From contract certainty to legal certainty for reinsurance transactions: the Principles of Reinsurance Contract Law (PRICL)

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I. Contract certainty in reinsurance transactions

1. "Deal now, details later": contract uncertainty

Reinsurance business exhibits a number of special features in comparison to primary insurance business. For instance, the manner in which reinsurance contracts are negotiated presents significant differences. The process of contract formation has repeatedly been described as "deal now, details later".[1] Accordingly, a contract is concluded following a negotiation of the essential terms, while detailed issues are left to be dealt with in the contract documentation following contract conclusion.[2] The process of contract documentation takes time and a "reinsurance treaty commencing on January 1 may, therefore, not be signed until April, May or even June of the same year"[3]. The process may take even longer.[4] This approach creates some degree of contract uncertainty, at least until documentation of the entire contract has been completed, if it is completed at all.

This attitude towards contract conclusion requires cooperative behaviour between the contracting parties.[5] This does not just apply to the contract conclusion phase, but also to the entire life of a reinsurance contract and in particular to the settlement of damage claims, including any dispute resolution deemed necessary. Such dispute resolution, which entails reaching amicable agreements and, if necessary, accessing arbitration courts often with (former) industry representatives rather than professional lawyers acting as arbitrators, is traditionally preferred over litigation before state courts.[6] In 1990, the Court of Appeals of the State of NY, for example, referred to reinsurance law as "a field in which differences have often been settled by handshakes and umpires".[7] In this sense, reinsurance contracts are often viewed and/or designed as gentlemen's agreements or honourable undertakings.[8] This requires mutual integrity and good will of the parties.

2. Contract uncertainty v. juridification of reinsurance relationships

In the recent past, this "club atmosphere" has been disturbed repeatedly.[9] An increase in the number of state court rulings on reinsurance law matters, at least in Anglo-American

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[1] See, e.g. the London Market Group's website mentioning the traditional "deal now detail later culture" of the London market: https://www.londonmarketgroup.co.uk/contract-certainty, last accessed on 8th March, 2018.

[2] See, *SR International Business Insurance Co Ltd v. World Trade Center Properties LLC*, 222 F.Supp.2d 385, 387 ff.

[3] Gerathewohl, Klaus, *Reinsurance – Principles and Practice*, Vol. 1, 1980, p. 652.

[4] It may last months or even years; cf. Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.145 (c).

[5] Cf. Gerathewohl, Klaus, *Reinsurance – Principles and Practice*, Vol. 1, 1980, p. 487: "Reinsurance treaties are performed on the basis of fairness and good faith, any disputes generally being solved by way of an amicable agreement."; Noussia, Kyriaki, *Reinsurance Arbitration*, 2013, p. 81.

[6] Noussia, Kyriaki, *Reinsurance Arbitration*, 2013, p. 20; Gumbel, Edward, *Thoughts on arbitration under reinsurance contracts and on an attempt to draft a standard clause*, in: Reichert-Facilides, Fritz / Rittner, Fritz / Sasse, Jürgen [eds.], Festschrift für Reimer Schmidt, 1976, p. 883.

[7] *Sumitomo Marine Fire Insurance Co., Ltd. – U.S. Branch v. Cologne Reinsurance Company of America et al., and Buffalo Reinsurance Company et al.*, 75 NY2d 295 (NY Ct App 1990).

[8] Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.145 (d); Noussia, Kyriaki, *Reinsurance Arbitration*, 2013, p. 21, 82.

