PEICL – THE PROJECT OF A EUROPEAN INSURANCE CONTRACT LAW*

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This article discusses the newly drafted "Principles of European Insurance Contract Law" (PEICL). The article explores the possibility of the PEICL becoming an optional legal instrument that parties to an insurance contract may use as an alternative to relaying on the laws of the various Member States in the European Union. The article includes an in-depth investigation of the PEICL and concludes that while the draft language could benefit from certain adjustments, it nonetheless offers a strong basis for discussion amongst policymakers in the European Union and the U.S.

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I. INTRODUCTION

From a U.S. perspective it used to be quite a difficult task to become acquainted with the main principles that govern insurance contract law within the European Union, as each of the twenty-seven Member States have their own law, and in addition the legal traditions that are reflected in these laws vary considerably. However a recent initiative for a European Insurance Contract Law has changed the situation. This set of rules has been elaborated on the basis of a thorough comparative analysis of the existing laws. The initiative, which has recently been expedited by the European Commission, has led to a draft statute that shall be discussed here, as it might offer some inspiration for future law reform in the U.S. and other countries.

The initiative mentioned above has to be seen in the context of a broader project of a common European contract law. This project has led to the publication of the so-called Draft Common Frame of Reference (DCFR).[1] While only few references to insurance contracts can be found in

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* Updated written version of a talk given at the University of Connecticut Insurance Law Center on January 30, 2013. See Studi in onore di Aldo Frignani, 2011, pp. 51-75 ss.

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[1] PRINCIPLES, DEFINITIONS AND MODELS OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (2008) [hereinafter 'DCFR']; *see generally Proposal for a Regulation of the European Parliament and of the Council on a*

the index of the DCFR, this does not mean that no detailed provisions regarding the common European insurance law could be found. On the contrary, a "Project Group on a Restatement of European Insurance Contract Law", founded by Fritz Reichert-Facilides and now led by Helmut Heiss, has drafted a comprehensive set of rules called the "Principles of European Insurance Contract Law" (PEICL).[2] The draft dated 1 August 2009 is accessible online under www.restatement.info.

The PEICL rules are strongly connected to a project that has been discussed for decades within the European Union: the development of a common European insurance contract law. As early as in 1979, the Commission published the first and quite ambitious draft of a Directive.3 This draft included rules on classical insurance contract law topics such as the reduction of risk and the payment of premiums. During the following decades, however, the Commission focused on the harmonization of the conflict of law rules for insurance contracts while the draft for a harmonization of material insurance contract law seemed to be almost forgotten.

Now with the PEICL – following the DCFR – a new attempt has been made to develop a consistent European insurance law. On January 17, 2013 the European Commission set up an Expert Group that is aimed at analysing the need for a common insurance contract law.4 The main task of this Expert Group will be to examine whether differences in contract law pose an obstacle to cross-border trade in insurance products, and to identify such products.

The PEICL are neither aiming at a European Directive, nor at a mere restatement of the law in force, but rather at an "optional instrument" which is at the disposition of the parties. Thus the PEICL shall apply when the parties have agreed that their contract shall be governed by them (Art. 1:102 PEICL).[5] The technique of an "optional instrument" is remarkable in

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Common European Sales Law, COM (2011) 635 final (Oct. 11. 2011), for the European Commission's 2011 proposal of a common European sales law.

[2] *See* Hulmut Heiss, *The Common Frame of Reference (CFR) of European Insurance Law*, *in* CFR AND EXISTING EC CONTRACT LAW, 229 (Reiner Shulze ed., Sellier 2008). For more information on the goals and intentions of this project; see also Christian Armbruester, *Das Versicherungsrecht im* CFR 775, (2008) for a comparison to the reformed German Insurance Contract Law offer by the author.

[3] See Commission Proposal for a Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Insurance Contracts, O.J. C 190/2 (July 10, 1979).

[4] Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law, 2013 O.J. C 16/6.

[5] Principles of European Insurance Contract Law art. 1:102 (2009) [hereinafter PEICL].

several respects. It gives parties a choice between the laws that govern the contract under Private International Law and an alternative set of rules. At the same time if the PEICL turn out to be considered an attractive alternative to domestic law by the parties of insurance contracts this may encourage Member states to change their domestic laws in order to make them more attractive for those parties. However until now the PEICL are just a proposal by a working group; they are not in any sense binding law. In order to provide such a choice for the parties, the European Union would have to formally admit such an "optional instrument". Today no one can predict the likelihood of such a step, by which Member states would put their national insurance contract laws at the disposal of the parties to the insurance contract. In any case the PEICL provide an important basis for the further discussion about a common European insurance contract law.[6]

A. DESCRIPTION AND ASSESSMENT OF THE ESSENTIAL PARTS OF THE PEICL

The draft of PEICL dated August 1, 2009 consists of four parts. Part One contains common provisions, Part Two comprises provisions common to indemnity insurance, Part Three focuses on provisions common to the insurance of fixed sums, and the final Part Four is dedicated to special provisions. While Parts One and Two already contain a considerable number of provisions, there are no special provisions yet, and in Part Three, for the time being, only an enumeration of different insurances (Art. 14:101 PEICL) can be found. In the following analysis the provisions shall be both explained and critically assessed.

