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CONSUMER PROTECTION OF INSURANCE SERVICES IN ENGLISH LAW

REVIEW SCIENTIFIC PAPER

Abstract

In this paper, the author analyses the legal protection of consumers of insurance services under English law, with particular reference to the nature and scope of the pre-contractual duty of disclosure and provision of information. Proceeding from the current legal framework, which largely relies on regulatory rules, the author identifies certain structural shortcomings in legal certainty, transparency, and the effectiveness of consumer protection in the field of insurance. The central hypothesis of the paper is that such reliance on subordinate legislation, primarily administrative sources of law, rather than on comprehensive statutory regulation of the pre-contractual duty to inform, results in fragmented and less predictable consumer protection. For the purpose of obtaining a more complete perspective, the English approach is compared with the German legal system, in which the Insurance Contract Act provides a coherent, transparent, and consumer-accessible normative framework.

On the basis of the foregoing analysis, the final part of the paper proposes solutions that would enable more effective and legally certain protection of consumers of insurance services under English law.

Keywords: consumer protection in insurance services, pre-contractual disclosure, duty to inform, principle of utmost good faith (*bona fides*), English law.

I Introduction

Consumer protection is one of the fundamental postulates of modern contract law, particularly in the field of services of broader public interest, such as

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the insurance industry. Insurance contracts, owing to their specific structure, informational asymmetry, and relatively standardised content, place policyholders, as the weaker contractual parties, in a position of increased risk regarding comprehension and legal certainty.² Precisely for this reason, the manner in which a legal system regulates the mutual pre-contractual duty of disclosure and provision of information between contracting parties is of essential importance for ensuring transparency and effective protection of both parties, and consumers in particular.

In this domain, English law departs from the standard model of comprehensive statutory codification characteristic of continental legal systems. Rather than relying on clearly prescribed statutory provisions governing the respective duties of contracting parties in insurance contracts, it largely depends on a regulatory framework established by the *Financial Conduct Authority (FCA)*, primarily through the rules contained in the *Insurance: Conduct of Business Sourcebook (ICOBS)*.³ Such a solution raises questions concerning legal certainty for consumers, the effectiveness of mechanisms to reduce informational asymmetry, and consistency in the application and protection of consumer rights.

Proceeding from the principal hypothesis that a regulatory model grounded in the ICOBS results in fragmented and less predictable consumer protection within the sphere of insurance, to the extent that it is insufficient to ensure consistent and comprehensive protection, the author tends, through a thorough examination of the existing positive legal framework accompanied by a comparative legal analysis, to highlight the advantages of a model based on comprehensive statutory regulation, such as that found in German law, primarily through the German Insurance Contract Act.⁴ For that purpose, the paper is divided into three parts. The first part outlines the lengthy historical development of the regulation of contractual relations in insurance contracts, culminating in the most recent amendments introduced over the past decade and a half. The second part analyzes the duty of disclosure and provision of information owed mutually by the contracting parties, with particular reference to the rules governing this duty and the legal consequences of its breach. In the third part, drawing on the previous analysis of the normative logic and the identified structural division between the legislative and regulatory spheres, the author proposes specific reform directions and potential solutions for improving the English system of consumer protection in the field of insurance.

² Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja*, Beograd, 2015, 43.

³ Financial Conduct Authority, *Insurance: Conduct of Business Sourcebook* (hereinafter in footnotes: ICOBS), available at: <https://www.handbook.fca.org.uk/handbook/ICOBS/1/?view=chapter>, accessed on 15 July 2025.

⁴ German Insurance Contract Act of 2008 (*Versicherungsvertragsgesetz*)

II Normative Basis and the Developmental of the Regulation of Contractual Relations in Insurance

The development of insurance contract law in English law represents an example of the evolution of a branch of private law that long remained closely tied to commercial practice and judicial doctrine, before undergoing significant legislative transformations in the twentieth and twenty-first centuries, particularly with regard to consumer protection. Insurance contracts, especially marine insurance, emerged within the context of the rapid expansion of trade and the risks associated with the maritime transport of goods throughout the seventeenth and eighteenth centuries. Within such commercial relationships, pronounced informational asymmetry prevailed, whereby the insured typically possessed all facts material to the assessment of risk, while the insurer was required to act on the basis of limited information provided by the insured, who often failed to disclose facts of decisive importance.⁵ From this asymmetry arose the need to introduce a principle that would safeguard the integrity of the contractual relationship and ensure confidence in the insurance market.

Thus, the principle of *utmost good faith* gradually developed, the logical foundation for the establishment of this doctrine in English insurance contract law being found in the opinion of Lord Mansfield in *Carter v. Boehm*. Lord Mansfield articulated a general principle concerning the disclosure of information during negotiations for the conclusion of an insurance contract, the essence of which lies in the duty of the insured to disclose to the insurer, prior to the conclusion of the contract, all facts that may be regarded as material. In this manner, the foundation was laid for the duty of full and frank disclosure of material circumstances by the insured. This meant that the insured was required not only to answer truthfully the questions asked, but also voluntarily to disclose all circumstances that might influence the insurer's decision whether to accept the risk or to impose additional conditions on coverage.⁶

Over time, the principle of *utmost good faith* was elevated from a useful concept denoting particularly stringent standards in insurance negotiations to a foundational and organising principle of insurance law.⁷ This occurred through its codification in the Marine Insurance Act 1906, which prescribes that a contract of

⁵ John Birds, *Insurance law in the United Kingdom*, sixth edition, Alphen aan den Rijn, 2024, 22; Ben Foat, „Levelling the Playing Field – The Modernisation of Insurance Law in the United Kingdom“, *International In-house Counsel Journal*, Vol. 8, No. 31/2015, 2–3.