[9] Noussia, Kyriaki, *Reinsurance Arbitration*, 2013, p. 15; Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p. 3 f.; Labes, Hubertus W., *Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen*, 1996, p. 6 f.

jurisdictions, indicates a growing juridification of reinsurance relationships.[10] If the parties are unable to come to an amicable agreement, the primary task of the judge will be to hand down a ruling on the matter. In order for the judge to do so, a high degree of contract certainty is required. Seen in this light, it is unsurprising that judges have repeatedly expressed their incomprehension of reinsurance practice and especially its traditional "deal now, details later" attitude in court decisions. For example, *Erik Stenberg*[11] refers to a comment by the Court of Appeals of the State of NY stating that the "swift, almost casual process of contract formation" had led to the dispute at hand.[12] In a similar vein, in *Reinsurance Practice and the Law*, a handbook prepared by Clyde & Co LLP, there is a reference to traditional practice in which insurance contracts, despite their internationality and commercial importance, "have often been drafted with little or no legal assistance".[13] It is also stated that reinsurance wordings remain "relatively untouched by the hand of the legal draftsman".[14] Therefore, there is also a reference in the handbook to court decisions, in which reinsurance wordings have received critical comments from judges.[15] For example, in 1915, Justice Eve remarked that reinsurance wordings were "made up … of paragraphs culled from several precedents and strung together without any accurate estimate of their relative consistency";[16] and Justice Morison referred to the drafting of the reinsurance policy as a "dog's breakfast" in 2004.[17]

3. Regulators' call for contract certainty

The "deal now, details later" attitude adopted by the reinsurance industry has also attracted the attention of regulators.[18] They are demanding an increasingly higher degree of contract certainty in relation to reinsurance from supervised institutions, i.e. swift, complete and structured contract documentation. As a result, the London Market created the Market Reform Group, more recently renamed as the London Market Group, which has drafted a Code of Practice[19] and a Market Reform Contract[20] for the purposes of establishing contract certainty. Similar developments can be observed in the USA.[21] In Singapore, the Contract Certainty Working Group (CCWG) has also been doing similar work since 2011.[22] On the basis of these endeavours, the details of reinsurance contracts are now being documented. These developments may reinforce the trend towards the juridification of reinsurance relationships and, in particular, claims settlement.

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[10] Cf. Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.143; Noussia, Kyriaki, *Reinsurance Arbitration*, 2013, p. 15.
[11] Stenberg, Erik, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 12 no. 16 and footnote 29.
[12] *Sumitomo Marine Fire Insurance Co., Ltd. – U.S. Branch v. Cologne Reinsurance Company of America et al., and Buffalo Reinsurance Company et al.*, 75 NY2d 295 (NY Ct App 1990).
[13] Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.135.
[14] Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.142.
[15] Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.136.
[16] *Law Guarantee Trust & Accident Society v. Munich Reinsurance Co.*, [1915] 31 T.L.R. 572.
[17] *Eagle Star Insurance Co. Ltd. v. J. N. Cresswell & Others*, [2004] 1 All ER 508.
[18] Cf. the FSA's press release of 24 January 2007 with regard to both direct insurance and reinsurance, available at: http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/009.shtml, last accessed on 8th March, 2018.
[19] See the current 2012 version at https://www.londonmarketgroup.co.uk/contract-certainty, last accessed on 8th March, 2018.
[20] See https://www.londonmarketgroup.co.uk/mrc, last accessed on 8th March, 2018.
[21] See Circular Letter No. 20 (2008; with Supplement 2010) of New York State Insurance Department, see http://www.dfs.ny.gov/insurance/circltr/2008/cl08_20.htm, last accessed on 8th March, 2018.
[22] More information is available at http://www.contractcertainty.sg/Home.aspx, last accessed on 8th March, 2018.

4. The industry's efforts towards clarity and consistency

Contract certainty as required by regulatory bodies does not, however, necessarily guarantee the desired degree of clarity in the wordings and their consistency.[23] The pursuit of clarity and coherence, therefore, requires more than swift and complete documentation of the contents of a contract. The insurance industry has made particular efforts to provide contracting parties and their intermediaries with standard clauses, the wording of which should be as legally clear and coherent as possible.[24] The use of such clauses permits the requirements for contract certainty to be met, while maintaining the high transaction speed[25] in reinsurance business.
Such model clauses are provided by the London Market. It is particularly worth noting the excess of loss clauses drafted by the Joint Excess of Loss Committee as well as the London Model Wording Library (MWL), which contains over 14,000 model wordings, clauses and policy forms for insurance and reinsurance contracts.[26] In the USA, the Broker & Reinsurance Markets Association (BRMA) was founded in 1986 and published the Contract Wording Reference Book, which was last updated and modified in 2017.[27] On its website, the organisation expressed its hope "that use of some or all of these clauses in a reinsurance contract, as the parties to the contract may deem appropriate, will improve the clarity of the contract and the efficiency of the marketplace."[28]