II. COMMON PROVISIONS (PART ONE)

A. INTRODUCTORY PROVISIONS (CHAPTER ONE)

1. Application of the PEICL (Art. 1:101 – Art. 1:105 PEICL)

Art. 1:101 PEICL clarifies that the PEICL shall apply to private insurance in general, including mutual insurance. Their application to the highly professionalized area of reinsurance is excluded, as legal provisions of contract insurance law which are mandatory or half-mandatory (i.e., mandatory insofar as they offer an advantage for the insured) are, in general,

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[6] *See* Daniela Weber-Rey, *Harmonisation of European Insurance Contract Law, in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 207 (Stefan Vogenauer & Stephen Weatherill eds., Hart Publishing 2006).

meant to protect the insured, whereas professional market participants such as insurers and reinsurers do not need such protection. Therefore, professional participants do not need the type of general framework that PEICL provides because they have the sophistication and bargaining power to protect themselves when negotiating individual agreements.

A very important rule concerning PEICL's optional use – especially in context with the private international law – is contained in Art. 1:102 sentence 1 PEICL. According to this provision the PEICL rules apply whenever the parties have agreed that their contract shall be governed by them (notwithstanding any limitations of choice of law under private international law). This is necessary in case that – according to private international law – the contract is governed by the law of a state that is not a Member of the European Union and that state's law does not allow parties to choose the PEICL.

However it is not entirely clear whether any restrictions concerning the choice of law – in case the law of a Member state of the European Union governs the contract – also affect the PEICL. As the PEICL are an "optional instrument" that is destined to become part of European law[7] (e.g., by regulation), any restrictions on the choice of law in the law of the Member states as shaped by the Rome I Regulation or the Directives concerning international insurance contract law cannot apply.[8] Art. 1:102 sentence 1 PEICL needs to confirm that outcome by more clearly stating that PEICL only refers to restrictions of the choice of law in non-EU states but not in Member states.

According to Art. 1:102 sentence 1 PEICL, the possibility of agreeing on the application of the PEICL is independent from the connection of the contract to one or more Member states. The PEICL are therefore applicable as well if the contract has no connection to more than just one Member state,[9] notwithstanding the fact that the PEICL are aimed at harmonizing the different national insurance contract laws and thus at helping to realise the single European Market in the insurance sector. Art. 1:102 sentence 1 PEICL offers parties – even if they are doing business exclusively in their common domestic market – a second set of rules beside the domestic insurance contract law. This may indeed help to simplify the insurer's actuarial calculations, especially with regard to risk pooling.[10] At

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[7] *See* Heiss, *supra* note 2, at 242 (explaining what an "optional instrument" is); *see also* Jurgen Basedow, *Der Gemeinsame Referenzrahmen und das Versicherungsvertragsrecht*, *in* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 280, 285 (2007).

[8] Heiss, *supra* note 2, at 240.

[9] Heiss, *supra* note 2, at 229, 240, 250.

[10] Heiss, *supra* note 2, at 229, 246.

the same time the PEICL compete with the national insurance law systems. If the PEICL are seen as a first step on the way towards a common European insurance law this might be considered to be an advantage, as the national legislators could be forced to adjust their national provisions at least in a few significant points. However, it is uncertain whether Member states are willing to accept this type of pressure with respect to a sector that is only partly covered by the law-making competence of the European Union.[11] Furthermore, it remains unclear if the parties to a contract that is related only to one single state will be ready to agree on the application of the PEICL, especially if national provisions are imperative.[12]

It is very reasonable that the parties cannot agree just partly on the application of the PEICL, but that if they want them they have to agree on them as a whole.[13] This rule prevents abuse[14] and helps to keep contracts understandable and clear. Furthermore fewer doublings or gaps are to be expected if there is only one law that governs the contract and if interpretation rules are the same for the whole contract.[15]

It is a different question whether the PEICL are binding or whether they may be modified by agreement of the parties. According to Art. 1:103 (1) PEICL, some provisions which are not yet finally enumerated shall be mandatory. As Art. 1:103 (2) PEICL shows, the basic rule, however, is that 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 the beneficiary. Exceptions are made, generally speaking, for major risks as defined in European Directives[16] as well.

The rule of Art. 1:104 sentence 1 PEICL on interpretation of PEICL provisions states what may be considered as *opinio comunis* (common opinion) in European law. Thus, interpretation is based on the wording, context, and purpose of the respective PEICL rule. Besides, the

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[11] The Treaty on the Functioning of the European Union (TFEU) does not grant the EU comprehensive law-making competence in the field of contract law but only with regard to specific issues such as consumer protection. Von Christian Armbrüster, Ein *Schuldvertragsrecht für Europa? Bemerkungen zur Privatrechtsangleichung in der Europäischen Union nach "Maastricht" und "Keck" in* RABELS ZEITSCHRIFT 72 (1996).

[12] Heiss, *supra* note 2, at 241.

[13] PEICL, *supra* note 5, at art. 1:102 sentence 2.

[14] Heiss, *supra* note 2, at 229, 248; Petr Dobiáš, *Insurance Soft Law?, in* PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW 287, 289-95 (Jürgen Basedow et al., 2009).

[15] Dobiáš, *supra* note 14, at 289, 295.

