

Social Market Responsibility in British Insurance Law

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I. Research Project

The following analysis is part of a research project the author has undertaken for preparation of a teaching program on British Insurance Law¹ for German experienced insurance practitioners. While the preparatory script is for a first glance to the subject, students are kindly invited to take this essay for deepening their knowledge.² Other practitioners and scholars of this area of economic law shall be triggered to learn from this article and to give their feedback on this internet platform.

1. To the Concept of New Economic Law and “Neue soziale Marktwirtschaft”. For understanding what is meant here by “news” of the law of commerce the reader should turn to the article on online forum Neues Wirtschaftsrecht in NWiR 1/2002 update of 2012. On practical reasons this law journal is not in English, despite the fact that one of the

¹ As published in www.assurances.de.

² The text might also be helpful for fresh-up certification required by the CII London from time to time (for further information see again www.assurances.de).

particularities of the legal developments dealt with is the international character of the functional instruments of the new economic law. Most of this article, however, has not been translated to German language, since it is not more than a preparation for some more comparative work. For the full German comparison the reader must be asked to wait until next year. Only the following introduction and the final draft of conclusions are in German:

The recent discussion on risk management and risk responsibility in corporate finance seems to be one of the most essential innovative movements after the financial crises since 2008. While calls of return to former times of regulated insurance markets were dominating in the past, and re-regulation seemed to be the trend, the more prudent perspective is going to prevail more and more in present time.³ One thinks it to be better to develop successful de-regulatory steps than to reiterate long standing, but outdated positions. To take it more generally: controlling instruments of social market responsibility have existed since longer times already, and it is good enough to go on with that and to learn from missteps in detail, instead of stepping back to hard core re-regulation.

One of the most discussed actual economic model is the one of the Nobel price winner A. Sen, which is called economy for men.⁴ Closely connected is the movement of “Neue soziale Marktwirtschaft” (new social market economy)⁵, which seems to be approved, more or less, by economists⁶ as well as by law scholars.⁷ The former model of market economy shall not be given up, but principles of humanity, equal chances and self fulfilment of workers, consumers and investors are stressed and brought into balance with protection of economic efficiency as well as system needs.⁸

While the discussion is focussed on banks and banking law, the actual consumer protection developments of insurance law are overlooked, most often. This gap shall be filled here by showing that important experiences with balancing of economic and social principles can be overtaken for the general after-crises law of banks and other financial market players.

³ But see political discussion, e.g. R. Berscheins/M.Maisch, Briten können Verbot hoher Boni nicht stoppen, HBL of 3/6/2013, p. 33 with reference to British objections; to the practice of minimum wages, fixed by an independent commission in GB see J. Möller, Interview in HBL. 2/28/2013, p. 27.

⁴ A. Sen, *Ökonomie für den Menschen*, 5. Aufl. 2011.

⁵ Zur gleichnamigen Einrichtung s. www.wikipedia zu „Neue soziale Marktwirtschaft“; nahestehend auch namhafte Persönlichkeiten wie DiFabio, Achleitner u.a.

⁶ Vgl. nur A. Sen, *Ökonomie für den Menschen*, S. 150 (zum Begründer moderner Wettbewerbslehren Adam Smith); A.-K. Achleitner, Do CG Motives Drive Hedge Fund and Private Equity Fund Activities, in: *European Financial Management*, 2010, 805 ff.; aber auch Stieglitz und Krugmann, dazu die Beurteilung von S. Tharakan, in P. Ulrich u.a., *Marktwirtschaft*, o.J., Internetversion v. 22.12.12

⁷ Vgl. nur U. Di Fabio, *Die Kultur der Freiheit*, 2005, S. 13 u.ö., mit Bezug auf den Humanismus.

⁸ Cf. above references of Sen, Achleitner, Stieglitz and Krugmann; also Herrmann, NWiR 2002/12 zu I.1 and II.1.

The regulatory focus of insurance law, in Germany, is to the protection against reckless marketing as a consequence of opening the European markets for competition. Most of all one has changed the right of insurers to avoid payment in cases of misrepresentation or breaches of utmost good faith duties of the insured. Under §§ 19, 23, 28 VVG 2008 the insurer cannot deny cover on the basis of misinformation, risk increase or warranties' violations (Obliegenheitsverletzungen), even if the insured has acted with slight negligence; and also in cases of gross negligence partial payments are owed by the insurer. Critical voices to this innovative consumer protection have stressed the point that system risks of adverse selection in competition can be caused, i.e. risk increase must be taken by insurers, without being able to manage it by adequate estimation of risk affording capacity and without suitable premium calculation.⁹

Similar problems arise in the context of consumer information and suitable advice duties provides for in §§ 6 s., 60 ss, VVG 2008. Product transparency and market information is good for workable competition, but it can have adverse effects, if market risks are transferred to the wrong contract party. Damage claims of customers cannot be given to market participators for compensation of risks they have overtaken, to make profits. In other words: misuse of the suitability doctrine has effects of adverse selection.¹⁰ More competition leads to less opportunity to raise prices and to worse capacity of risk compensation by insurers. One might not have to fear that system relevant market players fall insolvent in the short run of such consequences, and that tax payers will have to pay for risk exaggeration of giant enterprises; but small and medium insurers are not without existential insolvency danger in such an adverse competitive market scenario. System risks are implied as soon as more and more adverse selection is caused by protective regulation.

A glance over the frontier of Germany is good for lifting the treasury of legal experiences, as the leading school of functional law comparison scholars says.¹¹ One cannot find out the best of human common law (droit commun de l'humanité¹²), but as far as the economic and social circumstances are similar, the law systems can learn from each other.¹³ Since system risk phenomenon after the crises are comparable, and that they have been dealt with in British law during the financial crisis of 2002/3 already, the hypothetical conclusion can be made, that some of the reforms in GB can be compared to German law. One can even

⁹ For further details see Herrmann, *VersR* 2003, 1333, with references.