⁶ Howard Bennett, „The Three Ages of Utmost Good Faith“, *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (eds. Charles Mitchell, Stephen Watterson), London, 2020, 64–68; Jan Woloniecki, „The Duty of Utmost Good Faith in Insurance Law: Where Is It in the 21st Century?“, *Defense Counsel Journal*, Vol. 69, No. 1/2002, 63.

⁷ H. Bennett, 70.

marine insurance is “a contract based upon the utmost good faith” and that, if either party fails to observe the duty arising therefrom, the other party may rescind the contract.⁸ Although the act pertains to marine insurance, in practice it has been applied as a general point of reference for other forms of insurance as well.⁹ Thus, the insurance contract became a typical example of a contract of *utmost good faith*, subject to a special legal regime governing the disclosure of facts, whereby their non-disclosure or misrepresentation, even if unintentional, entitled the insurer to rescind the contract.¹⁰

However, such strictness gradually attracted criticism, particularly in the context of mass consumer contracts, where proposers were often unaware of the extent of their obligations and the consequences of their omissions. Concurrently, consumer law underwent substantial development as a response to the growing complexity of markets and the imbalance of power between consumers and commercial entities. The modern insurance market has changed considerably since the enactment of the 1906 Act, with contemporary practice characterised by sophisticated systems, procedures, and more complex data analysis, alongside an expanding range of insured risks and potentially available information. As a result, the existing legal framework failed to keep pace with these developments and did not reflect contemporary trends in consumer law. The act favoured insurers because it originated at a time when they occupied a weaker bargaining position in relation to insureds; accordingly, in cases of breach by the insured, insurers were given the opportunity to avoid the contract in its entirety, even where such a response was disproportionate to the breach.¹¹ For these reasons, the modern era has witnessed significant legislative progress in this field, particularly through the enactment of the Consumer Insurance Act and the Insurance Act.¹² Although these acts collectively

⁸ Marine Insurance Act 1906, Art. 17.

⁹ Paul Jaffe, „Reform of the Insurance Law of England and Wales-Separate Laws for the Different Needs of Businesses and Consumers“, *Tulane Law Review*, Vol. 87, No. 5/2013, 1083–1084.

¹⁰ The burden of identifying and disclosing material facts, namely, any fact that would influence the judgment of a prudent insurer in assessing the risk, rested upon the proposer. This rule applied even where no questions had been asked and therefore frequently led to unfair consequences. The essence of the problem lay in the circumstance that the average proposer was unaware of which facts the insurer considered relevant; nevertheless, a failure to disclose a material fact enabled the insurer to rescind the contract retroactively. Nurjannah Chew Li Hua, “The Doctrine of Utmost Good Faith: Back to Common Law to Move Forward?“, *Journal of Malaysian and Comparative Law*, Vol. 39, 2012, 10–11; Ozlem Gurses, “What Does ‘Utmost Good Faith’ Mean?“, *Insurance Law Journal*, Vol. 27, 2016, 124–126; B. Foat, 2.

¹¹ Andre Farrugia, Simon Grima, „A model to determine the need to modernise the regulation of the principle of utmost good faith“, *Journal of Financial Regulation and Compliance*, Vol. 29, No. 4/2021, 455; Daniel Vásquez-Vega, „A comparative analysis of utmost good faith in Colombian and English insurance law“, *EAFIT Journal of International Law*, Vol. 5, No. 02/2014, 86; B. Foat, 3.

¹² The Consumer Insurance (Disclosure and Representations) Act 2012 (hereinafter: CIDRA) and the Insurance Act 2015.

represent an upgrade to the previously applicable rules of the Marine Insurance Act, their purpose and scope of application differ. CIDRA applies exclusively to contracts concluded between consumers and insurers, whereas the Insurance Act governs business transactions, that is, commercial insurance contracts.¹³

The division of insurance rules between these two acts is intended to make a clear distinction between two separate regimes, each reflecting the specific nature of the relationship between the contracting parties.¹⁴ In this manner, a clear distinction is made, underscoring the premise that consumers must benefit from a higher level of protection through less onerous duties and clearer guidance, as opposed to commercial relationships in which a greater degree of knowledge and diligence is expected. Such differentiation contributes to enhanced legal certainty and transparency, while simultaneously requiring additional caution to ensure the coordinated operation of these sector-specific statutes in relation to numerous regulatory rules, thereby avoiding overlap and inconsistency.

CIDRA defines its scope of application by characterising a consumer insurance contract as one concluded between an insurer and “an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business, or profession”.¹⁵ Accordingly, the insured must be a consumer who is a natural person, and the principal purpose of concluding the contract must be non-commercial, i.e. unrelated to the individual’s business activities.¹⁶

Moreover, the statute clearly prescribes what is expected of consumers and the legal remedies available to insurers in the event of a consumer’s breach of the duty to inform. In this respect, a specific pre-contractual duty is introduced that

¹³ This division is largely the result of the transition undergone by insurance law under the influence of European Union law and consumer legislation. With the rapid expansion of consumer protection standards, the distinction between consumer and commercial insurance has gained increasing importance. The criterion of differentiation is mainly the nature of the risk, supplemented by the status of the insured. Accordingly, what confers a consumer character upon insurance is the private rather than commercial nature of the covered risk. Determining the consumer character of a contract on the basis of these criteria has significant practical implications, particularly because it avoids problematic situations that may arise from differing definitions of the concept of consumer. Nataša Petrović Tomić, *Pravo osiguranja – sistem*, Knjiga I, Belgrade, 2019, 285–286.

