

What is Scandinavian Law? English Lawyers Look at Swedish and Norwegian Insurance Law

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1 Introduction

The Law Commission for England and Wales and the Scottish Law Commission are carrying out a review of insurance contract law.³ They published a first consultation paper in the summer of 2007. This deals principally with non-disclosure and misrepresentation by the insured and with warranties in insurance contracts. The invitation to contribute to the conference on “What is Scandinavian law?” came as a welcome surprise. It is inevitable that if a lawyer from outside the Nordic countries is asked to comment on the characteristics of Scandinavian law, the result will be an exercise in comparing Scandinavian law to other legal systems, typically the one in which the lawyer was trained. For us, the invitation provided a valuable opportunity to look in some detail at how the topics we have been considering at the Law Commission are dealt with in the Nordic countries, and in particular under the recent Swedish Insurance Contracts Act of 2005.

Unfortunately, what we have been able to find out is limited because we do not speak any of the Scandinavian languages and, though impressive work has been done in translating the laws into English, we have only managed to find English translations of the legislation from Sweden⁴ and Norway.⁵ So we will confine our remarks to them. Even for these laws we are heavily indebted to the secondary sources which are referred to in the footnotes.

Even comparing the legislation to English law is not a straightforward exercise. First, the target is a moving one. Insurance law is a dynamic subject, one that is constantly changing and developing. Thus in Sweden, while the 2005 Act finally replaced the Insurance Act of 1927, many of the consumer provisions derive directly from the Consumer Insurance Act of 1980.⁶ On the UK side the picture is even more complicated. As we will explain below, the positive law has in many respects been superseded by regulatory requirements imposed by our Financial Services Authority under powers granted by the Financial Services and Markets Act 2000, and by the requirements of the Financial Ombudsman Service. Further, the Law Commission's consultation paper contains proposals on how the law might be updated.⁷ So we have to compare Scandinavian law not just to our law but also to our regulatory requirements and our reform proposals. We would like also to look at the regulatory requirements in Sweden and Norway but we have not as yet been able to do so.

3 *Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured* (LCCP 182/SLCDP 134, 2007) Details of the project as a whole can be found at “www.lawcom.gov.uk/insurance_contract.htm”.

4 We have used a translation of the Insurance Contracts Act 2005 provided by TransLegal Language Services.

5 Ministry of Justice translation of Act of 16 June 1989 No 69: Act relating to Insurance Contracts, available at “[www.cefor.no/insurance_cond/documents/InsuranceContractsAct\(rev2006\).doc](http://www.cefor.no/insurance_cond/documents/InsuranceContractsAct(rev2006).doc)”.

6 A translation of the 1980 Act (‘CIA 1980’) can be found in A Neal and A Victorin (eds), *Law and the Weaker Party: an Anglo-Swedish Comparative Study* (Professional Books, Abingdon, 1983), Vol III p 113.

7 See n 3 above.

Secondly there is the question of what to compare. For example, a characteristic of Swedish tort law is its use of insurance funds to replace certain kinds of tort liability.⁸ This is not so in the UK, where the primary link between tort and insurance is principally that one hopes that the tortfeasor has adequate liability insurance.⁹ So we will concentrate on private insurance rather than wider “collective” insurance schemes. Equally we will not discuss the Swedish consumer’s “right to insurance”, which seems to derive from the same background of using insurance as a substitute for tort.¹⁰

Thirdly, there are the perennial difficulties of comparative law. To what extent are different words describing the same thing, and similar words different things? To what extent are the apparent differences in substance real? Are they merely different ways of achieving the same result, or do they reflect real differences in attitude or policy?

Lastly, there is the problem of detail. We believe that proper comparative law requires close attention to the detail, but time and space are both limited. We have tried to overcome this problem by concentrating on rather narrow areas mentioned at the outset, but even then we have to generalise to some extent – and that is dangerous.

Despite these difficulties, we have to try to make some comparisons. First, it is in effect required by the conference! But secondly, if we don’t try, that would be to say that we cannot learn anything at all from each others’ systems. That would be a very sad conclusion.

In fact, from the areas we have looked at in detail, we reach the unsurprising conclusion that for the most part we are applying rules that in functional terms are pretty similar. However, significant differences do remain, to some extent in consumer insurance and more so in business insurance. This is true even in the fields that the Law Commissions have looked. But perversely, it is in some of the fields at which the Law Commissions have not even planned to look in which there seem to be the biggest differences.¹¹ There are some rules in the Swedish and Norwegian legislation which simply have no equivalent at all in UK law. We think that these may tell us something about the more detailed differences across the law as a whole, and about the nature of Scandinavian insurance law. We end this paper with speculation on the role that insurance is seen as playing in society in Sweden and Norway, and indeed about the role of contract law in general.

8 See B Bengtsson, “Torts and Insurance”, in M Bogdan, *Swedish Law in the New Millennium* (Norstedts Juridik AB, Stockholm, 2000), 299.