¹⁰ For further details see Herrmann, in Wambach/ders, *Solvency II Vermittlerrichtlinie*, 2005, p. 79, 84 ss. with references.

¹¹ Zweigert, *RabelsZ* 15 (1949/50), p. 5 with ref.

¹² See von Bar/Mankowski, *Internationales Privatrecht*, Bd. 1, 2nd ed., 2003, p. 94 s.

¹³ Cf. the system competition approach of modern law comparison, as analysed by R. van den Bergh, in Ehlermann u.a. (Hrsg.) *European Competition Law*, 2006, S. 155 ff.; Herrmann, *ibid.*, S.101 ff.

expect further leading instruments of market adequate risk management regulation, because British law of finance, in general, is more developed in the direction of market conformity than the German is.

2. General Remarks to British Insurance Law.¹⁴ Since the EU-Commission has revived¹⁵ its former plans¹⁶ of European harmonization, much literature on this point has been published, some of it being interested on the British-German similarities and differences.¹⁷ One can even say that the comparison of British and German insurance law has become a pilot project of the European harmonization of private law.¹⁸ While the focus will be on such comparative questions, some introductory information on the economic importance of the London market (a.) shall be given and some general differences between German and British law can be useful (b.) The purposes of these parts are the following: first of all, the facts may give an impression of how global the British markets are, and that the internationality of the market structure might be a special reason why the new economic perspective of balanced interests in competition has been developed some more than in other countries, included Germany. As a second point, the global important market significance gives a good argument to urgent needs of European law adaptation, which has been stressed by the mentioned work of the expert group for EU-principles of insurance law. Finally the general remarks on the difference of the legal systems of the compared countries shall underline the general and the practical background.

a. The London Market. The London market is constituted mainly by the Lloyds organization (64 syndicates¹⁹) 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 American (38 %) and British names and firms (25 %), about 18 % come from the European

¹⁴ The following text, in parts, is taken from lessons the author has given to German students on British insurance law. In so far the pedagogic style is kept to a certain extent.

¹⁵ See communication from the Commission to the European Parliament and the Council – A more Coherent European Contract Law – An Action Plan, COM (2003) 68 (12 Feb), no. 49-9 and 74.

¹⁶ See Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the insurance contract, OJ 1979, N. C 190/2; amendments in OJ 1980, No. C 355/30.

¹⁷ See *Rühl*, Common Law, Civil Law, and the Single European Market for Insurances, 55 (2006) ICLQ, 879 ss. with further references.

¹⁸ See, most basic, Study Group on a European Civil Code, as commented by *Drobnig*, Gutachten F zum 51. DJT 1976, F 12 und F 89 s.; *Kieninger*, AcP 2008, 182 ss.; *Herrmann*, Privatrecht für Bachelor-Studiengänge BWL/VWL, vol. 2, edition 2008/2009, p. 110 ss.; for insurance law see Principles of European Insurance Contract Law, 2007, www.restatement.info; for German comment see *Mönnich*, Europäisierung des Privatrechts, in Versicherungsrechts-Hdb. (ed. Beckmann/Matusche-Beckmann), 2nd ed. 2009, § 2, p. 70 ss., at no. 106 ss.

¹⁹ 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.

continent, Munich Re (Apollo) and Gerling Global Re20 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.²¹ 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	900 mrd. BPS	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)	350/1.094 (biggest 2006/7)	78.5 %
Trenwick (Chartwell), USA	205	99.5 %
Markel, USA	200	100 %
Munich Re (Apollo), Germany	184	100 %
AEGIS, Bermuda	140	100 %
AIG (Ascot), 2nd biggest	118	100 %
Danish Re, USA	113	100 %
Berkshire Hatherway, USA (Warren Buffet)	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.*²², 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.²³

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

²⁰ Name changed to Revios; overtaken by the French re-insurer SCOR since 2006.

²¹ The following is based mainly on *Lechner*, op. cit..

²² Op. cit., fn. 6.

²³ *Lechner*, op.cit., p. 7.

Lloyd's broker business possible.²⁴ Lloyd's realizes an annual business of 22 mrd. €, only 400 million of which coming from 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.²⁵ 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.

Big Mergers in the UK (since 1985)	
Royal Insurance/ Sun Alliance	Merger of 1996: Royal & Sun/Alliance
Commercial Union Aviva, alias General Accident Norwich Union	Mergers of 1998/2000: CGNU; since April 02 "Aviva"
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 ²⁶
Eagle Star	taken over by Zurich
Royal&Sun Alliance	taken over by the investor Resolution Group ²⁷
Life Assurance Holdings	taken over by Swiss Re ²⁸
Abbey Life	by Resolution ²⁹ , in 2007 by Deutsche Bank
Friends Provident	by Resolution Group (2009)
AXA Life	by Resolution Group and merger with ex-Friends Provident ³⁰
(Nordea Bank (Sweden))	by Sampo Insurance (Finland, 21.3%) ³¹
Legal&General (biggest life insurer, GB)	by Hannover Rück (HBL, Jan.2012)

The British second biggest insurer, Aviva, has an all-finance co-operation with the Royal Bank of Scotland (today FORTIS/Netherlands³²) and bought the automobile club RAC in March 2005.³³

²⁴ Please, see Handelsblatt 7/9/06, p. 22.

²⁵ *Ibid.*

²⁶ Please, see Handelsblatt of 12/27/04, p. 18.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Handelsblatt of 6/8/06, p. 28

³⁰ Handelsblatt of 7/15/2010, p. 35.

