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**Point n°9 de l'ordre du jour: Contrats du commerce international –  
Formulation de principes en matière de contrats de réassurance**

(préparé par le Secrétariat)

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**I. HISTORIQUE ET ETAT ACTUEL DU PROJET**

1. En juillet 2015, le Secrétariat a été contacté par un groupe de chercheurs et de juristes praticiens dirigé par les Professeurs Anton K. Schnyder et Helmut Heiss (Université de Zürich, en qualité de "Chef de file"), Martin Schauer (Université de Vienne) et Manfred Wandt (Université de Francfort), qui ont examiné la faisabilité de formuler des "Principes du droit des contrats de réassurance" (PRICL). Cette initiative s'inspire du Groupe chargé de la "Redéfinition du droit régissant le contrat d'assurance européen", qui a débouché sur la publication des "Principes du droit européen du contrat d'assurance" (PDECA)<sup>1</sup>. Ce projet a pour objectif de formuler une "redéfinition" du droit de la réassurance existant, qui est largement ancré dans la coutume et l'usage international, mais fait rarement l'objet d'une législation.

2. Les responsables du projet ont exprimé l'avis que les principes proposés supposent l'existence préalable de règles adéquates du droit général des contrats. Plutôt que d'essayer de recréer ces règles, les nouveaux principes proposés devraient être rédigés comme une "partie spéciale" des Principes d'UNIDROIT relatifs aux contrats du commerce international.

<sup>1</sup> Principes du droit européen du contrat d'assurance, édité par le Groupe chargé de la "Redéfinition du droit régissant le contrat d'assurance européen", établi par Fritz Reichert-Facilides †, Président: Helmut Heiss, *Sellier European Law Publishers* (octobre 2009).

3. Le Conseil de Direction a décidé de recommander à l'Assemblée Générale d'insérer ce sujet au Programme de travail pour la période triennale 2017-2019, et a proposé de lui attribuer une priorité basse. L'Assemblée Générale a approuvé la recommandation du Conseil de Direction à sa 75<sup>ème</sup> session le 1<sup>er</sup> décembre 2016.

4. Le projet a obtenu le soutien financier du Fonds national suisse de la recherche scientifique, de la Fondation allemande pour la recherche et du Fonds autrichien pour la promotion de la recherche. En plus des chefs de projet, l'équipe de recherche comprend des représentants connus de l'Afrique du Sud, de l'Allemagne, de la Belgique, du Brésil, de la Chine, des Etats-Unis d'Amérique, de la France, de la Grande-Bretagne, de l'Italie, du Japon et de Singapour. En outre, deux groupes consultatifs constitués de représentants des marchés mondiaux des assurances et de la réassurance conseillent l'équipe de recherche.

5. Les participants au premier atelier du Groupe chargé du projet (Zürich, 27-30 janvier 2016) ont convenu qu'il conviendrait de rédiger des principes et des commentaires spécifiques sur les sujets suivants: choix de la loi, non-divulgation, erreurs et omissions, conditions suspensives, événement / cumul / agrégat, avis hors-délai, couverture adossée, clauses de partage du sort et de règlement des sinistres, coopération, prescription, échéance du contrat et recapture, obligations extracontractuelles du réassuré. Les participants se sont également mis d'accord sur un calendrier en vue de la finalisation des travaux de rédaction des PRICL d'ici l'an 2018. La forme finale et les modes de publication des PRICL sont encore à l'étude.

6. Depuis le premier atelier et suite à l'approbation de l'inclusion du projet dans le Programme de travail de l'Institut pour la période triennale 2017-2019, UNIDROIT a participé activement à trois autres ateliers (Vienne, 12-15 octobre 2016; Francfort, 8-12 mars 2017; Zürich, 28 juin-1<sup>er</sup> juillet 2017) en vue d'assurer la cohérence entre les PRICL et les Principes d'UNIDROIT.

7. Les 16 et 17 janvier 2018, à Vienne, UNIDROIT a participé au 5<sup>ème</sup> Atelier sur les Principes du droit des contrats de réassurance dont l'objectif principal était d'assurer la cohérence avec les Principe d'UNIDROIT relatifs aux contrats du commerce international et d'en fournir une interprétation, en particulier sur les dispositions concernant les recours. Le prochain Atelier se tiendra à Francfort en juin 2018.

8. Le Professeur Heiss a récemment envoyé au Secrétariat une première table des matières des PRICL ainsi qu'un rapport d'avancement du projet qui figurent dans le présent document en Annexe I et Annexe II (en anglais seulement). Deux Chapitres (sur les Moyens pour inexécution et sur l'Attribution des pertes) sont encore en cours de développement.