[16] Council Directive 73/239, art. 35, 1973-2013 O.J. (L 228) 3-19 (EC); Directive 2001/83, of the European Parliament and of the Council as of 5 November 2002 concerning life insurance, 2002 O.J. (L 345) 1.

comparative background of the PEICL shall be taken into account. This is essential as the PEICL are modelled on national provisions and have been developed on the basis of a comparative analysis of European principles of insurance law. However, taking into account the comparative background may lead to some difficulties, especially as European law and the PEICL are to be interpreted autonomously, *i.e.*, independently from national perceptions. Interpretation is made much easier by the comprehensive comparative remarks regarding the single rules that have been published along with the PEICL, including hints concerning possible alternatives that are discussed.[17]

According to Art. 1:104 sentence 2 PEICL, good faith and fair dealing in the insurance sector is a key canon of interpretation, in addition to the principles of certainty in contractual relationships, uniformity of application,[18] and the adequate protection of policyholders. Some of these canons have also been laid down in I.-I:102 DCFR, while some others are not expressly mentioned in the PEICL, e.g. the fundamental freedoms granted by the EU.[19] In this respect, harmonization seems necessary, especially with regard to the principle of protection of policyholders. The latter is an indispensible element of the purpose of the provision, at least as mandatory provisions are concerned. If a provision, on the other hand, is not meant to protect the policyholder, this criterion cannot be taken into account for the interpretation.

As parties cannot agree on a partial application of the PEICL, no recourse to national law, whether to restrict or to supplement the PEICL, shall be permitted.[20] An exception is made in Art. 1:105 (1) sentence 2 PEICL for national laws specifically enacted for insurance branches which are not covered by special rules contained in the PEICL. Any questions arising from the insurance contract which are not expressly addressed in the PEICL are to be settled in conformity with the Principles of European Contract Law (PECL), and in the absence of relevant rules within that instrument, they shall be in accordance with the general principles common to the laws of the Member states. Obviously, the PEICL are not considered to be part of the PECL (now the DCFR).

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[17] PEICL, *supra* note 5; *see also* Jürgen Basedow & Till Fock, Europäisches Versicherungsvertragsrecht (Mohr Siebeck 2002).

[18] PEICL, *supra* note 5, at art. 7.

[19] The four basic freedoms guaranteed by the EU to each citizen are the freedom of movement of goods, the freedom of movement of persons, the right of establishment and the freedom to provide services, Treaty on the Functioning of the European Union art. 34, 45, 49, 57, Mar. 25, 1957 O.J. (C. 83) [hereinafter TFEU].

[20] PEICL, *supra* note 5, at art. 1:105 (1).

2. General rules (Art. 1:201 – 1:207 PEICL)

Art. 1:201 PEICL and 1:202 PEICL contain some definitions of essential terms. A number of important terms, however, are missing, e.g., "insurance money"[21] or "insurance benefits"[22], which are probably meant to be synonymous.

Art. 1:203 (1) PEICL is modelled on the provisions on transparency contained in the Directive on unfair terms in consumer contracts.[23] There are, however, no sanctions mentioned in case the insurer does not comply with these transparency requirements. Art. 1:203 (2) PEICL, modelled on Art. 5 (2) of the Directive,[24] stating that any doubt in interpretation must be resolved in favour of the policyholder, cannot be seen as a sanction. This is because there is a significant difference between transparency rules and interpretation rules. An application of II.-9:402 (2) DCFR is possible but is not satisfactory, as the PEICL are meant to be an independent set of rules.

Art. 1:203 (1) PEICL contains an important liberalization concerning the language of the contract. Until now, European rules in the insurance sector have hardly dealt with the question of the language in which the documents provided by the insurer are to be offered. It was considered a basic rule that the language of the Member state of the commitment [25] governed the whole contract. Usually, the contract is provided in the language of the Member state of the residence of the policyholder. According to Art. 1:203 (1) PEICL, all documents provided by the insurer shall be plain and intelligible and in the language in which the contract is negotiated. With regard to language, this rule offers an advantage for the insurer, which is not forced to translate documents in all languages spoken in the place of residence of any future clients. There is no express sanction for a breach of this rule, which is fine as it is to be expected that insurers will comply with the rule anyway. As to the transparency requirement, this is governed by a separate rule, which provides sanctions for opaque wordings.[26]

The burden of proving that the policyholder has received any documents to be provided by the insurer shall lie with the insurer.[27] This

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[21] PEICL, *supra* note 5, at art. 2:102(5).

[22] PEICL, *supra* note 5, at art. 7:102.

[23] Council Directive 93/13, of the European Parliament and of the Council of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29.

[24] *Id.*; *see also* Dobias, *supra* note 14, at 289-95.

[25] Directive 2001/83, of the European Parliament and of the Council as of 5 November 2002 concerning life insurance, 2002 O.J. (L 345) 1.

[26] PEICL, *supra* note 5, at art. 2:304.

[27] PEICL, *supra* note 5, at art. 1:204.

provision might be misused by some policyholders, especially in cases when the beginning or expiration of a time limit depends on the receipt of the documents. Nevertheless, this rule on the burden of proof does not appear to be inappropriate. It is possible for the insurer to ensure the policyholder has received the documents, e.g. by using special methods of delivery or by asking the insured to confirm the receipt of documents. However, this can be costly, and in any case some risk of abuse remains. Therefore, Art. 1:204 PEICL should be modified and the proof relaxed, e.g., in case a policyholder repeatedly denies the reception of documents.