II. Contract certainty v. legal uncertainty

1. The law applicable as an *uncertainty*

The efforts to establish contract certainty encourage and require the parties to make their contractual relationship as transparent as possible. Nevertheless, the fact remains that certain *uncertainties* are wholly or partially beyond the control of the parties. An obvious uncertainty factor, which is not or at least not fully within the control of the parties, is posed by the legal rules applicable to the reinsurance contract.[29] These govern crucial aspects of the contract, such as its conclusion, its validity, its interpretation or the existence of implied terms.[30] More

[23] See, e.g. Burling, Julian, *Lloyd's: Law and Practice*, 2017, no. 11.4: "This does not necessarily guarantee contract coherence".
[24] However, doubts have been raised in legal literature as to whether standard clauses actually guarantee greater coherence; cf. Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.137 ff.
[25] With regard to transaction speed as a source of the "deal now, details later" attitude in the reinsurance industry, cf. Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 12.145 (c).
[26] For previous attempts to standardise reinsurance contracts, see Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 458 f.
[27] Available at www.brma.org/frommembers/frommemcontractwdbook.htm, last accessed on 8th March, 2018.
[28] According to the BRMA's explanations at www.brma.org/frommembers/frommemcontractwdbook.htm, last accessed on 8th March, 2018.
[29] Cf. Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p. 74; Rodger, Angus, in: Merkin, Rob [ed.], *A Guide to Reinsurance Law*, 2007, p. 380; Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts*, Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 60.
[30] The importance of the law applicable in relation to the interpretation of reinsurance contracts was pointed out by Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 489; also see Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts,* Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 60.

generally, the applicable legal rules determine the question of whether and, if so, which reinsurance customs should be taken into account in assessing the contractual relationship.[31]
Take the example of a reinsurance contract which does not contain a "follow-the-settlements clause". While the reinsurer's duty to follow the settlement of its reinsured is accepted by German legal commentary[32] on the basis of a corresponding, purportedly international reinsurance custom[33] and will be considered an implied term by some US American courts,[34] it will not be recognised by all US American courts[35]and is rejected by English courts in the absence of an agreement in the contract.[36]
Yet, even where various jurisdictions recognise such an implied term, this does not automatically mean that the substance of the duty to follow the settlements will be understood in the same way.[37] In this vein, *Gerathewohl* has already clearly stated: "Upon reflection, one sees that reinsurance customs are, in reality, not always as uniform as one might assume. Moreover, there are certain differences not only in customs – particularly between the Continental and the British market systems – but also in terminology: Terms which appear uniform at first sight may have a different meaning in different markets and, depending on the legal concepts applied, in different contexts."[38] One reason for this may be that a particular reinsurance custom is always viewed by lawyers in reference to the principles of their national laws, which serve as a frame of reference. Under German law, for example, the duty to follow