9 Liability insurance is of course compulsory in some fields, e.g. motor insurance and employers’ liability insurance.

10 See “Insurance contracts law reform in Sweden” (2006) 18 *Insurance Law Monthly* no 5, pp 2-3.

11 The Law Commissions started their project by Issuing a Scoping Paper (2006), asking what topics should be covered. The responses indicated that a large number of topics should be covered: see “www.lawcom.gov.uk/docs/insurance_analysis.pdf2”.

2 Pre-contract Information: Different Insurance Sectors

Although the Law Commissions have been concentrating on non-disclosure and misrepresentation by the proposer when the contract is made, we need to consider what each party must tell the other when or before the contract is made, and what will be the consequences if one party fails to disclose something relevant or gives incorrect information to the other.

Following what is in effect the Scandinavian pattern, we will divide the discussion to three sectors: the consumer sector, where a person buys insurance for risks which are not connected to a business; the marine sector; and general business insurance.

3 Consumers

3.1 *Law, Regulation and the Requirements of Ombudsmen*

Here we immediately find at least a formal difference between UK and Scandinavian law. The UK Marine Insurance Act 1906, which is taken to codify the principles of common law and thus to apply to insurance contracts generally,¹² makes no separate mention of consumers. The same formal law applies to all three classes of insurance. But the practical position is different. Consumers are treated very differently to the rest.

STATEMENTS OF INSURANCE PRACTICE

In 1977, when what was to become the Unfair Contract Terms Act 1977 was going through Parliament, the insurance industry managed to secure exemption from the Act¹³ by undertaking to issue statements of practice to which insurers would be encouraged to adhere in dealing with consumer cases. So in 1977 the British Insurance Association (predecessor to the Association of British Insurers) and Lloyd's issued a Statement of General Insurance Practice ("SGIP").¹⁴ The Statement was not formally binding on insurers and in a report issued in 1980 the Law Commission said that the Statements did not give policyholders adequate protection.¹⁵ Rather, the Statements "are themselves evidence that the law is unsatisfactory and needs to be changed".¹⁶ Legislation was prepared to implement the Law Commission's proposals to improve the law on misrepresentation, non-disclosure and breach of warranty but again the industry

12 See *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] AC 501, 518.

13 Unfair Contract Terms Act 1977, schedule 1, para 1(2)(1)(a).

14 This was followed later in the same year by a Statement of Long-Term Insurance Practice ("SLIP") issued by the Life Offices' Association (now part of the ABI) and the Associated Scottish Life Offices.

15 Insurance Law Non-Disclosure and Breach of Warranty (1980) Law Com No 104, paras 3.24 to 3.30.

16 Above at para 3.28.

was able to persuade the Government that self-regulation would suffice.¹⁷ In 1986 the Statements were strengthened somewhat and the industry set up a private Ombudsman scheme (Insurance Ombudsman Bureau or 'IOB').

REGULATION

Investment-type insurance (e.g. endowment life policies) had been subject to regulation since 1988, under the Financial Services Act 1986. It was a two-tier system, with a statutory regulator - the Securities and Investments Board - overseeing self-regulating organisations and recognised professional bodies. The self-regulating organisation for insurance was the Life Assurance and Unit Trust Regulatory Organisation ("LAUTRO"), later replaced by the Personal Investment Authority. LAUTRO appointed IOB to act as its primary complaints-handling mechanism; later there was also a separate PIA Ombudsman scheme.

One of the earliest acts of the Labour government formed in May 1997 was an announcement that it intended to introduce statutory regulation for the financial services industry with a single regulator – the Financial Services Authority ("FSA"). This new system was introduced in 2001 under the Financial Services and Markets Act 2000 ("FiSMA"). It has resulted in major changes.

First, in 2005 the FSA took over responsibility for conduct of business regulation of general insurance. The Rules for "pure protection insurance" are contained in the Insurance Conduct of Business ("ICOB") sourcebook. On the same date, the SGIP was withdrawn. Meanwhile, rules for investment-type insurance are to be found in the Conduct of Business ("COB") sourcebook.

While some FSA rules dealing with insurance intermediaries apply whatever the type of insurance, the bulk of the ICOB and COB rules apply only to the "retail" sector – in other words, to consumer insurance. By and large the FSA rules follow the SGIP, not the law.

THE FINANCIAL OMBUDSMAN SERVICE

Secondly, when this new system was being designed, it was decided that there should be a single complaints-handling body, the Financial Ombudsman Service ("FOS"). This replaced eight existing dispute-resolution mechanisms, including the Insurance Ombudsman Bureau and the Personal Investment Authority Ombudsman.¹⁸ The FOS seeks wherever possible to settle complaints by mediation. Should this prove impracticable, the case will be investigated and a view reached by an adjudicator. If either party remains dissatisfied, an appeal may be made to an Ombudsman. An Ombudsman has the power to make awards of up to £100,000 against an insurer, or instruct it to take specified steps, the cost of which should not exceed that limit.