The "imputed knowledge" Art. 1:206 PEICL deals with is of particular practical impact. According to this provision, any knowledge persons entrusted by the policyholder have or ought to have is considered to be the knowledge of the policyholder. This rule does not just aim at proxies of the policyholder, but includes any person somehow entrusted by him.

Like the DCFR (II.-2:101 ff.), and unlike the PECL, the PEICL also include provisions concerning anti-discrimination. They are modelled on the Gender[28] and Anti-racism[29] Directives. Contrary to the Gender Directive, the PEICL does not prohibit all forms of gender-related distinctions. Based on Art. 5 (2) of the Gender Directive, Art. 1:207 (1) PEICL admits distinctions to be made if "the insurer shows that proportionate differences in individuals' premiums and benefits are based upon relevant and accurate actuarial and statistical data" (except for differences resulting from pregnancy and maternity). However, Art. 1:207 (1) PEICL does not have exactly the same wording as the Gender Directive, as the latter expressly states that it is legally sufficient if gender-related differences are a determining factor. Notwithstanding that difference, it is only necessary that the gender is one factor among others. This is due to the actuarial reality[30] and to multi-factorial calculation.[31] However, as the ECJ held on December 21, 2012, Art. 5 (2) of the Gender Directive is incompatible with EU anti-discrimination law as laid down in Art. 5 (1) of the Gender Directive, as well as in Art. 21,

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[28] Directive 2004/113, of the European Parliament and Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004 O.J. (L 373) 37.

[29] Directive 2000/43, of the European Parliament and of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22.

[30] *See* M. Wandt, Geschlechtsabhängige Tarifierung in der privaten Krankenversicherung 1341 (Marlene Danzl, 2009).

[31] *See* Christian Armbrüster, Bedeutung des Allgemeinen Gleichbehandlungsgesetzes für private Versicherungsverträge [Importance of the General Equal Treatment Act for Private Insurance Contract], VERSICHERUNGSRECHT (VERSR) 1297, 1300 (2006) (Ger.).

23 EU Charter, so that no gender-based distinctions are admissible,[32] Art. 1:207 (1) PEICL needs to be changed.

Nationality, "racial" or ethnic origin may – the latter in accordance with the Anti-Racism Directive – never justify differences in individuals' premiums and benefits.[33] Any contract terms in breach of Art. 1:207 (2) PEICL, including those concerning the premium, are not binding on the policyholder or the insured.[34] In such a case the contract continues to bind the parties on the basis of non-discriminatory terms.[35] These two provisions leave it open whether the insurer shall be bound to the discriminatory terms or not.[36] This point needs to be clarified. As a further sanction the policyholder shall be entitled to terminate the contract.[37] This seems to be inconsistent: if the discriminatory terms are eliminated,[38] there is no need for a termination of the contract. The entitlement to terminate the contract could even lead to misuse: the policyholder gets the possibility to terminate, by referring to discrimination, a contract which he or she does not want to continue for quite different reasons. It is true that the Directives demand sanctions that have to be "effective, proportional and dissuasive,"[39] the latter meaning that the sanctions need to have a deterring effect on the purveyors of services. This, however, refers much more to indemnification than to a right of termination, as the discriminatory terms contain some kind of "attack" on personal dignity, which is based on factors like gender or ethnic origin. An indemnification of that "attack" would be much more effective than the right to terminate the contract, and it would allow for a reaction that is proportionate to the intensity of the discrimination.

Furthermore there are a certain number of other questions for which Art. 1:207 PEICL does not offer an answer. This is partially due to the fact that the PEICL are only applicable if the parties agree on them. If the conclusion of the contract is declined to an interested party in a discriminatory way, the PEICL are not applicable, and therefore no

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[32] *See* Case C-236/09, Association belge des Consommateurs Test-Achats ASBL v. Conseil des Ministres, 2011 E.C.R. I-00773. In this case a Belgian consumer protection association as well as two male citizens challenged a Belgian law that, in accordance with Art. 5 (2) of the Gender Directive, allowed differences in premiums and conditions of insurance contracts based on gender.

[33] PEICL, *supra* note 5, at art. 1:207(2).

[34] PEICL, *supra* note 5, at art. 1:207(3).

[35] PEICL, *supra* note 5, at art. 1:207(3).

[36] PEICL, *supra* note 5, at art. 1:207(3) (compare sentence one with sentence two).

[37] PEICL, *supra* note 5, at art. 1:207(4).

[38] PEICL, *supra* note 5, at art. 1:207(3).

[39] Council Directive 2000/43, art. 15 sentence 2, 2000 O.J. (L180) (EC); Council Directive 2004/113, art. 8 sec. 2, 2004/113 (L373) (EC).

provisions concerning an obligation to contract or a "culpa in contrahendo" are necessary. However some answers should be given, e.g. whether a positive (or reversed) discrimination may be justified.

It is wise that the PEICL limits the rules on discrimination to the criteria of nationality, ethnic or "racial" origin and gender. This means that different treatments with regard to other criteria – especially of those included in the employment Directives – do not have to be individually justified, which is reasonable as insurance premiums are risk-based and therefore any insurance contract implies a need for differentiation. Nevertheless, it is to be expected that European anti-discriminatory legislation will be extended to different treatment based on age, disability, sexual identity and religion/belief as well.[40] Any such future legislation concerning insurance contracts will have to be implemented in the PEICL.

