Introduction

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Contents

I. The Principles of European Insurance Contract Law as an Academic Endeavour

1. The Idea

I1. The Project Group aiming at a "Restatement of European Insurance Contract Law"[1] started its work in 1999. By then, Community legislation in the field of insurance supervisory law had established a system of single licensing and the conflict of laws issues had been partly unified and partly harmonised through the Brussels Convention[2], the Rome Conven-

[1] This Group has been called by various names such as "Project Group", "Innsbruck Group", "Insurance Group" or "Restatement Group"; for the purposes of this article the Group shall be called "Project Group".

[2] The Brussels Convention was initially transformed into the Brussels I Regulation (44/2001), which has now been replaced by Brussels Ibis Regulation (1215/2012).

tion (80/934/EEC)[3] and the Directives on insurance law[4]. However, in contrast with these achievements in supervisory and private international law, an earlier attempt to harmonise substantive insurance contract law had failed.[5] In view of this shortcoming of Community legislation in the field of insurance law, the Project Group decided to undertake to elaborate "Principles of European Insurance Contract Law" (PEICL) in order to reactivate the unification process.

I2. The reasons for this undertaking have been extensively chronicled in the research works of the late Professor *Fritz Reichert-Facilides* and of Professor *Jürgen Basedow* which were first presented at an international conference hosted by Professor *Anton K. Schnyder* in Basle in 1998.[6] In the course of this conference both argued that the attempts to complete the internal insurance market within the EU had failed so far. *Reichert-Facilides* pointed out that the harmonisation of private international law had failed to bring about the expected or at least aspired effects for the internal market.[7] The analysis provided by *Jürgen Basedow* showed that the private international law of insurance contracts was in fact an inadequate means for the creation of an internal insurance market.[8] For the sake of policyholder protection, which is considered a "general good" by the European Court of Justice,[9] the applicable rules of private international law are to a large extent mandatory. Pursuant to art. 11 para. 1(b) of the Brussels Ibis Regulation (1215/2012), a policyholder, insured or beneficiary may bring an action against an insurer at the court where the plaintiff is domiciled. Under the relevant rules of private international law as laid down in art. 7 of the Rome I Regulation

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3 As to the application of the Rome Convention (80/934/EEC) to certain insurance contracts, see art. 1 paras. 3 and 4 of the Rome Convention (80/934/EEC); the Rome Convention (80/934/EEC) has meanwhile been replaced by the Rome I Regulation (593/2008).

4 See – for non-life insurance – the Second Non-Life Insurance Directive (88/357/EEC); Third Non-Life Insurance Directive (92/49/EEC); for life assurance the Life Assurance Consolidation Directive (2002/83/EC); the Directives' rules on the conflict of laws have meanwhile been replaced by the Rome I Regulation (593/2008), in particular its art. 7; as far as insurance contracts are concerned, the Rome I Regulation applies also in EEA Contracting States, see art. 187 of the Solvency II Directive (2009/138/EC).

5 The Amended Proposal for a Council Directive on Insurance Contract Law [1979] OJ C190/2 (as amended by [1980] OJ C355/30) was withdrawn by the Commission on 4 August 2003. With regard to earlier attempts of harmonisation of insurance contract law, see Jürgen Basedow, 'The Optional Application of the Principles of European Insurance Contract Law' in Angelika Fuchs (ed.), *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, vol. 9 (Springer, Heidelberg 2008) 111.

6 See the conference volume edited by Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000).

7 Fritz Reichert-Facilides, 'Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000) 1, 10; *id.*, 'Europäisches Versicherungsvertragsrecht?' in Jürgen Basedow, Klaus J. Hopt and Hein Kötz (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck, Tübingen 1998) 119.

8 Jürgen Basedow, 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000) 13.

9 Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755.

(593/2008), the law applicable to the insurance contract will regularly be the law of the Member State in which the policyholder has his habitual residence. It follows that litigation in matters relating to insurance will usually take place in the home country of the policyholder and be subjected to the law of this country as well.[10] As a consequence, insurers must be and actually are aware of the fact that any product they sell cross-border will be subjected to a law different to the law in their home country.