[31] Cf. Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, with regard to US law; Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 15.25 ff., with regard to English law; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 65 ff., with regard to German law; Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts,* Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 58; Ondo, Paul-Gabor, *Gerichtsstandsklauseln, Rechtswahl und Schiedsgerichtsbarkeit in Rückversicherungsverträgen*, Schweizerische Versicherungs-Zeitschrift 63 (1995), p. 41, footnote 14, both with regard to Swiss law.
[32] For greater detail, see e.g. Looschelders, Dirk, in: Baumann, Horst / Beckmann, Roland Michael / Johannsen, Katharina / Johannsen, Ralf (†) / Koch, Robert [eds.], *Bruck/Möller Versicherungsvertragsgesetz Großkommentar*, 9th ed., Vol. 11, § 209 VVG no. 62; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 76 ff.; Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 473 ff.; Quinto, Cornel, *Reinsurance arbitration from a Swiss law perspective*, Jusletter of 1st December 2008, p. 10; cf. also Reymond, Philippe M., *La réassurance: un domaine abandonné aux usages de la pratique et à la liberté des conventions*, Revue Suisse d'Assurances 49 (1981), p. 403, discussing the Judgment of the Swiss Federal Supreme Court, *BGE 107 II 196.*
[33] This custom has, however, "never been shown to exist" according to Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p. 78; for reinsurance customs in general, see e.g. Mello, Sergio Ruy Barroso, *Contrato de Resseguro*, 2013, p. 87 ff. with examples.
[34] E.g. *International Surplus Ins. v. Underwriters at Lloyd*, 868 F.Supp. 917, p. 920, with regard to Ohio law; *Aetna Casualty and Surety Co. v. Home Insurance Co.*, 882 F.Supp. 1328 (S.D.N.Y. 1995), p. 1350, with regard to New York law; according to Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p. 78, these cases erroneously suggested that the follow-the-settlements clause was implied in fact by a reinsurance usage that has never been shown to exist.
[35] Cf. Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 83; Stenberg, Erik, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 12 no. 55.
[36] *Commercial Union Assurance Company plc and Others v. NRG Victory Reinsurance Ltd.*, [1998] C.L.C. 920, p. 935; Geiger, Hermann, *The Comparative Law and Economics of Reinsurance*, 2000, p. 117; O'Neill, Terry P. / Woloniecki, Jan W., *The Law of Reinsurance in England and Bermuda*, 2010, no. 5-013.
[37] Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p. 74 f.; Cf. Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts,* Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 58 f.; Hummer, Paul M., *Common Reinsurance Issues: Follow the Fortunes, Late Notice and Rescission*, 66 Defense Counsel Journal, [1999] 374, p. 374, where no distinction is drawn between follow-the-fortunes and follow-the-settlements. In this regard, see also *Aetna Casualty and Surety Co. v. The Home Insurance Co.*, 882 F.Supp. 1328, p. 1345 f.
[38] Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 488.

is considered by *Schwepcke* to be a manifestation of the unauthorised management of the affairs of another (*negotiorum gestio*), so that the relevant provisions in §§ 677 BGB (German Civil Code) should apply.[39] Similarly, *Looschelders* refers to § 677 BGB (German Civil Code) when defining the required standard of care of the reinsured in exercising its right to business management.[40] These examples show that purportedly "international" reinsurance customs are often perceived and dealt with in a national legal context. Differences in outcome will often be the result.

2. Differences in legal sources available

Differences between national laws also become apparent in respect of the existence of statutory law and case law concerning reinsurance contracts. Under English law, the legislation on insurance contracts, in particular the Marine Insurance Act and the relatively new Insurance Act, is generally deemed to apply to both direct insurance and reinsurance.[41] In contrast, civil law jurisdictions often exclude reinsurance contracts from the scope of national insurance contract law codifications.[42] Moreover, the question of whether the regulations governing direct insurance contracts can be extended, at least in part, by analogy to govern reinsurance contracts is also unclear at least where the details are concerned.[43] This situation leads to a general lack of transparent standards governing issues specific to reinsurance.
England and other Anglo-American jurisdictions have a fairly considerable body of case law. However, the discussion of implied terms has already shown that there is by no means any uniform case law regarding reinsurance contracts in Anglo-American jurisdictions; instead significant differences can be discerned. For example, leading practitioners have emphasised that a follow-the-settlements clause "may have a very different meaning when it is interpreted in the light of New York law than that of England".[44] In civil law jurisdictions, there is an