## **II. ACTION DEMANDEE**

8. *Le Secrétariat d'UNIDROIT invite le Conseil de Direction à prendre note des développements concernant la formulation de principes en matière de contrats de réassurance.*



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Zürich, March 16, 2018

## Report on the Project “Principles of Reinsurance Contract Law (PRICL)”

Note: The following report is taken from the article Heiss, From Contract Certainty to Legal Certainty: The Principles of Reinsurance Contract Law (PRICL), *Scandinavian Studies in Law*, Volume 64 (2018) forthcoming

### 1. The “Principles of Reinsurance Contract Law (PRICL)” Project Group

The PRICL Project Group began to develop transnational<sup>1</sup> Principles of Reinsurance Contract Law (PRICL) in early 2016.<sup>2</sup> The Project Group is led by the Universities of Zurich, Frankfurt am Main and Vienna. It has a Principles Drafting Committee (PDC), which is comprised of professors from a large variety of countries (Brazil, various European countries, Japan, Singapore, South Africa and the USA).<sup>3</sup> The PDC receives financial support from the Swiss National Science Foundation (SNSF), the German Research Foundation (DFG) and the Austrian Science Fund (FWF).

In addition to the PDC, there are Advisory Groups, which are made up of representatives from reinsurance companies, primary insurance companies and reinsurance brokers.<sup>4</sup> They represent the living law of reinsurance, provide all the data required for the project and give practical feedback on the drafts of the Principles. In addition, people with particular expertise in relation to specific questions, such as arbitration issues or the effect of internationally

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<sup>1</sup> On transnational insurance law in general Heiss, Helmut, *Transnationales Versicherungsrecht – Eine Skizze*, in: Kronke, Herbert / Thorn, Karsten, (eds.), *FS Bernd von Hoffmann*, 2011, 803 ff.

<sup>2</sup> For details, see <https://www.rwi.uzh.ch/de/oe/PRICL.html>, last accessed on 8<sup>th</sup> March, 2018.

<sup>3</sup> See <https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/draftingcommittee.html>, last accessed on 8<sup>th</sup> March, 2018.

<sup>4</sup> See <https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/agr.html> for the advisory group reinsurers and brokers, last accessed on 8<sup>th</sup> March, 2018; see <https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/agi.html> for the advisory group direct insurers, last accessed on 8<sup>th</sup> March, 2018.

mandatory provisions on the application of transnational principles, occasionally participate and act as Special Advisors.<sup>5</sup>

The aim of the project is to provide reinsurance markets with uniform soft law rules on contract law issues. Contracting parties will be given the option of adopting the rules. Moreover, the PRICL pursue ideas similar to those of the Restatements of the American Law Institute (ALI) in the US. The ALI was founded “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>6</sup> The Principles of Reinsurance Contract Law pursue the same aim, albeit at a transnational level.<sup>7</sup>

## 2. Cooperation partner: UNIDROIT

The project group carries out its work in cooperation with the International Institute for the Unification of Private Law (UNIDROIT) in Rome.<sup>8</sup> UNIDROIT was founded as an organisation of the League of Nations in 1926, following the demise of which it continued as an independent intergovernmental organisation.<sup>9</sup> Due to the fact that it is an intergovernmental organisation, only states can become members. UNIDROIT currently has 63 Member States.<sup>10</sup> On its website, the Institute describes its tasks and goals as follows: “Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.”<sup>11</sup> UNIDROIT is therefore not only concerned with producing treaties containing uniform international law, but also with formulating transnational principles governing commercial law (soft law).<sup>12</sup> Incidentally, there were already efforts within UNIDROIT to initiate work towards a standardisation of reinsurance law in 1935/36. The circumstances at the time, however, left the project with no chance of realisation.

Among the important principles of commercial law produced by UNIDROIT to date are the Principles of International Commercial Contracts (PICC), a new version of which was made

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<sup>5</sup> See <https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/specialadvisors.html> for the special advisors, last accessed on 8<sup>th</sup> March, 2018.

<sup>6</sup> See the reference to the Charter at <https://www.ali.org/about-ali/creation/>, last accessed on 8<sup>th</sup> March, 2018.

<sup>7</sup> See the Introduction to the 1994 edition of the UNIDROIT Principles of International Commercial Contracts, mentioning that the initiative of UNIDROIT goes into the direction of elaborating an international restatement of general principles of contract law.

<sup>8</sup> See also the announcements on the UNIDROIT website: <https://www.unidroit.org/work-in-progress/reinsurance-contracts>, last accessed on 8<sup>th</sup> March, 2018.

