Principles of European Insurance Contract Law: A Model Optional Instrument

With a Postscript in Honour of
Fritz Reichert-Facilides

edited by
Helmut Heiss

in co-operation with
Mandeep Lakhan

on behalf of the Project Group
Restatement of European Insurance Contract Law

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The conference in Vienna was made possible thanks to the support received from various institutions. The Project Group is especially grateful to the Austrian Ministry of Justice *(Bundesministerium für Justiz)* for hosting the event at Palais Trautson.

It also greatly appreciates the financial support offered by the following sponsors:

- **Tyrolean Regional Government** *(Amt der Tiroler Landesregierung)*
- **Austrian Ministry for Science and Research** *(Bundesministerium für Wissenschaft und Forschung)*
- **Tiroler Versicherung V.a.G.**
- **Uniqa Versicherungen AG**
- **University of Innsbruck** (through the International Relations Office and *Jubiläumsfonds)*

The Group is also appreciative of the continued support provided by its general sponsor, the Austrian Science Fund *(Österreichischer Fonds zur Förderung der wissenschaftlichen Forschung)*.

ISBN (print) 978-3-86653-184-0
ISBN (eBook) 978-3-86653-945-7

The Deutsche Nationalbibliothek lists this publication in the Deutsche National-bibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de.

Production: Karina Hack, Munich. Typesetting: fidus Publikations-Service GmbH, Nördlingen. Printing and binding: AZ Druck und Datentechnik, Kempten. Printed on acid-free, non-ageing paper. Printed in Germany.

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Preface

The PEICL provide the first fully developed model of an optional instrument, a "2nd Regime", in European Contract Law. In particular, Articles 1:102 and 1:105 PEICL set out the option of the parties as well as the relationship of the PEICL to national law and general principles of contract law. While these provisions have been drafted with a view to insurance contract law, they can operate as a model for a general optional instrument at the same time. This volume presents the views and opinions of representatives of the political, business and academic arena on the suitability of the PEICL as a model for an optional European insurance contract law.

In addition, a postscript has been added in commemoration of the founding father of the Project Group "Restatement of European Insurance Contract Law", the late Dr Fritz Reichert-Facilides, LL.M. (Ann Arbor), Professor Emeritus of the University of Innsbruck, Austria.

Table of Contents

Part I

Welcome Address

Georg Kathrein

Ladies and gentlemen,

On behalf of Claudia Bandion-Ortner, the Austrian Minister of Justice, welcome to Vienna and welcome to the Ministry of Justice. Unfortunately, Mrs Bandion-Ortner is not able to open your conference and to pay a visit to your discussions. But she has an excuse, a good excuse; she is engaged in the Informal Council at Toledo where the European Minsters will discuss *inter alia* the further development of European Civil Law. She wishes you all the best for the conference and she asked me to deliver her thanks that you have chosen Vienna to discuss the Principles of European Insurance Contract Law.

It is a great honour for us to offer you a platform for the presentation of the Principles. And we hope that you might taste just a little bit of the European spirit in the Palais Trautson where the Ministry of Justice is located. For more than 150 years, this building was the headquarters to the Hungarian Royal Lifeguard that served at the Habsburg Court not far away. After the collapse of the Habsburg Empire, the Palais hosted two Hungarian state institutions until it was sold to the Republic of Austria in the sixties of the former century. Since then, the building has been renovated several times, most recently in 2006/2007 to prepare an adequate setting for the Austrian Presidency in the year 2008. The ballroom we are in now has seen quite a lot of international conferences on European Civil Law. So after all, it is not an exaggeration if I say that the "*spiritus loci*" might bring some advantages to the project. I hope that it will contribute in a positive way to the further development of European Insurance Law.

We all know that the development of European Civil Law is a difficult process: The European Parliament has already pled for further harmonisation of that part of law several times, bearing in mind the needs and requirements of European citizens and companies. The European Commission has elaborated an Action Plan and some further communications, but those efforts have not come to an end yet, we are still waiting for some

further information. The Council and the Member States seem to be more critical than the other European institutions. There are serious objections against the plans and the resolutions of the European Parliament and the efforts of the Commission. As far as I can survey that, it has not yet been possible to find a common political understanding.

The European scientific community shows us a totally different picture: All over Europe, universities and teachers have come together to discuss the future European Civil Law, partly supported by the Commission, partly by other institutions and the industry. The Draft Common Frame of Reference, the results of the so-called "Gandolfi Group", the Principles of European Tort Law and now the Principles of European Insurance Contract Law, all those papers contain more or less concrete rules and principles of European Civil law. They are inspired by Community law and by national regulations. And they all demonstrate what the future European law could look like. So this is quite a difficult situation: On the one hand, there are the political institutions and the Member States that have not been able to find a common position; on the other hand, European academics have developed several instruments and drafts. One may ask what it is worth if there is no realistic political perspective to implement all those proposals into real law. Are we all wasting our time on theoretical issues that will never come to an end? Is it all pure science, without a view to the reality of European law-making business?

