The Europeanization of British Insurance Law

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Throughout the 20th century British and continental legal systems have taken profoundly different approaches to insurance law in general and to insurance contract law in particular. Comparatists have considered them as a constant which renders any attempt at harmonization futile. While many observers considered such harmonization as desirable in order to allow for more cross-border insurance cover and an extension of risk pools, the efforts made in the 1970s and renewed later on by what is now the European Union were doomed to failure, *inter alia* because of the insurmountable differences in insurance contract law. It is irony of history that shortly before the exit of the United Kingdom from the European Union the UK Parliament has adopted two statutes in recent years that have brought about far-reaching changes to British insurance contract law and have considerably reduced the distance from the law applied in continental jurisdictions. This present article dedicates itself to examining these changes.

1 Foundations

1.1 Alpine and Maritime Models of Insurance Contract Law

Drawing upon the work of French economist *Michel Albert*, the Belgian insurance law scholar *Herman Cousy* has identified two primary approaches to insurance: the "Alpine Model" and the "Maritime Model".[1] In the Alpine Tradition that is followed by most of the continental European countries, insurance is customarily viewed as a mechanism fostering solidarity. Good and bad risks are insured equally, one alongside the other, with this being achieved through only a modest spread in insurance premiums, relatively minimal competition and intensive supervision by both regulatory authorities and the courts. By contrast, the Maritime Tradition, dominant particularly in Great Britain, is characterized by fierce competition, exacting calculation of premiums, rigorous risk-evaluation and broad contractual freedom.

Over recent years, this generalized distinction has been steadily blurred by the convergence accompanying the creation of the European Single Market; nevertheless, the depiction quite accurately describes the starting point from which Great Britain proceeded in its recent recalibration of insurance law. As described by *Giesela Rühl*, the sources of insurance contract law in the United Kingdom are found primarily in court rulings, with statutory law being an isolated phenomenon; the Marine Insurance Act of 1906 (MIA) stands alone as an Act that cohesively and comprehensively regulated insurance contract law in the maritime context and thereby offered the courts a certain amount of guidance

1 Herman Cousy, *Insurance Law*, in *Jan M. Smits*, ed., Elgar Encyclopedia of Comparative Law, Cheltenham, Edward Elgar, 2006, pp. 312-324 (318 ff.).

in ruling on disputes in other areas of insurance contract law.[2] Contractual freedom serves as the foremost and bedrock principle, and only in exceptional cases do we see mandatory rules regarding the substantive content of insurance contracts.[3] Until the implementation of the European Directive on unfair terms in consumer contracts,[4] there were no special requirements prescribed in respect of insurance policy conditions. Such terms were consistently and automatically incorporated into the contract even when the insured was neither provided with the terms nor given a specific advisement as to their existence. [5]

1.2 Pre-contractual Disclosure Duties

In terms of the substantive rights and duties of the parties, the foundation of British insurance law remains *Lord Mansfield's* 18th-century pronouncement declaring that a contract of insurance demands the "utmost good faith".[6] Broad duties of disclosure were derived from this standard, and it served to justify a rigorous and narrow treatment of any loss claimed. Concededly – as in other European legal systems[7] – the pre-contractual duty of disclosure extends only to those conditions about which the insured knew or should have known.[8] Yet according to sec. 18 MIA, this encompasses all those circumstances that would influence the judgment of a prudent insurer in setting premiums and determining whether to accept the risk; moreover, the disclosure duty exists independent of an inquiry by the insurer. Consequently, the insured must reflect on what circumstances or conditions are relevant for an insurer and must communicate them to the insurer. Risk evaluation – presumably a central component of an insurer's business activities – is thus shifted onto the insured. While this can be explained by the unique characteristics of marine insurance, where an insurer must accept risks in faraway lands and oceans that are not readily inspected, its

2 Marine Insurance Act 1906 c. 41, 6 Edw. 7; *see* Giesela Rühl, *Vereinigtes Königreich und Republik Irland*, in Jürgen Basedow/Till Fock, eds., Europäisches Versicherungsvertragsrecht, Vol. II, Tübingen 2002, pp. 1377-1520 (1380).

3 Rühl, preceding Fn., p. 1392.

4 Council Directive 93/13/EEC of 5 April1993 on unfair terms in consumer contracts, OJ 1993 L 95/29, implemented in Great Britain by the Unfair Terms in Consumer Contracts Regulations 1999 and the European Community's Unfair Terms in Consumer Contracts Regulations 1995.

5 Rühl, above Fn. 2, p. 1418.

6 *Carter v. Boehm*, (1766) 3 Burr. 1905 (1909 – 1910), 97 Eng.Rep. 1162; the formulation was carried over into sec. 17 MIA.

7 *See* the comparative *Notes* in Jürgen Basedow/John Birds/Malcolm Clarke/Herman Cousy/Helmut Heiss/Leander Loacker, eds., Principles of European Insurance Contract Law (PEICL), Second expanded edition, Köln, Otto Schmidt 2016, S. 106-108.