<sup>9</sup> See <https://www.unidroit.org/about-unidroit/overview>, last accessed on 8<sup>th</sup> March, 2018; Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 14.

<sup>10</sup> See <https://www.unidroit.org/about-unidroit/membership>, last accessed on 8<sup>th</sup> March, 2018; Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 14.

<sup>11</sup> See <https://www.unidroit.org/about-unidroit/overview>, last accessed on 8<sup>th</sup> March, 2018.

<sup>12</sup> Cf. Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 11.

available in 2016.<sup>13</sup> According to the preamble, the PICC contain “general rules for international commercial contracts”. This means that they govern every issue relating to general contract law, in particular freedom of contract which prevails in commercial law (Art. 1.1 PICC). With regard to the detailed rules, Chapter 4 of the PICC (Arts. 4.1 - 4.8), which establishes uniform rules for contract interpretation, should be highlighted in particular; the same is true of Chapter 2 of the PICC (Arts. 2.1.1 - 2.2.10), which lays down rules governing the formation of the contract, and Chapter 7 of the PICC (Arts. 7.1.1 - 7.4.13), which lays down rules governing non-performance.

The PICC are of outstanding importance to the Principles of Reinsurance Contract Law (PRICL) project. Firstly, the project itself was also inspired by the UNIDROIT PICC. In both of the initiatives, creating a kind of global Restatement<sup>14</sup> or background law<sup>15</sup> is the goal. The PRICL are also closely based on the PICC in terms of their structure. In addition to the classification into Chapters, Sections and Articles, they furthermore follow the internal structure of the PICC using Articles, Comments and Illustrations.<sup>16</sup>

Secondly, the PRICL Project would not adequately meet the needs of reinsurance business if it restricted itself to rules specific to reinsurance. As illustrated above, legal uncertainties result in no small part from the differences arising between national legal systems on questions of general contract law (formation of contract, interpretation of contracts, etc.).<sup>17</sup> Therefore, uniform reinsurance soft law cannot restrict itself to reinsurance-specific rules; it must provide rules on general contract law as well. The PRICL are in a position to provide such rules by referring to and thus incorporating the PICC.<sup>18</sup>

Substantively, the PICC are especially suited to constituting the general contract law governing reinsurance contracts. Reinsurance business is internationally oriented and of global importance.<sup>19</sup> This corresponds to the global perspective taken by the PICC, which embody the common legal culture of modern commercial law.<sup>20</sup> It is this that distinguishes them from both national principles, in particular the US American Restatements, and regional rules, in particular the Principles, Definitions and Model Rules of European Private Law, i.e. the so-

<sup>13</sup> See <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>, last accessed on 8<sup>th</sup> March, 2018.

<sup>14</sup> Bonell, Michael Joachim, *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts*, 2005, p. 9 ff.; Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 3.

<sup>15</sup> Michaels, Ralf, *The UNIDROIT Principles as global background law*, 19 *Uniform Law Review*, 2014, 643-668.

<sup>16</sup> Cf. Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 32 ff.

<sup>17</sup> Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts*, *Schweizerische Versicherungs-Zeitschrift* 66 (1998), p. 60.

<sup>18</sup> See Michaels, Ralf, *Umdenken für die UNIDROIT-Prinzipien, Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts*, *The Rabel Journal of Comparative and International Private Law*, 2009, p. 885 ff.

<sup>19</sup> Quinto, Cornel, *Reinsurance arbitration from a Swiss law perspective*, *Jusletter* of 1st December 2008, p. 3; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 20; Thomas, Steven W., *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, *Duke Law Journal*, Vol. 41, 1992, 1548, p. 1556; Rodger, Angus, in: Merkin, Rob [ed.], *A Guide to Reinsurance Law*, 2007, p. 380.

<sup>20</sup> Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 3, 14.

called Draft Common Frame of Reference of European Private Law.<sup>21</sup> Furthermore, reinsurance business is concerned with genuine commercial contract law.<sup>22</sup> An equivalent stance is found in the PICC, which, from the outset, are directed towards commercial contracts and therefore carry the commercial spirit.<sup>23</sup> In this regard too, the PICC differ from the Principles of European Private Law, which are not restricted to commercial transactions and ultimately also aim to protect the weaker contracting party, especially consumers.<sup>24</sup> Another advantage of the PICC is that they are regularly updated. Originally published in 1994, the current version from 2016 is already the 4<sup>th</sup> edition of the PICC.<sup>25</sup> Moreover, the publication of the PICC always includes Comments and Illustrations, which explain the wording of the Principles (Comments) and exemplify their application with typical examples (Illustrations).<sup>26</sup> In cooperation with other partners, UNIDROIT also maintains a website (<[www.unilex.info](http://www.unilex.info)>) where case law, court decisions and arbitration awards in particular, as well as legal literature on the PICC are made available.<sup>27</sup> All of this facilitates the application of the PICC to specific situations.