¹⁴ P. Jaffe, 1086–1088.

¹⁵ CIDRA, Art. 1. This formulation closely resembles that contained in the *Consumer Rights Act 2015*, where a consumer is defined as a natural person acting for purposes wholly or mainly outside that person’s trade, business, craft, or profession.

¹⁶ It should be noted that, in accordance with this understanding, the concept of consumer insurance may encompass so-called mixed-purpose transactions, where a person obtains insurance partly for business and partly for private purposes. Such a contract will be regarded as consumer insurance if the non-business purpose predominates in the particular case. The assessment is conducted in light of the factual circumstances of each individual case. Thus, for example, where a taxi driver uses a vehicle predominantly for transporting passengers and only occasionally for personal needs, the insurance will not be considered consumer insurance. N. Petrović Tomić (2015), 114.

differs from the duty applicable in the non-consumer market, thereby recognising the distinct insurance needs of natural persons acting as consumers in comparison with other entities. Opposite this redefined duty of the consumer, to exercise reasonable care during the pre-contractual stage so as not to make misrepresentations to the insurer, there is no corresponding statutory duty imposed upon insurers. Unlike the approach adopted in other legal systems, the insurer's pre-contractual duty to provide information is not expressly regulated by the relevant statute. Nevertheless, this does not mean that such a duty is entirely absent on the part of the insurer; rather, it is governed by other regulatory instruments. In this manner, two distinct legal regimes governing duties of disclosure have been established, with a separate regime applicable to each contracting party.

III Dual Legal Regime Governing the Pre-contractual Duty of Disclosure

The pre-contractual duty of disclosure in insurance contracts constitutes a key protective mechanism aimed at reducing the inherent informational asymmetry between the contracting parties – the insurer, as a professional, on the one hand, and the proposer, most often a consumer, on the other. Insurance is a specific type of legal transaction whose purpose and price are grounded in risk assessment, whereby the insurer depends on accurate and complete information, while the consumer frequently does not fully understand all elements of the service being purchased. Accordingly, the parties' respective pre-contractual duties of disclosure are of decisive importance for transparency, protection, and balance within the contractual relationship. They ensure that the consumer makes an informed decision on the basis of all known circumstances, while simultaneously protecting the insurer from inaccurate presentations of risk. In this sense, the duty is not merely an instrument for achieving balance in the contractual relationship but also a foundation for a legally valid and sustainable insurance contract. For these reasons, the existence of a clear yet appropriately balanced normative framework governing pre-contractual disclosure is essential to the stability of the insurance relationship.¹⁷

Within this context, English law has developed a dual legal regime, one applicable to consumers and another to insurers, with the aim of ensuring effective protection for both parties, while allocating responsibility in accordance with the

¹⁷ Robert Cooter, Thomas Ulen, *Law and Economics*, 6th edition, Boston, 2016, 41; David Schwartz, „Resolving the Disclosure Puzzle in Insurance Law“, *Business Law Review*, Vol. 6/2007, 180; Ana Keglević, „Pre-contractual Information Duty and Unfair Contract Terms – Open questions and dilemmas –“ *Insurer's Precontractual Information Duty*, Turkish Chapter of AIDA, Istanbul, 2013, 81; Ana Keglević, *Građansko-pravni aspekti obveze obavještanja kod potrošačkog ugovora o osiguranju*, doktorski rad, Pravni fakultet Univerziteta u Zagrebu, Zagreb, 2012, 8–9.

actual capacities and reasonable expectations of each participant in the contractual relationship. Such an approach, however, raises a number of issues concerning the coherence of the existing regimes, their practical application, and their overall effectiveness.

1. The Consumer's Duty to Disclose Information to the Insurer

Prior to the enactment of the Consumer Insurance, the principle of utmost good faith served as the guiding standard in regulating the duty of disclosure. The policyholder was required to disclose all facts that might influence a prudent insurer's assessment of the risk, and this duty existed regardless of whether the insurer had made any specific questions for that purpose. The justification for such a broadly formulated duty lay in the assumption that the policyholder had full knowledge of the facts material to the risk assessment, in contrast to the insurer, who was presumed to know none. Over time, however, the question arose as to how a policyholder could reasonably be expected to identify which facts were material to risk assessment. Recognition of this problem led to the development of a strongly consumer-oriented practice, as well as significant legislative advances in this area.¹⁸

The entry into force of CIDRA marked a turning point in the pre-contractual disclosure obligations owed to insurers by proposers. The previous duty requiring policyholders voluntarily to disclose all material facts impacting the decision of a prudent insurer was abolished and replaced with a new, more limited obligation requiring consumers "to take reasonable care not to make a misrepresentation to the insurer".¹⁹ This means that consumers are no longer obliged to voluntarily disclose information, instead, they must take reasonable care to provide accurate and complete answers to the insurer's questions.²⁰ Whether reasonable care has been exercised is assessed in light of all relevant circumstances, several of which are identified *exempli causa* in the statute: the type of consumer insurance and its target market; any relevant explanatory material produced, published, or endorsed by the insurer; the clarity and specificity of the insurer's questions; in cases relating to renewal or variation of a consumer insurance contract, the extent to which the