I3. The impact of a new legal environment on an insurance product can be very great.[11] If, for example, an insurance product which is lawfully marketed in England is sold cross-border to a German customer, a particular exception contained in the contract terms which is, in principle, not subject to the English Unfair Terms in Consumer Contracts Regulations 1999[12] may be subject to regulation under German law and could be held to be void under s. 307 German CC. If so, the scope of cover provided by one and the same particular insurance product will turn out to be broader in Germany than in England due to the differences in the law applicable. It follows that insurers will be reluctant to provide cross-border services.[13]

I4. In fact, statistics show that cross-border provision of insurance services plays a minor role in the internal European market.[14] The European Commission has repeatedly acknowledged this fact.[15] Insurers carry on their international business predominantly through subsidiaries or branch offices. Despite the fact that such international activities are widespread in the European market they are insufficient to establish an internal market for insurance products. The products sold by foreign subsidiaries or branch offices are not the same as the products sold by the insurer in the country where it is domiciled. Products offered in the country of the subsidiary or branch office are either developed independently of the products sold in the home market of the insurer or at least adapted to the legal regime of the state where the insurance product is sold.

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[10] See, for example, Helmut Heiss, 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG' in Petra Pohlmann (ed.), *Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster ("Münsteraner Reihe")*, Issue 99 (VVW, Karlsruhe 2005) 8 f.

[11] Jürgen Basedow, 'Insurance Contract Law as Part of an Optional European Contract Act' [2003] Lloyd's Maritime and Commercial Law Quarterly 498, 500 (abridged version in *ERA Forum 2003 (ERA Forum scripta iuris europaei)*, vol. 4, issue 2 (Springer, Heidelberg 2003) 56); as to examples of obstacles, see the CEA Policy Report as well as the Final Report of the Commission Expert Group on European Insurance Contract Law.

[12] For details see Malcolm Clarke, *The Law of Insurance Contracts* (5th edn Informa, London 2006) 19-5.

[13] For further examples Helmut Heiss, 'Mobilität und Versicherung', Versicherungsrecht (2006) 448.

[14] See Jürgen Basedow, 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000) 17 referring to data provided by EUROSTAT; Final Report of the Commission Expert Group on European Insurance Contract Law, nos. 4 ff. (in particular no. 6).

[15] See para. I61 below.

I5. To give a relatively simple example, in Germany foreign insurance companies primarily sell insurance products through subsidiaries or branch offices.[16] There are, however, no foreign (mass) insurance products sold in Germany in the same way they are sold at the place of origin. As a result, competition between insurance products throughout Europe remains rather restricted. Insurance enterprises are not in a position to compete across Europe with any innovative products they introduce, nor are customers in a position to gain full access to various national insurance products. The internal market for insurance products has not been completed.

I6. It may be argued that the shortcomings of the internal insurance market in its current condition could be overcome by a shift in European international insurance contract law allowing parties to choose the law of the insurer's domicile as the law applicable to the insurance contract. However, the argument turns out to be mistaken. First of all, the approach would deprive the policyholder of protection by private international law, which does not appear to be acceptable as a matter of legal policy. Secondly, the shift in the rules of private international law would be followed by a switch in behaviour on the part of insurers and policyholders. Whereas under the current private international law regime, it is chiefly the insurer who hesitates to provide cross-border services, it would be the policyholder who would be reluctant to acquire foreign insurance products in the absence of protection under private international law. The internal market would remain incomplete.[17]

I7. In the light of this analysis, the Project Group adopted the view that "the law of insurance [in Europe] must be one".[18] However, the Project Group thought that the European Commission could hardly be expected to resume its efforts to harmonise insurance contract law unless the circumstances which had led to the failure of the earlier proposal for a directive had changed or would change in the future. In fact, several factors had indeed changed by 1999. The European Court of Justice had opened the door to a system of single licensing in its decision of 4 December 1986,[19] and the system was finally introduced by the Third Generation of Insurance Directives[20] some years later. Some members of the Project Group reported talks with representatives of insurance companies and their impression

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[16] See, for example, Leander D. Loacker, 'Insurance soft law?' Versicherungsrecht (2009) 289; for Europe in general Final Report of the Commission Expert Group on European Insurance Contract Law, no. 4 ff.

