (cf. § 166 VVG).

2. Performance and Late Payment. The performance duties of the insurer, in general, are the same as explained in general contract law (ch. II) and in general insurance contract law (ch. III and V). Most important differences, however, have to be regarded with respect of due premium payment.

a. Premium, Contract without Premium, and Surrender Value Common clauses include no cover without payment of premium (for more information, refer to chapter 2 II.6: "days of grace").

The mere assignment of a policy does not place the assignor under any obligation to pay the premium or otherwise to keep up the policy. However, covenants are common, especially in cases of debt securitisation (mortgage/bank deposit). If the debtor does not pay, the mortgagee can pay instead and add the expenses to the securitised debt. The debtor's ultimate equity of redemption will fall under the condition that the premium expenses *and* have been compensated by the proceeds of the policy sale.

Example: Debtor D gets a credit of 200.000 PSt. from the Bank B for financing the purchase of a family house in Wales. He assigns to B a life policy on 250.000 PSt. as a mortgage, which will become mature in 10 years, and contains a *covenant to pay premiums after the assignment. After 3 years, D gets divorced and stops paying the premiums to the life policy. B continues paying after having asked D to do so without success. 2 years later, D emigrates to Hong Kong. B sells the life policy for 300.000 PSt.*

1. Can B keep 270.000 PSt. because D did not pay back the credit, and B's expenses for the policy premiums were 20.000 PSt.?

2. The premium expenses were accounted to 60.000 PSt. Can B claim 10.000 PSt. from D?

To 1: Yes.

To 2: Yes.

In cases of endowment policies, the insurer must pay the surrender value if the contract is cancelled before having become mature (cf. § 176 VVG). The insured can cancel the contract at any time without giving information about his/her reasons. The surrender value must be calculated by an expert of insurance mathematics (actuar) as the value of the paid premiums without consideration of the mortality risk carreid by the insurer (cf. § 174).

To avoid the disadvantages of the surrender value, the insured can apply for novation of contract without premium, which means reduction of the payable amount (comparable to an insurance with unique premium at the date of novation).

b. Increase of Risk, Suicide, etc. Further differences to general insurance contract law exist in regard of risk increasing, which can be seen as wilful misconduct. Under most standard terms this is an implied exception to the risk as it generally is in the case of insurances if the misconduct was a proximate cause of the death.

Example: The assured was killed in a motor accident while driving intoxicated and at excessive speed.
This was assessed as a wilful misconduct being an implied exception to the risk.[329]

Wilfulness often is denied in cases of suicide. However, nothing can prevent the insurer from excluding all cases of suicide, sane or insane, from the risk.[330]Generally, no suicide exception clause is inserted in life policies. Sometimes, policies provide that in cases of suicide, committed in a state of insanity, the policy shall be treated as surrender (cf. Nr. 9 ALB). Other contracts require a prior investigation to find out if the family of the assured has a history of suicide. The assured, in these cases, will be offered a choice between an exception clause and a higher premium.

3. Termination, esp. Redemption Value. Life insurance contracts are regularly long lasting contracts. In the longer run parties are caused to terminate the contract, quite often. Also, needs of contract adaptation occur very often. The contract shall be continued, provided that the duties of one or both parties can be changed reasonably.

a. Contract Adaptation and Trusts. Statutory law does not provide regulations on compulsory contract adaptation (but refer to § 172 VVG). Common law on contract frustration *also* does not apply to needs of raising premiums. Many contracts, however, provide for the adjustment and settlement of claims. Often, the assured will be advised by a "claim maker."[331]

The differences of the British rules of contract adjustment can partially be explained by the fact that the contracts are generally terminated for a relative short period (1 year; but refer to § 8 III VVG: 5 years; Chapter 2 II.7 for long term British life policies). By a trust, one can vest a person (*a* trustee) with rights, which he/she is bound to exercise in the interest of another person only (*a* beneficiary). Normally, the restriction of the trustee's right does not have external effects. In cases of misuse by the trustee, the respective action has legal effect, but the beneficiary can claim eventual damages from the trustee.

Example: Father F takes out an endowment policy for his daughter D, whereby she is to receive 3.000 BPS if she should reach the age of 21.

F can assign the policy to a third person (T) without consent of D. D has no claim against T of giving back the policy to her personally or to her father, but she has a claim against F on her 21st birthday for damages that amount to 3.000 BPS.

Trusts of life policies are quite common. Two major reasons seem to be relevant for this practice. First, there are some advantages of inheritance tax, since money, on the death of the insured, will be transferred directly to the beneficiary. Hence, accounting as a part of the insured's estate can be avoided.

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[329] *Marcel Beller vs. Hayden* (1978) Q.B. 694; cited *in Colinvaux*, op. cit, p. 336; but refer to OLG Hamm VersR 88, 1260 to § 25 VVG: bad tires.
[330] *Horn vs. Anglo-Australian Life*, (1861) 30 L.J. Ch. 511, cited *in Colinvaux*, op. cit., p. 337:, but see §§ 169, 178 VVG.
[331] Please, see *Colinvaux*, op. cit, p. 201.

Another reason could be that if the insured holds the policy in trust and falls bankrupt, the beneficiary can claim the full amount because the policy will be separated in the insolvency procedure. Other creditors of the insured are restricted to his/her ordinary assets, which seems to be especially important in cases of group insurance policies taken out by an employer on the lives of his employees.[332]

Sec. 11 of the Married Women's Property Act 1882 states that a policy effected by a married man or woman, on her or his own life and expressed to be for the benefit of his or her spouse and/or children, creates a trust in favour of the said person. Also, trusts under common law are possible provided that the trustee has declared himself/herself a trustee of property by clear words showing an intention to do so. Modern case law shows greater willingness to assume a trust.[333]

b. Redemption Value. For analysis of redemption value and surrender value cf. § 169 VVG. For equivalents in British law the reader must be directed to the update of the script in www.assurances.de, which will be published as soon as possible.