It should also be noted that an otherwise significant reason for the parties to refrain from applying the PICC does not exist where the PRICL are concerned. As pointed out in legal literature, one of the reasons that contracting parties often do not choose the PICC as the law applicable to their contract is that the Principles lack rules governing special types of contracts.<sup>28</sup> This problem is resolved by the fact that the PRICL provide rules on reinsurance, a special contract type, while any contract law matters not governed by the PRICL will be subject to the UNIDROIT PICC pursuant to draft Art. 1.1.2 PRICL. Thus, upon publication of the PRICL, it will truly be the first time that a special contract type, reinsurance, will also be governed by the PICC. In other words, the PICC and PRICL must be viewed as a uniform package. It will become an attractive option to make a combined choice in favour of the PICC and PRICL as the law applicable to a reinsurance contract.

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<sup>21</sup> Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 14.

<sup>22</sup> Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 43.

<sup>23</sup> Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 2; Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 26 ff.

<sup>24</sup> Cf. Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 27.

<sup>25</sup> Cf. Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 22 ff.; see also <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>, last accessed on 8<sup>th</sup> March, 2018.

<sup>26</sup> Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 32.

<sup>27</sup> See <http://unilex.info/dynasite.cfm?dssid=2377&dsmid=14311>, last accessed on 8<sup>th</sup> March, 2018.

<sup>28</sup> Michaels, Ralf, *The UNIDROIT Principles as global background law*, 19 Uniform Law Review, 2014, 643-668, p. 663.

### 3. PRICL: Non-binding soft law

The PRICL are not drafted as a model law and do not require any implementing legislation, whether at national, international or supranational level. Apart from the fact that it is highly unlikely that such legislation would be adopted, it is not required nor would it be helpful. Legislation is not necessary because the parties may choose the PRICL as the law governing their reinsurance contract, at least when such a choice in favour of the PRICL is combined with an arbitration clause.<sup>29</sup> Legislation would also not be helpful: *National* legislation obviously does not provide an adequate answer to the problem of unpredictability of results arising from the differences in national reinsurance contract law regimes. *International* legislation in the form of an international treaty could eradicate problems created by differences in national laws. However, international treaties tend to petrify the law because any alteration will require consent from and ratification by all of the contracting states.<sup>30</sup> Thus, the more successful an international treaty is, i.e. the greater the number of contracting states, the more it petrifies the law and markedly prevents further evolution of the law. Finally, *supranational* law, to the extent that it exists today - for example in the EU - would be restricted to certain regions and does not provide for a set of globally accessible rules. In view of the fact that reinsurance markets are global markets,<sup>31</sup> questions of reinsurance contract law cannot be properly addressed at a regional level only.

In contrast, “soft law” rules, such as the PRICL, provide for a set of globally uniform rules without in any way preventing the future development of reinsurance contract law. Due to their character as soft law, the PRICL are by no means imposed on the parties to the contract. They will apply only when parties choose them as the law governing their contract or incorporate them into their contract and will remain inapplicable if parties abstain from using the option.<sup>32</sup>

### 4. General Provisions

Chapter 1 of the PRICL contains general provisions governing structural issues and the connection between the PRICL and the PICC. A brief outline of the contents is provided below.

Draft Art. 1.1.1 governs the substantive scope of the PRICL. Accordingly, the PRICL apply to “contracts of reinsurance”. Pursuant to the definition in draft Art. 1.2.1, such a contract is a “contract under which one party, the reinsurer, in consideration of a premium, paid to it pro-

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<sup>29</sup> For a more detailed discussion, see 0 below.

<sup>30</sup> Cf. Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 8; cf. Blackaby, Nigel / Partasides, Constantine et al., in: *Redfern and Hunter on International Arbitration*, 2015, no. 3.168.

<sup>31</sup> Quinto, Cornel, *Reinsurance arbitration from a Swiss law perspective*, Jusletter of 1st December 2008, p. 3; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 20.

<sup>32</sup> For a more detailed discussion, see 0 below.



mises another party, the reinsured, cover against the risk of exposure to insurance and/or reinsurance claims”.

At the same time, draft Art. 1.1.1 clearly sets out that the PRICL only apply to a reinsurance contract if the parties so agree. Rather than being forced upon the parties, the PRICL provide an opportunity to “opt-in”.