3. Enforcement (Art. 1:301 – 1:302 PEICL)

The final provisions of Chapter One deal with injunctions seeking an order to prohibit infringements of the PEICL. The provisions refer to the Directive on injunctions for the protection of consumers' interests.[41] However it has to be taken into consideration that this Directive's scope of application is limited to consumer protection. The entities mentioned in the Commission's list of entitled entities usually serve the purpose of consumer protection, while the application of the PEICL may be agreed on by commercial parties as well. Of course this does not mean that there might be a lack of legal protection, as in the commercial sector there is no need for any such specific protection.

Art. 1:302 PEICL clarifies that the application of the PEICL does not preclude access to other out-of-court complaint and redress mechanisms otherwise available to the policyholder. This is important especially with regard to the Ombudsman systems which have been established in many Member states. As to the recourse to State courts or to arbitration, the PEICL offer no specific rule.[42]

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[40] See Resolution on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or belief, Disability, Age, or Sexual Orientation, COM (2008) 0426, EUR. PARL. DOC. P6_TA (2009) 0211.

[41] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests 1998 O.J. (L 166).

[42] *See* Heiss, *supra* note 2, at 239 sec. (f).

A. INITIAL STAGE AND DURATION OF THE INSURANCE CONTRACT (CHAPTER TWO)

1. Applicant's Pre-contractual Information Duty (Art. 2:101 – 2:105 PEICL)

For the decision whether and with which contents to conclude a contract the insurer obviously needs some risk-related information from the applicant. Art. 2:101 PEICL deals with the applicant's duty of disclosure. The applicant has to inform the insurer about the circumstances of which he is, or ought to be, aware, including such circumstances of which the person to be insured was or should have been aware. Art. 2:101 PEICL limits the duty to those circumstances which have been subject to clear and precise questions that have been put forward to the applicant by the insurer. Nevertheless, in case of any inaccurate additional information given to the insurer, there are the same sanctions that apply to information given in fulfilment of the duty of disclosure.[43]

In the case of fraudulent breach of the duty of disclosure, the insurer is entitled to terminate the contract and to retain the right to any premium due.[44] In any other case, the insurer is entitled to propose a "reasonable" variation of the contract.[45] In that case the contract will be continued on the basis of the variation proposed for the future, unless the policyholder rejects the proposal within one month.[46] Termination of the contract by the insurer is only possible if the policyholder is not in innocent breach of his duty of disclosure or if the insurer proves that the contract would not have been concluded had he known of the information concerned. Whether the information was "material" in the decision to conclude the contract has to be determined, according to Art. 2:103 (b) PEICL. The question is whether a "reasonable insurer" would have considered the circumstances to be essential for the decision to enter into the contract.

These provisions should be reconsidered. It is hard to understand why an insurer should only be entitled to terminate the contract in case of fraudulent breach of the duty of disclosure, and why there should be no

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[43] PEICL, *supra* note 5, at art. 2:105.

[44] PEICL, *supra* note 5, at art. 2:102.

[45] Concerning the insurer's duty to provide information, the wording of PEICL art. 2:102(1)-(2) refers on the one hand to the *intention* of the insurer and on the other hand to the *decision*; but in fact, the meaning here is the same as both times the PEICL refer to the chosen legal consequence.

[46] PEICL, *supra* note 5, at art. 2:102 (2) (referring to the *agreement* of the parties, but obviously means that the policyholder does not reject according to Art. 2:102 (2)).

right of rescission.[47] However, at least the insurer shall be entitled to avoid the contract according to Art. 2:104 PEICL.

Even more important is a second point which concerns the criterion of the "reasonable insurer". This new creature seems questionable. First of all there is no need for it. In addition it appears to be highly problematic to introduce objective criteria – such as the "reasonable insurer" – while trying to establish the (hypothetic) intention of the individual insurer concerned. A policyholder who breaches his duty of disclosure may, if the criterion of the "reasonable insurer" is applied, obtain an undeserved advantage compared to an honest policyholder. The latter probably has to pay higher premiums than the former, accept surcharges or even risk that the insurer might refuse to conclude the contract. It is absolutely sufficient to limit private autonomy by applying the general contract law principles (anti-discrimination rules, semi-mandatory provisions, etc.), and not by asking what a "reasonable insurer" might consider to be appropriate. The objective approach of the PEICL would lead to a general control of the contract terms in case of breach of the duty of disclosure, while in the case that the duty is fulfilled according to the PEICL, no such control takes place. This would lead to unequal treatment, and any such control regarding the adequacy of the terms would be incoherent with the principle of private autonomy.

Some exceptions to the duty of disclosure are made in Art. 2:103 PEICL. According to lit. d of this provision, the sanctions shall not apply in respect to information which the insurer was or should have been aware. In this matter it can be difficult to draw the lines, e.g. if a policyholder features various risks that are covered by the same insurer. The PEICL offer no further details, so that this will be a task of the courts.