³¹ Handelsblatt of 2/11, p. 25.

³² 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).

It realized more than half of its new business of 2004 in continental Europe³⁴ and about 40 % of its profits from outside the UK.³⁵ 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.³⁶ 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.³⁷ Nowadays no. 1 is Prudential, which has a lot of business in the USA, and is very strong in the Chinese life insurance business. Its share is estimated to be about 39 Mrd. US dollars.³⁸ In spring 2010, Prudential tried to take over the Asian daughter of the state owned AIG Group, AIA in Hongkong, but was hampered by the FSA, which interdicted a big capital augmentation Prudential planned for this purpose.³⁹

Standard Life Insurance is the biggest European mutual insurer, but under the new solvability standards of the Financial Services Authority (FSA), it can be forced to change its legal form to a listed business company.⁴⁰ The biggest in life risk insurance business is Legal and General (L&G) with global assets of 400 mrd. €. ⁴¹ 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.⁴²

b. General Differences of German and British Law. A fundamental 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. A dual division of law systems of the Western countries is a basis for comparing German and British insurance law.

Roman
France

Anglo-American
UK (exceptions in Scottish law)

³³ Please, see Handelsblatt of 3/10/05, p. 24.

³⁴ Please, see Handelsblatt of 1/26/05, p. 23.

³⁵ Please, see Handelsblatt of 5/26/04, p. 20.

³⁶ 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).

³⁷ Please, see Handelsblatt of 3/12/04, p. 22.

³⁸ Please, see Handelsblatt of 7/14/05, p. 18; Prudential has licenses for 10 Chinese cities, which is even more than the biggest US insurer American International Group (AIG) has.

³⁹ Handelsblatt 5/6/10, p. 37.

⁴⁰ Please, see Handelsblatt of 1/14/04, p. 26 and 1/9/04, p. 20.

⁴¹ Handelsblatt of 8/5/2010.

⁴² 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.

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 legal family has developed mostly on the cultural basis, which seems to be a relatively undisputed fact worldwide. Only in few respects, the Roman legal family seems to be more disputed. The main reason for this seems to be a basic conflict between the Catholic Church and the Protestants in the Netherlands 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 a later Habeas Corpus Act in England of 1679⁴³, the Bill of Rights in Northern America of 1776 and the Déclaration des droits de l'homme et du citoyen in France of 1789.

Another speciality of British law is to be seen in respect to constitutional law. Unlike most 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.

There is a **system of government**, 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 structure of England/Wales and Scotland. These rules are contained in a numerous constitutional material. Some of it is statutory law, for example the rules as to voting in a Parliamentary election. Some of it is common law of both legal traditions, others began as common law and now is contained in legislation. The bulk of civil liberties developed throughout the centuries in a variety of criminal and civil cases. Now a great deal of 'civil liberties' is encapsulated in statute, much of it is restrictive of freedom, though the recent incorporation of the most of the European Convention on Human Rights and its Protocols by

⁴³ Being based on the English *Magna Charta Libertorum* of 1215; Please, see *Fikentscher*, Zwei Wertebenen, 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.

the Human Rights Act 1998 may counter that, and accelerate consideration of and respect for human rights in a way which was not formerly open.

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.

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),

German law, in contrast to the British one, not only has a written constitution, the Grundgesetz (GG). But also there is a special court for constitutional affairs, the 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.

While studying private law in the following, a further step to understand the comparison of British and Roman (German) legal families is to have 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.) and the national health and social security law (c.).

(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 government 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 1987.⁴⁴ 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.

⁴⁴ For its functions of market stability control see below (b).

The White Paper recommended to empower 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.⁴⁵ More recent press releases of 2011, however, give report of dramatic restrictions of the FSA-powers.⁴⁶ Already in 2010, the Financial Policy Committee (FPC) was instituted being an independent branch of the Bank of England (BoE).⁴⁷ Also the central bank became the central authority of information and documentation of commercial paper transactions, an additional task by which it is respected the most powerful financial supervisory institution in GB as well as worldwide.⁴⁸ In cases of crisis events, the ministry of finance keeps to be the decisive instance of decision making, following the statement of the Minister of Finance, *Hoban*, who is in office since the 2010 change of government in London. More recently, the powers of the FSA have been reduced drastically, but there is much dispute on that development, because the BoE shall not become to much a super power institution of the financial system, and loose its independence by getting too many political tasks.⁴⁹ The head officers of the FPC, however, will be the top managers of the FSA.⁵⁰

(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. Regulations are made in respect of different categories of employment, mainly by the Secretary of State for Employment. Prior statutory provision is slowly being systematized and improved, and European Directives in the field of health and safety at work are implemented. 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

⁴⁵ 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.

⁴⁶ Handelsblatt 2/18/19.2011, p. 37.

⁴⁷ Cf. Handelsblatt of 7/27/2010, 34.

⁴⁸ 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. Handelsblatt 8/17/2010, p. 32.

⁴⁹ Handelsblatt 2/18/19.2011, p. 37; ebd. 1/18.2012, p. 35.

⁵⁰ E.g. the independent experts of the State Bank, Cohrs, Clarc, s. again Handelsblatt 2/18/19.2011, p. 37.

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. However, a good many enforcement duties are possessed by other authorities, including Her Majesty's Industrial Pollution Inspectorate.

Particular legislation applies to most work-places, depending on the nature of the work undertaken there. This legislation is designed to secure that the work-place is as safe as it may be. The construction of some premises is closely regulated. Methods of conducting operations are set out, sometimes in codes of practice and sometimes by legislation. 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.