¹⁸ Ana Keglević Steffek, „Trust and Transparency in Insurance Contract Law: European Regulation and Comparison of Laws“, *Cambridge Yearbook of European Legal Studies*, Vol. 24, 2022, 331–332; John Lowry, „Whither the Duty of Good Faith in UK Insurance Contracts“, *Connecticut Insurance Law Journal*, Vol. 16, No. 1/2009, 99. It may be observed that the traditional duty of the insured to inform the insurer of the risk has gradually been replaced, or at least supplemented, by the insurer's duty to obtain material information independently, that is, to take an active role in identifying the needs of the particular client. Herman Cousy, „The Principles of European Insurance Contract Law: the Duty of Disclosure and the Aggravation of Risk“, *ERA Forum 9 (Suppl 1)*, 2008, 123.

¹⁹ CIDRA, Section 2.

²⁰ N. Petrović Tomić, 254.

insurer clearly communicated the importance of responding to such questions; and whether an insurance agent acted on behalf of the consumer. The applicable standard is that of the reasonable consumer. The assessment of whether a consumer meets this standard is primarily objective, subject to two exceptions requiring consideration of the consumer's personal (subjective) characteristics. First, where the insurer knew or ought reasonably to have known that the consumer had particular traits or was subject to specific circumstances, those factors must be taken into account. Second, a deliberate misrepresentation is invariably regarded as a failure to exercise reasonable care. These exceptions ensure that the assessment captures consumers with specialised knowledge or skills, as well as those acting in bad faith, while still allowing room for reasonable error on the part of the average consumer when making a decision.²¹

The shift away from the earlier model, under which policyholders were expected to volunteer facts material to risk assessment, represents a significant easing of the consumer's burden. The consumer's duty now essentially consists in reading the insurer's questions with reasonable care and answering them accurately and as fully as possible. The consumer no longer needs to be concerned about omitting a material fact, since it is the insurer who asks questions presumed to be material to the assessment of risk.²² In this way, numerous obstacles in the insurance market, most notably informational asymmetry are mitigated, while simultaneously enabling insurance services to be tailored to the needs of individual consumers through such a mechanism.²³

If a consumer breaches the duty of disclosure, the result is a misrepresentation of circumstances material to the assessment of risk. The determination of whether a misrepresentation has occurred is governed by common law and supported by substantial case law. It is frequently emphasised that even a statement that is literally true may constitute a misrepresentation if it is incomplete.²⁴ In practice, this issue is particularly significant at the stage of contract renewal, when the consumer is required to confirm or amend previously provided information. In this case, the statute expressly provides that a failure to do so may constitute a misrepresentation.²⁵

²¹ CIDRA, Section 3; *Consumer Insurance (Disclosure and Representations) Bill [HL]*; (hereinafter: CIDRA Bill), para. 30, available at: <https://publications.parliament.uk/pa/bills/lbill/2010-2012/0068/en/2012068en.htm>, accessed: 27 July 2025.

²² N. Petrović Tomić (2015), 254; A similar solution exists in German law. Under Art. 19(1) of the *Versicherungsvertragsgesetz*, the policyholder must disclose all circumstances material to the insurer's decision whether to enter into the contract on the agreed terms. This obligation is fulfilled by responding to questions expressly posed by the insurer in written form, most commonly through questionnaires specifically designed for that purpose. Manfred Wandt, Kevin Bork, "Disclosure Duties in German Insurance Contract Law", *Zeitschrift für die gesamte Versicherungswissenschaft*, Vol. 109/2020, 82–83.

²³ A. Keglević Steffek, 337.

²⁴ CIDRA Bill, para. 23.

²⁵ CIDRA, Section 2.

However, the breach of the duty of disclosure in the form of a misrepresentation of circumstances material to the assessment of risk will not, in itself, be sufficient to entitle the insurer to a remedy for the protection of its interests. In addition to the breach, a further requirement must be satisfied, namely, the misrepresentation must be presumed to have influenced the insurer's decision whether to accept the risk and on what terms.²⁶ The insurer must demonstrate that it would not have entered into the contract, or would have done so only on materially different terms, had the misrepresentation not occurred. This entails proof of the insurer's actual reliance on the consumer's statement, rather than simply establishing the hypothetical relevance of the statement to a prudent insurer.²⁷

With respect to the legal consequences of misrepresentation of circumstances material to the assessment of risk, a clear shift is noticeable from the traditional "all-or-nothing" approach to a "proportionality-based system". The all-or-nothing rule rests on the view that a breach of the duty of disclosure renders the parties' consent defective, with the consequence that avoidance of the contract is the only available remedy. On the other hand, the principle of proportionality rejects this rigid approach in favour of a more economically rational model based on balancing the actual risk against the level of the premium. Subject to certain exceptions and depending on the nature of the breach, the principle of proportionality requires that the contract be amended or adjusted in proportion to the degree of fault. It can be concluded that the legislature's evident intention was to promote mutual trust and the continuation of the contractual relationship, even under modified terms relating to the premium or other contractual elements.²⁸

For the principle of proportionality to apply, it is necessary, once a breach of the duty of disclosure has been established, to determine the consumer's subjective attitude toward the accuracy of the given information. The remedies available to the insurer depend accordingly on the consumer's state of mind. Where the misrepresentation is honest and reasonable (*reasonable misrepresentation*), the insurer may not refuse payment after the insured event has occurred and must satisfy the

²⁶ CIDRA, Section 4.