8 Rühl, above Fn. 2, p. 1450.

extension to all branches of the insurance industry is extremely questionable.[9] The violation of the duty of disclosure entails harsh consequences: not only does it allow the insurer to avoid the contract, but – unlike the legal situation Germany and other European nations[10] – the contract is avoided (i) retroactively to the date of the contract's conclusion, (ii) independent of any causal nexus between the contractual violation and the occurrence of damage, and (iii) without regard for any fault on the part of the insurer.[11] The contract is treated as if it never existed.[12]

What this can mean in practical terms was quite clearly illustrated in the case of *Lambert v. Co-Operative Insurance Society*.[13] Here, a married couple purchased an "all risks" household insurance policy from the defendant, renewing it over the course of nine years. When Mrs. Lambert filed an insurance claim following the loss of jewellery, the insurer refused to pay. As justification, the insurer pointed to an earlier and undisclosed criminal conviction suffered by Mr. Lambert, despite never having inquired about criminal convictions with the insured in the first place. Moreover, given that Mr. Lambert was serving a jail sentence at the time of the insurance incident, the risk that he represented could, at most, have only indirectly contributed to the loss.

1.3 Warranties – Obligations

Even more decisive are the legal consequences resulting from a violation of warranties, i.e. statements of the insured that are either *affirmative warranties* as to the existence or non-existence of certain circumstances or *promissory warranties* that promise the performance or non-performance of certain conduct. Such warranties are often the result of pre-formulated clauses, according to which answers recorded in an insurance application form become the basis of the subsequent contract, i.e. "basis of contract clauses".[14] In 1991, the House of Lords ruled that the violation of a warranty not only justifies the insurer's avoiding the contract but also, *ipso iure*, releases him from any obligation of

9 For a critical assessment, *see* e.g. Malcolm Clarke, *The Law of Insurance Contracts*, 6th ed., London, Informa, 2009, para. 23-1A, S. 700.

10 The legal situation in the majority of European jurisdictions is captured in Art. 2:102 PEICL, above Fn. 7; *see* also the corresponding comparative Notes on pp. 110-112.

11 Rühl, above Fn. 2, p. 1451 f.

12 Robert Merkin, *Colinvaux's Law of Insurance*, 10th ed., London, Sweet & Maxwell, 2014, margin note 6-124, p. 313.

13 *Lambert v. Co-Operative Insurance Society*, [1975] 2 Lloyd's Rep. 485 (CA).

14 Merkin, Colinvaux, above Fn. 12, margin note 7-038, S. 403 ; John Birds, *The Current Law*, in Peter Tyldesley, ed., Consumer Insurance Law, Haywards Heath, Bloomsbury Professional, 2013, S. 1 – 44 (33) : "Historically, perhaps the most common and easiest way of creating warranties in non-marine policies was the basis of the contract clause contained at the foot of the proposal form."

performance from the date of violation forward.[15] Moreover, these legal consequences are triggered regardless whether the violation precipitated the materialization of the risk and regardless whether fault can be attributed to the insurer.[16] They even apply if the actually insured risk proves to be smaller than the risk indicated by the earlier statements of the insured.[17]

The harsh nature of these rules can be demonstrated with the following example: Assume that a comprehensive auto-insurance policy is taken out on a car that is, according to the insured, regularly parked inside a garage. Let us further assume that the insured has, per the terms of the insurance policy, assumed the obligation to shut the garage door whenever the auto is parked inside the garage. If the garage and the auto are then destroyed by a fire resulting from a lightning strike, previously existing case law would relieve the insurer of any coverage liability if it were subsequently determined that the garage door had been left open at the time of the incident – it is of no consequence that the warranty secured from the insured aimed to protect against theft and not fire. Similarly, the insurer would have no obligation to make payment if the garage's locking mechanism malfunctioned because of a power outage and at no fault of the insured. Such a result can be contrasted to German law; pursuant to § 28 Para. 3 VVG (*Versicherungsvertraggesetz* – Insurance Contract Act), the insurer would still be obliged to make payment since the loss was not caused by the violation of a duty owed by the insured. Moreover, in the event that such causality can be established, it nevertheless remains without consequence if the obligation was violated accidentally or as the result of ordinary (not: gross) negligence. And even in cases of gross negligence, there would be only a reduction in the insurance payout consistent with the recent amendment of § 28 Para. 2 VVG.

On balance, British insurance contract law has traditionally protected only especially attentive and extremely prudent policy holders. By contrast, the legal regimes of various continental European nations have been far more forgiving, with protection being extended both to policy holders exercising only an average amount of care as well as to those who are negligent.

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15 *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd.* [1991] 2 W.L.R. 1279 (1294); *Rühl*, above Fn. 2, p. 1458 with further references. *See* also sec. 33 MIA and *Merkin*, Colinvaux, above Fn. 12, margin note 7-056, p. 415.

16 Rühl, Fn. 2, p. 1457; *Clarke*, above Fn. 9, para. 20-3, p. 644, regarding the causal link between a breach of a warranty and the occurrence of damages; as to situations where fault is established, one sometimes sees exceptions made, *see Clarke*, para. 20-6B2, S. 659.