[332] Partially equivalent, please, see § 328 BGB; also trust (*echte Treuhand*) is possible; for cases of misuse, please refer to *Gruber*, Der Treuhandmissbrauch, AcP 2002, 435 ss.)
[333] cf. *Birds*, et al., op.cit., p.342.

Appendix 1: Consumer Insurance (Disclosure and Representations) Act 2012

2012 CHAPTER 6

CONTENTS

An Act to make provision about disclosure and representations in connection with consumer insurance contracts. [8th March 2012]

E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Main definitions

1 Main definitions

In this Act—

"consumer insurance contract" means a contract of insurance between—

(a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and

(b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000);

"consumer" means the individual who enters into a consumer insurance contract, or proposes to do so;

"insurer" means the person who is, or would become, the other party to a consumer insurance contract.

Pre-contract and pre-variation information

2 Disclosure and representations before contract or variation

(1) This section makes provision about disclosure and representations by a consumer to an insurer before a consumer insurance contract is entered into or varied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.
(3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection).
(4) The duty set out in subsection (2) replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.
(5) Accordingly—
(a) any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act, and
(b) the application of section 17 of the Marine Insurance Act 1906 (contracts of marine insurance are of utmost good faith), in relation to a contract of marine insurance which is a consumer insurance contract, is subject to the provisions of this Act.

3 Reasonable care
(1) Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances.
(2) The following are examples of things which may need to be taken into account in making a determination under subsection (1)—
(a) the type of consumer insurance contract in question, and its target market,
(b) any relevant explanatory material or publicity produced or authorised by the insurer,
(c) how clear, and how specific, the insurer's questions were,
(d) in the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),
(e) whether or not **an agent** was acting **for the consumer**.
(3) The standard of care required is that of a reasonable consumer: but this is subject to subsections (4) and (5).
(4) If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account.
(5) A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care.

4 Qualifying misrepresentations: definition and remedies
(1) An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied only if—
(a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and
(b) the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.
(2) A misrepresentation for which the insurer has a remedy against the consumer is referred to in this Act as a "qualifying misrepresentation".
(3) The only such remedies available are set out in Schedule 1.

5 Qualifying misrepresentations: classification and presumptions
(1) For the purposes of this Act, a qualifying misrepresentation (see section 4(2)) is either—
(a) deliberate or reckless, or
(b) careless.
(2) A qualifying misrepresentation is deliberate or reckless if the consumer—

(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and
(b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.
(3) A qualifying misrepresentation is careless if it is not deliberate or reckless.
(4) It is for the insurer to show that a qualifying misrepresentation was deliberate or reckless.
(5) But it is to be presumed, unless the contrary is shown—
(a) that the consumer had the knowledge of a reasonable consumer, and
(b) that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.

6 Warranties and representations
(1) This section applies to representations made by a consumer—
(a) in connection with a proposed consumer insurance contract, or
(b) in connection with a proposed variation to a consumer insurance contract.
(2) Such a representation is not capable of being converted into a warranty by means of any provision of the consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

7 Group insurance
(1) This section applies where—
(a) a contract of insurance is entered into by a person ("A") in order to provide cover for another person ("C"), or is varied or extended so as to do so,
(b) C is not a party to the contract,
(c) so far as the cover for C is concerned, the contract would have been a consumer insurance contract if entered into by C rather than by A, and
(d) C provided information directly or indirectly to the insurer before the contract was entered into, or before it was varied or extended to provide cover for C.
(2) So far as the cover for C is concerned—
(a) sections 2 and 3 apply in relation to disclosure and representations by C to the insurer as if C were proposing to enter into a consumer insurance contract for the relevant cover with the insurer, and
(b) subject to subsections (3) to (5) and the modifications in relation to the insurer's remedies set out in Part 3 of Schedule 1, the remainder of this Act applies in relation to the cover for C as if C had entered into a consumer insurance contract for that cover with the insurer.
(3) Section 4(1)(b) applies as if it read as follows—
"(b) the insurer shows that without the misrepresentation, that insurer would not have agreed to provide cover for C at all, or would have done so only on different terms."
(4) If there is more than one C, a breach on the part of one of them of the duty imposed (by virtue of subsection (2)(a)) by section 2(2) does not affect the contract so far as it relates to the others.
(5) Nothing in this section affects any duty owed by A to the insurer, or any remedy which the insurer may have against A for breach of such a duty.

8 Insurance on life of another
(1) This section applies in relation to a consumer insurance contract for life insurance on the life of an individual ("L") who is not a party to the contract.
(2) If this section applies—

(a) information provided to the insurer by L is to be treated for the purposes of this Act as if it were provided by the person who is the party to the contract, but
(b) in relation to such information, if anything turns on the state of mind, knowledge, circumstances or characteristics of the individual providing the information, it is to be determined by reference to L and not the party to the contract.

9 Agents
Schedule 2 applies for determining, for the purposes of this Act only, whether an agent through whom a consumer insurance contract is effected is the **agent of the consumer** or of the **insurer**.

10 Contracting out
(1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects the matters mentioned in subsection (2) than the consumer would be in by virtue of the provisions of this Act is to that extent of no effect.
(2) The matters are—
(a) disclosure and representations by the consumer to the insurer before the contract is entered into or varied, and
(b) any remedies for qualifying misrepresentations (see section 4(2)).
(3) This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

11 Consequential provision
(1) Any rule of law to the same effect as the following is abolished in relation to consumer insurance contracts—
(a) section 18 of the Marine Insurance Act 1906 (disclosure by assured),
(b) section 19 of that Act (disclosure by agent effecting insurance),
(c) section 20 of that Act (representations pending negotiation of contract).
(2) The Marine Insurance Act 1906 is amended as follows—
(a) in section 18, at the end add—
"(6) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.";
(b) in section 19, the existing text becomes subsection (1), and after that add—
"(2) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.";
(c) in section 20, at the end add—
"(8) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.".
(3) In section 152 of the Road Traffic Act 1988 (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks), in subsection (2)—
(a) in paragraph (a), after "avoid it" insert "either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply,";
(b) in paragraph (b), after "policy or security" insert "under that Act or", and for "it" substitute "the policy or security".

