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GOVERNING COUNCIL
105th session
Rome, 20-23 May 2025

UNIDROIT 2025
C.D. (105) 8
Original: English
April 2025

Item No. 5 on the agenda: Draft Instruments

(d) Principles of Reinsurance Contracts: Authorisation to proceed with publication

(prepared by the Secretariat)

<i>Summary</i>	<i>Final Report on the Project</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the finalised version of the black-letter rules and comments of the Principles of Reinsurance Contracts (PRICL), second edition, prepared by the PRICL Working Group, to commend their use of the UNIDROIT Principles on International Commercial Contracts as a model and as rules of general contract law, and to authorise the Secretariat to refer to the text of the PRICL on the UNIDROIT website once their publication is finalised</i>
<i>Mandate</i>	<i>Work Programme 2017-2019; renewed for Work Programmes 2020-2022 and 2023-2025</i>
<i>Priority level</i>	<i>Low</i>
<i>Related documents</i>	<u>UNIDROIT 2024 – C.D. (103) 8</u>

I. HISTORY AND CURRENT STATUS OF THE PROJECT

1. The project on the “Formulation of Principles of Reinsurance Contracts” (PRICL) was included in the UNIDROIT 2017-2019 Work Programme on the proposal of the Universities of Zurich, Frankfurt and Vienna. The project’s purpose was to formulate a “restatement” of global reinsurance law (see section III below for a more detailed overview of the purpose and scope of the instrument). The project was supported by a Study Group composed of an international team of experts from Europe, Asia, Africa, and the Americas, and was enriched by the participation of representatives of the global insurance and reinsurance markets. These representatives were organised in two consultative groups and were instrumental in individuating the topics to be covered and in gauging the effectiveness of the recommended principles and rules in practice. The UNIDROIT Secretariat participated to ensure consistency with the UNIDROIT Principles of International Commercial Contracts (UPICC), which, to the extent possible, were deemed and treated as best practice concerning general rules of contract law.

2. As the project was financially self-sufficient, it was classified among the low priority activities in the Work Programme.

3. Consistent with the announced timeline for the project, the black-letter rules and comments of the PRICL were published as Version 1.0 in 2019, following approval by the UNIDROIT Governing Council at its 98th session (Rome, 8-10 May 2019). At the same time, the Governing Council recommended the continuation of the project in the Work Programme 2020-2022 to ensure coverage of additional topics that consultations with the industry had deemed relevant for the success and usefulness of the instrument. The recommendation was adopted by the General Assembly at its 78th session and renewed by the General Assembly at its 81st session in December 2022 on the Governing Council's recommendation to keep the project on the Institute's Work Programme 2023-2025 until its completion by the end of 2024, since completion of the instrument was slowed down during the pandemic period when in-person meetings were not possible. The UNIDROIT Secretariat continued to actively participate in the project to ensure the prominent role of the UPICC as background general contract law as well as potential applicable law to the contract.

II. PROJECT ACTIVITIES SINCE THE LAST GOVERNING COUNCIL SESSION

A. Drafting Committee

4. Following the last plenary session of the Working Group, a Drafting Committee has continued to finalise the drafting of the new parts, as well as refine the entire text, through remote and in-person meetings, with a view to ensuring completion of the instrument by April 2025 and publication later in the year.

B. Consultation and dissemination activities

5. During the phase of conclusion of the drafting of the instrument, the Working Group continued to engage in consultations with stakeholders from different jurisdictions to test the validity of the policy decisions included in the draft instrument and its usefulness in practice.

6. Among other events, an international conference entitled "Zurich Forum on transnational insurance law - Soft Law in Insurance", organised by the University of Zurich on 9-10 January 2025, co-sponsored by UNIDROIT and funded by the Swiss National Science Foundation, featured the outcome of a research project led by Prof. Helmut Heiss and the PRICL Working Group. The conference addressed various topics connected with the use of soft-law instruments in insurance and reinsurance contract law, including presentations on the PRICL. Deputy Secretary-General Prof. Anna Veneziano was invited to deliver a keynote speech on "Soft-Law Instruments in Contract Law". The Working Group Drafting Committee also met in person around the conference.

III. OVERVIEW OF THE FINALISED INSTRUMENT

A. Purpose of the instrument

7. The PRICL were developed as a response to a need which had arisen in reinsurance markets, which are international in nature, resulting from an increasing lack of legal certainty and adequate legal responses for reinsurance relationships that became particularly evident from 2000 onwards. Previously, reinsurance contracts were considered gentlemen's agreements, the conclusion and fulfilment of which followed the "handshake" mentality of the market participants. In the recent past, various calamitous events, new requirements in the area of compliance and supervision ("contract certainty requirement") as well as companies that went into so called "run off" (that is, they ceased to provide new insurance policies focusing on claims management and settlement until all liabilities were resolved), have called this mentality into question. The market started asking for legal certainty,

which the PRICL strive to provide or at least increase by offering a balanced set of global principles and rules specific to such contracts.

B. Relationship with the UNIDROIT Principles of International Commercial Contracts

8. The PRICL are a non-binding set of principles and rules that parties can either choose as the law governing their contract or incorporate into their agreement. In this respect, the PRICL draw on the example of the Preamble of the UPICC (see Art. 1.1.1 PRICL). In addition, the PRICL also contain a provision (Art. 1.1.2) dealing with external gaps, according to which “Issues not settled by the PRICL shall be settled in accordance with the UNIDROIT Principles of International Commercial Contracts 2016”.