[39] Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 76.
[40] Looschelders, Dirk, in: Baumann, Horst / Beckmann, Roland Michael / Johannsen, Katharina / Johannsen, Ralf (†) / Koch, Robert [eds.], *Bruck/Möller Versicherungsvertragsgesetz Großkommentar*, 9th ed., Vol. 11, § 209 VVG, no. 60 with footnote 100.
[41] Brook, Nigel, in: Clyde and Co, *Insurance Act 2015 – Shaking up a century of insurance law*, 2016, p. 50; Official Explanatory Notes to the Insurance Act 2015, Part 1, Section 1, no. 36, available at: http://www.legislation.gov.uk/ukpga/2015/4/notes/contents, last accessed on 8th March, 2018; Cf. also Thomas, Steven W., *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, Duke Law Journal, Vol. 41, 1992, 1548, p. 1565.
[42] Germany: § 209 Versicherungsvertragsgesetz (VVG); France: Art. L 111-1 Code des assurances; Luxembourg: Art. 4 No. 4 Loi du 27 juillet 1997 sur le contrat d'assurance; Finland: Section 1 subsection 3 Insurance Contract Act No 543; Switzerland: Art. 101 Section 1 no. 1 Versicherungsvertragsgesetz (VVG); Principality of Liechtenstein: Art. 63 Versicherungsvertragsgesetz (VersVG); Austria: § 186 Versicherungsvertragsgesetz (VersVG); Belgium: Art. 54 Loi relative aux assurances du 4 avril 2014; Netherlands: Art. 7:927 Dutch Civil Code; for Brazilian law, see Mello, Sergio Ruy Barroso, *Contrato de Resseguro*, 2013, p. 82 ff.; exceptions: Italy: Art. 1928 ff. Codice Civile and Spain: Art. 77 ff. Ley 50/1980 de 8 octobre, de contrato de seguro, provide for statutory rules with regard to reinsurance contracts.
[43] Mello, Sergio Ruy Barroso, *Contrato de Resseguro*, 2013, p. 83; Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 38 ff.; cf. Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 398 ff.; Geiger, Hermann, *The Comparative Law and Economics of Reinsurance*, 2000, p. 108 ff.; Reymond, Philippe M., *La réassurance: un domaine abandonné aux usages de la pratique et à la liberté des conventions*, Revue Suisse d'Assurances 49 (1981), p. 399.
[44] Clyde & Co LLP, *Reinsurance Practice and the Law*, Looseleaf, no. 20.1; Hoffman, William, *On the use and abuse of custom and usage in reinsurance contracts*, 33 Tort & Insurance Law Journal, 1997, p.75, with regard to the different meanings of "follow the settlements" under German law and US law.

almost total lack of case law on this matter.[45] While arbitration awards exist, they are largely kept secret to maintain discretion.[46] Therefore, even industry experts do not have a comprehensive overview.[47] It follows that an underwriter who uses the same wording for a follow-the-settlements clause in various reinsurance contracts must ultimately conclude that he has by no means used the same clause if the contracts are governed by different laws.

3. Implications for reinsurance contracts

These observations have implications for reinsurance contracts. Take, for example, the case of a reinsurer concluding its contracts in accordance with the law at the registered office of a respective cedant. For the reinsurer, this means that it will conclude different contracts in other jurisdictions despite the use of uniform wording. It can only counter this fact by adapting its contracts to the respective law of a cedant. This will only be partly possible; the reinsurer will incidentally be exposed to foreign law and thus differences.

In principle, the reinsured is in the exact opposite situation: all of its reinsurance contracts are subject to its own law, with which it is familiar. Yet, this situation by no means signifies legal certainty for the reinsured. Especially in jurisdictions where there is no statutory law and case law on reinsurance, uncertainty exists for the reinsured in relation to how a court or arbitration tribunal will decide a specific dispute. Such uncertainty will, in turn, create uncertainty for the parties in dealing with each other.

Reliance on relevant case law found in foreign jurisdictions is also no fail-safe solution. First of all, it is difficult for civil law judges or arbitrators to have recourse to case law in Anglo-American jurisdictions, because such case law does not apply directly in the countries concerned and represents persuasive authority at best.[48] Secondly, where foreign case law is consulted, it is by no means clear which of the various precedents should be regarded as persuasive. In such cases, judges or arbitrators are largely left to their own devices in interpreting the contract wording; they lack detailed default rules, a frame of reference and binding terminology.