(4) In Article 98A of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154 (N.I.)) (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks), in paragraph (2)—

(a) in sub-paragraph (a), after "avoid it" insert "either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply,";

(b) in sub-paragraph (b), after "policy or security" insert "under that Act or", and for "it" substitute "the policy or security".

12 Short title, commencement, application and extent

(1) This Act may be cited as the Consumer Insurance (Disclosure and Representations) Act 2012.

(2) Section 1 and this section come into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Treasury may by order made by statutory instrument appoint.

(3) An order under subsection (2) may not appoint a day sooner than the end of the period of 1 year beginning with the day on which this Act is passed.

(4) This Act applies only in relation to consumer insurance contracts entered into, and variations to consumer insurance contracts agreed, after the Act comes into force.

In the case of group insurance (see section 7), that includes the provision of cover for C by means of an insurance contract entered into by A after the Act comes into force, or varied or extended so as to do so after the Act comes into force.

(5) Nothing in this Act affects the circumstances in which a person is bound by the acts or omissions of that person's agent.

(6) Apart from the provisions listed in subsection (7), this Act extends to England and Wales, Scotland and Northern Ireland.

(7) In section 11—

(a) subsection (3) extends to England and Wales and Scotland only;

(b) subsection (4) extends to Northern Ireland only.

SCHEDULE 1 INSURERS' REMEDIES FOR QUALIFYING MISREPRESENTATIONS

PART 1 CONTRACTS

General

1 This Part of this Schedule applies in relation to qualifying misrepresentations made in connection with consumer insurance contracts (for variations to them, see Part 2).

Deliberate or reckless misrepresentations

2 If a qualifying misrepresentation was deliberate or reckless, the insurer—

(a) may avoid the contract and refuse all claims, and

(b) need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them.

Careless misrepresentations—claims

3 If the qualifying misrepresentation was careless, paragraphs 4 to 8 apply in relation to any claim.

4 The insurer's remedies are based on what it would have done if the consumer had complied with the duty set out in section 2(2), and paragraphs 5 to 8 are to be read accordingly.

5If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid.

6If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.

7In addition, if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may ***reduce proportionately the amount to be paid on a claim***.[334]

8"Reduce proportionately" means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 6), where—

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

Careless misrepresentations—treatment of contract for the future

9(1)This paragraph—

(a)applies if the qualifying misrepresentation was careless, but

(b)does not relate to any outstanding claim.

(2)Paragraphs 5 and 6 (as read with paragraph 4) apply as they apply where a claim has been made.

(3)Paragraph 7 (as read with paragraph 4) applies in relation to a claim yet to be made as it applies in relation to a claim which has been made.

(4)If by virtue of sub-paragraph (2) or (3), the insurer would have either (or both) of the rights conferred by paragraph 6 or 7, the insurer may—

(a)give notice to that effect to the consumer, or

(b)terminate the contract by giving reasonable notice to the consumer.

(5)But the insurer may not terminate a contract under sub-paragraph (4)(b) if it is wholly or mainly one of life insurance.

(6)If the insurer gives notice to the consumer under sub-paragraph (4)(a), the consumer may terminate the contract by giving reasonable notice to the insurer.

(7)If either party terminates the contract under this paragraph, the insurer must refund any premiums paid for the terminated cover in respect of the balance of the contract term.

(8)Termination of the contract under this paragraph does not affect the treatment of any claim arising under the contract in the period before termination.

(9)Nothing in this paragraph affects any contractual right to terminate the contract.

PART 2VARIATIONS

10This Part of this Schedule applies in relation to qualifying misrepresentations made in connection with variations to consumer insurance contracts.

11If the subject-matter of a variation can reasonably be treated separately from the subject-matter of the rest of the contract, Part 1 of this Schedule applies (with any necessary modifications) in relation to the variation as it applies in relation to a contract.

[334] Highlighted version added HH.

12Otherwise, Part 1 applies (with any necessary modifications) as if the qualifying misrepresentation had been made in relation to the whole contract (for this purpose treated as including the variation) rather than merely in relation to the variation.

PART 3MODIFICATIONS FOR GROUP INSURANCE

13Part 1 is to be read subject to the following modifications in relation to cover provided for C under a group insurance contract as mentioned in section 7 (and in this Part "A" and "C" mean the same as in that section).

14References to the consumer insurance contract (however described) are to that part of the contract which provides for cover for C.

15References to claims and premiums are to claims and premiums in relation to that cover.

16The reference to the consumer is to be read—

(a)in paragraph 2(b), as a reference to whoever paid the premiums, or the part of them that related to the cover for C,

(b)in paragraph 9(4) and (6), as a reference to A.

PART 4SUPPLEMENTARY

17Section 84 of the Marine Insurance Act 1906 (return of premium for failure of consideration) is to be read subject to the provisions of this Schedule in relation to contracts of marine insurance which are consumer insurance contracts.

SCHEDULE 2 Rules for determining status of agents

1. This Schedule sets out rules for determining, for the purposes of this Act only, whether an agent through whom a consumer insurance contract is effected is acting as the agent of the consumer or of the insurer.

2. The agent is to be taken as the insurer's agent in each of the following cases—

(a) when the agent does something in the agent's capacity as the appointed representative of the insurer for the purposes of the Financial Services and Markets Act 2000 (see section 39 of that Act),

(b) when the agent collects information from the consumer, if the insurer had given the agent express authority to do so as the insurer's agent,

(c) when the agent enters into the contract as the insurer's agent, if the insurer had given the agent express authority to do so.

3(1) In any other case, it is to be presumed that the agent is acting as the consumer's agent unless, in the light of all the relevant circumstances, it appears that the agent is acting as the insurer's agent.

(2) Some factors which may be relevant are set out below.