The critical point is that the FOS does not apply the strict law. Complaints are determined "by reference to what is, in the opinion of the ombudsman, fair and

17 On 21 February 1986, the Secretary of State confirmed to the House of Commons that the DTI had accepted changes in the Statements as an alternative to law reform (Written answer).

18 It was established under Part 16 and Schedule 17 of FiSMA. Rules relating to the FOS can be found in the *Dispute Resolution: Complaints* sourcebook ("DISP") within the FSA Handbook.

reasonable in all the circumstances of the case”.¹⁹ As we will see, in practice the FOS often expects insurers to abide by “good practice” as was set out in the SGIP, even though that has formally been withdrawn; and its interpretation of the SGIP is quite severe. In other words the FOS requires insurers to depart from the law and in effect to give consumer insureds much greater rights than the strict law requires.

The FOS scheme applies primarily also to consumer insurance, but it will also take cases from small businesses with a turnover of less than £1m per year. It does not necessarily apply such stringent rules to small business insurance; the approach varies according to the sophistication of the business and similar factors.

THE LAW COMMISSIONS’ REVIEW OF INSURANCE CONTRACT LAW

The result is that we cannot compare the Scandinavian legislation to the Marine Insurance Act 1906 alone. Instead we have to compare it to a complex and very confusing tangle of law, regulation and Ombudsman requirements. Not surprisingly, one of the main tasks of the Law Commissions’ project is to sort this jungle into a single set of clear rules.

Reform is not just necessary in order to make the overall position coherent and clear, however. There are real gaps in coverage. The FSA rules are essentially disciplinary, rather than aiming at redress in individual cases. It is true that technically speaking a consumer insured who has been injured by a breach of the rules may bring an action under FiSMA for breach of statutory duty,²⁰ but the expense of doing so is likely to make this remedy of little practical value. The FOS offers a much better route of redress. However not all consumers think of complaining to the FOS; and not every case can be handled by it. In particular, where there is a conflict of evidence that can only be resolved by the examination of witnesses, the FOS will not take the case. Instead it must go to court – and a court must apply the Marine Insurance Act 1906.

4 Pre-contract Information: Consumer Insurance

So it is obvious that the Scandinavian legislation and the formal law of the UK look very different when we come to the requirements for pre-contractual information in consumer cases. We will concentrate on the Swedish Insurance Contracts Act 2005 (‘ICA 2005’).

¹⁹ Financial Services and Markets Act 2000, s 228(2).

²⁰ Financial Services and Markets Act 2000 s 150.

4.1 *Disclosure by the Insurer*

ICA 2005 chapter 2²¹ section 2²² requires the insurer to “provide information which facilitates the customer’s assessment of the need for, and choice of, insurance.”²³ MIA 1906 contains nothing like this. It is true that what it does say is that the contract of insurance is one of the utmost good faith on both sides.²⁴ This means that in principle the insurer should disclose to the proposer any material fact, but very little has been made of this by UK courts. The reason is simple: the only remedy for breach of the duty of good faith is avoidance of the contract.²⁵ Avoidance is a valuable remedy for an insurer but usually it is the last thing an insured wants.

What is perhaps surprising is that the courts do not seem to have developed a principle that a party who did not take steps to point out onerous terms in the policy when it was taken out should be prevented by the doctrine of good faith from relying on the terms at a later stage.²⁶ Such a principle is set out expressly in ICA 2005 c2 s 8.

When we turn to the FSA rules, however, we find requirements rather close to those of the ICA 2005.²⁷ The insured must be given a policy summary which must draw their attention to “significant or unusual exclusions or limitations”.²⁸ And curiously, if the information is not given, the remedy may be more draconian than in Sweden. At least in principle, the English consumer may claim damages for breach of statutory duty, whereas ICA 2005, s 9 points to remedies under Markets Court Act 1995. S 29 of that Act allows for damages but, if we have understood it correctly, only if an order has already been made by the court against the insurer and the insurer has failed to comply.²⁹

4.2 *Disclosure by the Insured*

We find a similar contrast when we look at the question of information that the consumer proposing insurance must give to the insurer. MIA 1906 is draconian. Though English law does not know any general duty of good faith, insurance is an exception. The contract of insurance is one of a small number of types of

21 The Act has separate sections dealing with different types of insurance. Each section contains a fairly full set of rules. This involves some repetition but is more useful to insurers and policy-holders, who will normally be concerned with just one policy at a time. Chapter 2 deals with individual liability insurance for consumers.

22 CIA 1980 had a roughly equivalent provision in s 6.

23 This need not be provided to the extent that the customer declines it or in the circumstances it is impractical to give it: ICA c 2 s 3.

24 MIA s 17.

25 *Banque Keyser v Skandia* [1990] 1 QB 665, 781.

26 But see suggestions by Rix LJ in his address of 19 December 2001, reprinted in British Insurance Law Association, *Insurance Contract Law Reform* (2002) App B.

