Final Test DVA April 2012

1 hour working time. Since both questions are equally difficult, you should take about 20 - 25 minutes for each and the remaining time for corrections. Please write your name on top of each page and answer in English as far as possible. Do not answer simply yes or no, but always explain some reasons why. Answers in German will be accepted by half value, if they do not exceed 50% of the full text.

I.1. Which are the main differences between warranties and regular obligations, especially with regard of materiality and causality?

In cases of violation, the causally/materiality test and the test of causality must be done as a precondition of the right of the insurer to step back from the contract and to avoid liability if the insured risk has occurred. Warranty based reactions of the Irer., by common law, are not restricted to the tests mentioned.

2. Why do standard contract clauses headline certain sections as „basic to the contract“?

The headline text “basic to the contract” can be taken as an indication of a warranty is meant. It is, however, not binding for a court. The court can hold it to be an obligation with broader preconditions, as mentioned under no. 1.

3. Can warranties be controlled by the fairness test of the standard terms court control?

It depends on the question of economic importance. However, the case law, in some cases, has taken warranties as main subject provisions, for which the content control is excluded by the UCCTR 1999. If they are similar to risk exclusions, which typify the kind of insurance cover, they count to main subject provisions. This resembles to the German distinction of primary and secondary risk exclusions.

4. Do you know about more recent restrictions of the law of warranties (make distinction of reasoning being based on actual binding law and political discussion).

An ABI-Statement of the end of 20th century has narrowed the applicability of warranties to cases of negligent actions or fraud or deceptive indication of risks. Until 2001, however, the ABI-Statement was not more than a part of internal law of the association, because members had to follow its statutes. Non-members were free to follow the common law and its broad meaning of warranties. After a similar regulation of the GISC (General Insurance Standards Commission), and after this was overtaken by the ombudsman system of the FSMA of 2001, the restrictions of the ABI have become binding for all parties who are involved in the GISC procedure.

Further reforms have been proposed by the Royal Commission and the Scottish Commission in 2008-2010, but have not been enacted until now. Inter alias, the proportionality provision is part of the Commission paper, which is comparable to the one of §§ 19, 28, 23 ss. VVG, etc., and which would be a contrast to the all or nothing principle of actual binding case law.

II.1. What is a preliminary cover note, and what are the main reasons for this contract type?

Pcn-contracts cover risks events being possible before the beginning of the main contracts for this type of insurance, e.g. car insurance. The binding conclusion of the main contract, automatically, terminates the preliminary cover and replaces it, despite the fact that it is taken as a separate contract.

2. Insured Ird. has applied for a car insurance. Insurer Irer. sent him an acceptance letter and a cover note for the same car. Does Ird. have cover for an accident which occurs on his way to the registration authority?

Yes, the acceptation of the offer of the Irer. will be effectuated by taking out the car to the general traffic, despite the fact that there is no declaration expressis verbis, and with full communication with the Irer. But it is not an acceptance by silence, which would not be possible, but a paralingual action, from which an acceptance declaration can be derived.

3. Preliminary cover notes and main insurance contracts are held to be two different contracts. Can you explain why (one reason only)?

Within the time between the two contracts happening risk increasing has to be notified to the Irer., provided that the Ird. is aware of the relevant facts before the beginning of the main contract. The principle of utmost good faith becomes applicable during the pre-contractgual time, only. But by the German law concept of separate contracts, there is a pre-contractual situation in the virtual moment between termination of the pcn and the main contract.

4. Some comparative remarks to German law.

In German law, the same phenomenon exists: the separation theory is disputed, but seems to be dominating in the literature, despite the fact that §§ 23 ss. VVG provide for risk increase notification, while the lack of it, in British law, is seen the main reason for separating the preliminary cover and the main insurance contract. There are, however, further reasons for the theory, e.g. payment of first premium for the main contract shall not be taken as following payment within the meaning of § 38 VVG. If both contracts would be combined to one, a delay of the first payment of the premium of the main contract would be sanctioned under the preconditions of a qualified warning, the provisions of which are much stricter than the ones under § 37 VVG.