(3) Examples of factors which may tend to confirm that the agent is acting for the consumer are—

(a) the agent undertakes to give impartial advice to the consumer,

(b) the agent undertakes to conduct a fair analysis of the market,

(c) the consumer pays the agent a fee.

(4) Examples of factors which may tend to show that the agent is acting for the insurer are—

(a) the agent places insurance of the type in question with only one of the insurers who provide insurance of that type,

(b) the agent is under a contractual obligation which has the effect of restricting the number of insurers with whom the agent places insurance of the type in question,

(c) the insurer provides insurance of the type in question through only a small proportion of the agents who deal in that type of insurance,

(d) the insurer permits the agent to use the insurer's name in providing the agent's services,

(e) the insurance in question is marketed under the name of the agent,

(f) the insurer asks the agent to solicit the consumer's custom.

4 (1) If it appears to the Treasury that the list of factors in sub-paragraph (3) or (4) of paragraph 3 has become outdated, the Treasury may by order made by statutory instrument bring the list up to date by amending the sub-paragraph so as to add, omit or alter any factor.

(2) A statutory instrument containing an order under sub-paragraph (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

Appendix 2: Unfair Terms in Consumer Contracts Regulations 1999

STATUTORY INSTRUMENTS

1999 No. 2083

CONSUMER PROTECTION

The Unfair Terms in Consumer Contracts Regulations 1999

Made	*22nd July 1999*
Laid before Parliament	*22nd July 1999*
Coming into force	*1st October 1999*

Whereas the Secretary of State is a Minister designated [1] for the purposes of section 2(2) of the European Communities Act 1972[2] in relation to measures relating to consumer protection:

Now, the Secretary of State, in exercise of the powers conferred upon him by section 2(2) of that Act, hereby makes the following Regulations:-

Citation and commencement

1. These Regulations may be cited as the Unfair Terms in Consumer Contracts Regulations 1999 and shall come into force on 1st October 1999.

Revocation

2. The Unfair Terms in Consumer Contracts Regulations 1994[3] are hereby revoked.

Interpretation

3. - (1) {t2} In these Regulations-

"the Community" means the European Community;

"consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;[335]

"court" in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland, the Sheriff or the Court of Session;

"Director" means the Director General of Fair Trading;

"EEA Agreement" means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the protocol signed at Brussels on 17th March 1993[4];

"Member State" means a State which is a contracting party to the EEA Agreement;

"notified" means notified in writing;

"qualifying body" means a person specified in Schedule 1;

"seller or supplier" means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;

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[335] Some case law can be understood to extend the term consumer to small business, see *McKandrik*, Contract Law, 4th ed. 2010, p. 441 with quotations of the case law.

"unfair terms" means the contractual terms referred to in regulation 5.

(2) In the application of these Regulations to Scotland for references to an "injunction" or an "interim injunction" there shall be substituted references to an "interdict" or "interim interdict" respectively.

Terms to which these Regulations apply

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

(2) These Regulations do not apply to contractual terms which reflect-

(a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);

(b) the provisions or principles of international conventions to which the Member States or the Community are party.

Unfair Terms

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Assessment of unfair terms

6. - (1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Written contracts

7. - (1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

Effect of unfair term

8. - (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Choice of law clauses

9. These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States.

Complaints - consideration by Director

10. - (1) It shall be the duty of the Director to consider any complaint made to him that any contract term drawn up for general use is unfair, unless-

(a) the complaint appears to the Director to be frivolous or vexatious; or

(b) a qualifying body has notified the Director that it agrees to consider the complaint.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction under regulation 12 in relation to any complaint which these Regulations require him to consider.

(4) In deciding whether or not to apply for an injunction in respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

Complaints - consideration by qualifying bodies

11. - (1) If a qualifying body specified in Part One of Schedule 1 notifies the Director that it agrees to consider a complaint that any contract term drawn up for general use is unfair, it shall be under a duty to consider that complaint.

(2) Regulation 10(2) and (3) shall apply to a qualifying body which is under a duty to consider a complaint as they apply to the Director.

Injunctions to prevent continued use of unfair terms

12. - (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) A qualifying body may apply for an injunction only where-

(a) it has notified the Director of its intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or

(b) the Director consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit.

(4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.

Powers of the Director and qualifying bodies to obtain documents and information

13. - (1) The Director may exercise the power conferred by this regulation for the purpose of-

(a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or

(b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(2) A qualifying body specified in Part One of Schedule 1 may exercise the power conferred by this regulation for the purpose of-

(a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or

(b) ascertaining whether a person has complied with-

(i) an undertaking given to it or to the court following an application by that body, or

(ii) a court order made on an application by that body,

as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(3) The Director may require any person to supply to him, and a qualifying body specified in Part One of Schedule 1 may require any person to supply to it-

(a) a copy of any document which that person has used or recommended for use, at the time the notice referred to in paragraph (4) below is given, as a pre-formulated standard contract in dealings with consumers;

(b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.

(4) The power conferred by this regulation is to be exercised by a notice in writing which may-

(a) specify the way in which and the time within which it is to be complied with; and

(b) be varied or revoked by a subsequent notice.

(5) Nothing in this regulation compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court.

(6) If a person makes default in complying with a notice under this regulation, the court may, on the application of the Director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.

Notification of undertakings and orders to Director

14. A qualifying body shall notify the Director-

(a) of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers;

(b) of the outcome of any application made by it under regulation 12, and of the terms of any undertaking given to, or order made by, the court;

(c) of the outcome of any application made by it to enforce a previous order of the court.

Publication, information and advice

15. - (1) The Director shall arrange for the publication in such form and manner as he considers appropriate, of-

(a) details of any undertaking or order notified to him under regulation 14;

(b) details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the Director considers to be unfair in contracts concluded with consumers;

(c) details of any application made by him under regulation 12, and of the terms of any undertaking given to, or order made by, the court;

(d) details of any application made by the Director to enforce a previous order of the court.