27 ICOB s 5.

28 ICOB R 5.5.5.

29 We assume that the obligations under ICA 2005 are not directly sanctioned by damages under the Act. Is this correct?

contract that are *uberrimae fides* - of the utmost good faith.³⁰ At the pre-contractual stage, the effect of the duty of utmost good faith is that each party must disclose any material fact even if no question is asked by the other party. Naturally, in practice this burden falls more on the insured than on the insurer, and it is a severe burden. A material fact is any fact a prudent insurer would want to know about, even if it would not necessarily be decisive in a prudent insurer's decision as to whether to grant cover or on what terms. If the proposer fails to disclose a material fact, then provided that the actual insurer would not have entered the contract on the same terms had it known the fact in question, the insurer may avoid the policy and refuse to pay any claim. Equally the proposer must not misrepresent any material fact, and an insurer who relied on the misrepresentation may avoid the policy even if the proposer was both honest and careful – for example, they honestly and reasonably believed what they said was true. It is obviously easy for the insurer to argue that if they had known the truth, they would have charged a higher premium.

To make matters even worse, the insurer may get the proposer to “warrant” the truth of what was said. The effect of this is that if the statement warranted is not correct, the policy is automatically discharged. It doesn't matter that the proposer acted wholly innocently or even that the statement was completely irrelevant to the risk.

It is not surprising that the SGIP recognised that this would not be consistent with good practice in consumer cases. The FSA rules now forbid an insurer to reject a claim, except where there is evidence of fraud, refuse to meet a claim made by a retail customer on the grounds:

- (a) of non-disclosure of a fact material to the risk that the retail customer who took out the policy could not reasonably be expected to have disclosed
- (b) of misrepresentation of a fact material to the risk, unless the misrepresentation is negligent;...³¹

In effect, the insurer must act as if materiality test were what the reasonable insured would think, and should not avoid for innocent misrepresentation.

The FOS goes even further. The old SGIP said that insurers should ask specific questions about matters that are relevant to the risk. The FOS interprets this literally. If the consumer has not disclosed something, the FOS will order the insurer to pay unless the insurer had asked a specific question about it and had received an incorrect (and negligent or dishonest) answer. Effectively the FOS has taken on itself to abolish the duty of disclosure and the right to avoid for “innocent” misrepresentation in consumer cases. The FOS will ignore warranties of fact altogether.

30 Other such contracts include “contracts to subscribe for shares in a company, family settlements, contracts for the sale of land, contracts for suretyship and partnerships.” *Chitty on Contracts* (29th ed 2004) para 6-139).

31 ICOB R 7.3.6.

It is more pertinent to compare the Swedish ICA to the requirements of the FOS than to the requirements of the strict law in the UK. If we do so we find that the approach in the two countries is very similar. For example, ICA provides that a person wishing to acquire consumer insurance shall have an obligation to provide information which may be material to the decision to issue the insurance, but only upon the request of the insurance company. The policyholder must give true and complete answers to the insurer's questions.³² It does not seem that the insurer's questions have to be specific. Interestingly, the Norwegian Act is a bit more demanding than either the ICA or the FOS. It provides that the policyholder shall also upon his or her own initiative give details of specific circumstances which he or she must realise to be of material significance to the insurer.³³

Neither the Swedish or the Norwegian law allows the insurer a remedy if the policyholder was not even negligent.

When we turn to the insurer's rights or remedies when there has been misrepresentation, we see some differences. However it is not clear to what extent these are merely differences in language. Under MIA 1906 the insurer may avoid even for a wholly innocent misrepresentation, but we saw earlier that the FOS will not allow that. In cases of negligence the FOS will not allow the insurer to avoid the policy or refuse to pay claim unless, if it had known the truth, the insurer would not have accepted the risk or would have inserted an exception that would have excluded the relevant claim. If the insurer would merely have charged a higher premium, it must pay a proportion of the claim. The insurer is allowed to avoid as of right only when the consumer's misrepresentation was "deliberate" or "reckless" (in the sense that they did not care whether or not what they said was true). ICA uses different language. The contract is void if the policyholder acted "fraudulently or contrary to good faith". Does the latter mean the same as the English "recklessly"? If the policyholder "otherwise intentionally or negligently disregarded the obligation to inform", the insurer may reduce the amount paid by a reasonable amount in the light of the significance the fact would have had for the insurer's assessment of the risk. That sounds to be the same as the FOS approach. But what is "intentional" disregard of the obligation? To an English ear it sounds like fraud!

Our conclusion is that the two Scandinavian systems produce pretty much the same results as the FOS requires of insurers. This gives us added confidence in the Commissions' proposal that the law of the UK on the policyholder's duty of information be brought into line with what is already required by the FOS, but it doesn't reveal a great deal about any particular characteristics of Scandinavian law.

There is one interesting difference, however. In the Scandinavian systems the duties of information on the insurer are set out in the Acts. In the UK these are imposed by regulation, and we have received no suggestion that they should be placed in any new act on insurance contracts. We suspect there are two reasons.

32 ICA c 4 s 1.

33 S 4-1. We are not sure if the insurer must warn the consumer of this duty. The Act does not provide this but the supervisory authority (*see* s 2-1) may have done so.