17 *Dawsons Ltd. v. Bonnin*, [1922] 2 A.C. 413: Although the insured provided an address in a high-crime area in the centre of Glasgow in connection with the insured car, he in fact parked the car in a suburb having a lower risk of crime. Regardless, in the view of the House of Lords the insurer was fully entitled to avoid the contact.

2 Self-Regulation

2.1 Statements of Practice and Codes

As judicial review of contractual terms and conditions became a topic of discussion also in Great Britain, the insurance industry initiated attempts at self-regulation. Hoping to avoid the application of the Unfair Contract Terms Act of 1977[18] to insurance contracts the insurance industry, spearheaded by the Association of British Insurers, adopted the Statements of Insurance Practice.[19] Specifically, the Statement of General Insurance and the simultaneously issued Statement of Long-Term Insurance Practice obligated insurers to provide information on normal insurance practice such that insured parties would more readily appreciate their pre-contractual duties and could more easily fulfil obligations existing during the term of the policy. Additionally, the Statements served to limit the legal rights of insurers, as described above, in the event of a breach of warranties or obligations existing under the policy. The principles laid down in the Statements primarily protect consumers.

Particularly as regards their limited scope of application, the Statements seem inadequate given that there is also a generally acknowledged need to extend protection beyond consumer contracts, a need encompassing small- and medium-sized risks.[20] It has also been negatively observed that not all insurers are members of the Association of British Insurers. Moreover, members of the Association are not prevented from declining to adhere to the Statements in individual cases, e.g. in cases heard by a judge. However, such non-compliance has occurred only on rare occasion, and the Statements have indeed served to shape the character of British insurance practice over the last decades.[21]

Nonetheless, in attempting to answer such criticisms, the British insurance industry established the General Insurance Standards Council (GISC), which – on the basis of the Statements – authored the Private Customer Code for consumer contracts and the Commercial Code for other types of contracts.[22] Yet these private initiatives did little to diminish the widespread criticism of the insurance contract regime that the courts had developed, this despite the fact that the framework and practical importance of self-regulation was enhanced by various institutions, such as the Financial Services Authority, and that it was

18 Unfair Contract Terms Act 1977 c. 50.

19 Giesela Rühl, *Obliegenheiten im Versicherungsvertragsrecht*, Tübingen, Mohr Siebeck 2004, p. 18; for a comprehensive critique *see John Birds*, Codes of Modern Practice, The Statement of Insurance Practice – A Measure of Regulation of the Insurance Contract, Modern Law Review 40 (1977) 677-684.

20 *See* Art. 1:103 PEICL, above Fn. 7, and the references to various legislative Acts of the European Union in Comment C 6 found on p. 67.

21 Rühl, *Obliegenheiten im Versicherungsvertragsrecht*, above Fn. 19, p. 20.

22 Rühl, *Obliegenheiten im Versicherungsvertragsrecht*, above Fn. 19, p. 21 f.

fostered by extra-judicial dispute resolution mechanisms like the Financial Services Ombudsman.[23]

2.2 The Long Road Travelled by the Law Commissions

Although a legislative correction of judge-made insurance contract law had been called for since the middle of the 20th century, the wish fell on deaf ears for many decades.[24] In 1978 the Law Commission was given the task of analysing European insurance contract law particularly in regard to European Commission proposals aiming at legal harmonization.[25] However, the reports of the Law Commission from this period remained without effect.[26] In 2006 the Law Commission and the Scottish Law Commission took up insurance contract law once again. Here as well, it seems the primary impetus may have stemmed from efforts in Brussels, as it was in 2004 that the European Commission first made clear that its work on a uniform European contract law would also include *insurance* contract law.[27]

The Law Commissions dedicated themselves primarily to three sub-topics: first, establishing the boundary between insurable interests and acts of wagering and gaming; second, in the area of insurance taken out by businesses (B2B insurance), precontractual duties of disclosure, warranties, legal remedies against fraudulent claims, and default in payment; and third, in the area of consumer insurance, pre-contractual duties of disclosure and misrepresentation. In their numerous issue papers, the Law Commissions have referred to various international developments, such reference including the Australian Insurance Contract Act of 1984 as well as more recent legislation enacted by continental European nations.[28]

In 2012 and 2015, proposals made as to the second and third sub-areas were incorporated into legislation that significantly amended British insurance contract law, although it should be observed that in many regards the

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23 Thomas von Hippel, *Der Ombudsmann im Bank- und Versicherungswesen*, Tübingen, Mohr Siebeck, 2000.

24 In more detail *see* Peter Tyldesley, *Reform at Last*, in *id.*, above Fn. 14, pp. 45 – 90 (55 f.) on the work of the Law Reform Committee of 1957.

25 Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, presented by the Commission to the Council on 10 July 1979, amended proposal of 30 December 1980 in OJ 1980 C 355/30.

26 Rühl, Obliegenheiten im Versicherungsvertragsrecht, above Fn. 19, pp. 28-30.

27 *See* the Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the acquis: the way forward, Annex I at the end, COM (2004) 651 final of 11 October 2004, p. 17.

