

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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**An Optional Instrument
for Insurance Contract
Law: the point of view of
Legal Practice**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**An Optional Instrument for Insurance
Contract Law: the point of view of Legal
Practice**

NOTE

Abstract

This note provides the point of view of the legal practice as regards an optional instrument for insurance contract law. In particular, the note assesses the advantages of an optional instrument for cross-border insurance contracts in the EU. Furthermore, it formulates some suggestions on a possible model and contents of an optional instrument.

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CONTENTS

| | |
|--|----------|
| Contents | 3 |
| LIST OF ABBREVIATIONS | 4 |
| EXECUTIVE SUMMARY | 5 |
| 1. GENERAL | 6 |
| 2. NECESSARY CONTENTS | 6 |
| 3. MANDATORY IN FAVOUR OF THE INSURED | 7 |
| 4. POSSIBILITY TO START FROM THE PEICL AND THE DCFR | 7 |

LIST OF ABBREVIATIONS

CCBE Council of Bars and Law Societies of Europe

DCFR Draft Common Frame of reference (for European Contract Law)

PECL Principles of European Contract Law

PEICL Principles of European Insurance Contract Law

EXECUTIVE SUMMARY

Representatives of the legal practice welcome the idea of an optional instrument for insurance contract law. A coherent European contract law for cross border actions is important for European citizens as well as for the proper functioning of the Internal Market. An optional instrument is for the moment the only realistic method in order to advance an internal market for insurance services, which is currently inexistent.

An optional instrument for insurance contract law cannot work if there is no optional instrument for contract law in general. Such an instrument could be drafted on the basis of a contractualised Draft Common Frame of reference (DCFR) and the Principles of European Insurance Contract Law (PEICL) as adapted to the former.

1. GENERAL

In general, lawyers do welcome the idea of an optional instrument for contract law in general and for insurance contract law more specifically. The Council of Bars and Law Societies of Europe (CCBE) believes that a coherent European contract law for cross-border actions is important for the European citizen as well as for the proper functioning of the Internal Market. The CCBE also aims to support through its work and legal expertise a more coherent European Contract Law¹.

We do believe it would be beneficial if we could, in advising clients on drafting contracts (whether insurance contracts or contracts where insurance obligations or effects of insurance contracts are taken into account), dispose of a choice between a national insurance contract law and an optional European insurance contract law (and make the choice according to the needs and circumstances).

Moreover, an optional instrument is for the moment the only realistic method in order to advance an internal market for insurance services, which is virtually inexistent (apart from large risks in non-life insurance). Such an instrument would be especially useful in the small risk sector², where there is no real choice of law under the conflict of law rules³, and where the differences in mandatory law between the Member States make common insurance policies impossible.

An optional instrument is to be preferred over a free choice of law, as the latter would in most cross-border cases lead to the duty to apply the law of the insurer by the courts in the country of the insured party⁴ (and a duty for the acting advocates in the latter country to present that foreign law). Legal certainty, correct application of the law and a sufficiently equal protection of insured parties are better guaranteed when courts only have to apply either their national law or a common European instrument. Moreover, an optional instrument would be available in all official languages of the EU, which is not the case for the laws of the Member States.

2. NECESSARY CONTENTS

An optional instrument for insurance contract law cannot work if there is no optional instrument for contract law in general. This does not necessarily mean that the option to choose that general instrument should be available for all types of contracts. But in order to have an optional insurance contract law, there has to be an instrument that deals with all the issues of general contract law relevant for insurance contracts. This includes *inter alia* precontractual information duties, precontractual liability, formation of the contract, representation, withdrawal rights, invalidities or other effects of defects of consent (very important for insurance contracts), effects of the intervention of third parties in the making of the contract, effects on the contractual relationship of illegality, interpretation of contracts, contracts for the benefit of third parties, unfair terms, time limitations and conditions and related rights of termination, modalities of performance, non-performance

¹ See the CCBE Position Paper on the Draft Common Frame of Reference, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1265878409.pdf.

² Given the possibility of choice of law for large risks in non-life insurance, see art. 7 (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

³ See Art. 7 of Rome I Regulation.

⁴ This follows from Art. 9 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 12, 16.1.2001, p. 1.

and remedies for non-performance including restitution in case of invalid or terminated contracts, contractual assignment and transfer of contract, subrogation or assignment *ex lege*, set-off, and probably also plurality of parties and prescription. A good criterion is probably to cover the full range of topics falling within the scope of the Rome I Regulation - as spelled out in Art. 10 and ff. - plus the question whether an agent is able to bind a principal in relation to a third party.

What we fear most in a certain sense is an optional instrument leaving out important issues of general contract law, as this would lead to a mere illusion of uniformity. It would also make it very difficult for advising lawyers to predict the concrete rule as it will often not be very clear which issues are governed by the uniform optional instrument and which ones left to the otherwise applicable national law.

1. MANDATORY IN FAVOUR OF THE INSURED

An internal market can only be established if the application of an optional instrument would disapply all national mandatory law on the issues within the scope of the instrument. This disapplication of a higher level of protection provided by national law is only acceptable if the optional instrument itself provides for a high level of protection of insured parties. Parties should remain free to derogate from the instrument to the detriment of the insurer, but not to the detriment of the policy holder or insured party (except for the so-called large risks).

2. POSSIBILITY TO START FROM THE PEICL AND THE DCFR

The Principles of European Insurance Contract Law (PEICL)⁵, prepared by the Restatement of European Insurance Contract Law Project Group and published in 2009 are a well-considered set of rules drafted in a form that makes them suitable for an optional instrument. It is on the other hand important to take into account the limitations of these Principles, as spelled out clearly in art. 1:105 PEICL.

On the one hand, not all branches of insurance are covered by special rules in the PEICL, and art. 1:105 PEICL therefore allows a recourse to national law for mandatory rules specifically enacted for such branches.

On the other hand, the PEICL do not contain the rules of contract law normally belonging in general contract law as they are not specific to insurance contracts. As the PEICL were drafted between 1999 and 2008 and the Draft Common Frame of reference was only published in an interim version in 2008 and a final version in 2009⁶, the PEICL still refer to the predecessor of the DCFR, namely the Principles of European Contract Law (PECL), published in 1999 (Parts I and II) and 2003 (Part III). The DCFR contains an updated version of PECL and has integrated also large parts of the *acquis communautaire* which were missing in PECL. PECL did e.g. not contain any of the special rules of consumer contract law, nor did it contain certain other parts of the *acquis communautaire* integrated in the DCFR such as the Late Payment Directive, the Directive on Commercial Agency, etc. A full optional instrument for insurance contract law would therefore require on the one hand a so-called contractualisation of the DCFR⁷ and on the other hand an adaptation of the PEICL to the contents of that contractualised DCFR (rather than than its predecessor, the PECL)

⁵ Available in English and several other languages at <http://www.uibk.ac.at/zivilrecht/restatement/draft>.

⁶ At http://ec.europa.eu/justice_home/fsj/civil/docs/dcf_r_outline_edition_en.pdf

⁷ The author presented a contractualised version of the DCFR for service contracts at an ELA/ERA Conference in Trier in March, see "A DCFR-based Optional instrument for services: "How would an optional instrument for service contracts look like if based on the DCFR", <http://storme.be/OptionalInstrumentforServices.pdf>.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C** CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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