Draft Art. 1.1.2 establishes a connection between the PRICL and the PICC by stating that the latter apply to issues not governed by the PRICL. It is important to remember that the PICC only govern general contract law matters, not issues specific to reinsurance. Where such issues are not governed by the PRICL<sup>33</sup> and the ensuing “internal gap” cannot be filled by means of analogy,<sup>34</sup> the prevailing legal situation, particularly the current international reinsurance customs, will continue to apply.

Under draft Art. 1.1.3, parties are free to exclude certain principles from the scope of application as well as derogate from these or vary their effects even once they have adopted the PRICL as the governing law of their reinsurance contract. This is to say that the PRICL are entirely non-binding in nature. Consequently, they will not interfere with the products offered nor with model clauses used in international reinsurance markets. On the contrary, the PRICL, as default (“background”) rules, should ease the international offer of reinsurance products as well as the use of model clauses, because the PRICL provide a frame of reference which will ease the interpretation and application of model and individual clauses. Of course, parties will have to consider the effect of a choice of the PRICL (together with the PICC) on their model or individual clauses just as they have to consider the impact of national law(s) under the current legal situation. However, this task will become easier because the PRICL provide one uniform set of rules and are easier to understand than many national laws because the Rules are presented together with Comments and Illustrations. To the extent that parties choose to apply the PRICL to their individual transaction, they can also just adopt the rules provided by the PRICL without drafting their own clauses. Sometimes, they may decide to use clauses complementing PRICL rules and adapting them to their needs.

Draft Art. 1.1.4 determines the application of usages and practices. Pursuant to para. 1, the parties can of course agree to the application of certain usages. Furthermore, the parties are bound by any individual practices which they have established between themselves. Beyond these applications, trade usages will only be taken into account for the purpose of interpreting the contract and only if such usages are regularly known to and observed by the parties. In this respect, the PRICL differ markedly from the PICC. The latter namely generally grant usages precedence over the PICC. This is understandable, because the PICC govern legal principles and therefore do not affect special usages. The PRICL, in contrast, govern matters which have to date been dealt with by contract practice and its usages. If usages were to prevail over the PRICL, the latter would ultimately not have any effect despi-

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<sup>33</sup> In respect of a deliberate gap in the PRICL, see section 5 below.

<sup>34</sup> Cf. draft Art. 1.1.6 PRICL.



te the parties' choice thereof. Where the PRICL govern an issue, they must, in accordance with the choice of the parties, be given precedence over general usages.

Draft Art. 1.1.5 governs the precedence of mandatory rules of national, international and supranational law. The exact scope of this precedence will be discussed separately below.<sup>35</sup> Draft Art. 1.1.6 sets out principles for the interpretation and any gap-filling of the PRICL. These essentially correspond to those set out in Art. 1.6 PICC. However, the promotion of good faith and fair dealing in the reinsurance sector is added to the interpretive aims under para. 1.<sup>36</sup>

## 5. Specific rules on reinsurance contract law

From Chapter 2 onwards, the PRICL contain specific rules on reinsurance contract law. Chapter 2 deals with the mutual duties of the contracting parties. The formulation of the individual duties is based on the general duty to observe the utmost good faith.<sup>37</sup> As reinsurance contracts are predominantly viewed as contracts *uberrimae fidei* in worldwide practice<sup>38</sup>, the principle has been laid down in the PRICL, despite the fact that it does not manifest itself uniformly in national jurisdictions.<sup>39</sup>

The specific duties in the PRICL include a duty of confidentiality, a duty to settle disputes in good faith, a duty of disclosure, a duty to pay the premium, a duty to document the contract (contract certainty), a duty to notify changed circumstances and increased risk, the reinsurer's rights of inspection, the reinsured's duty to handle claims reasonably and prudently, the notice of claims, a duty to follow the fortunes and follow the settlements, a duty to cooperate in claims handling and a duty in relation to the timely payment of reinsurance benefits and resolution of disputes.

Chapter 3 supplements Chapter 2 with remedies in the event of a breach of duty. In line with their basic approach, these remedies are based on the principle of proportionality.

Chapter 4 governs issues concerning aggregation. In particular, it will provide definitions of the unifying factors "event" and "(common) cause". So far, the understanding and use of these terms by courts and in legal literature have varied considerably.<sup>40</sup> Chapter 5 regulates issues concerning allocation.

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<sup>35</sup> See below, 0 and 0.

<sup>36</sup> Cf. the similar Art. 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

<sup>37</sup> Thomas, Steven W., *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, Duke Law Journal, Vol. 41, 1992, 1548, p. 1548 ff.