28 *See* e.g. Insurance Contract Law, Issues Paper 1: *Misrepresentation and non-disclosure*, September 2006, pp. 132-139, available at the website www.lawcom.gov.uk. The Australian Insurance Contract Act 1984 no. 80 is printed in Basedow/Fock, above Fn. 2, Vol. III, Tübingen 2003, p. 13 ff.

amendments were consistent with the self-regulatory instruments that had been previously developed.[29] Apart from certain isolated exceptions, the two legislative Acts apply to England and Wales, Scotland, and Northern Ireland.[30] Substantively, British law has moved closer to European standards in several aspects, as will be more thoroughly described in the instant analysis. The discussion will consider the key rules of the two Acts and does not address group insurance.

3 The Consumer Insurance (Disclosure and Representations) Act 2012

The first of the two Acts is the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA).[31] The Act exclusively regulates pre-contractual duties of disclosure owed by the insured in the context of consumer insurance contracts. The latter are defined as contracts of insurance that a natural person enters into wholly or mainly for purposes unrelated to the individual's trade, business or profession.[32] An extension of the Act's scope to small and medium-sized enterprises – as is, for example, contemplated by the Rome I Regulation for international insurance contracts[33] – was opposed by the insurance industry. As a result, micro-enterprises, e.g. proprietors of small retail establishments and professionals practising alone or in small partnerships, are deprived of protection, their instead being grouped together with major corporations boasting billions of pounds of revenue, thousands of employees and their own legal departments – a dubious rule that has been roundly criticized.[34]

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29 *See John Birds/Ben Lynch/Simon Milnes*, MacGillivray on Insurance Law, 13th ed., London, Sweet & Maxwell, 2015, margin note 19-003 with reference to corresponding statements of the Law Commissions.

30 Consumer Insurance (Disclosure and Representations) Act, 2012 c. 6 (hereafter: CIDRA), sec. 12(6); Insurance Act, 2015 c. 4 (hereafter: IA 2015), sec. 23 (1).

31 *See* preceding Fn.

32 Sec. 1 (a) CIDRA.

33 *See* Art. 7 Paras. 2 and 3 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6. In addition to insurance in certain individual sectors, in particular marine and transport insurance large risks include insurance for policy holders whose enterprises exceed at least two of the following criteria: a balance-sheet total of 6.2 million Euros; a net turnover of 12.8 million Euros; or an average number of 250 employees during the financial year.

34 *See* e.g. John Lowry/Philip Rawlings, '*That wicked rule, that evil doctrine…': Reforming the law on disclosure in insurance contracts*, Modern Law Review 75 (2012) 1099-1122 (1118): "… there is unfairness in lumping multinational companies with tens of thousands of employees and billions of pounds in turnover together with the micro-business such as a cornershop with no more than one or two employees and a turnover of thousands." The inquiries of the Law Commissions, by comparison, have led to the realization that the harsh rules on pre-contractual duties of disclosure under sec. 18 MIA are problematic for all types of businesses, *see* Tamara Goriely, *Insurance Law Reform: Where Next?* In *Tyldesley*, above Fn. 14, pp. 233 – 250 (236).

3.1 Pre-contractual Disclosure Duties

Whereas British law still deviates considerably in terms of the scope of application issue, the substantive rules that have been adopted represent a firmer step in the direction of European standards. In place of the insured's earlier duty to disclose all circumstances relevant to the contract, we find the obligation "to take reasonable care not to make a misrepresentation to the insurer."[35] This has the practical consequence that insurers will no longer be able to wait for voluntary and self-initiated disclosures on the part of the insured; instead, insurers will themselves assume the burden of making inquiry and posing questions.[36] Although the law does not require that insurers formulate such questions clearly or precisely, the standard imposed on insured parties – i.e. "reasonable care not to make a misrepresentation" – will presumably translate into the clarity and preciseness of insurers' questions being taken into account, alongside other factors.[37] The obligation to avoid misstatements is drafted in such a way as to not only relate to answers given by the insured in response to questions of the insurer but to also encompass voluntary disclosures. Where the misstatement of an insured party reflects dishonesty, he has unquestionably breached his duty of reasonable care.[38]

In regards to the legal remedies available to an insurer, the Act distinguishes between deliberate or reckless misrepresentations, on one hand, and careless misrepresentations on the other. The Act does not expressly speak of innocent misrepresentations. However, careless misrepresentations are defined such that they are neither deliberate nor reckless,[39] a definition that thus also includes innocent misrepresentation. On the other hand, the designation of "careless" implies an absence of diligence, i.e. conduct that could have been avoided by a cautious individual, making it conduct that is worthy of being blamed. This is not the case with an innocent misrepresentation.[40] For instance, an individual who suffers a mild heart attack need not be aware of this fact, and one could hardly apportion blame for his failing to consult a doctor immediately in response to a passing infirmity. If, in applying for insurance years later, he responds in the negative to a question inquiring whether he has previously experienced any heart disease, the declaration would constitute an innocent misrepresentation. The exact consequences of such a misrepresentation cannot

35 Sec. 2 (2) CIDRA.

36 *Lowry/Rawlings*, above Fn. 34, Modern Law Review 75 (2012) 1110; similarly *Malcolm Clarke*, The Consumer Insurance Act 2012, Shipping & Transport International 9 (2) 11 – 13 (2012).