²⁷ The statute effectively codifies the legal position articulated in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] AC 501. It reflects the view that, for an insurer successfully to rely on misrepresentation, it is not sufficient that the misrepresented fact be material; the insurer must also demonstrate that the statement induced it to enter into the contract on those terms. In other words, it is insufficient that a hypothetical prudent insurer might have been influenced by the inaccurate information, there must be a decisive effect on the actual insurer's decision for the misrepresentation to be regarded as material. It is further emphasised that recognising liability for misrepresentation where the will of the particular insurer was unaffected would be contrary to common sense and fairness. Paul Walker, "Non-disclosure: Some Comparisons", *Victoria University of Wellington Law Review*, Vol. 26/1996, 832; Laura Reeves, "The Duty of Pre-Contractual Disclosure in English Insurance Law: Past and Future – Does the Law Need to be Changed?", *Southampton Student Law Review*, Vol. 5/2015, 3.

²⁸ A. Keglević Steffek, 341.

claim. In such cases, the consumer is deemed to have acted with the reasonable care expected of a reasonable consumer, taking into account relevant objective circumstances; subjective characteristics are considered only if known, or ought reasonably to have been known, to the insurer. Where the misrepresentation results from the consumer's careless misrepresentation, the insurer is entitled to a proportionate remedy determined by how it would have acted had accurate information been provided. If the insurer hadn't entered into the contract, it may rescind the contract and return the premiums paid. Conversely, if it had been contracted on different terms, the policy is treated as having been concluded on those terms. Finally, where the misrepresentation is deliberate or reckless, the insurer may rescind the contract and reject the claim, retaining the premiums unless doing so would be unfair to the consumer. To establish that a misrepresentation was deliberate or reckless, it must be proven, on the basis of all relevant circumstances, that the consumer 1) either knew the statement was untrue or misleading, or was indifferent as to whether it was true; and 2) knew the fact in question was relevant to the insurer, or was indifferent as to its relevance. The burden of proving such misrepresentation rests with the insurer. However, the statute provides for rebuttable presumptions: 1) that the consumer possessed the knowledge reasonably expected of a reasonable consumer; and 2) that the consumer knew that a fact forming the subject of a clear and specific question was material to the insurer's decision whether to conclude the contract.²⁹

In this manner, a clear framework has been established in which legal consequences are determined by the degree of the insured's fault, while the principle of proportionality safeguards fairness and the interests of both contracting parties. Because insurers are able to adjust the contract upon becoming aware of previously undisclosed risks, either by reducing the indemnity or increasing the premium, they are less compelled to invest time and resources in exhaustive pre-contractual investigations aimed at avoiding avoidance or rescission. For this reason, the principle of proportionality represents a mutually beneficial solution for both parties.³⁰

²⁹ CIDRA, Section 5, Schedule 1; CIDRA Bill, paras. 36–40. Andrew Hutchinson, Helena Stoop, „Misrepresentation in Consumer Insurance: The United Kingdom Legislature Opts for a Reasonable Consumer Standard“, *South African Law Journal*, Vol. 130, No. 4/2013, 710–712.

³⁰ A. Keglević Steffek, 346. German law likewise embraces the principle of proportionality, subject to certain specific features. Where a misrepresentation results from ordinary negligence, the insurer is entitled to withdraw from the contract in accordance with the general rules of civil law governing termination. Conversely, where the misrepresentation is intentional or the result of gross negligence, the insurer may terminate the contract subject to one month's notice. However, the right to terminate may be exercised only where the contract cannot be adjusted to reflect the undisclosed circumstances, as the principle of proportionality takes precedence under German law. If, at the time of conclusion, the insurer would have agreed to the contract on different terms had it been aware of the relevant facts, it is obliged to adjust the contract accordingly, thereby incorporating those facts into the contractual framework. For the principle of proportionality to apply, two additional conditions must be satisfied: 1) a causal link must exist between the undisclosed circumstance and the assessment of risk; and 2) the insurer must have been willing to

2. The Insurer's Duty to Inform the Consumer

The insurer's pre-contractual duties are primarily directed toward protecting all prospective policyholders, and consumers in particular. The policyholder represents the weaker party in the contractual relationship and, as such, warrants special protection, being typically in a weaker economic position and having less knowledge of insurance services than the insurer. The primary form of protection lies in the provision of all necessary information enabling the prospective policyholder to make an informed decision. In this regard, the insurer is under a duty to provide such information not only prior to the conclusion of the contract but also throughout its duration. This duty arises both from specific statutory provisions governing insurance and, in their absence, from general legal principles such as good faith and liability for damage incurred during the negotiation phase. Nevertheless, given the complexity and significance of this subject matter, general principles alone are insufficient, thereby precise regulation through specific rules is needed.³¹

Most legal systems have opted for a clear statutory regulation of this duty. For example, under the German Insurance Contract Act, pre-contractual advice and disclosure are positioned as a central component of policyholder protection. The duty to inform applies to all insurance contracts regardless of the specific type of cover, and for the purposes of protective provisions the legislature makes no difference between natural and legal persons. The duty is limited to cases involving large risks. The importance attributed to pre-contractual disclosure in German law is further evidenced by the adoption of the Regulation on Information Duties, which elaborates the statutory obligation by specifying its precise scope and content.³²