<sup>38</sup> Cf. Ondo, Paul-Gabor, *Gerichtsstandsklauseln, Rechtswahl und Schiedsgerichtsbarkeit in Rückversicherungsverträgen*, Schweizerische Versicherungs-Zeitschrift 63 (1995), p. 43; Merkin, Rob, in: Merkin, Rob [ed.], *A Guide to Reinsurance Law*, 2007, p. 125 ff.; Labes, Hubertus W., *Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen*, 1996, p. 6.

<sup>39</sup> Cf. di Lorenzo, Assunta, *IBA Insurance Committee Substantive Project 2014, The Duty of Utmost Good Faith*, 2014, available at:

[http://www.mcmillan.ca/Files/177712\\_IBA%20Master%20Substantive%20Project%202014%20-%20Insurance%20Committee%20\(Final\).pdf](http://www.mcmillan.ca/Files/177712_IBA%20Master%20Substantive%20Project%202014%20-%20Insurance%20Committee%20(Final).pdf), last accessed on 8<sup>th</sup> March, 2018.

<sup>40</sup> Cf. Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 28.1 ff., with regard to these notions under English law; Cf. Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas

## 6. “Use” of the PRICL: Parties’ choice of law in national court and arbitration proceedings

### Soft law

The PRICL constitute a private codification of relevant issues of reinsurance contract law and therefore soft law. In contrast to national, international and supranational law, they have no automatic binding effect on the parties. In this respect, they are on par with the UNIDROIT Principles of International Commercial Contracts (PICC).<sup>41</sup> Therefore, the general principle outlined in the preamble to the PICC also applies to the PRICL. Accordingly, the PICC and the PRICL shall “be applied when the parties have agreed that their contract be governed by them.” In essence, the binding force of transnational principles depends on a voluntary decision by the contracting parties.<sup>42</sup> In economic terms, this leads to the market determining whether the PICC as well as the PRICL will be used.

Both sets of Principles may, however, also often indirectly have a certain effect in other ways. The preamble to the PICC indicates that the Principles *may* be applied “when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like”<sup>43</sup> or also “when the parties have not chosen any law to govern their contract”.<sup>44</sup> They may also *be used* “to interpret or supplement domestic law”.<sup>45</sup> The same will apply to the PRICL.

In regard to whether a court or arbitral tribunal will in fact refer to the PRICL in one or another of the ways described, the answer clearly rests on the applicable rules of conflict of laws.<sup>46</sup> National conflict of laws provisions often make distinctions based on whether or not a

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[eds.], *Rückversicherungsrecht*, 2013, § 8 no. 353 ff., with regard to the German understanding of aggregation clauses.

<sup>41</sup> Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 11 ff.

<sup>42</sup> Cf. Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.; Blackaby, Nigel / Partasides, Constantine et al., in: *Redfern and Hunter on International Arbitration*, 2015, no. 3.179.

<sup>43</sup> Oser, David, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, 2008, p. 49 ff.; Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 78 ff.; Bonell, Michael Joachim, *The Unidroit Principles in Practice*, 2006, p. 45 f.; Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.b.

<sup>44</sup> Oser, David, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, 2008, p. 61 ff., 131 ff.; Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 82 ff.; Bonell, Michael Joachim, *The Unidroit Principles in Practice*, 2006, p. 46 f.; Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.c.

<sup>45</sup> Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 108 ff.; Bonell, Michael Joachim, *The Unidroit Principles in Practice*, 2006, p. 46 f.; Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 6.

<sup>46</sup> Cf. Oser, David, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, 2008, p. 71 ff.; Blackaby, Nigel / Partasides, Constantine et al., in: *Redfern and Hunter on International Arbitration*, 2015, no.

contract contains an arbitration clause. If it does, special rules of conflict of laws often apply, which leave more space for private autonomy than the conflict of laws rules which apply in state courts.<sup>47</sup> In the following sections, a distinction will, therefore, be drawn between reinsurance contracts with and without an arbitration clause. In addition, any existing supervisory restrictions must be taken into consideration. Consequently, the regulatory situation will be outlined briefly below the remarks concerning conflict of laws.

### Reinsurance contracts without an arbitration clause

Constructed as soft law, a choice of the PRICL as well as the PICC will usually not be able to replace the otherwise applicable national law.<sup>48</sup> This may be demonstrated by referring to EU rules of conflict of laws. The Rome I Regulation (Regulation (EC) No 593/2008 on the law applicable to contractual obligations) does not permit a choice in favour of a non-State body of law.<sup>49</sup> Recital 13 of the Rome I Regulation merely indicates: “This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.” At first sight, the Hague Principles on Choice of Law in International Commercial Contracts are more receptive towards a choice in favour of non-State bodies of law. Art. 3 states “the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules”. This approach is, however, immediately constrained by the fact that the provision ultimately gives precedence to any restrictions imposed by national rules of conflict of laws.<sup>50</sup>