37 Sec. 3 (2) (c) CIDRA.

38 Sec. 3 (5) CIDRA.

39 *See* sec. 5 (3) CIDRA.

40 For a commensurate opposition to any extension of the insurer's remedies to cases of innocent misrepresentation, *see* also John Birds, *Birds' Modern Insurance Law*, 9th ed., London, Sweet & Maxwell, 2013, para. 17.15.2, p. 145.

be predicted with certainty at present. Under the former law, the insurer could avoid the contract; the issue would hinge solely on the question of whether the fact was relevant to the assessment of risk, not on the question of fault.[41] Given that the 2012 Act aims to soften the severe legal consequences associated with a *culpable breach* of a disclosure duty in consumer insurance contracts, it is unlikely that harsh consequences would result from a *blameless breach*, particularly since the insurance industry's attempts at self-regulation had already ruled out such outcomes for consumer insurance contracts.[42]

A misrepresentation is defined as deliberate or reckless where the consumer (i) knew that it was untrue or misleading, or did not care whether it was untrue or misleading, and (ii) knew that the information was relevant to the insurer, or did not care whether it was relevant to the insurer.[43] If the insurer establishes a deliberate or reckless misrepresentation, he can avoid the contract *ex tunc* and refuse all claims, without having to return any of the premiums paid.[44] For careless misrepresentations, these remedies are available to the insurer only when he would not have entered into the contract on any terms if the disclosure duty had been properly complied with; and in these cases the insured must return the paid premiums.[45] If, on proper disclosure of the facts, the insurer would have only entered into the contract on payment of higher premiums, he may proportionally reduce the amount to be paid on a claim.[46] Between these two poles is the situation where the properly informed insurer would have entered into the contract only on different terms (e.g. under the exclusion of certain risks); here the contract may be treated as if it had been entered into on those different terms.[47]

These rules contemplate a differentiated treatment based on the degree of fault, the hypothetical behaviour of the insurer in the event the true circumstances had been disclosed, and possible legal remedies. As such, they begin to approximate a number of the regulatory schemes recently adopted in

41 *See* sec. 20 (1) MIA; *Birds/Lynch/Milnes*, MacGillivray, above Fn. 29, margin note 16-009; *Merkin*, Colinvaux, above Fn. 12, margin note 6-030.

42 Under Rule 8.1.2R (1) of the Insurance Conduct of Business Sourcebook (ICOBS) of the Financial Services Authority (FSA), the rejection of a consumer policyholder's claim based on improper disclosure is "unreasonbable" if it relates to the "non-disclosure of a fact material to the risk which the policy-holder could not reasonably be expected to have disclosed." *See Robert Purves*, The Impact of FSA Regulation, in *Tyldesley*, above Fn. 14, S. 91 – 127 (123). The example of a mild heart attack given in the text would presumably fall under this provision.

43 Sec. 5 (2) CIDRA.

44 Schedule 1, part 1, sec. 2 (a) and (b) CIDRA.

45 Schedule 1, part 1, sec. 3 – 5 CIDRA.

46 Schedule 1, part 1, sec. 7 CIDRA.

47 Schedule 1, part 1, sec. 6 CIDRA.

continental European jurisdictions.[48] In particular, British law has as to this aspect bid farewell to the all-or-nothing approach.

3.2 Causation

Yet any convergence with European standards remains limited given the continuing harshness of a scheme that allows insurers to avoid contracts and, correspondingly, refuse performance for misrepresentations that relate to characteristics or circumstances that have no causal connection to the insurance claim at issue. In all of the various statutory configurations, the only determinative question is whether the insured's representation was relevant to the insurer's decision to enter the contract of insurance: whether or not the misrepresented characteristic or circumstance was causally linked to the loss that occurred has no significance.

Nevertheless, a regard for causality is for some cases set out in the Insurance Act 2015 (IA).[49] Specifically, when the insured can show that his non-compliance with a contractual term did not serve to increase the risk of the loss which later actually occurred, the insurer cannot rely on this non-compliance to limit his liability under the contract of insurance.[50] However, Sec 11 IA 2015 relates to the breach of a *contractual term*, whereas the obligation "not to make a misrepresentation" is a *statutory obligation*. It remains to be seen whether British courts are prepared to embrace an analogous application.[51] Such an interpretation is, however, supported by the general legal notion inherent to sec. 11 IA 2015, namely that an insured's breach of an obligation should limit the insurer's duty of performance only where the breach can be causally linked to the materialization of the risk.

Rejecting the analogy would produce inconsistent outcomes. Consider the following scenario: In purchasing a full coverage policy for his auto, a consumer represents that his car is normally parked in a garage. Assume further that he later forgets of this representation, parks his car on the street and begins to use his garage as a temporary storage place for his old furniture. After being involved in an auto accident on a subsequent vacation, he files an insurance claim to cover the costs of damage to the car. The insurer, however, refuses to make payment upon determining that the insured could not have been parking his car inside the – now otherwise occupied – garage. If the insurer incorporated the representation of the insured as a contractual term, i.e. that a garaged vehicle was being insured, the insurer's duty of performance would remain under sec. 11 IA given that the

48 *See* Art. 2:102 – 2:104 PEICL, above Fn. 7 with the associated Comments and Notes.