The considerations discussed above demonstrate that uniform default rules of reinsurance contract law, a uniform system and standardised terminology would greatly assist in the consistent interpretation of reinsurance contracts. However, such default rules do not yet exist, at least not at a cross-border, transnational level.

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[45] Cannawurf, Sieglinde / Schwepcke, Andreas, in: Lüer, Dieter W. / Schwepcke, Andreas [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 63; cf. Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 453 f.; there are isolated court decisions on reinsurance law in Switzerland: Judgment of the Swiss Federal Supreme Court, *BGE 107 II 196*; Judgment of the Swiss Federal Supreme Court, *BGE 140 III 115*; Judgment of the Swiss Federal Supreme Court of 4th October 2017, *4A_150/2017.*

[46] Quinto, Cornel, *Reinsurance arbitration from a Swiss law perspective*, Jusletter of 1st December 2008, p. 4; cf. Gerathewohl, Klaus, *Reinsurance Principles and Practice*, Vol. I, 1980, p. 452; O'Neill, Terry P. / Woloniecki, Jan W., *The Law of Reinsurance in England and Bermuda*, 2010, no. 1-024; Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts*, Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 59.

[47] Cf. Gerathewohl, Klaus, *Reinsurance – Principles and Practice*, Vol. 1, 1980, p. 452.

[48] Cf. Judgment of the Swiss Federal Supreme Court, *BGE 140 III 115*, consideration 6.3 which explicitly refers to the English case law on reinsurance contracts.

4. Side note: Smart contracts und blockchain initiative

An increased need for standardisation and therefore also uniform default rules may also result from an ongoing blockchain initiative.[49] This initiative was launched by various direct and reinsurance companies to test the use of information technology in the context of contract conclusion, ongoing contract processing and claims handling. If the initiative proves successful, the (re)insurance industry may conclude so-called smart contracts in the future.[50] For the use of such contracts, a high degree of standardisation and thus also the most uniform legal basis possible is required. For the time being, however, the results of this pilot project remain to be seen and it may be necessary to examine the PRICL´s possible role in this context.

III. Achieving legal certainty through transnational Principles of Reinsurance Contract Law

1. The "Principles of Reinsurance Contract Law (PRICL)" Project Group

In 2016, the PRICL Project Group began to develop transnational[51] Principles of Reinsurance Contract Law (PRICL) in early 2016.[52] 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).[53] The PDC receives financial support from the Swiss National Science Foundation (SNSF), the German Research Foundation (DFG) and the Austrian Science Fund (FWF).

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[49] For further information, see e.g. http://www.swissre.com/reinsurance/insurers_and_reinsurers_launch_blockchain_initiative.html, last accessed on 8th March, 2018.

[50] Blockchain technology is used in some specific branches of insurance such as flight delay insurance already; see e.g. http://www.businessinsider.com/axa-turns-to-smart-contracts-for-flight-delay-insurance-2017-9, last accessed on 8th March, 2018; more generally on smart contracts in the insurance sector, see Püttgen, Frank / Kaulartz, Markus, *Versicherung 4.0*, ERA Forum (2017) 18:249 – 262; Cohn, Alan / West, Travis / Parker, Chelsea, *Smart After All: Blockchain, Smart Contracts, Parametric Insurance, And Smart Contracts*, 1 Geo. L. Tech. Rev. 273 (2017); Gatteschi, Valentina / Lamberti, Fabrizio / Demartini, Claudio /Pranteda, Chiara / Santamariá, Víctor, *Blockchain and Smart Contracts for Insurance: Is the Technology Mature Enough?*, accessible at: http://www.mdpi.com/1999-5903/10/2/20, last accessed on 8th March, 2018; Adam-Kalfon, Pauline, *Blockchain, a catalyst for new approaches in insurance*, PwC report, 2017, accessible at: https://news.pwc.ch/wp-content/uploads/2017/09/Xlos_Etude_Blockchain_UK_2017_Web.pdf, last accessed on 8th March, 2018; Maguire, Eamonn / Ng, Wei / Adler, Michael / de Vries, Dennis / Reinmueller, Jan, *Blockchain accelerates insurance transformation*, KPMG report, 2017, accessible at: https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/blockchain-accelerates-insurance-transformation-fs.pdf, last accessed on 8th March 2018; Z/Yen Group, *A Wholesale Insurance Executive's Guide To Smart Contracts*, a Long Finance guide, 2017, accessible at: http://www.zyen.com/Publications/A_Wholesale_Insurance_Executive's_Guide_To_Smart_Contracts_2017.01_Final.pdf, last accessed on 8th March 2018; Roughton, Tim / Bidewell, Peter, *Smart insurance contracts*, Pinsent Masons discussion paper, 2017, accessible at: https://www.pinsentmasons.com/PDF/2017/Financial-Services/FinTech_Smart_Insurance_Contracts_Flyer.pdf, last accessed on 8th March, 2018.