One is that regulations can be changed to meet new marketing practices more easily than can legislation. The second reason is that in the UK the insurers' information duties are conceived of as "regulatory" or "public law" rather than "private law" measures – even though "private law" is not a term often used in English law. In most cases the only effective sanction against violation will be an order of a public body such as the Market Court, as is provided by the ICA.³⁴ To an English lawyer it would seem odd to deal with such matters in an insurance contracts Act. For private law the real importance of the obligations under the ICA is that where the insurer has failed to emphasise a term or condition of a type that should have been pointed out, the insurer may not rely on it.³⁵ In the UK we have no such principle, though in practice consumers would often be able to challenge the term under the regulations³⁶ that implement the Directive on Unfair Terms in Consumer Contracts.³⁷

5 Precautions Required of the Policyholder: Consumer Insurance

When we look at the other area covered by the Law Commission's work to date, we find a similar pattern: the overall results are much the same in the UK and in Sweden and Norway.

The classic English way of ensuring that the policyholder takes precautions – e.g. that a householder who takes out "contents cover" maintains and sets a burglar or fire alarm – is to impose a warranty. As we indicated when we mentioned warranties of fact, the result is extraordinary. Liability for breach of warranty is strict, and if the warranty is broken the contract is automatically discharged. This can produce results that are little short of absurd. If the alarm system is out of action the policyholder is not covered even for damage by flood; and there is no cover even if the alarm has been repaired and is working properly at the time of the loss. It is hardly surprising that the courts often try to interpret the terms as not being warranties, so as to avoid these results, but if the contract terms are clear the court has no choice but to enforce them.

In its report in 1980 the Law Commission recommended a change in the law to prevent an insurer turning down claims on the ground of breach of warranty unless there is a causal connection between the breach and the loss. That recommendation was never implemented but both the FSA and the FOS now forbid insurers to reject claims unless there is such a causal connection. Perhaps we should copy the ICA, which provides:

Where in conjunction with an insured event, the insured failed to comply with a security provision set forth by the policy terms and conditions... the insurance indemnification to the insured himself shall be reduced in accordance with what

34 ICA c 2 s 9.

35 ICA c 2 s 8.

36 Unfair Terms in Consumer Contracts Regulations 1999.

37 93/13/EEC of 5 April 1993.

is reasonable in light of the nexus of such failure, the loss, whether there was negligence, or intent, and other circumstances.

We rather suspect, though, that English lawyers would opt for the superficial certainty of a “causal link” test than woolly talk of “other circumstances”!

6 Conclusion on Consumer Insurance

Our conclusion is that on the areas of consumer insurance that we have looked at, there is not much peculiarly Scandinavian about the ICA other than the typical Scandinavian characteristics of being up-to-date, fit for purpose and clear. In contrast, the English position is typical of English law - a basic law which is 100 years out of date and wholly unsuitable is in effect amended by a complex and confusing and conflicting series of non-statutory adaptations. Heath Robinson rules OK!

7 Marine Insurance

Since the UK Act is the Marine Insurance Act, it make sense to compare it to the Scandinavian laws on marine insurance. In principle these are covered by the relevant insurance acts but the Acts allow contracting out and in practice marine insurance is governed by special marine insurance plans. The current Norwegian Marine Insurance Plan dates from 1996,³⁸ the Swedish one from 2006.³⁹

We saw earlier that the UK MIA 1906 imposes a strict duty to disclose any information that a prudent insurer would want to know about, and that the sanction for any breach of this duty is avoidance. The only qualification is that there is no duty in respect of information that is not known to the proposer, but the policyholder “is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.”⁴⁰

At first sight the Norwegian Plan seems equally severe. The policyholder has the duty to disclose facts that are material to the insurer,⁴¹ and this applies whether or not the insured should have known that the fact was material – in effect, the same “prudent insurer” test that is used in the MIA,⁴² though it is said that the question is whether the information would affect the insurer’s decision, rather than whether the insurer would want to know about the matter.⁴³ The duty

38 The 2007 version is available at “www.norwegianplan.no/eng/index.htm”. In what follows we have relied on “Marine Insurance: the CMI Review Initiative”, CMI Yearbook 2000 (‘CMI’), pp 34 ff, and S Derington, “Non-disclosure and misrepresentation in contracts of marine insurance” [2001] *Lloyds MCLQ* 27.

39 See “www.sjoass.se/orgvillpdf/SPL/SPLeng.ver.pdf”.

40 MIA s 18(1).

41 § 3-1.

42 Derington at p 77.

43 CMI p 62.

to disclose seems to apply even if the matter was not known to the policyholder. But when we turn to the remedies, it will be seen that the Norwegian Plan is in fact significantly more generous to the insured than the UK's MIA. First, if the non-disclosure was innocent and reasonable, the insurer must pay the claim, though it may also cancel the policy after 14 days' notice.⁴⁴ Secondly, if the policyholder was honest but negligent, the outcome depends on what the insurer would have done. If it would have declined the risk, it may avoid. If it would have accepted it on different terms it may refuse to pay the claim unless there was a causal link between the fact not disclosed and the claim.⁴⁵ It is reported that this has been criticised on the basis that if the insurer would have charged a higher premium it should have to pay a proportion of the claim,⁴⁶ but this is still a good deal more generous than English law.