49 *See* above Fn. 30.

50 *See* secs. 11 (2) and (3) IA 2015.

51 For a discussion of analogous application by British courts *see* Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, Vol. II, Tübingen, Mohr Siebeck, 2001, pp. 1054 – 1057 and also pp. 1253 and 1254 on a prohibition of the rule's further extension.

misrepresentation cannot be causally linked to the insurance incident; yet if the representation was not incorporated into the contract and was instead used merely in setting the premium level, the absence of causality is of no consequence under the Consumer Insurance Act 2012. Under German law, the two situations would be treated identically under §§ 21 Para. 2 and 26 Para. 3 VVG, an approach that mirrors continental standards.[52]

3.3 Mandatory Law

Standing as a distinct similarity between the Act and continental-European law, the rules of the Act are, pursuant to sec. 10 CIDRA, unilaterally mandatory law in favour of the insured. Additionally, the insurer is prohibited from circumventing these rules by converting pre-contractual representations into contractual warranties that would carry harsh legal consequences for the insured as pointed out above.[53]

4 The Insurance Act 2015

All contracts for insurance that are entered into as of 12 August 2016 are subject to the Insurance Act 2015.[54] Specific to B2B policies, the Act regulates the obligation of the insured to fairly present the risk; further, as to all policies in general, it regulates warranties and other contractual conditions, fraudulent claims, the obligation of good faith and the mandatory character of certain provisions.

4.1 Pre-contractual Disclosure Duties in B2B Insurance

Already in the nature of its formulation, the pre-contractual duty of disclosure in the IA deviates significantly from that of CIDRA: Whereas the latter Act governing insurance contracts demands from the insured "*reasonable care not to make a misrepresentation*", thus a negative formulation prohibiting deception, in B2B insurance contracts the insured must "*make to the insurer a fair presentation of the risk*". Thus the insured has an affirmative duty to reasonably describe the risk. Similar to sec. 18 MIA, the insured must disclose all material circumstances that he knows or ought to know of; at a minimum he must provide the insurer with sufficient information so as to make a prudent insurer aware of

52 On German law *see* Christian Armbrüster, *Privatversicherungsrecht*, Tübingen, Mohr Siebeck 2013, margin notes 812 and 1140; for the European context Arts. 2:102 (5) and 4:202 (3) PEICL, above Fn. 7, in each case with comments and comparative notes.

53 Sec. 6 (2) CIDRA; on the legal consequences of a breach of warranty, above section I/3.

54 Compare Malcolm Clarke, *The London Insurance Market*, European Journal of Commercial Contract Law 7 (2015) 97-99 (97); Peter MacDonald Eggers, *The Insurance Act 2015: Successful Legislation? Yes and No*, Shipping & Transport International 10 (3) 8 – 15, 8 (2015).

the need to enquire further into circumstances having relevance for the risk.[55] Although the specific wording deviates from that of sec. 18 MIA, the result is likely to be the same in most instances.[56] As in the Marine Insurance Act of 1906, disclosure is unnecessary as to a number of circumstances, in particular circumstances known by the insurer and those tending to diminish the risk.[57]

In the area of many B2B policies, the insured's independent duty of "spontaneous" disclosure of risk-relevant circumstances is understandable in that the object of insurance, e.g. innovative goods or production processes, may be far more familiar to the insured than to either the insurer or the broker who is, in advance of the issuance of the policy, tasked with inspecting and assessing the particular risk and who is also expected to have sufficient knowledge of what is relevant for the insurer. B2B insurance can be distinguished from consumer insurance in both regards. Thus, it is not without justification that British law differentiates the insured's duties of disclosure depending on whether it is a B2B or B2C setting – even if it is the case that continental European standards generally do not make any such distinction.[58] In practice, the difference is not as large as it might at first seem. So long as contractual freedom is assured – such as that existing for large risks under § 210 *Versicherungsvertragsgesetz* (VVG – Insurance Contract Act)[59] – the treatment of a given situation on the Continent is likely to be the same as in Great Britain. The deviation from the European model will thus mostly affect B2B policies covering small and medium-sized risks.

4.2 Breach and Legal Remedy

As compared to the Marine Insurance Act, the new legislation also relaxes the legal consequences of a breach of disclosure duties. Whereas sec. 18 MIA gives the insured an unbounded right to avoid the contract and refuse all claims, under the new law all remedies are subject to the condition that but for the breach the insurer would either have not entered the contract or only done so on different terms.[60]

The legal remedies themselves are configured similar to those under CIDRA: In the event of a deliberate or reckless breach of the duty of disclosure the insurer can avoid the contract and refuse all claims, without needing to return any of the

55 Sec. 3 (4) IA 2015.

56 *MacDonald Eggers*, above Fn. 54, Shipping & Transport International 10 (3) 10 – 11 (2015); *Birds/Lynch/Milnes*, MacGillivray, above Fn. 29, margin note. 20-025.