In contrast to the clear and detailed solution adopted in German law, English law follows a different approach to regulating the insurer's pre-contractual duty. Namely, the Consumer Insurance (Disclosure and Representations) Act does not regulate the insurer's pre-contractual duty of disclosure at all, focusing instead exclusively on alleviating the consumer's position by redefining the consumer's duty in relation to the presentation of circumstances material to the assessment of risk. Consequently, the principle of utmost good faith originating in the Marine Insurance Act 1906

conclude the contract, albeit on modified terms. Robert Koch, "German Reform of Insurance Contract Law", *European Journal of Commercial Contract Law*, Vol. 2, No. 3/2010, 169–170.

³¹ N. Petrović Tomić (2015), 127; Samim Ünan, "Insurer's Pre-contractual Duties to Inform and Warn/Advise", *Insurer's Precontractual Information Duty*, Turkish Chapter of AIDA, Istanbul, 2013, 9–10; A. Keglević (2012), 8.

³² *Verordnung über Informationspflichten bei Versicherungsverträgen* (2008); Nataša Petrović Tomić, "Informisanje korisnika usluga osiguranja u nemačkom pravu", *Tokovi osiguranja*, No. 4/2015, 5–18; M. Wandt, K. Bork, 88–92; R. Koch, 166–168. A similar logic is reflected in *the Principles of European Insurance Contract Law*, which provides in Article 1:101 that they apply where "the contracting parties, notwithstanding any restrictions on the choice of applicable law under private international law, agree that these Principles shall govern their contract".

continues to apply to the insurer's duties in the pre-contractual phase, as well as to the relationship between the contracting parties following the conclusion of the contract. A possible explanation for this legislative choice lies in business practice, where it is widely considered more effective to shape insurers' conduct in accordance with standards of transparency and fairness embedded in self-regulatory instruments and rules governing insurance activities, rather than through rigid statutory provisions.³³

In accordance with the principle of utmost good faith, the insurer must act so as not to withhold from the consumer any information considered material to the conclusion of the contract. Therefore, even in the absence of a specific inquiry from the counterparty, the insurer is obliged, prior to contract formation, to disclose all circumstances material to the contract and to refrain from any misrepresentation.³⁴

Since compliance with the insurer's obligation under the principle of utmost good faith does not entirely resolve the problem of informational asymmetry on the consumer's side, further measures proved necessary. In order to ensure the fullest possible consumer protection, business practice, and subsequently insurance market regulators, sought solutions in clearer and more stringent regulatory instruments and rules governing insurance activities. As a result, nearly a decade prior to the enactment of the Consumer Insurance (Disclosure and Representations) Act, the *Financial Services Authority* (FSA) was established as the single statutory regulator of financial services. It issued a handbook containing specific rules for consumer insurance, entitled the *Insurance Conduct of Business Sourcebook – Rules on Non-disclosure and Misrepresentation (FSA Handbook – ICOBS Rules)*,³⁵ which, *inter alia*, required insurers to make clear questions concerning all circumstances material to the formation of the insurance contract. Following the abolition of the Financial Services Authority in 2013, part of its mandate was transferred to the *Financial Conduct Authority (FCA)*, which now supervises the provision of financial services and the conduct of financial institutions in the United Kingdom with the aim of protecting consumers and safeguarding market integrity. A revised Insurance Conduct of Business Sourcebook was subsequently adopted as part of the FCA Handbook, issued pursuant to the Financial Services Act.³⁶

The Insurance Conduct of Business Sourcebook contains detailed rules governing insurers' conduct in their dealings with consumers on the United Kingdom insurance market. Insurers are required to act honestly, fairly, and professionally in accordance

³³ A. Keglević Steffek, 324–325.

³⁴ H. Bennett, 70–74.

³⁵ Financial Services Authority, *Insurance Conduct of Business Sourcebook – Rules on Non-disclosure and Misrepresentation (FSA Handbook – ICOBS Rules)*, available at: <https://www.handbook.fca.org.uk/handbook/ICOB/2/?date=2005-01-14&view=chapter&timeline=True>, accessed on 6 August 2025.

³⁶ *Financial Services Act 2021*. A. Keglević Steffek, 326; Andrew Schmulow, Baladev Dayaram, Sian Mullen, "Consumer Protection in Insurance Contracts: The Need for a 'Treating Customers Fairly' Regime", *The International Review of Financial Consumers*, Vol. 8, No. 1/2023, 60–62.

with their customers' best interests at every stage of the contractual relationship, from the initiation of negotiations through contract formation to the potential occurrence of the insured event.³⁷ Moreover, all information provided to consumers, including advertising and promotional statements, must be clear, fair, and not misleading.³⁸ Prior to the conclusion of the contract, the insurer must present the consumer with all necessary information regarding the service, including: the main characteristics of the services; the scope of cover and exclusions; the duration of the contract; the premium, and the terms of payment.³⁹ Insurers are also required to supply a standardised document containing concise and easily comprehensible information about the service, thereby enabling consumers to compare different products more readily and to make an informed decision.⁴⁰ Additionally, a consumer must further be afforded a simple and timely means of exercising its contractual rights, including the right to cancel the contract within a specified period, as well as clear information concerning complaint procedures.⁴¹ Finally, specific conduct standards relating to product governance are prescribed, including the duty of insurers to develop and distribute products aligned with the needs of the target market, thereby providing additional protection against products that are unsuitable for consumers' interests and requirements.⁴²