The British National Health Service is the largest employer in Western Europe. It was set up in 1948 implementing most of the recommendations of the Beveridge Report of 1942 on matters of health. Separate legislation deals with the Health Service in England, where it is under a Secretary of State, and with Scotland, where it is dealt with by the appropriate minister of the Scottish Executive. Naturally, there is a considerable degree of uniformity between the two systems, I will not separately detail the Scottish legislation.

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 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 2001 and 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 3.937,50€ per month.

II. Insurance Contracts.

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.⁵¹

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.⁵²

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;

⁵¹ For further conditions if the first premium has not been paid in time, see below, I.6.

⁵² Cf. the example of *Collinvaux*, op. cit., p. 22

- 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.⁵³

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.⁵⁴

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 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 a 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.

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.⁵⁵ 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

⁵³ Cf. the example of *MacGillivray*, op.cit., p. 95.

⁵⁴ Cf. the example of *MacGillivray*, *ibid.*

⁵⁵ § 186 VVG exempts marine insurance from the scope of application of the VVG, but there is no equivalent provision of compulsory policies.

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.⁵⁶ 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 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.⁵⁷ 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.⁵⁸ 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.⁵⁹

*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.⁶⁰*

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.

⁵⁶ 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.

⁵⁷ Lord Sumner, 1923, cited after *Colinvaux*. op. cit., p. 20.

⁵⁸ *Canning vs. Farquhar* (1886) 16 Q.B.D. 727, 733.

⁵⁹ *Colinvaux*. op. cit., p. 20; root of contract is similar to the German *Geschäftsgrundlage* of § 313 BGB.

⁶⁰ 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.

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 cover note combined with a receipt of the premium. The underlying rationale 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 Appeal⁶¹ 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 Appeal⁶² 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. Irsers1-5 sign Lloyd's slips for 1 Mio. each. When Ird. was late with the payment of the premium instalments due to July 1st, Irsers1 cancelled the contract, while Irsers2-5 did not. 1 month after payment by the Ird to Irsers1-5, the building was destroyed by a fire.

1. Can Irsers1 deny cover?

2. Can Irsers2-5 do so, too?

3. Can Ird cancel the contracts of Irsers2-5 with the argument that he does not get insurance cover supplementing the contract with Irsers1, but has an offer to take over the whole risk of 5 Mio. by Irsers6?

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

⁶¹ *General Reinsurance vs. Forsakringsaktienbolaget Fennia Patria* (1983) Q.B. 856: contra *Jaglom vs. Excess Insurance Co. Ltd.* (1972) Q.B. 250.

⁶² See last fn.

- (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). 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.

2. Insurable Interest and Standard Terms Control of Risk Determination. 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. 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.

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 insured 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.⁶³

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).

⁶³ *Macaura vs. Northern Assurance Co* (1925), AC 619, House of Lords.

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.⁶⁴ No standard term control of good faith is possible, but plain intelligible language is required.⁶⁵

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) UTCCR). It can be seen, however, as an unclear or non-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 transparency provision must be distinguished from the similar contra proferentem rule. 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 rationale 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.

Example 4: 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).⁶⁶

3. Consumer Protecting Regulation: ICOB 2005 and ICOBS 2008. Some further consumer protection has been effectuated by special insurance regulation and self-regulation, which – to far reaching extent – will be treated in ch. VI/VII. Some of the regulatory subjects, however, especially the regulation of information duties of the insurer before contract conclusion, which are part of the Insurance Conduct of Business Rules (ICOB) and of the Insurance Conduct of Business Sourcebook (2008), are connected with the consumer decision on offers or acceptations in the sense of private law, directly. 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

⁶⁴ CCR 1999, No. 6(2)(a), s. *Rühl*, op.cit., p. 1421.

⁶⁵ CCR 1999, No 5 and No.6 (2)(a).

⁶⁶ *Houghton vs. Trafalgar Insurance Co Ltd* (1954) 1 QB 247, Court of Appeal.

action for breach of statutory duty for private persons who suffer loss.⁶⁷ One can argue, hence, that the regulation of ICOB and ICOBS, in its dogmatic nature, belongs to the private law.⁶⁸

ICOB was promulgated under the FSMA 2000, and enlarged in its scope in 2005. ICOBS followed in 2008.⁶⁹ The particular impetus for this was the need to implement the Insurance Mediation Directive⁷⁰, requiring the statutory regulation of insurance intermediaries, which will be discussed in the following chapter. The ICOB-rules, however, went further than that and applied generally to the conduct of the insurance business as such. The following catalogue of rules can be summarized:

- (1) general matters, including rules of communications with customers and prohibiting unfair inducements (no.2);
- (2) rules regarding distance communication, implementing the relevant EC-Directive (3);
- (3) general requirements for insurance intermediaries, including disclosure of their status and regarding the disclosure of fees and commissions (no. 4);
- (4) rules of identifying client needs and advising (no. 5);
- (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);
- (6) rules conferring cancellation rights on retail customers (no. 7);
- (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

⁶⁷ See Birds' Ins. Law, op. cit., p. 36, fn. 62 with further references.

⁶⁸ 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.

⁶⁹ As published in the Encyclopedia of Insurance Law, and in the internet under www.

⁷⁰ 2002/92/EC; implementation of the Directive on distance marketing of financial services (2002/65/EC) was intended, too; for this and the following cf. *Birds*, op. cit., p. 36 ss..

(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.

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 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).

(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.⁷¹

⁷¹ Woolcott vs. Sun Alliance and London Insurance Ltd (1978), 1 WLR 493, Queens Bench Division.

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 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.⁷² (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).⁷³

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.⁷⁴

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.⁷⁵

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.⁷⁶

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

⁷² *Dawsons Ltd vs. Bonnin* (1922) 2 AC 413, House of Lords.

⁷³ Please, see below I.5.