57 Compare sec. 18 (3) MIA and sec. 3 (5) IA 2015.

58 Art. 2:102 PEICL, above Fn. 7, applies equally to B2B and B2C insurance policies; they may however be modified in B2B insurance for large risks, compare Art. 1:103 PEICL.

59 For a similar legal delineation in other European legal systems *see* notes N 13 and N 14 to Art. 1:103 PEICL, above Fn. 7.

60 Sec. 8 IA 2015.

premiums paid.[61] Below the threshold of recklessness we find a differentiated scheme similar to that of CIDRA. If the insurer would not have entered the contract, he can avoid the contract but must return all premiums paid. If the insurer would have entered the contract but charged higher premiums, the insurer may proportionately reduce the amount paid out on a claim. If the insurer would have entered the hypothetical contract but on different terms (particularly with additional risk exclusions), the contract is to be treated as if entered on those terms.[62] It is of note that these differentiated remedies apply to all breaches of the duty of disclosure that are neither deliberate nor reckless; thus, this also includes – unlike under CIDRA – innocent misrepresentations.[63]

Here as well there is no express requirement that the breach of the disclosure duty must relate to a fact that was causally connected to the later loss. And here too, it is uncertain whether the courts will derive a general principle from the above-discussed sec. 11 IA 2015. If not, then also here inconsistent outcomes will manifest themselves: Where the misrepresentation was incorporated as a contractual term but the material circumstance in question was not causally connected to the insurance incident, the insurer will not be able to raise the disclosure duty breach under sec. 11 IA 2015. Where, by contrast, the insurer merely took note of the misrepresentation – perhaps using the fact in setting the premium level – he will be able to assert all of the above-mentioned legal remedies despite the material circumstance at issue having no causal relevance.[64]

4.3 Warranties – Obligations

An orientation on European standards can also be observed in the area of warranties. The present text has already discussed the wide-spread practice whereby basis of contract clauses are used to give certain pre-contractual disclosures the status of affirmative warranties, and the text has similarly considered the harsh consequences of a breach of affirmative and promissory warranties.[65] In recent years, particularly the automatic and permanent loss of all prospective insurance coverage – regardless of whether the manifested risk relates to the breached warranty – has struck some courts as excessive. To a certain degree courts have revived insurance coverage where the breach of the warranty was cured prior to the loss.[66] The new legislation is not silent on this

61 Schedule 1, part 1, sec. 2 IA 2015.

62 Schedule 1, part 1, secs. 4-6 IA 2015.

63 Schedule 1, part 1, secs. 3 IA 2015 and in this regard Malcolm Combe, *The Insurance Act* 2015: Risky Business , Reform, Scots Law Times 2015 (14) 63-66 (65 f.).

64 Compare the text, above, preceding Fn. 47.

65 *See* the text, above, associated with footnotes 14-17.

66 Just how far this new orientation actually goes is not completely clear; an *obiter dictum* in *Sugar Hut Group Ltd. v Great Lakes Reinsurance (UK) plc.* [2010] EWHC 2636 = [2011] Lloyd's Rep. IR 198 (Comm.) has in part been interpreted as suggesting that insurance coverage is only suspended for the period of non-compliance, as argued by MacDonald Eggers, above Fn. 54, Shipping & Transport International 10 (3) 12 (2015); conversely,

issue: Pursuant to sec. 9 IA 2015, representations of the insured cannot be converted into a warranty by means of a contractual provision; as such, basis of contract clauses will no longer be effective.[67] Under sec. 16 (1) IA, this provision is unilaterally mandatory in favour of the insured. However, it remains unclear whether this precludes factually relevant affirmative warranties.

In any event, it is still possible to incorporate promissory warranties in which the insured pledges to undertake or refrain from certain future behaviour. The legal consequences of the breach of such warranties have, however, been significantly softened. On one hand, the insured will lose insurance coverage only for the period of time during which he is in breach of the warranty; as soon as the breach is cured, the insurance protection runs anew.[68] On the other hand, insurance coverage also exists for all insurance incidents occurring prior to the breach of the warranty.[69] Finally, at the initiation of the House of Lords, sec. 11 was introduced into the Act; accordingly, the insurer's liability cannot be excluded or limited where non-compliance with a warranty or some other contractual term could not have increased the risk of the loss which actually occurred.

The rules that have been summarized here are formulated in a complicated and highly detailed fashion, such that their relation with each other is far less than clear. Nonetheless, one sees a certain orientation on European standards. Under Art. 4:103 PEICL, the effectiveness of a clause that totally or partially exempts the insurer from liability depends on whether the loss was caused by non-compliance with a behavioural obligation ("precautionary measure"). However, a clause entitling the insurer to terminate the contract for breach of such an obligation is effective only when the breach was done with an intent to cause the loss or with a reckless disregard of this likelihood; by contrast, a negligent breach of warranty cannot be the basis for such a legal consequence in a B2B insurance contract under the PEICL. Here, although it has followed a different path in terms of the breach of pre-contractual duties of disclosure, British law continues to adhere to the all-or-nothing approach. Namely, also in cases of negligent and even innocent breaches of warranty, there is no inquiry made as to whether the insurer would have perhaps merely charged a higher premium in connection with the policy if he had known in advance of the looming breach.