Incorporating the PRICL into a contract in such a manner would downgrade them to contractual terms, which would always yield to any mandatory national contract law. The PRICL and the PICC would only replace those rules of national contract law that are non-mandatory

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3.188; Born, Gary B., *International Commercial Arbitration*, 2014, 2754; Looschelders, Dirk, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 9 no. 70; on this subject in general *Halpern v. Halpern*, [2007] APP.L.R. 04/03; Judgment of the Swiss Federal Supreme Court of 20th December 2005, 4C.1/2005, consideration 1.4; *Beximco Pharmaceuticals Ltd v. Shamil Bank of Bahrain EC*, [2004] APP.L.R. 01/28; Calliess, Galf-Peter, in: Calliess, Galf-Peter [ed.], *Rome Regulations Commentary*, 2015, Art. 3 Rome I Regulation, no. 33.

<sup>47</sup> Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 59; Scherer, Mathias, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble II, no. 1; cf. Oser, David, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, 2008, p. 27, 71; Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a; Michaels, Ralf, *Umdenken für die UNIDROIT-Prinzipien, Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts*, *The Rabel Journal of Comparative and International Private Law*, 2009, p. 869.

<sup>48</sup> Michaels, Ralf, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble I, no. 59; Oser, David, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, 2008, p. 71; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 21; Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.

<sup>49</sup> Merkin, Rob, *The Rome I Regulation and Reinsurance*, *Journal of Private International Law*, 2009, 69, p. 76; Looschelders, Dirk, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 9 no. 70.

<sup>50</sup> Official Comments to Article 3 of the Principles on Choice of Law in International Commercial Contracts, no. 3.14, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#text>, last accessed on 8<sup>th</sup> March, 2018; for a detailed analysis see Michaels, Ralf, *Non-State Law in the Hague Principles on Choice of Law in International Contracts*, in: Purnhagen, Kai / Rott, Peter [eds.], *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, 2014.

default rules.<sup>51</sup> The same applies “when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like”. Even if a judge were to regard the PRICL and the PICC as “general principles of law, the *lex mercatoria* or the like”, the Principles would have to yield to mandatory national law. However, it is worth remembering that reinsurance contract law contains hardly any mandatory provisions.<sup>52</sup> A choice in favour of the PRICL would, therefore in general, also be possible by way of their incorporation into a contract.

Having regard to these considerations, it is difficult to believe that a judge would directly apply the PRICL and PICC pursuant to national rules of conflict of laws without a choice of law by the parties. It would be quite conceivable, however, for a judge to use the PRICL or PICC to interpret or supplement domestic law.

### Reinsurance contracts with an arbitration clause

The picture changes where reinsurance contracts containing an arbitration clause are concerned. These are removed from the jurisdiction of national courts and entrusted to arbitration through the use of arbitration clauses. When creating or reforming their national arbitration legislation, many national legislatures across Europe and the world have taken account of the UNCITRAL Model Law on International Commercial Arbitration (1985/2006).<sup>53</sup> This includes Art. 28(1), which grants the parties the option of choosing either State law (“law”) or non-State principles (“rules of law”) as the law applicable.<sup>54</sup> A very clear explanation of what this means is provided in point 39 of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration (as amended in 2006): “...by referring to the choice of ‘rules of law’ instead of ‘law’, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum, but have not yet been incorporated into any national legal system.”<sup>55</sup> In relation to the PICC, UNIDROIT has drafted a model choice of law clause which can be integrated into arbitration clauses.<sup>56</sup> This model clause could also be used in reinsurance contracts once it has been adapted to the PRICL. Consequently, the PRICL and the PICC could be chosen to govern reinsurance contracts containing arbitration clauses,

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<sup>51</sup> Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.

<sup>52</sup> Looschelders, Dirk, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 9 no. 70.

<sup>53</sup> Currently, 78 states in 109 jurisdictions have based their arbitration law on the UNCITRAL Model Law for International Commercial Arbitration, see

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html), last accessed on 8<sup>th</sup> March, 2018.

<sup>54</sup> Scherer, Mathias, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Preamble II, no. 4.

<sup>55</sup> Available at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf), last accessed on 8<sup>th</sup> March, 2018; for the position under the English Arbitration Act 1996, see O’Neill, Terry P. / Woloniecki, Jan W., *The Law of Reinsurance in England and Bermuda*, 2010, no. 14-105.