[51] 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.

[52] For details, see https://www.rwi.uzh.ch/de/oe/PRICL.html, last accessed on 8th March, 2018.

[53] See https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/draftingcommittee.html, last accessed on 8th March, 2018.

In addition to the PDC, there are Advisory Groups, which are made up of representatives from reinsurance companies, primary insurance companies and reinsurance brokers.[54] 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 mandatory provisions on the application of transnational principles, occasionally participate and act as Special Advisors.[55]
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."[56] The Principles of Reinsurance Contract Law pursue the same aim, albeit at a transnational level.[57]

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.[58] 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.[59] Due to the fact that it is an intergovernmental organisation, only states can become members. UNIDROIT currently has 63 Member States.[60]
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."[61] UNIDROIT is therefore not only concerned with producing treaties containing uniform international law, but also with formulating transnational principles governing commercial law (soft law).[62] Incidentally, there were already efforts within UNIDROIT to initiate work towards a standardisation of

[54] See https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/agr.html for the advisory group reinsurers and brokers, last accessed on 8th March, 2018; see https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/agi.html for the advisory group direct insurers, last accessed on 8th March, 2018.
[55] See https://www.rwi.uzh.ch/de/oe/PRICL/whoweare/specialadvisors.html for the special advisors, last accessed on 8th March, 2018.
[56] See the reference to the Charter at https://www.ali.org/about-ali/creation/, last accessed on 8th March, 2018.
[57] 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.
[58] See also the announcements on the UNIDROIT website: https://www.unidroit.org/work-in-progress/reinsurance-contracts, last accessed on 8th March, 2018.
[59] See https://www.unidroit.org/about-unidroit/overview, last accessed on 8th March, 2018; Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 14.
[60] See https://www.unidroit.org/about-unidroit/membership, last accessed on 8th March, 2018; Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 14.
[61] See https://www.unidroit.org/about-unidroit/overview, last accessed on 8th March, 2018.
[62] Cf. Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 11.

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 available in 2016.[63] 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[64] or background law[65] 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.[66]

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.).[67] 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.[68]

Substantively, the PICC are especially suited to constituting the general contract law governing reinsurance contracts. Reinsurance business is internationally oriented and of global importance.[69] This corresponds to the global perspective taken by the PICC, which embody the common legal culture of modern commercial law.[70] 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.

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[63] See https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016, last accessed on 8th March, 2018.

[64] 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.

[65] Michaels, Ralf, *The UNIDROIT Principles as global background law*, 19 Uniform Law Review, 2014, 643-668.

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

[67] Nebel, Rolf, *Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts*, Schweizerische Versicherungs-Zeitschrift 66 (1998), p. 60.

[68] 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.

[69] 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.

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

the so-called Draft Common Frame of Reference of European Private Law.[71] Furthermore, reinsurance business is concerned with genuine commercial contract law.[72] An equivalent stance is found in the PICC, which, from the outset, are directed towards commercial contracts and therefore carry the commercial spirit.[73] 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.[74] Another advantage of the PICC is that they are regularly updated. Originally published in 1994, the current version from 2016 is already the 4th edition of the PICC.[75] 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).[76] In cooperation with other partners, UNIDROIT also maintains a website (<www.unilex.info>) where case law, court decisions and arbitration awards in particular, as well as legal literature on the PICC are made available.[77] 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.[78] 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.