⁷⁴ But no duty of special enquiry, *MacGillivray*, op. cit., ch. 17-10.

⁷⁵ See *Keating vs. New Ireland Ass. Co.* (1990) 2 I.R. 383.

⁷⁶ Cf. *Schimikowski*, *Versicherungsvertragsrecht*, No. 276 ss., 283.

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.⁷⁷

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 (but see the standard terms in fire insurance practice, mentioned in ch. X.2, and § 23 II VVG). 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.⁷⁸

(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.⁷⁹ The House of Lords, however, denied this option in its more recent decision⁸⁰ 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. It is, however, not only this why the Law Commission and Scottish LC have taken some steps to up-date British law. This will be explained at the end of the next section, because the papers 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

⁷⁷ *Glicksman vs. Lancashire & General Assurance Co Ltd* (1927).

⁷⁸ *Manifest Shipping Co. Ltd. Vs. Uni-Polaris Insurance Co., Ltd.* (2001), 2 W.L.R. 170, 1888 s.; cf. *Rühl*, op. cit., p. 1455.

⁷⁹ *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.

⁸⁰ *Manifest Shipping Co. Ltd. Vs. Uni-Polaris Insurance Co., Ltd.* (2001), 2 W.L.R. 170, 1888 s.

on the law of non-disclosure and warranties, the details shall be given in the context of the following, too.

5. Conditions, Warranties and Suspensive Conditions. 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. 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*⁸¹, 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. 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”.⁸² There are, however, many more recent decisions being based on quite the same rational.

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.

⁸¹ (1786) 1 T.R. 343.

⁸² *Birds*, op. cit., at 152, fn. 8; id. (1991) 107 L.Q.R. 540.

The Court of Appeal, reversing the trial judge, held that the company could disown liability.⁸³ 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.⁸⁴

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.

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*⁸⁵ 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..."⁸⁶

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.⁸⁷ In *Hussain vs. Brown*⁸⁸, on the other hand, the court held that prima facie reading of such clauses cannot be generally accepted. Also authoritative is the construction of warranty of opinion clauses, 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.⁸⁹

Another possibility for avoiding the strict consequences of warranties is to assume that the insured might have waived his rights of a violated warranty.

⁸³ *Conn vs. Westminster Motor Insurance Association Ltd* (1966), 1 Lloyd's Rep 407, Court of Appeal.

⁸⁴ *Farr vs. Motor Traders' Mutual Insurance Society* (1920), 3 KB 669; cf. the decision of the House of Lords in *Provincial 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.

⁸⁵ (1942) 1 K.B. 66.

⁸⁶ *Kennedy vs. Smith*, 1976 S.L.T. 110.

⁸⁷ See *Hales vs. Reliance Fire and Accident Insurance Co.*, (1960) 2 Lloyd's Rep. 391.

⁸⁸ (1996) 2 Lloyd's Rep. 627, 629 per Saville L.J., as quoted in *Birds*, op. cit., at 158.

⁸⁹ See *Birds*, op. cit., at 159.

*Example 5: In West vs. National Motor and Accident Insurance Union*⁹⁰ 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.⁹¹ Although the opinion was criticised in the literature⁹², it is in line with the mentioned decisions, which try to avoid the strict consequences of the principles of warranties.

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.⁹³ 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)⁹⁴;
- 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.⁹⁵

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

⁹⁰ (1954) 1 Lloyd’s Rep. 461.

⁹¹ Ibid., at 463.

⁹² See *Birds*, op. cit., at 156.

⁹³ See in more detail below lit.b; insofar correct *Rühl*, 55 (2006) ICLQ, 879 ss.; cf. *id.* in Basedow et al. (ed.) op. cit.

⁹⁴ This seems to be an example to what is said above, text with the fn. before.

⁹⁵ Sec. 226 FSMA, and below IV.3.

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 FSMA-Regulation of 2000 and, hence, must be treated to a far reaching extent⁹⁶ 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 be a step towards consumer protection, as distinct from protection of commercial insured⁹⁷, a separate development which also is initiated in other European member countries, and esp. in Germany.⁹⁸ 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 will be followed by further ones.⁹⁹ The Commission’s opinion is based on the argument, that “the harshness of current UK law cannot be justified as compared much fairer law in other EU countries”.¹⁰⁰ Proposals of the Commission are:

- “Reasonable care” would be judged by the standards of a reasonable consumer in the light of all circumstances, which especially means, that circumstances the insurer and the agent knows or ought to know do not have to disclosed by the insured;
- it shall be relevant how clear and how specific the insurer’s questions were (presumption of relevance, if asked – cf. § 16 I.3 VVG 1908);
- any violation of information duties of the insurer and even the “relevant explanatory material or **publicity (!)**¹⁰¹ produced ore authorised by the insurer” must be taken into account for the assessment of reasonable care of the insured;

⁹⁶ 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.

⁹⁷ Not applicable in a commercial context, *James vs. CGU Insurance plc* (2002) Lloyd’s Rep. I.R. 206; but s. *infra*, Fn. 230.

⁹⁸ Stressed by *Rühl*, 55 (2006) ICLQ, 879 ss.; cf. *id.* in Basedow et al. (ed.) op. cit.; *Birds*, op. cit., p. 15, 148.

⁹⁹ 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).

¹⁰⁰ As quoted in *Birds*, at p. 150.

¹⁰¹ Emphasis added by the author.

- if the insurer offers contracts on terms covering the higher risk of the non-disclosed circumstances, he will be treated as if entered into those terms;
- if the insured risk has occurred already, a principle of **proportionality**¹⁰² shall be put into statute: 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? (For no. 2 apply the Commission's draft)

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. Commission's Draft: It is a private contract, which the Commission's draft proposition 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 1/5th can be deducted, since the regular contract would have been concluded with P as a private detective, the premium for which was 20% higher. I has to pay 800 PSt.

