Final Test mit Lösungsvorschlägen Sept. 2015

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

I. Insured I had a car insurance contract with a certain company (Irer) for his lorries. In reply to a question in the proposal, he has stated that the lorries would usually be garaged at their ordinary place of business in Glasgow; and this clause should be the basis of the contract. Later, it was normally garaged at a farm on the outskirts of the city. One lorry was destroyed by a fire at the latter address. Can Irer deny cover?

1. What is the case law for this question?

2. Are you aware of more recent law applicable to the case?

3. Some comparative remarks on German law.

Possible Answers:

I.1 The case is from a SC decision of 1922 holding that the garaging promission is taken as a warranty, and that there is no precondition of causality in warranties law. The Irer was given the right to deny cover, despite the fact that the warranty violation could not have increased the risk.

2. Sec. 11 subsec. 3 InsA 2015 provides that non-compliance with terms which "could not have increased the risk" are without legal consequence. This is a clear contradiction to the case law above mentioned. One must draw the conclusion that the elder case law will become overruled by the InsA until Aug. 2016, when the act becomes enforceable.

3. Under § 32 VVG the provisons on Anzeigepflichten and on Obliegenheiten of §§ 19, 28 are semi-binding (halbzwingend). Warranties are Obliegenheiten without preconditions of negligence and as such excluded by this provision. Exclusion clauses, however, are untouched. If warranties are converted into exclusion clauses, they could still be valid, because § 32 VVG does not apply for exclusions. Only risk of the insurer including such an exclusion clause in his standard terms is that the court takes it as a hidden warranty (verhüllte Obliegenheit). These are forbidden under § 32 VVG.

II.1 The insurance agent has to give adequate information to the insured before his decision on making the contract or not. Can it be good enough to declare that he is not an expert of the whole market, but of the offers of his principal only?

2. What would be the legal consequences if the agent does not give a warning notice like under no. 1, and nevertheless makes a proposal which is the best offer of his principal, but not the best of the market?

3. What would be the legal consequences if the agent proposes a product, which is the best one offered by his principal, but is not adequate for the risk profile of the client?

4. Some comparative remarks on German law.

Possible Answers:

1. Yes, it can. Sec. 4.1.7 ICOBs 2008 provides for the possibility of a firm to a statement prior to the conclusion of the contract and declaring, whether personal recommendation or information is given or not. That means that the statement is required but an the information duty as such. Since ICOBS apply for b2b only, the CIA 2012 is special for consumer contracts. Here, something like suitable advice is owed, but also with the restriction, that the agent can make a statement not to give more market analysis than examining the products of his principal. Main difference to b2b: the agent for a b2c-contract cannot state that he does not give advice at all.

2. This would be a violation of contractual duties in any case, because the statement is binding for the contract parties. The Ired would have a damage claim under the case law of breach of contract.

3. Risik profiles are not requested by the law expressively. As far as the consequences of wanted or unwanted risks follow from the data known to the agent, he must give adequate advice. E.g. the agent knows of the fact whether the Ired is married or not and if he has children or not. If he gives advice which is unadequate for married fathers or mothers he violates his contractual duty of adequate information. A damage claim on breach of contract can be the consequence.

4. German law gives more consumer protection. Consumer profiles are provided for in § 60 ff. VVG (with documentation duties). General differentiation between b2b and b2c does not exist. There is, however, a differentiating provision in § 60 I VVG, as far as the adequacy of the advice depends on the professional situation of the agent, esp. whether he is an agent exclusively for one firm or not.