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

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

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

[73] 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.

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

[75] 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 8th March, 2018.

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

[77] See http://unilex.info/dynasite.cfm?dssid=2377&dsmid=14311, last accessed on 8th March, 2018.

[78] Michaels, Ralf, *The UNIDROIT Principles as global background law*, 19 Uniform Law Review, 2014, 643-668, p. 663.

with an arbitration clause.[79] 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.[80] 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,[81] 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.[82]

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 promises 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[83] and the ensuing "internal gap" cannot be filled by means of analogy,[84] 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

[79] For a more detailed discussion, see c) below.

[80] 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.

[81] 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.

[82] For a more detailed discussion, see a) below.

[83] In respect of a deliberate gap in the PRICL, see section 5 below.

[84] Cf. draft Art. 1.1.6 PRICL.

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 despite 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.[85]

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.[86]

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.[87] As reinsurance contracts are predominantly viewed as contracts *uberrimae fidei* in worldwide

[85] See below, b) and c).

[86] Cf. the similar Art. 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

[87] Thomas, Steven W., *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, Duke Law Journal, Vol. 41, 1992, 1548, p. 1548 ff.

practice[88], the principle has been laid down in the PRICL, despite the fact that it does not manifest itself uniformly in national jurisdictions.[89]
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.[90] Chapter 5 regulates issues concerning allocation.

6. "Use" of the PRICL: Parties' choice of law in national court and arbitration proceedings

a) 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).[91] 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.[92] 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

[88] 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.
[89] 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, last accessed on 8th March, 2018.
[90] 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 [eds.], *Rückversicherungsrecht*, 2013, § 8 no. 353 ff., with regard to the German understanding of aggregation clauses.
[91] Vogenauer, Stefan, in: Vogenauer, Stefan [ed.], *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2015, Introduction, no. 11 ff.
[92] 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.

like"[93] or also "when the parties have not chosen any law to govern their contract".[94] They may also *be used* "to interpret or supplement domestic law".[95] 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.[96] National conflict of laws provisions often make distinctions based on whether or not a 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.[97] 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.

b) 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.[98] 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

[93] 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.

[94] 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.

[95] 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.

[96] 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. 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, Gralf-Peter, in: Calliess, Gralf-Peter [ed.], *Rome Regulations Commentary*, 2015, Art. 3 Rome I Regulation, no. 33.

[97] 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.

[98] 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.

of law.[99] 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.[100]

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 default rules.[101] 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.[102] 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.

c) 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).[103] 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.[104] 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

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[99] 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.

[100] 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 8th 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.

[101] Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.

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

[103] 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, last accessed on 8th March, 2018.

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

(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."[105] In relation to the PICC, UNIDROIT has drafted a model choice of law clause which can be integrated into arbitration clauses.[106] 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, their provisions would supersede national law and, at least in principle, also its mandatory provisions.[107]

In the context of arbitration, party autonomy is limited only by so-called internationally or overriding mandatory provisions and by *ordre public*.[108] 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),[109] for which reinsurance contracts often contain special clauses. Standard clauses have already been developed for this purpose.[110]

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[105] Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, last accessed on 8th 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.

[106] 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.

[107] Official Comments to the Unidroit Principles of International Commercial Contracts (PICC), Preamble, no. 4.a.

[108] 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.

[109] 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*

d) 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, 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.[111]

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.[112]

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.

IV. Conclusion

The PRICL will provide contracting parties with a reinsurance contract soft law, which the parties may choose as the law applicable to their contracts, especially those containing arbitration clauses. By virtue of a choice in favour of the PRICL, parties avoid having to deal with the differences between and the uncertainties present in national contract laws. Greater legal certainty is the desired goal. At the same time, a choice in favour of the PRICL leaves contractual freedom untouched. By agreement, the contracting parties can exclude the application of certain rules or make agreements deviating from the rules.

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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.

[110] Cf. also the London Market Association's model clause, LMA 3100 (Sanctions Limitations and Exclusion Clause).

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

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