[17] See in more detail Jürgen Basedow, 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000) 20 f.; Helmut Heiss, 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG' in Petra Pohlmann (ed.), *Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster ("Münsteraner Reihe")*, Issue 99 (VVW, Karlsruhe 2005) 13 f.

[18] *Hans Möller* as quoted by Fritz Reichert-Facilides, 'Rechtsvereinheitlichung oder Rechtsvielfalt? Überlegungen vor dem Modell des Versicherungsvertragsrechts' in Fritz Schwind (ed.), *Europarecht, IPR, Rechtsvergleichung* (Verlag der Österreichischen Akademie der Wissenschaften, Vienna 1988) 155.

[19] Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755.

[20] See (what is today) art. 15 para. 1 of the Solvency II Directive (2009/138/EC); Ulrike Mönnich, 'Europäisierung des Privatversicherungsrechts' in Roland Michael Beckmann and Annemarie Matusche-Beckmann (eds.), *Versicherungsrechts-Handbuch* (3rd edn Beck, Munich 2015) § 2 paras. 49 ff.; Helmut Heiss

that the insurance industry was actually rather keen to provide its services cross-border but could not do so for the reasons given. Last but not least, an ever increasing number of European citizens, "euro-mobile citizens", were moving and living in Member States other than their home country.[21] Without any doubt, these "euro-mobile citizens" had created a strong demand for Europe-wide insurance solutions, namely the availability of insurance policies which they could bring along without facing legal barriers whenever they moved from one Member State to another.[22] What was still missing was a comparative analysis of the various insurance contract laws in Europe and a text stating the Principles of European Insurance Contract Law which could be considered a set of rules amounting to a common understanding of insurance contract law throughout Europe.

I8. The requisite comparative analysis of insurance contract law in Europe was presented shortly afterwards by *Jürgen Basedow*, a founding member of the Project Group, and his research team at the Hamburg Max Planck Institute. The work was published as "Europäisches Versicherungsvertragsrecht"[23] in three volumes in 2002 and 2003.[24] The Hamburg team did not, however, elaborate a model law for Europe, leaving this task to the Project Group which was established by *Fritz Reichert-Facilides*[25] and chaired by him until his death on 23 October 2003. Following his death, *Helmut Heiss*, who was then vice-chairman of the Project Group, took over as interim chairman and was appointed as the new chairman by the Project Group on 15 April 2004. The overall purpose of the work done by the Project Group is to provide the European legislature with a model law designed to overcome the existing barriers to an integrated European insurance market.

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and Anton K. Schnyder, 'Versicherungsverträge' in Herbert Kronke, Werner Melis and Anton K. Schnyder (eds.), *Handbuch des Internationalen Wirtschaftsrechts* (Schmidt, Cologne 2005) 142.

21 The image of a "euro-mobile citizen" was first created by Jürgen Basedow, 'Das österreichische Bundesgesetz über internationales Versicherungsvertragsrecht – Eine rechtspolitische Würdigung' in Reichert-Facilides (ed.), *Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum* (Mohr Siebeck, Tübingen 1994) 89.

22 See, inter alia, the exemplifications in Helmut Heiss, 'Mobilität und Versicherung', Versicherungsrecht (2006) 448.

23 European Insurance Contract Law.

24 Jürgen Basedow and Till Fock (eds.), *Europäisches Versicherungsvertragsrecht*, vols. I & II (Mohr Siebeck, Tübingen 2002); vol. III (Mohr Siebeck, Tübingen 2003).