<sup>56</sup> UNIDROIT Model Clauses on the Use of the PICC, available at:

<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>; for more details, see Bonell, Michael Joachim, *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*, Uniform Law Review, 2013, p. 473 ff.

their provisions would supersede national law and, at least in principle, also its mandatory provisions.<sup>57</sup>

In the context of arbitration, party autonomy is limited only by so-called internationally or overriding mandatory provisions and by *ordre public*.<sup>58</sup> These restrictions are governed by Art. 11 of the Hague Principles on Choice of Law in International Commercial Contracts as follows:

Article 11 - Overriding mandatory rules and public policy (*ordre public*)

1. These Principles shall not prevent a court from applying **overriding mandatory provisions** of the law of the forum which apply irrespective of the law chosen by the parties.
2. The law of the forum determines when a court may or must apply or take into account **overriding mandatory provisions** of another law.
3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of **public policy** (*ordre public*) of the forum.
4. The law of the forum determines when a court may or must apply or take into account the **public policy** (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.
5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

An attempt to define an overriding mandatory provision is made in Art. 9(1) of Regulation (EC) No 593/2008 (Rome I): “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

An example which has recently become particularly relevant to reinsurance business is that of international embargoes (sanctions),<sup>59</sup> for which reinsurance contracts often contain special clauses. Standard clauses have already been developed for this purpose.<sup>60</sup>

### Restrictions by supervisory law

Restrictions on the choice of law may also be imposed by national supervisory law. Such laws may oblige direct insurers to conclude their reinsurance contract in accordance with national law. Sometimes, supervisory rules do not directly prohibit the choice of foreign law,

<sup>57</sup> Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.

<sup>58</sup> Blackaby, Nigel / Partasides, Constantine et al., in: *Redfern and Hunter on International Arbitration*, 2015, no. 3.03; Born, Gary B., *International Commercial Arbitration*, 2014, p. 2689 ff.

<sup>59</sup> See Schwampe, Dieter, *Gesetzeskonforme Vertragsgestaltung im internationalen Rückversicherungsgeschäft im Lichte des deutschen Aussenwirtschaftsrechts am Beispiel der Iran-Sanktionen*, *Recht der Transportwirtschaft*, 2015, p. 161 ff.; Heinisch, Stefan, *Die praktische Umsetzung von Sanktionen in der (Rück-) Versicherungswirtschaft*, *Corporate Compliance Zeitschrift*, 2012, p. 136; Heinisch, Stefan, *Aktuelle Probleme des Sanktionsrechts für die Erst- und Rückversicherung*, *Recht der Transportwirtschaft*, 2014, p. 309; Sigl, Uta, in: Langheid Theo / Wandt, Manfred, *Münchener Kommentar zum VVG*, 2017, *Luftversicherung*, no. 511 ff.

<sup>60</sup> Cf. also the London Market Association's model clause, LMA 3100 (Sanctions Limitations and Exclusion Clause).

but make such a choice unattractive by attaching economically disadvantageous legal consequences to it.

An example of both types of restrictions is provided by Australian law. Under paragraph 34 of the General Insurance Prudential Standard GPS 230, laid down by the Australian Prudential Regulation Authority (APRA), parties to a reinsurance contract must make Australian law applicable in the Australian non-life insurance sector. This compulsory requirement does not directly apply to life insurance; by virtue of the solvency rules, it does however indirectly force reinsurance to be taken out with reinsurers licensed in Australia. This also leads, as a general rule, to the application of Australian law.<sup>61</sup>

In a similar vein, Art. 38 of Resolution 168/07 of the Brazilian National Council of Private Insurance (Conselho Nacional de Seguros Privados (CNSP)) requires reinsurance contracts covering risks situated in Brazil to include a choice of law clause in favour of Brazilian law.<sup>62</sup>

## 7. Publication and future work

The PRICL containing the content described above will be published in 2019, i.e. immediately following the end of the project period at the end of 2018. This will not represent a complete codification of reinsurance contract law, which does not seem necessary. Contractual terms govern many areas of reinsurance contract law without significant disputes arising. In these areas, default rules play a less significant role. There are of course further topics on which provisions should be added to the PRICL. For this purpose, the Project Group will attempt to acquire further funding for its work as part of a second project, which will hopefully run for another 3 years.



Prof. Dr. Helmut Heiss

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<sup>61</sup> See Heiss, Helmut, in: Mankowski, Peter / Magnus, Ulrich [eds.], *European Commentaries on Private International Law, Rome I Regulation*, 2017, Art. 7, no. 233.

<sup>62</sup> See Heiss, Helmut, in: Mankowski, Peter / Magnus, Ulrich [eds.], *European Commentaries on Private International Law, Rome I Regulation*, 2017, Art. 7, no. 233.

# **PRINCIPLES OF REINSURANCE CONTRACT LAW**

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*updated 12 March, 2018*