The Swedish Plan comes to the same results in a very straightforward fashion. The policyholder is obliged to disclose what it is asked for and anything it knows or ought to know is relevant to the insurer's assessment of the risk.⁴⁷ If the policyholder acted deceitfully or contrary to good faith and fair dealing, the contract is invalid.⁴⁸ If the policyholder was negligent, the outcomes are the same as under the Norwegian plan.⁴⁹ If the policyholder was in good faith, the insurer must pay in full.⁵⁰

8 Non-marine Business Insurance

It is when we turn to non-disclosure and misrepresentation in non-marine business insurance that the differences between UK law and the ICA seem to be the greatest. In the UK the MIA 1906 applies almost without qualification. It is true that the FSA regulations which prohibit rejection of consumer claims on the ground of non-negligent disclosure, etc also have a provision that applies to commercial customers. However all it says is that the insurer must not unreasonably reject a claim by a commercial customer.⁵¹ It gives no guidance on when rejection would be unreasonable, which seems to leave the matter to be decided by the strict law. The FOS will take complaints from small businesses (defined as those with an annual turnover of less than £1m) but not larger ones. Even with small business it will not necessarily apply the same rules as for consumers. Its approach is based on its assessment of the sophistication of the business in question. The most vulnerable businesses will be treated as

44 § 3-4.

45 § 3-3. *See* Derington p 80.

46 Derington at p 81, referring to H J Bull, *Utkast til Motiver Norsk Sjøforsikringsplan* (Oslo, 1996), 67.

47 Art 4.1.

48 Art 4.6.

49 Art 4.7.

50 Art 4.4.

51 ICOB R 7.3.6(1).

consumers, while others will not. For example, in a survey we made of FOS decisions on misrepresentation and non-disclosure, a fish and chip shop was treated in the same way as a consumer. In contrast the FOS held that a landlord should have revealed that his tenant was unsatisfactory even though the proposal form did not ask about this, whereas a consumer would not have been expected to make a disclosure on a matter about which no question had been asked.⁵²

Even here the contrast is not complete. For example, the ICA imposes an obligation on the policyholder to disclose information that “may be relevant” “on the request of the insurance company” (which presumably can be in such general terms that it really amounts to little more than a warning that the policyholder should disclose relevant facts). Furthermore, even if not asked, the policyholder must disclose information “of clear significance for the risk assessment.”⁵³

However, if there is a breach of the duty, the remedies of the insurer are much more limited under the ICA than under English law. Provided the policyholder did not act fraudulently or (again!) contrary to good faith, but was negligent, remedies will once more depend on what the insurer would have done had it had the correct information. For example, if it would have accepted the risk at a higher premium it must pay a proportionate part of the claim – the same approach as the FOS in the UK use for consumer insurance. The only difference is that under the ICA the terms of the contract may provide for the approach taken by the marine plans - that the insurer need not pay unless there was no connection between the information and the loss suffered.⁵⁴

Likewise, the much-criticised English warranty rules find no place in the ICA. The ICA provides that the insured may recover if it can show there was no causal connection between any breach of a security provision and the damage.⁵⁵ Moreover, it seems that this rule cannot be varied by the parties, since provisions which can be varied by agreement seem to say so, whereas the section on security provisions makes no mention of the possibility.

One of the problems about security provisions is that the policyholder may not realise that the term is in the contract, may pay insufficient regard to security and end up losing its right to claim. This is obviously a particular problem if breach of the term has consequences as serious as does breach of warranty in English law. Must the insurer take steps to bring the term to the policyholder’s attention? The ICA imposes a duty on the insurer, since it is provided that the requirement to provide information applicable to consumer insurance “shall also apply to business insurance, unless the customer can be deemed to have no need of the information.”⁵⁶ However it is not clear that there is any remedy for the insured who has not been informed and has consequently got itself into trouble.

52 See above, text after n 31.

53 ICA c8 s 8. This is less stringent than s 7 of the Insurance Act 1927, which required to insured to disclose information whose importance he ought to have known. See “Utmost good faith”, (2007) 19 Insurance Law Monthly no 2, p 1.

54 ICA c 8 s 9.

55 ICA c 8 s 6.

56 ICA c 8 s 1.

The remedy stated in the Act is simply to get an order from the Market Court, and it seems that it is only if such an order has been made and the insurer has failed to comply that damages will be available. There is no provision to prevent the insurer from relying on the term, as there is for consumer contracts.⁵⁷ The situation in the UK seems in principle to be more favourable to the insured. The insurer is required by the FSA to provide even the business insured with a policy summary stating significant and unusual terms, and an insured who has suffered a loss as a result of a breach of the regulation can claim damages for breach of statutory duty.⁵⁸ However a remedy in damages is probably of little practical value: it will be difficult for the policyholder to prove a sufficient causal connection between any breach of the insurer's duty and the loss suffered by the policyholder.