(2) The Director shall inform any person on request whether a particular term to which these Regulations apply has been-

(a) the subject of an undertaking given to the Director or notified to him by a qualifying body; or

(b) the subject of an order of the court made upon application by him or notified to him by a qualifying body;

and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.

(3) The Director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations.

Kim Howells
Parliamentary Under-Secretary of State for Competition and Consumer Affairs, Department of Trade and Industry.

22nd July 1999

Appendix 3: UK Insurance Act 2015 (selected sections)

- **UK Insurance Act 2015**

Insurance Act 2015

2015 CHAPTER 4

An Act to make new provision about insurance contracts; to amend the Third Parties (Rights against Insurers) Act 2010 in relation to the insured persons to whom that Act applies; and for connected purposes.

[12th February 2015]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1Insurance contracts: main definitions
In this Act (apart from Part 6)—

- "consumer insurance contract" has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012;
- "non-consumer insurance contract" means a contract of insurance that is not a consumer insurance contract;
- "insured" means the party to a contract of insurance who is the insured under the contract, or would be if the contract were entered into;
- "insurer" means the party to a contract of insurance who is the insurer under the contract, or would be if the contract were entered into;
- "the duty of fair presentation" means the duty imposed by section 3(1).

2Application and interpretation
(1)This Part applies to non-consumer insurance contracts only.

(2)This Part applies in relation to variations of non-consumer insurance contracts as it applies to contracts, but—

(a)references to the risk are to be read as references to changes in the risk relevant to the proposed variation, and

(b)references to the contract of insurance are to the variation.

3The duty of fair presentation

(1)Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

(2)The duty imposed by subsection (1) is referred to in this Act as “the duty of fair presentation”.

(3)A fair presentation of the risk is one—

(a)which makes the disclosure required by subsection (4),

(b)which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c)in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

(4)The disclosure required is as follows, except as provided in subsection (5)—

(a)disclosure of every material circumstance which the insured knows or ought to know, or

(b)failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5)In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—

(a)it diminishes the risk,

(b)the insurer knows it,

(c)the insurer ought to know it,

(d)the insurer is presumed to know it, or

(e)it is something as to which the insurer waives information.

(6)Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains supplementary provision.

4Knowledge of insured

(1)This section provides for what an insured knows or ought to know for the purposes of section 3(4)(a).

(2)An insured who is an individual knows only—

(a)what is known to the individual, and

(b)what is known to one or more of the individuals who are responsible for the insured’s insurance.

(3)An insured who is not an individual knows only what is known to one or more of the individuals who are—

(a)part of the insured’s senior management, or

(b)responsible for the insured’s insurance.

(4)An insured is not by virtue of subsection (2)(b) or (3)(b) taken to know confidential information known to an individual if—

(a)the individual is, or is an employee of, the insured’s agent; and

(b)the information was acquired by the insured's agent (or by an employee of that agent) through a business relationship with a person who is not connected with the contract of insurance.

(5)For the purposes of subsection (4) the persons connected with a contract of insurance are—

(a)the insured and any other persons for whom cover is provided by the contract, and

(b)if the contract re-insures risks covered by another contract, the persons who are (by virtue of this subsection) connected with that other contract.

(6)Whether an individual or not, an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

(7)In subsection (6) "information" includes information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance).

(8)For the purposes of this section—

(a)"employee", in relation to the insured's agent, includes any individual working for the agent, whatever the capacity in which the individual acts,

(b)an individual is responsible for the insured's insurance if the individual participates on behalf of the insured in the process of procuring the insured's insurance (whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity), and

(c)"senior management" means those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised.

5Knowledge of insurer

(1)For the purposes of section 3(5)(b), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity).

(2)For the purposes of section 3(5)(c), an insurer ought to know something only if—

(a)an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or

(b)the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).

(3)For the purposes of section 3(5)(d), an insurer is presumed to know—

(a)things which are common knowledge, and

(b)things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.

6Knowledge: general

(1)For the purposes of sections 3 to 5, references to an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.

(2)Nothing in this Part affects the operation of any rule of law according to which knowledge of a fraud perpetrated by an individual ("F") either on the insured or on the insurer is not to be attributed to the insured or to the insurer (respectively), where—

(a)if the fraud is on the insured, F is any of the individuals mentioned in section 4(2)(b) or (3), or

(b)if the fraud is on the insurer, F is any of the individuals mentioned in section 5(1).

7Supplementary

(1)A fair presentation need not be contained in only one document or oral presentation.

(2)The term "circumstance" includes any communication made to, or information received by, the insured.

(3)A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

(4)Examples of things which may be material circumstances are—

(a)special or unusual facts relating to the risk,

(b)any particular concerns which led the insured to seek insurance cover for the risk,

(c)anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

(5)A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.

(6)A representation may be withdrawn or corrected before the contract of insurance is entered into.

8Remedies for breach

(1)The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—

(a)would not have entered into the contract of insurance at all, or

(b)would have done so only on different terms.

(2)The remedies are set out in Schedule 1.

(3)A breach for which the insurer has a remedy against the insured is referred to in this Act as a "qualifying breach".

(4)A qualifying breach is either—

(a)deliberate or reckless, or

(b)neither deliberate nor reckless.

(5)A qualifying breach is deliberate or reckless if the insured —

(a)knew that it was in breach of the duty of fair presentation, or

(b)did not care whether or not it was in breach of that duty.

(6)It is for the insurer to show that a qualifying breach was deliberate or reckless.

9Warranties and representations
(1)This section applies to representations made by the insured in connection with—

(a)a proposed non-consumer insurance contract, or

(b)a proposed variation to a non-consumer insurance contract.

(2)Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

10Breach of warranty
(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.

(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

(3)But subsection (2) does not apply if—

(a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,

(b) compliance with the warranty is rendered unlawful by any subsequent law, or

(c) the insurer waives the breach of warranty.

(4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—

(a) before the breach of warranty, or

(b) if the breach can be remedied, after it has been remedied.