25 As to the basic concepts of the project see Fritz Reichert-Facilides, 'Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick' in Fritz Reichert-Facilides and Anton K. Schnyder, *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Helbing und Lichtenhahn, Basel 2000); *id.*, 'Europäisches Versicherungsvertragsrecht?' in Jürgen Basedow, Klaus J. Hopt and Hein Kötz (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck, Tübingen 1998) 119; *id.*, 'Verbraucherschutz – Versicherungsnehmerschutz: Überlegungen im Blick auf das Projekt: "Restatement des Europäischen Versicherungsvertragsrechts"' in Bernhard Eccher, Kristin Nemeth and Astrid Tangl (eds.), *Verbraucherschutz in Europa. Festgabe für em. o. Univ.-Prof. Dr. Heinrich Mayrhofer* (Verl. Österreich, Vienna 2002) *179,* 180; as to his role as the founding father of the Project Group see Helmut Heiss, 'Introduction', in Helmut Heiss and Mandeep Lakhan (eds.), *Principles of European Insurance Contract Law (PEICL): A Model Optional Instrument* (Sellier, Munich 2011) 7, 8 ff.

2. Work Progress

I9. Since its establishment in 1999, the Project Group has drafted Principles of European Insurance Contract Law modelled on American Restatements of the Law,[26] in a manner which had previously been adopted by the so-called Lando Commission on European Contract Law in the course of drafting its Principles of European Contract Law (PECL).[27] Accordingly, the Principles of European Insurance Contract Law are drafted as Rules, followed by Comments presenting the reasons for the rule and illustrating how it should be applied by giving examples, and Notes[28] reproducing the *status quo* of insurance contract law in each Member State and the *acquis communautaire* on the point in question. The entire text was linguistically revised by the Drafting Committee of the Project Group, headed by Professor *Malcolm A. Clarke*.

I10. The first part of the Project Group's work, comprising the general part of insurance contract law including general rules for all types of indemnity insurance and for all types of insurance of fixed sums, was completed and published as the first edition to the present volume in 2009. The first edition of the PEICL consisted of three *Parts* comprising a total of 13 Chapters.[29]

I11. The Project Group's work of course did not stop at this point. In 2008, the Group started drafting special rules for individual branches of insurance, namely liability insurance, life insurance and group insurance. The Project Group chose these branches because it thought them to be at the forefront of transborder provision of services in the insurance sector. The Commission Expert Group on European Insurance Contract Law[30] evidently

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[26] With regard to the American Restatement of the Law, see www.ali.org (The American Law Institute's website).

[27] See Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (Kluwer Law International, The Hague 2000) and Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), *Principles of European Contract Law*, Part III (Kluwer Law International, The Hague 2003).

[28] The method of presenting these "Notes" has, however, changed in the new parts of the 2nd expanded edition; as to this change para. I12 below.

[29] As to the 1st edition of the PEICL, see the contributions of experts representing a political and academic view as well as the stakeholders' views of insurers, intermediaries and consumers, in Helmut Heiss and Mandeep Lakhan (eds.), *Principles of European Insurance Contract Law (PEICL): A Model Optional Instrument* (Sellier, Munich 2011); for further reviews of the PEICL see Alessandra Zanobetti, Uniform Law Review (2010) 611; Mario Pérez Garrigues (2010) Revista de Derecho Mercantil 797; Gerhard Köbler, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung (2011) No. 128; Andrea Uber and Inga Krebs, 'Neuerscheinungen versicherungswissenschaftlicher Bücher' Zeitschrift für die gesamte Versicherungswissenschaft 99 (2010) 237; Martin Ebers, European Review of Private Law (2010) 1037 ff.; Jacquetta Castle, 'Book Review' (March 2012) British Insurance Law Association No. 124, 84 ff.; Christian Armbrüster, 'PEICL – The Project of a European Insurance Contract Law' (2013-2014) 20(1) Connecticut Insurance Law Journal 119 ff.