2. Insurer's Pre-contractual Duties (Art. 2:201 – 2:203 PEICL)

There exist a wide range of pre-contractual duties of the insurer, especially the duty to provide information before the applicant has decided on the contract. Art. 2:201 PEICL is modelled on several European Directives. This rule says that the insurer has to provide the applicant with a copy of the proposed contract terms, as well as with a document that includes further information about a number of circumstances if relevant. According to paragraph 2, the information shall be provided – "if possible" – in sufficient time to enable the applicant to consider whether or not to conclude the contract. Although this is not expressly stated in the text, the purpose of the provision is to enable the applicant to decide on the basis of the information rendered by the insurer. This is in accordance with the

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[47] Especially as, according to PEICL, *supra* note 5, at art. 2:102 (5), the insurer is released from the obligation to perform only in case of negligence.

European Directives, which are based on the concept of a well-informed, reasonable consumer.[48] Apart from that, it is only the title of Art. 2:201 PEICL that clarifies that the duties mentioned have to be fulfilled prior to the conclusion of the contract.

The scope of application of this provision, as well as the question of how a breach of duty is sanctioned, remains unclear. As to the scope of application, Art. 2:402 PEICL states that Art. 2:201-203 PEICL do not apply to preliminary insurance contracts. However it is an open question as to how distance selling contracts are to be treated. Taking into account that "if possible" the information shall be provided "in sufficient time" to enable the applicant to consider whether or not to conclude the contract, it is likely that there will have to be a control regarding the circumstances of every single contract. In this context a certain standardisation is desirable. As far as the sanctions are concerned, the time limit for the avoidance of the contract according to Art. 2:303 (1) PEICL starts with the receipt of the insurer's acceptance or delivery of the documents enumerated in Art. 2:501 PEICL.49

The insurer has to warn the applicant of any inconsistencies between the coverage offered and the applicant's requirements.[50] Upon closer inspection of Art. 2:202 PEICL, it becomes obvious that this provision establishes a comprehensive duty of the insurer to advise the applicant, including an initial identification of his needs and wishes with regard to the risk coverage, and to give a recommendation. It is remarkable that the insurer has to take into consideration the circumstances and mode of contracting and, in particular, the fact whether the applicant has been assisted by an independent intermediary. However, it is hardly understandable why there should be a duty to advise the applicant, even if he has been assisted by an independent intermediary. This is especially true given that the intermediary is himself liable according to the European Directive on insurance mediation.[51]

Finally, the insurer immediately has to warn the applicant that the coverage does not commence until the contract is concluded and, if applicable, the first premium is paid,[52] if the applicant mistakenly believes that the coverage begins earlier. This article does not just represent a special case of the duty to give advice, as the insurer's duty depends on the error of the applicant.

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[48] *See also* DCFR, *supra* note 1, at sec. II-3:102 (1).

[49] PEICL, *supra* note 5, at art. 2:303(3)

[50] PEICL, *supra* note 5, at art. 2:202 (1).

[51] *See* Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, 2002 O.J. (L 9).

[52] PEICL, *supra* note 5, at art. 2:202(1).

3. Conclusion of the Contract (Art. 2:301 – 2:304 PEICL)

According to Art. 2:301 PEICL, the insurance contract need not be concluded or evidenced in writing. This provision was modelled on the basic rule in II.-I:107 (1) DCFR.[53] It is, however, of no practical importance as insurance contracts are usually concluded in writing.

Much more important is the right to revoke a contract. While according to Art. II.-402 DCFR revocation is possible until the insurer has declared acceptance of the applicant's offer,[54] according to Art. 2:302 PEICL, the applicant may revoke the contract if the revocation reaches the insurer before the applicant has received an acceptance from the insurer. In addition, Art. 2:303 PEICL grants the applicant a right to revoke the contract within two weeks after receipt of acceptance or delivery of the documents referred to in Art. 2:501 PEICL. There are no further requirements for this right to revoke, and only a few exceptions. Both provisions offer the applicant the possibility to withdraw from the contract for any reason or motive, even after the insurer has received the applicant's offer.

It is arguable why an offer that has been consciously and validly declared shall remain close to non-committal. This seems extraordinary, especially if one keeps in mind the wide range of duties that the insurer already has to fulfil before the contract is concluded. This comprehensive right to revoke the contract appears questionable if the applicant, *e.g.*, as an entrepreneur, doesn't need any protection. Even major risks are not excluded from the right of revocation.

Art. 2:304 PEICL is modelled on the European Directive on unfair terms in consumer contracts.[55] Therefore, the provisions regarding a significant imbalance of rights and obligations, as well as the exceptions concerning the premium and the essential description of the covered risk and terms individually agreed on, can be considered as European standard. However, according to Art. 2:304 paragraph 3 lit. b PEICL, the principle that the terms have to be in plain and intelligible language is only applicable on terms stating the essential description of the coverage granted. This allows the conclusion that any other term that is not in plain and intelligible language might cause a significant imbalance in rights and obligations pursuant to Art. 2:304 (1) PEICL as well. However, in order to meet the requirements of the Directive, a clearer wording appears to be necessary. It is, above all, not possible to apply exclusively Art. 1:203 (1) PEICL, as this provision contains no sanction.[56] Besides, many other

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[53] PEICL, *supra* note 5, at art. 2:101(2).
[54] PEICL, *supra* note 5, at art. 2:202(2).
[55] PEICL, *supra* note 5, at art.1:102(2).
[56] PEICL, *supra* note 5, at art. 2:203(1).

requirements of the Directive are not met, *e.g.* with regard to the interpretation of ambiguities. However, the reference to the PECL/DCFR made in Art. 1:105 (2) PEICL should lead to satisfying results. This article provides that any questions arising from the insurance contract, which are not expressly settled in the PEICL, are to be settled in conformity with the PECL and, where those do not contain any rules as well, in accordance with the general principles common to the laws of the Member States.