9. In order to facilitate parties’ choice of the PRICL, the drafters further inserted a Base Model Choice-of-Law Clause according to which “[T]his contract shall be governed by the Principles of Reinsurance Contract Law (2019)”, and two Base Clauses with an addition for gap-filling, according to which “(a) This contract shall be governed by the Principles of Reinsurance Contract Law (2019) and, with respect to issues covered neither by such Principles nor by the UNIDROIT Principles of International Commercial Contracts (2016), by generally accepted principles of international commercial law,” and “(b) This contract shall be governed by the Principles of Reinsurance Contract Law (2019) and, with respect to issues covered neither by such Principles nor by the UNIDROIT Principles of International Commercial Contracts (2016), by the law of [State X]”.

10. In addition to being proposed as the governing law of the contract for issues of general contract law not covered by the PRICL, the UPICC have fulfilled another important function, *i.e.*, as “background” contract law in the drafting of the new instrument. In this respect, they represent a successful outcome of the more general strategy recently pursued by the Secretariat in the promotion of the UPICC as a starting point for the development of guidance instruments for specific contracts, where the need for such guidance is confirmed by the relevant market stakeholders.

11. The relationship of the PRICL to the UPICC is expressly addressed and explained in the relevant parts of the Comments to the Articles. The PRICL mainly contain reinsurance-specific rules that are not covered by the UPICC, such as those on “Loss allocation” (Chapter 4); “Loss aggregation” (Chapter 5); “Back-to-back cover” (Chapter 6, Section 1); “Retention” (Chapter 6, Section 2); and “Liability for costs, XPL and ECO claims” (Chapter 6, Section 3). For a limited number of general contract law issues, they provide reinsurance-specific rules that modify or include additions to the ones contained in the UPICC. This is the case, for example, for the rules on “Duration” (Chapter 7) which also cover the consequences of early termination. Most of the other general contract law principles and rules of the UPICC are considered applicable to reinsurance contracts. The comments make reference to those that are not replicated in the PRICL to clarify this point. This is true not only for most of the general rules on formation, validity, performance, non-performance, remedies, etc., but also, for example, for time limitation (prescription), for which – following intensive discussions – no special rules were drafted since the relevant provisions in the UPICC were considered appropriate also in the context of reinsurance. For a more detailed explanation of the relationship between the PRICL and the UPICC, we refer to the comment to Art. 1.1.1. Moreover, the relationship with the relevant UPICC Principle(s) is clarified in the comments to the subsequent Articles, which also make reference to those general rules of contract law that are not reproduced but offer the “background” contract law for the PRICL more specific provisions.

C. Content and additional Chapters included in the second edition of the PRICL

12. The PRICL 2019 were composed of the following parts: Chapter 1: General provisions (containing rules on the scope, external gaps, modification or exclusion of provisions, overriding

mandatory rules, and interpretation and internal gaps, which are modelled on the parallel provisions of the UPICC, and a definition of a reinsurance contract); Chapter 2: Duties of the reinsurer and the reinsured (covering specific pre-contractual duties, duties owed during the contract period, and duties owed during the claims process, as well as a general duty of “utmost good faith” in Art. 2.1.2); Chapter 3 (a short Chapter including breach of pre-contractual duty of disclosure, to which a new Article on specific remedies for fraudulent claims was added in the final edition); Chapter 4: Loss Allocation; Chapter 5: Loss Aggregation.

13. For the final edition, the Working Group undertook a revision of all comments and added two additional Chapters: Chapter 6 (a reinsurance-specific Chapter on Coverage including back-to-back cover, Retention, and an innovative part on Liability for costs, XPL and ECO claims), and Chapter 7 on Duration. The final edition also contains the text of the black-letter rules of the UPICC as an Annexe to the instrument. For the table of contents of the draft instrument, see Annexe I.

IV. NEXT STEPS

A. Publication of the final version

14. The PRICL Working Group is in the process of editing the instrument for final publication, which is expected in the summer of 2025, after which the instrument, completed with foreword, introduction, list of Working Group participants, cases, and publications, will be posted online and referred to on the UNIDROIT website upon authorisation by the Governing Council at the present session.

B. Planned consultation and dissemination activities

15. In relation to future consultation and dissemination activities, various actions are planned:

- Events with participation of industry and other stakeholders in order to raise awareness on the practical relevance and usefulness of the instrument: among others, a networking and dissemination event will be held in London on 3 November 2025 for the benefit of stakeholders and major players in the reinsurance industry.
- During the course of 2024 and early 2025, the UNIDROIT Secretariat was involved in discussing plans for a strategy for the implementation of the future instrument, including the possibility of accessing additional external funding to ensure such activities. The leaders of the project are envisaging various possibilities, including the use of the Foundation of the University of Zurich to collect targeted contributions. The Secretariat will continue to discuss this matter with the Working Group’s leaders in order to find the most appropriate modalities for the continued involvement of UNIDROIT in such activities.

V. ACTION TO BE TAKEN

16. *The Governing Council is invited to take note of the finalised version of the black-letter rules and comments of the Principles of Reinsurance Contracts (PRICL) prepared by the PRICL Working Group, to commend their use of the UNIDROIT Principles on International Commercial Contracts as a model and as rules of general contract law, and to authorise the Secretariat to refer to the text of the PRICL on the UNIDROIT website once their publication is finalised.*