[30] This Expert Group was set up by Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law [2013] OJ C16/6; as to the Expert Group and its work section III.3.b. below.

shared this view since it chose in its Final Report of January 2014 for liability insurance (including motor insurance) and life insurance as branches specifically to be dealt with.[31]

I12. As a consequence, the present volume as compared with the first edition is enlarged by Parts Four (Liability Insurance), Five (Life Insurance) and Six (Group Insurance). The way the new Rules are presented is basically in line with the presentation of the Rules on general issues (Parts One, Two and Three). However, the Project Group decided not to produce separate Notes on special branch insurance rules, but instead to annotate the Comments to such rules by way of footnotes, giving references to the status quo of insurance contract law on the specific branches in national law. One of the main reasons for this change in style was that there are substantially less statutory rules on branches in national laws than on the general issues of insurance contract law.

3. The Approach

a. Scope of Application

I13. Despite the fact that the 2nd expanded edition of the PEICL provides for both general rules of insurance contract law and rules on specific branches, it does not mean that its scope of application is restricted to those branches regulated. Rather, the substantive scope of application of the Principles of European Insurance Contract Law encompasses all types of insurance[32] except reinsurance.[33] Insurance of special risks (for example marine and aviation insurance) and large risk insurance are covered by the Principles of European Insurance Contract Law, notwithstanding the fact that the second sentence of Article 1:103 para. 2 grants parties unfettered freedom of contract in those cases.[34]

b. Matters Not Regulated in the Principles of European Insurance Contract Law

I14. In spite of their broad scope of application, the Principles of European Insurance Contract Law do not govern every aspect which may become relevant in matters concerning insurance contracts. Quite the contrary, the Principles of European Insurance Contract Law abstain, in principle, from regulating issues of general contract law. The resulting gap must be filled in a way which allows as little recourse to national law as possible. Consequently, the first sentence of Article 1:105 para. 1 prohibits any recourse to national law when applying the Principles of European Insurance Contract Law. Instead, Article 1:105 para. 2 provides for the application of the Principles of European Contract Law in their most recent edition

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31 As to this Report para. I63 below.

32 As to the application of national rules to specific branches which are not regulated by the PEICL, paras. I17 f. below.

33 See Article 1:101 PEICL.

34 See Monika Stahl, 'The Principles of European Insurance Contract Law (PEICL) and Their Application to Insurance Contracts for Large Risks', Veröffentlichungen aus dem LL.M.-Studiengang Internationales Wirtschaftsrecht der Universität Zürich und des Europa Instituts an der Universität Zürich, vol. 71 (Schulthess, Zurich 2013).

drafted by the Lando Commission.[35] By virtue of this reference, the Principles of European Contract Law become the *lex generalis* of the Principles of European Insurance Contract Law. Furthermore, the Project Group consistently drafted the Principles of European Insurance Contract Law with the Principles of European Contract Law in mind, not only as far as terminology is concerned but also in order to avoid any duplication in the provisions. Whenever a rule of the Principles of European Contract Law also appeared to be appropriate in the context of insurance, the Project Group abstained from regulating the matter in the Principles of European Insurance Contract Law. Nevertheless, some provisions were more or less "copied" from the Principles of European Contract Law to the Principles of European Insurance Contract Law, and for a simple reason: The provisions of the Principles of European Contract Law are, in principle, non-mandatory. However, the Project Group thought that some of these non-mandatory provisions should be mandatory in the context of insurance. This goal was achieved by copying these provisions into the Principles of European Insurance Contract Law and thereby making them mandatory in accordance with Article 1:103 para. 2 PEICL.[36]

I15. The choice in favour of referring to the Principles of European Contract Law had already been made by the Project Group for its first edition of the PEICL. This is mainly because the General Part of the Draft Common Frame of Reference (DCFR)[37] had not been finished at the time the Project Group was drafting its Rules, and the CESL Regulation Proposal,[38] which also provides for general rules, did not exist at that stage. Considering that the DCFR has never been adopted as an "official" CFR by the European Commission and that the fate of the proposal on a CESL appears to be unclear[39], the Project Group decided to retain a reference to the PECL as the *lex generalis* to its PEICL. The future developments on a CFR (if any) and a CESL will show whether it will be advisable to change from the PECL to another instrument in the future. This will, of course, not be possible without making adaptations to the PEICL.