As to the sanctions in case of a significant imbalance, Art. 2:304 PEICL states that the term concerned is not binding for the policyholder (or the insured or the beneficiary). In contrast, the insurer cannot claim that the term is not binding; thus he will not benefit from the breach of law which he is responsible for.[57] The unfair term shall be substituted by a term which reasonable parties would have agreed upon had they been aware of the unfairness of the term.[58] The idea of substituting the real parties with an abstract category like "reasonable" parties seems questionable but not as problematic as in the context of the duties of disclosure (see above a).

4. Retroactive and Preliminary Coverage (Art. 2:401 – 2:403 PEICL)

The provisions concerning retroactive insurance rule that if, at the time of the conclusion of the contract, the insurer knows that no insured risk has occurred, then the policyholder owes premiums only for the period after the time of conclusion.[59] Inversely, if the policyholder knows at the time of the conclusion of the contract that the insured event has occurred, the insurer shall provide coverage only for the period after the time of the conclusion of the contract. The reason for this provision that does not declare the contract void is that retroactive coverage is possible yet quite unusual. The provisions deserve approval. However, there is a problem if the retroactive coverage is aimed at covering the risk between application and conclusion of the contract. According to Art. 2:401 (2) PEICL, this may not be achieved as the insurer does not need to provide coverage for this period if at the relevant time of the conclusion of the contract the policyholder already knows that the insured risk has occurred.

Only few provisions of the PEICL deal with preliminary coverage, which is an independent contract with no or only a limited risk assessment. According to Art. 2:402 PEICL, only very little information has to be given, and no contract terms have to be provided. Therefore, it is necessary to

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[57] *See* Ch. Armbrüster, 'Das Transparenzgebot für Allgemeine Geschäftsbedingungen' [2004] DNotZ 437, 439.

[58] PEICL, *supra* note 5, at art. 2:304(2).

[59] PEICL, *supra* note 5, at art. 2:401.

determine which contract terms shall be applicable to the preliminary coverage contract. Neither is there a legal provision concerning the payment of premiums. Furthermore, the important question of the duration and ending of the preliminary coverage remains unaddressed. Art. 2:403 (1) PEICL does not state whether the conclusion of another preliminary coverage contract, or the beginning of a coverage provided by another insurer, will lead to the termination of the contract. It should also be clarified that a revocation of the application according to Art. 2:302 PEICL terminates the preliminary coverage. Finally, it would make sense to give the policyholder a right to terminate the agreement in case preliminary coverage was agreed on without a time limit. Without such a possibility, the policyholder would find it difficult to secure coverage by another insurer, e.g. if the insurer does not react to the application for the main contract in reasonable time.

It does not seem necessary to expressly entitle the insurer to terminate the preliminary coverage contract as according to Art. 2:403 (1) PEICL he is able to do so by declining the conclusion of the main contract. Art. 2:403 (2) PEICL contains a special provision in case preliminary coverage is granted to a person who does not simultaneously apply for a main contract with the same insurer. Such coverage may be cancelled by either party giving two weeks' notice, which is a reasonable rule.

5. Insurance Policy (Art. 2:501 – 2:502 PEICL)

According to Art. 2:502 PEICL, under certain conditions the contents of the insurance policy may determine the contents of the contract. If the terms of the insurance policy differ from those in the policyholder's application or any prior agreement between the parties and these differences are highlighted in the policy, they are deemed to have been accepted to by the policyholder unless he objects within one month of receipt of the policy. The insurer has to inform the policyholder about the right to object to the differences. However, it remains unclear how the "prior agreements" are related to the application. According to the wording "*any* prior agreement", even prior independent contracts are included. It seems questionable why such agreements should have to be considered although they are not part of the application.

6. Duration of the Insurance Contract (Art. 2:601 – 2:604 PEICL)

The provisions regarding the duration of the insurance contract are very strict. According to Art. 2:601 PEICL, the duration of the insurance contract is one year. Exceptions are only possible in case this is indicated by the nature of the risk and in the area of personal insurance.

There are many possibilities for a maximum duration, varying from one year in French law, three years proposed in the 1979 draft for a Directive already mentioned,[60] to ten years in Spanish law. The policyholder will frequently be interested in binding himself only for a short period in order to remain flexible: he may wish to adjust the contract to changed circumstances or even opt for another insurer. A short period is also advantageous for new market participants within the insurance industry, as this facilitates their access to customers. However, the advantages of a longer insurance period are considerable. First of all, continuity leads to an improvement of the basis for actuarial calculations. Furthermore, a longer period allows the insurer to save administrative costs, which implies an advantage for policyholders as well, as premiums may be lower. The possible need for an adjustment of the contract terms may be met by inserting adjustment clauses. And last but not least, establishing a maximum period for insurance contracts constitutes an interference with private autonomy. Therefore, the proposed maximum period of one year appears to be very short, unnecessarily preventing the parties from opting for the advantages of a longer period. In addition, the exceptions admitted by Art. 2:601 (1) PEICL need to be clarified.