What our law does not do is to give the court a residual discretion to refuse to enforce unfair terms, such as the Swedish courts have under Contracts Act s 36. Professor Ramberg tells us that s 36 has been applied to insurance contracts, for example to strike down a term in a policy against burglary that limited cover to situations of forcible entry, and so prevented the policy covering theft by a security guard who had a key.⁵⁹ From her tone we gather that this decision is regarded as a deviation,⁶⁰ but the fact remains that the power exists. The question for English law is whether it should adopt an equivalent at least for insurance contracts. It will be remembered that insurance contracts are exempt from our Unfair Contract Terms Act 1977. The industry was particularly keen to obtain this exemption because it feared that otherwise exceptions in standard policy documents might be challenged under s 3 of that Act.⁶¹ This provides that in a business contract, where a party is using its "written standard terms of business", it may not rely on a clause that would "entitle it to render a performance substantially different from that which was reasonably expected" of it, unless it shows that the clause was a fair and reasonable one to incorporate into the contract.⁶² It seems to me that if the Act applied to insurance, this section would also apply to warranties. A consumer insured can challenge a warranty under the Unfair Terms in Consumer Contracts Regulations 1999, but those do not apply to businesses.⁶³

57 ICA c 2 s 8, which is not applied to business insurance contracts.

58 FiSMA s 150.

59 NJA 1989 p 346. *See* C Hultmark, 'Obligations, Contracts and Sales' in M Bogdan, *Swedish Law in the New Millennium* (Norstedts Juridik AB, Stockholm, 2000) 273, 279.

60 Compare NJA 1992 782 (term stating cover would start only the day after premium received upheld). *See also* C Ramberg (2006) 4 ERCL 506, 511.

61 For Scotland the equivalent provision is s 17.

62 The test of what is "fair and reasonable" is set out in s 11.

63 The Law Commissions have recommended that protection roughly equivalent to that given to consumers by the UTCCR should be extended to small businesses (*see* Unfair Terms In Contracts (2005), Law Com No 292; Scot Law Com No 199) and the Government has indicated its intention to implement the recommendation. However insurance contracts again would be exempted.

However, attitudes may be changing, perhaps because neither UCTA 1977 nor the UTCCR 1999 have caused anything like as much difficulty or uncertainty as opponents of the measures suggested. We held a seminar with lawyers and insurers to discuss the problem of warranties and also of “hidden” exceptions” and “narrow definitions of the risk”, which can equally take the policyholder by surprise. We were surprised to find considerable support for adopting something like UCTA s 3. This would apply only to warranties, exceptions and the like contained in standard form policies. It would prevent the insurer from relying on the term if it would make the cover substantially different from what the policyholder reasonably expected. That would be much less draconian than Contracts Act s 36, but for English insurance law it would be a small revolution. We wonder whether on further reflection the industry will oppose it!

9 Conclusions on Business Insurance

In the areas of business insurance law that we have considered, Swedish law⁶⁴ seems to offer the policyholder much better protection than English law does currently. There is a much closer correlation between Swedish law and the proposals that we expect the Law Commissions have put forward in their consultation paper. What remains to be seen is whether any of the proposals for business insurance will be implemented. We sense that there is a feeling that consumer insurance law does have to be changed, but we expect to run into severe resistance to the business insurance proposals.

That may well seem perverse. The changes would do no more than bring the law into line with what, we are told, is widely recognised by the industry as good practice.⁶⁵ Why should the law be different? We think there are two principal reasons, one bad and the other – well, readers must make up their own minds.

The bad reason is that some insurers like to have technical defences “in reserve” to fall back on when they think a claim is fraudulent but they can’t prove it. It is rare for insurers to attempt to defend the rules set out in the Marine Insurance Act 1906 as they are written. In our experience, few people within the industry believe that a claim should be rejected on the grounds of a completely innocent and reasonable mis-statement, or because of a breach of warranty that has already been remedied. The main defence of such rules is not that they are reasonable in themselves but that they are useful where an insurer suspects fraud but cannot prove it. Insurers argue that fraud is widespread and difficult to prove. Some of those who responded to our Issues Papers say they need to rely on technical and seemingly irrelevant defences to defeat claims where fraud is suspected.

64 We have not the space to consider the Norwegian Act but we think broadly the same conclusion is applicable.

65 The Statements of practice issued in 1977 and 1986 apply only to consumer insurance, but they *seem* largely to encapsulate good market practice generally.

Needless to say, we reject this argument completely. Not only does it allow the insurer to “act as judge and jury in its own cause”, but we can think of few things better calculated to undermine confidence in English insurance. Who knows when they may wrongly be suspected of fraud?