This approach is not free of inconsistency. Given that contractual freedom is still enjoyed as regards B2B contracts, insurance brokers will shoulder great responsibility in the drafting and formulation of insurance contracts. They will have to ensure that insurance coverage is not lost also for innocent and negligent breaches of warranty, something that is readily prone to occur where the insured is a large business that employs many workers.

Merkin, Colinvaux, above Fn. 12, margin notes 7-060 and 7-048, adheres to the traditional understanding.

67 MacDonald Eggers, above Fn. 54, Shipping & Transport International 10 (3) 12 (2015).

68 Sec. 10 (2) IA 2015.

69 Sec. 10 (4) (a) IA 2015.

4.4 Mandatory Law

To the extent that B2C insurance contracts are governed by the mandatory law set out in the 2012 Act, the 2015 Act does not come into play. However, some of the provisions in the 2015 Act have a broader substantive scope than CIDRA, and as to these matters they thus regulate all insurance contracts, inclusive of B2C insurance policies. This holds true particularly for the legal consequences associated with a breach of warranty.[70] In cases where the 2015 Act creates rights for insured parties in consumer insurance contracts, the rights cannot be altered by agreement; that is to say, the relevant provisions are unilaterally mandatory in favour of the insured.[71]

As regards provisions of the 2015 Act that can be applied – or are exclusively applied – to B2B insurance contracts, they are governed by the principle of freedom of contract. The only exception here is the prohibition placed on basis of contract clauses, with this prohibition constituting mandatory law.[72] Freedom of contract ("contracting out") is, however, conditioned on the transparency of any contractual terms serving to disadvantage the insured:[73] not only must disadvantageous terms be clear and unambiguous as to their effect,[74] the insurer must also take sufficient steps to draw the insured's attention to them.[75] A contractual term that does not satisfy the conditions of transparency stipulated in the Act – these being detailed further in the Act – is of no effect if it would put the insured in a worse position than would otherwise be the case under the Act.

5 Conclusion

Since the 1990s, insurance contract law in Europe has been in a state of evolution. Many European countries have comprehensively revised their insurance contract laws or have even adopted completely new codes. This process of evolution has now also reached the United Kingdom. After long having left the matter to self-regulation, Acts passed in 2012 and 2015 have greatly amplified the importance of statutory law in this field. Two observations warrant being made in conclusion.

First, both Acts shine a spotlight on the United Kingdom's current legislative culture. Compared to the Marine Insurance Act of 1906, we observe a deterioration of statutory rules and a loss of internal comprehensibility. The MIA

70 *See* sec. 10 IA 2015 and text section IV/3.

71 *See* sec. 15 (1) IA 2015; *Birds/Lynch/Milnes*, above Fn. 29, margin note 20-058.

72 *See* sec. 9 and sec. 16 IA 2015.

73 Sec. 16 (2) IA 2015. *Birds/Lynch/Milnes*, above Fn. 29, margin note 20-059: "It is in most cases possible to contract out of the 2015 Act in non-consumer insurance."

74 Sec. 17 (3) IA 2015.

75 Sec. 17 (2) IA 2015.

is a legislative instrument stemming from an era still dominated by *Jeremy Bentham's* conception of legal codification;[76] the Act discernibly sought to regulate marine insurance in a single all-embracing statutory text that was comprehensible in itself and internally coherent. The new legislation, by contrast, has not only divided a singular subject into two separate Acts but has also partitioned the regulation of consumer insurance into two separate Acts; further still, it has severed the primary rules on conduct from the consequences attaching to their breach. It is particularly foreboding that, as described by many authors, the recently adopted Acts can be comprehended only as responses to existing case law and attempts at self-regulation. Notwithstanding the reforms achieved by the legislation, the Acts by no means signal a completely new beginning. They can be understood only by those familiar with the earlier law; thus, unlike a fresh codification, they fail to bring any relief to future generations of scholars and practitioners.

Second, in several important aspects the two Acts reflect a substantive convergence with European standards, as set forth in the Principles of European Insurance Contract Law. The approximation is more marked in the area of consumer insurance contracts than B2B insurance. Yet also in consumer insurance we see a noticeable discrepancy, namely the apparent insignificance attributed to the question of whether the loss is causally connected to the breach of the pre-contractual duty of disclosure. As regards B2B insurance, the liberal rules' broader scope of application – extending beyond large risks to medium-sized risks – stands as a significant difference to the European Principles and German law. Further, as regards breaches of warranty, the all-or-nothing approach and the applicability of remedies independent of an insured's degree of fault remain as noteworthy differences.

76 On the demand for codification as urged by Jeremy Bentham (1748 – 1832) and its impact on English law *see* Konrad Zweigert/Hein Kötz, *An Introduction to Comparative Law*, 3rd ed. Oxford OUP 1998, translated from German by Tony Weir, p. 197 seq.