In addition to the Handbook, an important role within the system of consumer protection in insurance services is played by the *Financial Ombudsman Service (FOS)*, an independent and impartial body whose principal function is to resolve complaints brought by consumers against financial service providers, including insurers. In fulfilling this role, it regularly interprets rules and standards of conduct, including those contained in the Insurance Conduct of Business Sourcebook, in light of fairness and the consumer's best interests. In this way, it contributes to the development of consumer-protection practice, as its stances and dispute-resolution approaches frequently affect insurers' behaviour as well as the interpretation of rules by legislators and market regulators. Thus, many positions first adopted in its practice have subsequently considerably impacted the shaping of the Consumer Insurance (Disclosure and Representations) Act. The Financial Ombudsman Service thus constitutes a key alternative dispute resolution mechanism within the insurance sector, enabling disputes to be resolved swiftly, efficiently, and accessibly without recourse to judicial proceedings. Therefore, its role is not merely protective, but also preventive and corrective win relation to insurers' behaviour.⁴³

³⁷ ICOBS, Art. 2.5.1R.

³⁸ ICOBS, Art. 2.2.2R.

³⁹ ICOBS, Art. 6.1.5R.

⁴⁰ ICOBS, Art. 6, annex 3.

⁴¹ ICOBS, Arts. 7.1.1R and 7.2.1R.

⁴² ICOBS, Arts. 4.2A.6R and 4.2A.13R.

⁴³ Ugochi Amajuoyi, Andrea Fejős, "Mind the Consumer Protection Gap: the UK Financial Ombudsman Service, Fairness and Reasonableness, and the Law", *Protecting Financial Consumers in Europe Comparative*

IV Effectiveness of Structural Division and Regulatory (In)Coherence in Consumer Protection

In light of the foregoing analysis, consumer protection in English insurance law is characterised by a pronounced structural division between the legislative and regulatory spheres. On the one hand, the Consumer Insurance (Disclosure and Representations) Act, as a sector-specific statute, governs matters relating to the consumer's duty to provide accurate and complete information prior to the conclusion of the contract. On the other hand, the regulatory framework governing insurers' behaviour stems primarily from the rules contained in the Insurance Conduct of Business Sourcebook (ICOBs). Such an arrangement results in a dual normative framework - one directed at consumer duties and the other at insurers' obligations. These frameworks are not necessarily systemically aligned, nor are they, as is often the case in continental legal systems, structured within a single sector-specific legislative instrument, as is often the case in continental legal systems.

German law, as a standard representative of the continental legal tradition, offers a more coherent model based on the integration of the principal consumer-protection rules within a statutory framework, most notably through the German Insurance Contract Act. The Act directly and transparently prescribes insurers' obligations to provide all material information prior to contract formation, including the insurance product information document, in accordance with rules harmonised at the EU level. This approach enhances legal certainty and transparency for both consumers and insurers as service providers.⁴⁴

By contrast, the English system sets regulatory rules outside the Consumer Insurance (Disclosure and Representations) Act, which may give rise to legal fragmentation and reduced predictability for end users. Although the rules contained in the Insurance Conduct of Business Sourcebook are binding, their formal status remains subordinate legislation, which may raise additional questions regarding the hierarchy of legal sources and the protection of consumer rights in the event of a dispute.

Nevertheless, this division may also offer certain advantages in terms of flexibility and responsiveness to market developments, as the Financial Conduct Authority (FCA), acting as regulator, is able to intervene and amend rules of conduct more rapidly than would be possible through the ordinary legislative process. In this respect, the effectiveness of structural division depends both on the stability of the regulatory regime and on the average consumer's ability to understand the distinction between statutory and regulatory protection. Accordingly, although

Perspectives and Policy Choices (eds. Piotr Tereszkievicz, Mariusz Golecki), Brill Nijhoff, 2023, 259–264; Mary Donnelly, "The Financial Services Ombudsman: Asking the Existential Question", *Dublin University Law Journal*, Vol. 35/2012, 231–234; B. Foat, 5–6.

⁴⁴ M. Wandt, K. Bork, 88–92; R. Koch, 166–168.

consumer protection in English insurance law is substantively robust, structural division and regulatory dispersion may undermine its practical operation, particularly when compared with models founded upon a unified and systematised normative basis.

The complexity of this protective framework is especially evident in regulatory interventions such as the FCA's 2017–2018 initiative known as *Renewal Transparency*. Implemented through amendments to the Insurance Conduct of Business Sourcebook, the intervention aimed to enhance the transparency of renewal offers and thereby protect consumers from the harmful effects of remaining with the same insurer without actively comparing alternative offers. It was found that many insurers failed to present the previous year's premium clearly, nor did they inform consumers of the possibility of renewing their policies on more favourable terms with other insurers. Consequently, insurers were required to prominently display the amount of the prior year's premium in the renewal offers and to include a message encouraging consumers to reassess their needs and consider alternative market options.⁴⁵

This practice demonstrates the capacity of regulatory flexibility to adapt consumer protection to real market problems, while simultaneously illustrating that, without such flexibility on the part of the Financial Conduct Authority, consumer protection would remain incomplete. Therefore, it may be concluded that this model depends primarily on regulatory initiative rather than on a stable statutory framework, meaning that consumers may often remain insufficiently protected where the regulator fails to act in a timely manner.