Further reforms seemed to be necessary. The National Consumer Council, already in 1997, issued a report¹⁰³ urging reform, based in part on the pioneering reforms introduced in Australia¹⁰⁴ some years ago. After the British Insurance Law Association added its voice to this and urged that the Law Commission be given the opportunity to examine the case for reform, the Commission was engaged on the task of reviewing many aspects of insurance contract law, the questions of disclosure duties and warranties being included.¹⁰⁵ On 28 May 2008, the Law Commission and the Scottish Law Commission (LC/SLC) published a summary of responses to Consultation Paper¹⁰⁶:

"(1) In consumer contracts 'basis to the contract' and similar clauses...should be of no effect. (para 7.31)

(2) In business insurance ...a 'basic of the contract' clause...should no longer be effective to turn the statements...into warranties. If warranties of past or existing facts are to be permitted at all, each statement warranted should be set out either in the policy, or in some document incorporated by reference to the policy...(para 7.35)".

¹⁰² 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.

¹⁰³ Insurance Law Reform: the Consumer Case for a Review of Insurance Law, 1997.

¹⁰⁴ See the Australian Insurance Contracts Act 1984.

¹⁰⁵ See www.lawcom.gov.uk/insurance-contract.htm.

¹⁰⁶ See again www.lawcom.gov.uk/insurance-contract.htm.

Further on, the All Party Parliamentary Group on Insurance and Financial Services met on 11 June 2008, and – as expressed by the responsible Law Commissioner – thought by majority “that the current position is unacceptably complex, confusing and unacceptable...”.¹⁰⁷ The commission has published a final report and draft bill on consumer insurance in Dec. 2009, the proposals of which are taken over by a Parliamentary Bill of May 2011. A 2nd consultation procedure was opened in Dec. 2011. Until 2011, it was uncertain when the Parliament would have had time to enact the Commission’s draft. Last year, however, the new Consumer Insurance (Disclosure and Representations) Act has passed Parliament and has gotten Royal assent on the 8 March 2012.¹⁰⁸ The Commission had proposed its draft before the 2010 election, and after the Conservatives have taken over, one could not predict, if the new way of consumer protection would be followed. As already mentioned, however, there is a European trend in some respect¹⁰⁹, which seems to have reached public acknowledgement. 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) and was given to consultation in Dec. 2011 (being discussed, in more detail after the following text on actual binding case law). After the Parliament has passed the act in March 2012 with most of the details the Commission proposed, it seems quite clear that no convincing protest of the industry was given. Royal Assent was given 8 March 2012. Since this assent is necessary for an Act to come into force¹¹⁰, it is called now an “Act of Parliament (Law)” (see www.legislation.gov.uk/ukpga/2012/6/contents/enacted). The Act is called Consumer Insurance (Disclosure and Representations) Act 2012 c.6 (cited here as CIA). However, it was still far away from coming into force, because sec. 12 (2) provides that it needs an order made by “statutory instrument appoint”. When this decision was prepared some of the stipulations have been found to be “outdated”. Hence, a list of amendments had to be worked out, which was to be “approved by Parliament”.¹¹¹ 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 will come into force definitely on 6th April 2013.¹¹²

Having this in mind, one must conclude that the legal reform, as to consumer contracts, is finished now. The new act has taken over the suggestions of the Commissions as they are presented above. Especially

¹⁰⁷ Press Release of 13 June 2008.

¹⁰⁸ see <http://lawcommission.justice.gov.uk/areas/insurance-contract-alaw.htm> (download 8/14/12).

¹⁰⁹ This is mainly true for the criteria of reasonability and proportionality; see *Loacher*, VersR 2009, 289 ss. with further ref.; *Männich*, in Beckmann/Matusche-Beckmann, Versicherungsrechts-Handbuch, 2nd ed., 2009, § 2 No. 7 ss.

¹¹⁰ Cf. Art. 82 II GG: assent of the Bundespräsident.

¹¹¹ See www.legislation.gov.uk/changes/affected/ukpga/2012/6; download 6 Sept. 2012.

¹¹² 2013 No. 450 (C.18), as published www.legislation.gov.uk/uksi/2013/450/made (download 3/11/2013).

- the utmost good faith principle is developed to a kind of reasonability doctrine;
- 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**".¹¹³*

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."

The law of B2B-contracts, however, has not been changed the same way. For purpose of explanation it might be worthwhile to read the following internet article of June 2012¹¹⁴:

UK law reform could raise insurance claims

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 1906 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, the Law Commission said on Tuesday.

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.

"The law in this area ... has fallen out of date," said **Scottish Law Commissioner** Hector McQueen.

"Large, complex international corporations **struggle to cope** with its requirements as much as their smaller counterparts because the present rules are weighted against them all."

The proposed shake-up comes amid signs that insurers, grappling with weak prices, are increasingly disputing claims in an effort to protect their profits....

"There is evidence of claims being questioned for reasons that seasoned market participants find surprising," MacTavish said in the report.

The Association of British Insurers said the planned reform could have unforeseen consequences for the commercial insurance market.

¹¹³ Highlighted version added HH.

¹¹⁴ <http://uk.reuters.com/article/2012/06/25/uk-insurance-law-idUKBRE8501D420120625> download 9/10/12

A most recent update of the Law Commissions reforming paper¹¹⁵ 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”. Such clauses absolve the insurer from liability to pay claims until the breach is remedied, and only for the duration of the breach.¹¹⁶ A wrong warranty of burglar alarms or sprinkler systems, 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.