The other reason is one of legal culture. Naturally there must be a link between law and morality, and if the two become too distant from each other we can expect trouble. But at least in English commercial law there is a strong tradition that we do NOT expect the law and good practice to be the same. We expect the parties to go beyond the law. We are accustomed to thinking of the law as merely setting outer limits, as preventing forms of behaviour that are unacceptable, rather than as setting ideal commercial standards. Traditionally we even allow parties to “play the rules” – the legal equivalent of football’s “professional foul”. For example, if there has been technical breach of contract which seems to cause the innocent party no loss at all, the law traditionally allowed the party to take advantage of the breach to escape from a contract that has turned out unfavourably for him for other reasons.⁶⁶ Ostensibly this approach is taken for reasons of legal certainty: it is said that when there has been a breach of contract it is vital for commercial parties to know whether or not they are bound to continue with the contract, without having to work out whether or not the breach will have serious (or indeed, any) consequences.⁶⁷

Many of the decisions are in cases arising from the commodity markets, and it may be that in these markets even commercial morality approves this kind of behaviour. What in other countries would be regarded as contrary to good faith may in England be regarded as good business. But this adversarial attitude tends to spread across our entire commercial law: remember that when the House of Lords rejected the idea of an obligation to negotiate in good faith, the principal reason given was that it “is inherently repugnant to the adversarial position of the parties when involved in negotiations.”⁶⁸ But in many markets, whatever the law says, parties do not expect each other to behave according to the law but in accordance with good practice.⁶⁹ That may explain why to refer the other party to the terms of the contract, even, is often treated as a sign that you don’t trust them⁷⁰ – and that may spell the end of the commercial relationship.

The gap between English law and commercial morality was perhaps best expressed by Cockburn CJ in a case of alleged mistake over 100 years ago.

66 The classic example is *Arcos v EA Ronaasen & Son* [1933] AC 470 (buyer entitled to reject wood on the basis that fractionally wider than contract stipulated, though still perfectly suitable for buyer’s purpose of making barrels). In this case statute would now prevent rejection, see Sale of Goods Act 1979, s 15A, but the classic rule still applies to other breaches e.g. slightly late delivery, and to other forms of contract.

67 See *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711, HL (FOB contract; sellers entitled to terminate when buyers gave notice of probable readiness of vessel four days late; no evidence that delay caused any difficulty for sellers).

68 *Walford v Miles* [1992] AC 128, 138.

69 See H Beale and A Dugdale “Contracts between Businessmen: Planning and the Use of Contractual Remedies” (1975) 2 *British Journal of Law & Society* 45-60.

70 See Deakin, Lane and Wilkinson in J.Michie and S. Deakin *Contracts, co-operation, and competition : studies in economics, management, and law* (OUP, 1997).

The question is not what a man of scrupulous morality or nice honour would do in such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding...⁷¹

Needless to say, since 1871 there have been huge inroads into the notion of caveat emptor, but the starting point of English commercial law has not changed that much. Nor have many of the end points. There seems to be a considerable difference not only from the civil law systems that have a pervasive doctrine of good faith but also from the results reached by the Scandinavian systems.

10 Provisions in the ICA not Suggested for the UK

We think we can find good examples of these differences if we look at some further provisions of the ICA dealing with the rights of the parties to cancel the insurance policy. Take first the policyholder's right to cancel a policy which it no longer needs, for example because it has sold the property insured. ICA gives the policyholder the right to cancel to both consumer⁷² and (unless otherwise agreed) to business insureds.⁷³ In England, many insurers will in practice allow the policyholder to cancel and will refund part of the premium, and that may even be provided for in the policy, but there is no legislation or even FSA regulation about this matter.⁷⁴

Conversely, the ICA limits the insurer's right to cancel a policy. Leaving aside failure to pay the premium⁷⁵, the insurer may cancel a consumer policy only if the insured has committed a material breach of its obligations to the company or other due cause exists. Except in cases of fraud or a contravention of good faith, at least 14 days' notice must be given. With business insurance the policy may be cancelled for those reasons or if there has been a significant change in the risk. Again in English law we find nothing, and the ABI tells us that most policies contain a clause allowing cancellation – which may be on any ground whatever. In consumer contracts such clauses will fall within UTCCR. In business policies there are no legal controls. It is simply left to the market – to whatever terms the insurer is prepared to offer or to its commercial judgement on the day.

71 *Smith v Hughes* (1871) LR 6 QB 597, 604.

72 ICA c 3 s 6 para 2.

73 ICA c 8 s 5 para 2.

74 The FSA's ICOB rules deal only with "cancellation" in the sense of withdrawal periods.

75 Another topic which English law leaves unregulated and on which commercial policies often contain extremely severe "premium warranties".

When the Law Commissions carried out their “scoping study” to determine what topics of insurance contract law should be included in the review,⁷⁶ there were no suggestions that either type of cancellation clause should be considered. Given the seriousness of being left without cover at short notice, that seems to me to say quite a lot about the differences between attitudes to contracts in UK and in Scandinavia.

⁷⁶ See above, n 10.