In light of these challenges, a number of institutional and normative solutions may be considered with a view to enhancing consumer protection. First, the integration of core sectoral rules, such as the standards contained in the Insurance Conduct of Business Sourcebook, into a single legislative act, for example through amendments to the Consumer Insurance (Disclosure and Representations) Act, could contribute to greater legal certainty and clarity. Furthermore, although insurers are currently expected to communicate information in accordance with the principle that it be "clear, fair and not misleading",⁴⁶ the introduction of an explicit statutory duty to provide key information prior to contract formation, modeled on the German insurance product information sheet, would further reduce informational asymmetry. The need to reinforce the insurer's duty of disclosure becomes particularly evident in light of the fact that English insurance regulation has traditionally relied on substantive regulation, focusing rules on contractual content and the conduct of market actors, rather than on transparency as a primary instrument of consumer protection. This historical tendency, stemming from the early development of insurance

⁴⁵ Financial Conduct Authority, Evaluation Paper 19/1: An evaluation of our general insurance renewal transparency intervention, 1–5, available at: <https://www.fca.org.uk/publication/corporate/ep19-1.pdf>, accessed: 31 July 2025.

⁴⁶ ICOBS, Art. 2.2.2R.

as a specialised professional activity, contributed to the prolonged neglect of informed consumer consent and to the relatively passive role of supervisory bodies in relation to evolving market dynamics. Only in more recent reforms, including initiatives undertaken by the Financial Conduct Authority, has a shift begun toward a model that values clarity and accessibility of information as prerequisites for fairness in contractual relations.⁴⁷ Moreover, strengthening institutional accountability by introducing a statutory obligation for the Financial Conduct Authority to report regularly on systemic risks and potentially harmful practices within the insurance sector would facilitate proactive, rather than reactive consumer protection. Such reports would assist in identifying practices likely to result in consumer harm even before they materialise through complaints submitted to the ombudsman or through judicial proceedings. Finally, consideration should be given to establishing a coordinating body tasked with monitoring the alignment of legislative and regulatory frameworks, particularly in the context of digitalisation, the deployment of artificial intelligence, and emerging insurance services, as an important step toward a more comprehensive and coherent system of protection.⁴⁸

Although the proposed reforms would require systemic intervention and a high degree of coordination between legislative and regulatory bodies, they would also present an opportunity to transform the structural division of the English system from a source of complexity into a reliable source of flexibility and adaptability. Consumer protection in the field of insurance would become not only normatively more accessible but also functionally more effective.

Therefore, it may be concluded that the effectiveness of structural division in English insurance law depends primarily on the quality of regulatory coherence and the clarity of the relationship between statutory and subordinate sources of law. While regulatory pluralism may enable rapid responses to market developments and innovation within the insurance sector, it simultaneously carries the risk of ambiguity, overlap, and impeded access to rights for consumers as the end users of insurance services. Although the English system provides materially high standards of protection, its practical effectiveness depends on the coherence and accessibility of those standards, and thus on the willingness of institutions to formally structure, harmonise, and make the regulatory framework more transparent for consumers.

⁴⁷ Daniel Schwarcz, "Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection", *UCLA Law Review*, Vol. 61/2014, 456.

⁴⁸ Zofia Bednarz, Kayleen Manwaring, "Keeping the (Good) Faith: Implications of Emerging Technologies for Consumer Insurance Contracts", *Sydney Law Review*, Vol. 43, No. 4/2021, 486–487; Paul Klumpes, "Coordination of cybersecurity risk management in the U.K. insurance sector", *The Geneva Papers on Risk and Insurance – Issues and Practice*, Vol. 48/2023, 336–339.

V Conclusion

The development of English insurance contract law in recent decades reflects a gradual yet decisive departure from the traditional approach characterised by strict formalism and a strong reliance on the principle of utmost good faith, in favour of a more modern and balanced regime for the protection of contracting parties, and consumers in particular. The adoption of the Consumer Insurance (Disclosure and Representations) Act, as well as the Insurance Act, represents a pivotal step in this direction, not only as an expression of legislative awareness of the need to enhance protection within the insurance market, but also as part of a broader transformation in the understanding of fairness and reasonableness in contractual relations.

A detailed examination of the duties of both contracting parties to an insurance contract, namely, the consumer's duty to provide accurate and complete information and the insurer's duty to communicate transparently and refrain from misleading the consumer, reveals the legislature's intention to achieve a balanced allocation of risk and responsibility. This balance constitutes the foundation of trust in insurance as a distinctive service whose primary function is the protection, while simultaneously defining the boundaries within which legal rules must safeguard the weaker party without undermining market dynamics and efficiency.

The analysis of the regulatory framework further demonstrates that, notwithstanding the high level of protection provided by the English insurance system, its structural division and regulatory complexity may impede the effective exercise of consumer rights. Terminological inconsistencies, fragmentation of legal sources, and the absence of institutional coordination call for systemic adjustments that could enhance the accessibility of legal protection, improve predictability, and strengthen confidence in the regulatory framework. In this respect, the English model may serve both as an illustration of the opportunities and as a reminder of the challenges inherent in constructing a modern system of insurance law, one in which legal certainty, consumer protection, and market flexibility are not competing values, but interdependent elements of a sustainable and contemporary legal framework.

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