Also the case law on “basic to the contract” clauses, as explained earlier, was proposed to be abandoned.¹¹⁷ This would lead to the consequence that warranties cannot be applied by interpreting 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.¹¹⁸ 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”. The Law Commissions plan to publish their final report and a draft bill by the end of the year 2013.

The case law, however, 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 recent decisions have rejected such a duty¹¹⁹, the Court of Appeal, in a recent decision¹²⁰ 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.¹²¹ On the other hand, the good faith argument was no clear view on exactly when an insurer would be in breach by avoiding¹²², and it does not allow to distinct between commercial and consumer contracts.

¹¹⁵ See www.out-law.com/en/topics/insurance/insurance-law-and-liability/reforming-insurance-law.warranties/ (download 3/14/2013).

¹¹⁶ To some similar examples of case law see below.

¹¹⁷ See the 2007 consultation paper, as cited in last footnote.

¹¹⁸ Cf. below II.6 to the suitability doctrine.

¹¹⁹ 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.

¹²⁰ See *Drake Insurance plc vs. Provident Insurance plc.*, (2003) EWCA Civ 1834, (2004) Lloyd’s Rep. I.R. 277.

¹²¹ See *MacGillivray*, 1st supplement to the 10th edition, para. 17-90A; *Clarke*, *The Law of Insurance Contracts*, 5th edn., 23-181.

¹²² See *Birds*, *op. cit.*, at 145.

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

The clause was taken as a warranty.¹²³ The warranty law seems to be still alive, the contract partner, however, not being a consumer, but the defendant *Polygram Holdings*, which took the insurance for the musician.

Warranties could be exempted from the fairness control under the Unfair Terms of Consumer Regulation 1999 (UTCCR)¹²⁴, because they belong to the main subject of the contract. Actual case law, however, cannot be taken as authoritative.

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*¹²⁵, 2006, rejected the suggestion that the condition precedent element of a clause was automatically wiped out as leaving the clause as a bare condition.

The insurer can lose 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.¹²⁶

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. Neither the actual self regulations nor the foreseeable parliamentary amendments reach so far to protect an insured acting without due diligence. Most 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 dissolution.

6. Agency Principles and Suitability Doctrine. 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).

¹²³ *Gerling-Konzern General Ins. Co. vs. Polygram Holdings* (1998) 2 Lloyd's Rep. 544; MacGillivray, Suppl. 1998, 21.

¹²⁴ See below, appendix 1.

¹²⁵ *Friends Provident vs. Sirius* (2006) Lloyd's Rep. I.R. 45; Colinvaux's Law of Insurance, op. cit., at 71.

¹²⁶ See *Scottish Coal Co. Ltd. Vs. Royal & Sun Alliance Plc.* (2008) Lloyd's Rep. I.R. 718; Birds, op. cit. 140 s.

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. While Germany has not yet finished the implementation,¹²⁷ 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)).¹²⁸

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 contracts which are

¹²⁷ The latest document was the statement of the *Bundesministerium* in June 2005. f. Wirtschaft und Arbeit v. 9.12.2004 VIII B 4-120363.

¹²⁸ No. 6.1.10 ICOBS and the annex no.2 thereto, as considered above III.2a; for details and comparison *please*, see *Wilkins*, in Wambach/Herrmann (ed.), *Solvency II Vermittlerrichtlinie*, 2005, p. 111, 127 s.;

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.

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.*¹²⁹

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.

¹²⁹ Please, see *Stone vs. Reliance Mutual Ins. Society Ltd.*, 1972, 1 Lloyd’s Rep. 469.

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.¹³⁰

Example 1: Broker B fills out 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.¹³¹

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.¹³²

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, however, has not been derived from the mere fact that the agent is armed with forms and frequently completes them.¹³³

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.

¹³⁰ Cf. Auge und Ohr-Rspr. of BGH, e.g. BGH NJW 1993, 2807; now § 70 VVG 80.

¹³¹ *Newsholme Bros vs. Road Transport&General Insurance Co.* (1929) 2 K.B. 356; please, see next chapters on misrepresentation and warranties.

¹³² Cf. Römer/Langheid, Kommentar VVG, 2. Aufl. 2003, §§ 16,17, Rdn. 40.

¹³³ Cf. Birds, op.cit., p.183 ss.

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 under the Suitability Doctrine. 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. There is, however, no general transfer of these provisions to the agents' and brokers' duties in insurance business, except the duty to work out a paper showing the essentials of the recommended insurance contract. While this can be compared to the Produktinformationsblatt of § 4 VVG-InfoV, duties of suitable pre-contractual information are not provided by insurance case law, except in certain cases of capital life-insurance. In March 2009, however, the Law Commission and the Scottish LC have published some recommendation for statutory amendment in this respect (see <http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm>, download of Febr.2012). The paper has been sent to certain interest organisations for comment, but the time until a binding Act will be promulgated, has been unknown, in March 2012. With respect of some further statutory projects in the field of consumer protection in private insurance law (see below, next section), one can expect some outcome of the project in more or less future time, nevertheless.

IV. State Regulation and Self Regulation

For better understanding the mentioned law reforms, some remarks shall be made to the regulatory system in GB.

1. Financial Services Authority and Insurance Companies. An insurer can carry on his/her business only if it satisfies the regulatory requirements established by detailed and complex legislation. The high level of regulation exists because of the very nature of most insurance business. The insured entrusts his/her money to the insurer but receives only a promise of payment in the event of specified events happening in return. Regulation, therefore, has long been seen necessary in order to ensure as far as possible that insurers are able to meet their promises. The State regulation of these subjects will be dealt with, in this chapter. – Additionally, insurance is a kind of a law product the quality of which cannot be assessed by the average customer but only by experts. Since State regulation to this topic has been mentioned in ch. III.2e- V.5 (ICOB and ICOBS), it can be left aside, here.