(5) For the purposes of this section, a breach of warranty is to be taken as remedied—

(a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,

(b) in any other case, if the insured ceases to be in breach of the warranty.

(6) A case falls within this subsection if—

(a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and

(b) that requirement is not complied with.

(7) In the Marine Insurance Act 1906—

(a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,

(b) section 34 (when breach of warranty excused) is omitted.

11 Terms not relevant to the actual loss
(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

(a)loss of a particular kind,

(b)loss at a particular location,

(c)loss at a particular time.

(2)If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3)The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4)This section may apply in addition to section 10.

12Remedies for fraudulent claims
(1)If the insured makes a fraudulent claim under a contract of insurance—

(a)the insurer is not liable to pay the claim,

(b)the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and

(c)in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.

(2)If the insurer does treat the contract as having been terminated—

(a)it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and

(b)it need not return any of the premiums paid under the contract.

(3)Treating a contract as having been terminated under this section does not affect the rights and obligations of the parties to the contract with respect to a relevant event occurring before the time of the fraudulent act.

(4)In subsections (2)(a) and (3), “relevant event” refers to whatever gives rise to the insurer’s liability under the contract (and includes, for example, the occurrence of a loss, the making of a claim, or the notification of a potential claim, depending on how the contract is written).

13Remedies for fraudulent claims: group insurance
(1)This section applies where—

(a)a contract of insurance is entered into with an insurer by a person (“A”),

(b)the contract provides cover for one or more other persons who are not parties to the contract (“the Cs”), whether or not it also provides cover of any kind for A or another insured party, and

(c)a fraudulent claim is made under the contract by or on behalf of one of the Cs (“CF”).

(2)Section 12 applies in relation to the claim as if the cover provided for CF were provided under an individual insurance contract between the insurer and CF as the insured; and, accordingly—

(a)the insurer’s rights under section 12 are exercisable only in relation to the cover provided for CF, and

(b)the exercise of any of those rights does not affect the cover provided under the contract for anyone else.

(3)In its application by virtue of subsection (2), section 12 is subject to the following particular modifications—

(a)the first reference to "the insured" in subsection (1)(b) of that section, in respect of any particular sum paid by the insurer, is to whichever of A and CF the insurer paid the sum to; but if a sum was paid to A and passed on by A to CF, the reference is to CF,

(b)the second reference to "the insured" in subsection (1)(b) is to A or CF,

(c)the reference to "the insured" in subsection (1)(c) is to both CF and A,

(d)the reference in subsection (2)(b) to the premiums paid under the contract is to premiums paid in respect of the cover for CF.

14Good faith

(1)Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.

(2)Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

(3)Accordingly—

(a)in section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from ", and" to the end are omitted, and

(b)the application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

(4)In section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (disclosure and representations before contract or variation), subsection (5) is omitted.

15Contracting out: consumer insurance contracts

(1)A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Part 3 or 4 of this Act than the consumer would be in by virtue of the provisions of those Parts (so far as relating to consumer insurance contracts) is to that extent of no effect.

(2)In subsection (1) references to a contract include a variation.

(3)This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

16Contracting out: non-consumer insurance contracts

(1)A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which section 9 applies than the insured would be in by virtue of that section is to that extent of no effect.

(2)A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as

relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term.

(3)In this section references to a contract include a variation.

(4)This section does not apply in relation to a contract for the settlement of a claim arising under a non-consumer insurance contract.

17The transparency requirements
(1)In this section, "the disadvantageous term" means such a term as is mentioned in section 16(2).

(2)The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.

(3)The disadvantageous term must be clear and unambiguous as to its effect.

(4)In determining whether the requirements of subsections (2) and (3) have been met, the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account.

(5)The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed

18Contracting out: group insurance contracts
(1)This section applies to a contract of insurance referred to in section 13(1)(a); and in this section—

- "A" and "the Cs" have the same meaning as in section 13,
- "consumer C" means an individual who is one of the Cs, where the cover provided by the contract for that individual would have been a consumer insurance contract if entered into by that person rather than by A, and
- "non-consumer C" means any of the Cs who is not a consumer C.

(2)A term of the contract of insurance, or any other contract, which puts a consumer C in a worse position as respects any matter dealt with in section 13 than that individual would be in by virtue of that section is to that extent of no effect.

(3)A term of the contract of insurance, or any other contract, which puts a non-consumer C in a worse position as respects any matter dealt with in section 13 than that person would be in by virtue of that section is to that extent of no effect, unless the requirements of section 17 have been met in relation to the term.

(4)Section 17 applies in relation to such a term as it applies to a term mentioned in section 16(2), with references to the insured being read as references to A rather than the non-consumer C.

(5)In this section references to a contract include a variation.

(6)This section does not apply in relation to a contract for the settlement of a claim arising under a contract of insurance to which this section applies.

21Provision consequential on Part 2
(1)The provision made by this section is consequential on Part 2 of this Act.

(2)In the Marine Insurance Act 1906, sections 18 (disclosure by assured), 19 (disclosure by agent effecting insurance) and 20 (representations pending negotiation of contract) are omitted.

(3)Any rule of law to the same effect as any of those provisions is abolished.

(4)In section 152 of the Road Traffic Act 1988 (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks)—

(a)in subsection (2)—

(i)in paragraph (a), for "it either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply," substitute "the policy under either of the relevant insurance enactments, or the security",

(ii)in paragraph (b), for "or security under that Act or" substitute "under either of the relevant insurance enactments, or the security";

(b)in subsection (3), after "specifying" insert "the relevant insurance enactment or, in the case of a security,";

(c)after subsection (4) add—

"(5)In this section, "relevant insurance enactment" means the Consumer Insurance (Disclosure and Representations) Act 2012 or Part 2 of the Insurance Act 2015."