Ladies and gentlemen, yes, it is pure science, yes, it is visionary and yes, it is theoretical, but it is even more than this. I do not want to strain phrases like "tool box", "optional instrument" or other slogans that are used in political and scientific discussion, as it is not clear what they mean and to what they refer. But in any case, it is remarkable that the European academics have shown us what could be done, that they have demonstrated the possibilities in comparison with the realities we all live and work in. Of course, it is much more difficult to work on "real" legal instruments that have to consider the different interests of Commission, Parliament, Member States and all the parties that are involved in the legislative process. But the Principles and Frames of Reference have demonstrated that there might be alternatives to the current situation, depending on the political will and on the economic needs and desires. Moreover, the scientific work would not have been done in vein if it would take a longer time until the European institutions come to a common position. The Principles and the Frames of Reference contain a lot of interesting proposals that have to be considered in daily work. Whatever the legislators

in the Commission, in Parliament or in the Member States are drafting, they have to keep an eye on the solutions they can find in the Principles or the Frames of Reference. The rules and principles herein are up-to-date, they represent the modern European standard and they are high-quality work. And the scientific drafts will find their way into the practical daily life of European jurists. They will be quoted in decisions and judgments of the courts as well as in other documents and statements. So we do not have to wait until the political stakeholders have come to a decision, the practical influence of the scientific efforts will start from the publication and the presentation of those works.

There has always been some sort of rivalry between legislators and scientists. I dare to talk about this fact because I work in both branches, in the Ministry of Justice as well as for the University of Vienna. Scientists usually tend towards a critical point of view; they ask and tell themselves and their readers what has gone wrong and what could have been done better. Legislators and politicians are a little bit cautious and insecure when dealing with pure science. Above all, they believe that scientists do not have any idea of the political reality and the influences and impacts on political work. One should not overvalue these tensions, but they probably are one of the reasons for the opposition against the drafts and Principles in the Member States. The question is how we could overcome these obstacles. Well, in my opinion we should go back to the beginning and we should keep in mind the aims of the projects: The Principles and the Frames of Reference cannot be perfect law; they should be the perfect proposal.

Professor Heiss asked me in the preparation of the conference if I could give a short estimation of the Principles. I promised him to do so but as I received the book I decided to break my vow. It is simply impossible to talk about the Common Frame without going into detail due to the quality and the extent of the proposal. I just have to tell you one impression I gained as I started to study the Principles: I thought to myself that the proposal is attractive, as it is short, simple and clear, and I thought that it is dangerous, as it is the perfect proposal which could be the foundation and basis of further development.

Let me come to an end and let me end with some personal remarks. I studied law at the University of Innsbruck years ago. One of my teachers in commercial law and private international law was Fritz Reichert-Facilides. At that time – in the late seventies – we did not learn too much about insurance law and we did not hear anything about European

law, as the European Community was far, far away from Austria. It is a special pleasure for me that the undertaking to compare and to summarise the European law started in Innsbruck has now come to an end. Professor Basedow and Professor Heiss, thank you very much for your efforts and good luck for the future of the Principles.

Introduction

Helmut Heiss

Thank you, Mr Kathrein, for your warm words of welcome, spoken on behalf of the Austrian Ministry of Justice. It is a pleasure to be hosted by you in your wonderful Palais Trautson.

Mrs Vice-President, dear conference speakers, my colleagues, ladies and gentlemen!

Successful law-making implies a complex social interaction between citizens, stakeholders, politicians and legal experts. Indeed, textbooks on comparative law present a rich selection of examples in which law-making "failed" because the interaction had been distorted in one way or another. A newly introduced law is usually deemed to have "failed" when society refuses to accept it and tries to avoid it as far as possible in social reality. Comparativists have pointed out that at least three criteria must be met in order to prevent a new law from failing:

(a) there must be demand in society for a new law which makes citizens receptive to new rules;
(b) the new rules must be based on a thorough analysis of the underlying problems so that they will address the demand appropriately; and
(c) there must be a political will strong enough to provide for a new law of this kind.

European insurance contract law in the past has presented yet another textbook example of failed legislation. The Amended Proposal for a Directive on Insurance Contract Law of 1980, which had never been enacted, was finally withdrawn by the Commission in 1993. Scarcity of demand, an inadequate analysis of the underlying problems and lack of political will are the main reasons behind the failure.

Today, we will discuss an entirely new model law, the "Principles of European Insurance Contract Law" (PEICL) which were published quite recently by the Project Group on a "Restatement of European Insurance Contract Law" (the Project Group). You may wonder why a new attempt

to unify insurance contract law was undertaken. After all, the questions remain the same: Which demand do the Principles meet? Do they give an appropriate answer to the problems of the single insurance market? Furthermore, is there strong enough political will to provide for a European Insurance Contract Law? We will hear answers and opinions to these questions from our most distinguished speakers, to whom we owe a debt of gratitude for taking the time and effort to analyse our model law – the text of which, after all, comprises 283 pages. I do not know what their position will be.