I16. Whenever an issue is neither regulated in the Principles of European Insurance Contract Law nor in the Principles of European Contract Law, Article 1:105 para. 2 PEICL refers to the principles common to the laws of the Member States. Article 1:105 para. 2 PEICL clearly prescribes methods of comparative law to fill gaps.

I17. As has been mentioned, the Principles of European Insurance Contract Law only regulate some, but not all individual branches of insurance. However, there are mandatory

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[35] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (Kluwer Law International, The Hague 2000) and Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), *Principles of European Contract Law*, Part III (Kluwer Law International, The Hague 2003).

[36] See, for example, Jürgen Basedow, 'The Optional Application of the Principles of European Insurance Contract Law' in Angelika Fuchs (ed.), *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, vol. 9 (Springer, Heidelberg 2008) 111, 114 f.

[37] The Draft Common Frame of Reference in its "Full Edition", including Comments and Notes, only became available at the end of 2009.

[38] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final, as amended.

[39] The proposal for a CESL has recently been withdrawn and a modified proposal has been announced; see para. I45 below.

provisions in national laws on the other branches not governed by the PEICL. It therefore seems inconceivable to apply the Principles of European Insurance Contract Law to such branches without recourse to the (otherwise applicable) national rules of law as the protection of the policyholder would be undermined. Hence, the second sentence of Article 1:105 para. 1 provides for the application of the mandatory rules of the national law applicable to the special types of insurance contracts. Such application of national law is, however, limited to "branches of insurance which are not covered by special rules contained in the PEICL".[40] Since the 2nd edition now regulates liability, life and group insurance, the second sentence of Article 1:105 para. 1 no longer plays a role for these branches.

I18. Special mention has to be made of compulsory liability insurance. While the PEICL apply to compulsory liability insurances (see Article 16:101), they do not unify rules on specific types of compulsory liability insurance. The reason is obvious: A large number of compulsory insurance contracts is regulated by national laws, EU law or other sources.[41] This is why Article 16:101 para. 2 in line with art. 7 para. 4(a) of the Rome I Regulation (593/2008/EC) provides that such insurance contracts must comply with the "specific provisions imposing the obligation" even if the PEICL have been chosen as the law governing a liability insurance contract. Thus, any rules making liability insurance compulsory, whether at the level of national law or EU law, will ultimately take priority over the PEICL.

c. Mandatory Rules

I19. As indicated earlier, it is the mandatory rules of national insurance contract law which form a barrier to the proper functioning of the internal insurance market. For this reason, the Project Group restricted its work to drafting European principles which are mandatory and therefore capable of substituting national mandatory law.

I20. The mandatory character of the Principles of European Insurance Contract Law can be seen in two manners. On the one hand, there are rules which must not be derogated from by parties' agreement at all. Such "absolutely" mandatory rules are mentioned in Article 1:103 para. 1, where the relevant rules are listed in the first sentence. Moreover, the second sentence of the same provision provides in a general manner that "sanctions for fraudulent behaviour" must not be derogated from by agreement. A good example of a rule containing a sanction for fraudulent behaviour is Article 2:104, for instance.

I21. The mandatory character of most provisions of the Principles of European Insurance Contract Law, however, is of a different kind and may be described as "semi-mandatory". The first sentence of Article 1:103 para. 2 PEICL states: "The contract may derogate from all other provisions of the PEICL as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary."

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[40] See the second sentence of Article 1:105 para. 1 PEICL.