(5)In Article 98A of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154 (N.I.)) (exceptions to duty of insurers to satisfy judgement against persons insured against third party risks)—

(a)in paragraph (2)—

(i)in paragraph (a), for "it either under the Consumer Insurance Act (Disclosure and Representations) Act 2012 or, if that Act does not apply," substitute "the policy under either of the relevant insurance enactments, or the security";

(ii)in paragraph (b), for "or security under that Act or" substitute "under either of the relevant insurance enactments, or the security";

(b)in paragraph (3), after "specifying" insert "the relevant insurance enactment or, in the case of a security,";

(c)after paragraph (4) add—

"(5)In this Article, "relevant insurance enactment" means the Consumer Insurance (Disclosure and Representations) Act 2012 or Part 2 of the Insurance Act 2015."

(6)In section 11 of the Consumer Insurance (Disclosure and Representations) Act 2012 (consequential provision), subsections (1) and (2) are omitted.

22Application etc of Parts 2 to 5

(1)Part 2 (and section 21) and section 14 apply only in relation to—

(a)contracts of insurance entered into after the end of the relevant period, and

(b)variations, agreed after the end of the relevant period, to contracts of insurance entered into at any time.

(2)Parts 3 and 4 of this Act apply only in relation to contracts of insurance entered into after the end of the relevant period, and variations to such contracts.

(3)In subsections (1) and (2) “the relevant period” means the period of 18 months beginning with the day on which this Act is passed.

(4)Unless the contrary intention appears, references in Parts 2 to 5 to something being done by or in relation to the insurer or the insured include its being done by or in relation to that person’s agent.

23Extent, commencement and short title

(1)This Act extends to England and Wales, Scotland and Northern Ireland, except for—

(a)section 21(4), which does not extend to Northern Ireland; and

(b)section 21(5), which extends to Northern Ireland only.

(2)This Act (apart from Part 6 and this section) comes into force at the end of the period of 18 months beginning with the day on which it is passed.

(3)In Part 6—

(a)section 19 comes into force at the end of the period of two months beginning with the day on which this Act is passed; and

(b)section 20 and Schedule 2 come into force on the day appointed under section 21(2) of the Third Parties (Rights against Insurers) Act 2010 for the coming into force of that Act.

(4)This section comes into force on the day on which this Act is passed.

(5)This Act may be cited as the Insurance Act 2015.

SYSC 2.1 Apportionment of Responsibilities

SYSC 2.1.1
01/12/2001
FCAPRA
A *firm* must take reasonable care to maintain a clear and appropriate apportionment of significant responsibilities among its *directors* and *senior managers* in such a way that:
(1) it is clear who has which of those responsibilities; and
(2) the business and affairs of the *firm* can be adequately monitored and controlled by the *directors*, relevant *senior managers* and *governing body* of the *firm*.
SYSC 2.1.1A
01/05/2011
FCAPRA
[1]*Firms* should also consider the additional *guidance* on risk-centric governance arrangements for effective risk management contained in SYSC 21.
SYSC 2.1.2
01/05/2011
FCAPRA
The role undertaken by a *non-executive director* will vary from one *firm* to another. For example, the role of a *non-executive director* in a *friendly society* may be more extensive than in other *firms*. Where a *non-executive director* is an *approved person*, for example where the *firm* is a *body corporate*, his responsibility and therefore liability will be limited by the role that he undertakes. [1]
SYSC 2.1.3
01/12/2001
FCAPRA
A *firm* must appropriately allocate to one or more individuals, in accordance with SYSC 2.1.4 R, the functions of:
(1) dealing with the apportionment of responsibilities under SYSC 2.1.1 R; and
(2) overseeing the establishment and maintenance of systems and controls under SYSC 3.1.1 R.

SYSC 7.1 Risk control

[Note: ESMA has also issued guidelines under article 16(3) of the ESMA Regulation covering certain aspects of the MiFID compliance function requirements. See http://www.esma.europa.eu/content/Guidelines-certain-aspects-MiFID-compliance-function-requirements.]

SYSC 7.1.1
01/04/2009
FCAPRA
[1]SYSC 4.1.1 R requires a[2] *firm* to have effective processes to identify, manage, monitor and report the risks it is or might be exposed to.
SYSC 7.1.2
01/01/2007
FCAPRA
A *common platform firm* must establish, implement and maintain adequate risk management policies and procedures, including effective procedures for risk assessment, which identify the risks relating to the *firm's* activities, processes and systems, and where appropriate, set the level of risk tolerated by the *firm*. [**Note**: article 7(1)(a) of the *MiFID implementing Directive*, article 13(5) second paragraph of *MiFID*]
SYSC 7.1.2A
06/08/2009
FCAPRA
[2,] Other *firms* should take account of the risk management policies and procedures *rule* (SYSC 7.1.2 R) as if it were *guidance* (and as if should appeared in that rule instead of must) as explained in SYSC 1 Annex 1.3.3 G[3].
SYSC 7.1.2B
01/07/2011
FCA

[4]A *management company* should be aware that COLL 6.11 contains requirements implementing article 12 of the *UCITS implementing Directive* in relation to risk control and internal reporting that will apply to it.

SYSC 7.1.2C

22/07/2013

FCA

[5]*Full-scope UK AIFMs* should be aware that FUND 3.7 and articles 38 to 47 of the *AIFMD level 2 regulation* contain further requirements in relation to risk management.

SYSC 7.1.3

01/01/2007

FCAPRA

A *common platform firm* must adopt effective arrangements, processes and mechanisms to manage the risk relating to the *firm's* activities, processes and systems, in light of that level of risk tolerance. [**Note**: article 7(1)(b) of the *MiFID implementing Directive*]

SYSC 7.1.4

01/01/2014

FCAPRA

The [6]*management body*[6] of a *common platform firm* must approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the *firm* is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle. [**Note**: [66]article 76(1) of *CRD*]

SYSC 7.1.4A

14/12/2010

FCAPRA

[2, 3, 7]For a *common platform firm* included within the scope of SYSC 20 (Reverse stress testing), the strategies, policies and procedures for identifying, taking up, managing, monitoring and mitigating the risks to which the *firm* is or might be exposed include conducting reverse stress testing in accordance with SYSC 20. A *common platform firm* which falls outside the scope of SYSC 20 should consider conducting reverse stress tests on its business plan as well. This would further *senior personnels* understanding of the *firm's* vulnerabilities and would help them design measures to prevent or mitigate the risk of business failure.[7]

SYSC 7.1.4B

14/12/2010

FCAPRA

[7]Other *firms* should take account of the risk management *rules* (SYSC 7.1.3 R and SYSC 7.1.4 R) as if they were *guidance* (and as if "should" appeared in those rules instead of "must") as explained in SYSC 1 Annex 1.3.3 G.