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).

The FSA is an independent non-governmental body, which exercises statutory powers under the FSMA. Its board is composed of one chairman, three executive directors, and eleven non-executives, who are all appointed by the Treasury.¹³⁴ Until 2000, the regulatory powers were concentrated on “Self Regulatory Organizations” (SRO) and the “Securities and Investment Board” (SIB). The FSA now has set up a so-called Regulatory Decisions Committee (RDC), which members are not state officers but currently or recently retired practitioners and individuals who represent the public interest.¹³⁵

The powers of the FSA have been broadened substantially by the Insurance Companies Regulation 1994 and – again – by the FSMA. They 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.¹³⁶

In comparison to German law, the powers of the FSA seem to be “extremely wide”¹³⁷ but are more adequate to the market functions. While the current misuse control is comparable to the Misstandsaufsicht 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.

In 1994, the home country principle came into force because the EC directives of the 3rd generation had to be implemented. The principle abandons the requirement of the insurance license for insurance companies, which are admitted in their home country. Only notice and proof of the admittance is necessary.

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.

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

¹³⁴ This is one of three so-called central government departments.

¹³⁵ Please, see www.fsa.gov.uk at 15.

¹³⁶ Please, see *Birds*, op. cit., p. 28.

¹³⁷ *Birds*, op. cit., 5th ed., p. 30.

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 2004.¹³⁸ 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 Protektor Insurance, which used to manage the securitization before the new German legislation was enacted. There is no equivalent of that in British law.

3. 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.

¹³⁸ 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 that 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.¹³⁹ 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."
- 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.

4. Financial Services Act 2010/FCA Paper 2012. As a consequence of the financial crisis of 2008/9, and on the basis of a official investigation of the main reasons, a White Paper was published in 7/09, 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 enactment of the Financial Services Act¹⁴⁰ with Royal assent of 4/8/2010.

Main issues of the act:

- 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 2013¹⁴¹; CFS decides 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 focuses 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 June 2011, FSA published a paper (White Paper), which proposes the establishment of a new authority, the Financial Conduct Authority (FCA). The main objective of the FCA shall be 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.

¹³⁹ Please, see *Birds*, op. cit., p. 29.

¹⁴⁰ Financial Services Act of 4/8/2010, c. 28 with the regulation of 10/11/2010, No. 2480, c. 120.

¹⁴¹ Further weakening of powers of the FSA in 2010/11, see Handelsblatt of 18./19.2.2011, p. 37; for "radikaler Umbau", as explained see Handelsblatt of 6/30/11, p. 33.

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 is 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, shall be overruled. Further on the White Paper provides for the establishment of a “Financial Policy Committee”, which shall become a branch of the BoE. The Bank will have supervisory power over FCA and its settlements with the financial industries.

5. The Codes of the General Insurance Standards Council and Follow-Up Regulations. Like other branches, insurers are organized in private non-profit associations, the membership of which is not compulsory. 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.¹⁴²

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.

6. 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 of self-regulation, the

¹⁴² For the replacement of the GISC Code by the regulations of the FSA on disclosure duties, misrepresentations and warranties see above 3e/aa.

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.

V. Resumé and Law Comparison Aspects

GB has sustained much of the traditional case law of utmost good faith and of warranties, but some reforms of German law have been taken over. What can be learned by comparing the two law systems? First answers to this question can be given by resuming the following trends of British development:

First of all, the proportionality principle has outdated the all or nothing rule. While this is true for the consumer insurance law only, one can regard this development as a part of modern social market economy. As pointed out above, new law of commerce is to be balanced between principles of efficiency and of humanity. One of the most struggling concepts is the all or nothing principle, since it is far away from what is called the interdiction of exaggeration (Übermaßverbot).

Also in the industrial insurance law we have found some steps back from the harshness of former warranty law and from the all or nothing rule, despite the fact that this is true only in respect of the basis to the contract interpretation, dispositive modification provisions of weaker warranties etc. It must be left to future research why British law is so much reluctant to give up the all or nothing rule.

The second key point of comparison is to negligence pre-conditions of misrepresentation and warranties violations. British case law and law reforms are not comparable to the German VVG in this respect. As suggested above the British law system is much more sensible for

reasons of workable competition. And this is also true for the private insurance law. Allowance of negligent pre-contractual information has effects of adverse selection, since market risks are transferred to the wrong contract party. Under conditions of competition the insurer cannot raise prices for insurance contracts with uncertain risks. While this dilemma is seems not to be a major problem for system relevant market players, smaller insurers can suffer systematic insolvency risks caused by adverse selection as a systematic deficiency of competition. Such system risks are the reason why British law keeps sanctioning misrepresentations, even if they are not done in gross negligence.¹⁴³

Finally, one can compare the exemption of legal remedies in cases of knowledge or constructive knowledge of the insurer about undisclosed risks. Sec. 3 (4) CIA provides for such a knowledge exception, but restricts it to consumer contracts. Again, it must be left to further research, whether this must be seen as a lack of reform in British law. As commented above, it is a question of information asymmetry. Similar adverse effects seem to be caused as in cases of slightly negligent misrepresentation; and it must be doubted, that the British balancing of interests of the contract parties and of competition values are in line with the general concept of new social market economy. For the German law, vice versa, the conclusion would be possible that British law, in this respect, should better be left. The learning process of system competition is going on, and only the future will show which will be the optimum mix of competition efficiency, consumer protection and humanity principles.

¹⁴³ Cf. the recent principles of European Insurance Contract Law, as presented by Basedow, unveröffl. Vortrag über Der Versicherungsbinnenmarkt und die Principles of European Insurance Contract Law (PEICL), Universität München, Risk and Insurance Center, 24.10.2012.