However, I do know that the founding father of our Project Group, the late Professor Fritz Reichert-Facilides, was very well aware of the three criteria mentioned previously. His initiative to set up the Project Group in 1999 was primarily based on the conviction that the progress in deregulating European insurance law, in particular the abolition of the traditional *ex ante* control of insurance products, had stimulated competition in the insurance sector and, thus, created an interest on the part of insurance companies to compete not only in domestic, but also in foreign markets. At the same time, the increasing mobility of policyholders raised the question of whether it was possible to reconcile the ideas of a single insurance market with the fact that policyholders were being forced to change their motor vehicle liability insurance policies, their household insurance policies, their health insurance policies, their life assurance policies and so on whenever they moved from one Member State to another. Both sets of interests, the industry's as well as the consumers', showed a newly developed demand for a unified insurance contract law and, thus, a new starting point for attempting to harmonise contract law in Europe.

Moreover, Fritz Reichert-Facilides clearly identified that the unification of insurance contract law must be approached in a way that met the new demand. His approach was, therefore, orientated towards the single market from the very beginning – which was obviously the only appropriate response to the new demand. This single market is based on freedom of contract and, therefore, relies on the creativity of the insurance industry in designing products which meet the demands of policyholders. The market is, however, restricted by mandatory rules of national insurance contract law, which also apply to foreign products – especially to products of mass risk insurance – once they are sold cross border. Following his single market orientation, Fritz Reichert-Facilides petitioned for a unification of mandatory rules only – a restriction which still forms the backbone of the project. Other features of the Principles of European In-

surance Contract Law conform to the single-market orientation as well: The Principles transpose the *acquis communautaire* existing in the area of insurance contract law, such as the information duties imposed on the insurer and the withdrawal rights granted to the policyholder by the Distance Marketing Directive[1] as well as the Life Assurance Consolidation Directive[2]. The Principles also transpose the insurance-related provisions in the Gender Directive[3], the Unfair Contract Terms Directive[4] as well as the Injunctions Directive[5]. This list of transposed directives indicates a third single-market element of the PEICL: they afford a high level of consumer or, more precisely, policyholder protection.

This single-market orientation is one of the main features of our project. The Project Group has maintained this orientation even since joining the Common Frame of Reference (CFR) Project in 2005. The CFR was envisaged to be a set of definitions and general principles, but not necessarily a model law for the single market. The Group, however, thought that, at least as far as insurance was concerned, the CFR itself would not be sufficient to build a single market. This is why the Principles of European Insurance Contract Law, while providing a CFR, also serve as a model law for the single market. This goes to show that despite the Principles being characterised by some authors as "academic" in nature (we take this as a compliment and, in fact, we share this view), it does not mean that the Principles do not address the practical needs of the single market. Fritz Reichert-Facilides never intended to create "virtual reality", but was instead willing to fight for change in the realm of the single market.

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1 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16.

2 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345/1.

3 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29.

5 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51.

The approach taken by Fritz Reichert-Facilides was welcomed by many outstanding scholars of insurance law who were willing to co-operate, join the Project Group and support Fritz Reichert-Facilides in his endeavour. Among them was Jürgen Basedow, who had just set up a "Hamburg Team" on insurance law and begun a comparative analysis of insurance contract law in Europe, which was published in a set of three volumes in 2002 and 2003. These volumes presented a reliable frame of reference for the purpose of extracting European Principles. Moreover, the Hamburg Team provided all the Notes for the published version of the PEICL, which contain comparative references to the status quo of insurance legislation in the Member States.

When Fritz Reichert-Facilides passed away in 2003, many of the Principles presented in our book had thitherto not been drafted. Yet, the concept on which the overall project was to be based had been established. In addition, since I distinctly remember that Fritz Reichert-Facilides liked to refer to the Aristotelian concept of "*entelechia*", it is clear to me that by applying this concept he could undoubtedly foresee what would be the ultimate outcome six years after his death. The Project Group is happy and proud to have completed what remained to be done when it lost Fritz Reichert-Facilides.

One major development which could be anticipated as early as in 2003 was the shift from the comprehensive harmonisation of laws to the creation of optional instruments, which offered a promising alternative, especially in the field of financial services. Optional instruments provide no more than an alternative because an optional instrument cannot bring about better results for the single market than comprehensive harmonisation. However, they provide a "promising" alternative because optional instruments do not share certain shortcomings inherent to comprehensive harmonisation: First of all, optional instruments do not directly affect the legal tradition of each Member State; it leaves national laws untouched. Secondly, optional instruments leave the decision regarding its application to a choice of the parties, thereby ensuring that they will be used where there is demand and conversely not be imposed on parties who do not wish the Principles to be applied.

This shift towards an optional instrument had previously been envisaged in a 2004 own-initiative Opinion on the "European Insurance Contract" from the European Economic and Social Committee, for which Jorge Pegado Liz was the rapporteur and Fritz Reichert-Facilides his ini-