SYSC 7.1.5

01/01/2007

FCAPRA

A *common platform firm* must monitor the following:

(1) the adequacy and effectiveness of the *firm's* risk management policies and procedures;

(2) the level of compliance by the *firm* and its *relevant persons* with the arrangements, processes and mechanisms adopted in accordance with SYSC 7.1.3 R;

(3) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the *relevant persons* to comply with such arrangements or processes and mechanisms or follow such policies and procedures. [**Note**: article 7(1)(c) of the *MiFID implementing Directive*]

SYSC 7.1.6

01/01/2007

FCAPRA

A *common platform firm* must, where appropriate and proportionate in view of the nature, scale and complexity of its business and the nature and range of the *investment services and activities* undertaken in the course of that business, establish and maintain a risk management function that operates independently and carries out the following tasks:

(1) implementation of the policies and procedures referred to in SYSC 7.1.2 R to SYSC 7.1.5 R; and

(2) provision of reports and advice to *senior personnel* in accordance with SYSC 4.3.2 R. [**Note**: *MiFID implementing Directive* Article 7(2) first paragraph]

SYSC 7.1.7

01/01/2007

FCAPRA

Where a *common platform firm* is not required under SYSC 7.1.6 R to maintain a risk management function that functions independently, it must nevertheless be able to demonstrate that the policies and procedures which it has

adopted in accordance with SYSC 7.1.2 R to SYSC 7.1.5 R satisfy the requirements of those *rules* and are consistently effective.
[**Note**: article 7(2) second paragraph of the *MiFID implementing Directive*]
SYSC 7.1.7A
06/08/2009
FCAPRA
[2,] Other *firms* should take account of the risk management *rules* (SYSC 7.1.5 R to SYSC 7.1.7 R) as if they were *guidance* (and as if should appeared in those rules instead of must) as explained in SYSC 1 Annex 1.3.3 G[3].
SYSC 7.1.7B
01/07/2015
FCAPRA
[8]In setting the method of determining the *remuneration* of *employees* involved in the risk management function:[9 10 66, 11 9 10]
(1) *firms* that SYSC 19D applies to will also need to comply with the *dual-regulated firms Remuneration Code*; and[9]
(2) *firms* that the remuneration part of the *PRA* Rulebook applies to will also need to comply with it.[9]
SYSC 7.1.7BA
22/07/2013
FCA
[5]In setting the method of determining the *remuneration* of *employees* involved in the risk management function *full-scope UK AIFMs* will need to comply with the *AIFM Remuneration Code*.
SYSC 7.1.7BB
01/01/2014
FCA
[12]In setting the method of determining the *remuneration* of *employees* involved in the risk management function, *BIPRU firms* will also need to comply with the *BIPRU Remuneration Code*.
SYSC 7.1.7BC
01/07/2015
FCA
[13]In setting the method of determining the *remuneration* of *employees* involved in the risk management function, *firms* that SYSC 19A applies to will also need to comply with the *Remuneration Code*.
SYSC 7.1.7C
01/05/2011
FCAPRA
[14]*Firms* should also consider the additional *guidance* on risk-centric governance arrangements for effective risk management contained in SYSC 21.
SYSC 7.1.8
01/01/2014
FCAPRA
[15]
(1) [15, 6][deleted][6]
(2) The term 'risk management function' in SYSC 7.1.6 R and SYSC 7.1.7 R refers to the generally understood concept of risk assessment within a[2] *firm*, that is, the function of setting and controlling risk exposure. The risk management function is not a *controlled function* itself, but is part of the *systems and controls function* (CF28).[15, 16, 17]
[17 17]

SYSC 7.1.9
01/01/2014
FCA
A *firm* must base credit-granting on sound and well-defined criteria and clearly establish the process for approving, amending, renewing, and re-financing credits.[11 12]
SYSC 7.1.10
01/01/2014
FCA
A *BIPRU firm* must operate through effective systems the ongoing administration and monitoring of its various credit risk-bearing portfolios and exposures, including for identifying and managing problem credits and for making adequate value adjustments and provisions.[11 12]
SYSC 7.1.11
01/01/2014
FCA
A *BIPRU firm* must adequately diversify credit portfolios given its target market and overall credit strategy.[11 12]

SYSC 7.1.12
01/01/2014
FCA
The documentation maintained by a *BIPRU firm* under SYSC 4.1.3 R should include its policy for credit risk, including its risk appetite and provisioning policy and should describe how it measures, monitors and controls that risk. This should include descriptions of the systems used to ensure that the policy is correctly implemented.[11]
SYSC 7.1.13
01/01/2014
FCA
A *BIPRU firm* must address and control by means of written policies and procedures the risk that recognised credit risk mitigation techniques used by it prove less effective than expected.[1112]
SYSC 7.1.14
01/01/2014
FCA
A *BIPRU firm* must implement policies and processes for the measurement and management of all material sources and effects of market risks.[1112]
SYSC 7.1.15
01/01/2014
FCA
A *BIPRU* firm must implement systems to evaluate and manage the risk arising from potential changes in interest rates as they affect a *BIPRU firm's* non-trading activities.[1112]
SYSC 7.1.16
01/01/2014
FCA
A *BIPRU firm* must implement policies and processes to evaluate and manage the exposure to operational risk, including to low-frequency high severity events. Without prejudice to the definition of *operational risk*, *BIPRU firms* must articulate what constitutes operational risk for the purposes of those policies and procedures.[1112]