[41] As to this point the Final Report of the Commission Expert Group on European Insurance Contract Law (see para. I63 below) states at no. 31: "The number and type of compulsory insurance requirements differ substantially from country to country. In Spain there are around 400 cases of compulsory insurance, for example liability for bullfighting and for owners of dangerous dogs, while in France there are around 100, in Poland 40 and in Germany, at the federal level, only around 30."

I22. The semi-mandatory character of the Principles of European Insurance Contract Law is limited to mass risk insurance. Since semi-mandatory rules of insurance law purport to ensure the protection of the policyholder, insured and beneficiary as the weaker parties, their mandatory character must be removed when there is no need for protection, as is the case with insurance covering large risks. Mass risks are distinguished from large risks by a statutory definition[42] in line with the existing *acquis communautaire*, which defines the term in art. 13 no. 27 of the Solvency II Directive (2009/138/EC) in line with its predecessor, art. 5 of the First Non-Life Insurance Directive (73/239/EEC). Art. 16 no. 5 of the Brussels Ibis Regulation (1215/2012) and art. 7 para. 2 of the Rome I Regulation (593/2008) also refer to the same definition. The protection granted to the policyholder, insured and beneficiary under the Principles of European Insurance Contract Law is consequently not restricted to consumer contracts, applying instead to all mass risks, including insurance contracts concluded by small or medium-size enterprises.

d. Adherence to the Existing Acquis Communautaire

I23. As has been mentioned, the definition of large risks in the second sentence of Article 1:103 para. 2 follows the one found in the existing insurance *acquis*. This shows that the Group endeavoured to adhere to the existing *acquis communautaire* as closely as possible unless shortcomings in it indicated a deviation from it. In addition to the *insurance acquis*,[43] several directives on consumer contract law[44] outlining the information duties of the entrepreneur and withdrawal rights of the consumer,[45] the judicial control of unfair contract terms[46] as well as injunctions[47] have been employed by the Principles of European Insurance Contract Law.

I24. The Principles of European Insurance Contract Law also include an adapted reference to the Gender Directive (2004/113/EC), which contains a special provision for insurance contracts.[48] While Article 1:207 in the first edition of the PEICL allowed differences in premiums and conditions in line with art. 5 para. 2 of the Gender Directive (2004/113/EC),

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42 See the definition given by the second sentence of Article 1:103 para. 2 PEICL.

43 An overview on the existing insurance *acquis* is presented by Robert Purves, 'Europe: the architecture and content of EU insurance regulation' in Julian Burling and Kevin Lazarus (eds.), *Research Handbook on International Insurance Regulation* (Elgar, Cheltenham 2011) 621; Ulrike Mönnich, 'Europäisierung des Privatversicherungsrechts' in Roland Michael Beckmann and Annemarie Matusche-Beckmann (eds.), *Versicherungsrechts-Handbuch* (3rd edn Beck, Munich 2015) § 2 paras. 23 ff., Dirk Looschelders and Lothar Michael, '§ 11 Europäisches Versicherungsrecht' in Armin Hatje and Peter-ChristianMüller-Graff (eds.), *Enzyklopädie Europarecht*, vol. V, *Europäisches Sektorales Wirtschaftsrecht* (ed. by Ruffert) (Nomos, Baden-Baden 2013) paras. 144 ff.; and Leander D. Loacker, 'Vorbemerkung C.' in Dirk Looschelders and Petra Pohlmann (eds.), *VVG-Kommentar* (2nd edn Wolters Kluwer Deutschland, Cologne 2011) paras. 14 ff.

44 As to the relevance of the consumer *acquis* in the field of insurance see Helmut Heiss and Anton K. Schnyder, 'Versicherungsverträge' in Herbert Kronke, Werner Melis and Anton K. Schnyder (eds.), *Handbuch des Internationalen Wirtschaftsrechts* (Schmidt, Cologne 2005) 195.

45 See in particular the Distance Marketing Directive (2002/65/EC) as amended.

46 See the Unfair Contract Terms Directive (93/13/EEC).

47 See the Injunctions Directive (2009/22/EC).

48 See art. 5 of the Gender Directive (2004/113/EC).