Another severe interference with private autonomy is that the maximum period of one year at the same time constitutes the minimum period. The exceptions provided in sentence two are identical with those for longer periods than one year. They are necessary as otherwise, a travel insurance policy, for example, would have to run for a whole year. It is difficult to see the reason why the maximum as well as the minimum duration should not, within a maximum limit of three years, for example, be left to the agreement of the parties. There is no need for a legally determined insurance period, and Art. 2:601 PECL therefore appears to be over-regulating the topic. This strict rule makes the PEICL, in this respect, a less attractive alternative to the national insurance laws, especially for commercial policyholders.

Art. 2:602 PEICL states asymmetric time limits for the termination of the contract. The insurer has to give notice that he does not want the contract to be prolonged at least one month before the expiration date. The policyholder has to give notice at the latest by the day the contract period expires or within one month after having received the insurer's premium invoice. The latter provision leads to insecurity: until the very end of the contract he has to prove the receipt of the premium invoice, even after the end of the contract the insurer will not know for sure whether the contract has expired or not. At the same time, there is no need to protect the policyholder, as he usually knows that he should not wait with the

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[60] *See* Council Directive, art. 3-4, 1979 O.J. (C 190) at 3-4.

declaration of termination until the expiration date of a contract that will otherwise be automatically prolonged. Therefore, a rule that contains symmetric time limits is clearly preferable.

Any adjustment of premiums and terms of contract has to meet very strict requirements,[61] notwithstanding further requirements (e.g. the rules on abusive clauses laid down in Art. 2:304 PEICL).[62] For instance, any alteration shall not take effect before the next prolongation. In addition, the insurer has to send a notice of alteration no later than one month before the expiration of the current contract period. Both these rules, taken together, may lead to a delay of more than one year. Thus, a quick reaction in case of changed circumstances becomes impossible. This seems too strict, especially as adjustment clauses are anyway controlled separately under the fair contract term rules.

The provision in Art. 2:604 PEICL on termination after an insured event has occurred is convincing, especially with regard to private autonomy. The rule only contains requirements for clauses dealing with the termination without giving a right to terminate. In any such clause, the right to terminate has to be granted to both parties, which seems reasonable. However, it is systematically unsatisfactory that both the provision on termination and the exercise of the right to terminate have to be "reasonable."[63] Here, the question arises as to where exactly the difference of this provision to the rules on abusive clauses[64] is to be found. In addition, as far as the exercise of the right to terminate is concerned, the fact that this must be "reasonable" should be part of the general rules as it constitutes a general principle of law.

7. Post-contractual Information Duties of the Insurer

In the section "Post-Contractual Information Duties of the Insurer" (what would be more accurate is to say "Information Duties After Conclusion of Contract"), the PEICL deal with duties of the insurer in the period between conclusion and termination. Among other duties, there is a duty of the insurer to provide the policyholder with information in writing on any change concerning his name and address and other related information, such as a change of his legal form, etc., without undue delay.[65] However, there is neither a sanction in case of lack of compliance nor a corresponding

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[61] PEICL, *supra* note 5, at art. 2:401.

[62] Those rules are modeled on Council Directive 93/13 on unfair terms in consumer contracts. 1993 O.J. (L 095) 0029 (EEC).

[63] PEICL, *supra* note 5, at art. 2:604(2).

[64] PEICL, *supra* note 5, at art. 2:304.

[65] PEICL, *supra* note 5, at art. 2:701.

duty of the policyholder. On request of the policyholder, the insurer has to provide him with information about all matters relevant to the performance of the contract, as well as about new standard terms offered by the insurer for insurance contracts of the same type as the one concluded with the policyholder. [66] Unfortunately, the PEICL do not state whether the policyholder can claim incorporation of the new standard terms in the contract or whether the incorporation is only possible after termination of the contract by concluding a new one. If the insurer was forced to incorporate new terms – even terms developed for the acquisition of new clients – in every existing contract, this might discourage it from developing new terms.

There is no duty to give advice comparable to Art. 2:202 PEICL for the time after the conclusion of the contract. This is advantageous for the insurer as the fulfilment of such duties can be cost-intensive. For the policyholder, however, the limited duty of information is of questionable use. He has to be provided with information about relevant matters, but that will often not suffice as a basis for the decision whether a change is advantageous for him or not. This is especially true as the duty according to Art. 2:702 (1)(b) PEICL is not limited to changes that are wholly or at least partly advantageous for the policyholder. With regard to the interest of the policyholder to be provided with information on the one hand, and the high costs and constraining effect for innovation on the other, it seems preferable to not only develop a duty to provide information, but to also give advice. However, this should be limited to the case that the innovation provides a reasonable benefit to the policyholder or the insured.

B. INSURANCE INTERMEDIARIES (CHAPTER THREE)

The Chapter about insurance intermediaries only deals with two questions about the powers of insurance agents and the liability of agents purporting to be independent. The insurance agent shall be authorized to perform all acts on behalf of the insurer are within the scope of his employment according to current insurance industry practice. Restrictions are only possible if disclosed to the policyholder in a separate document. But, even then, the authority has to cover at least the actual scope of his employment.[67] This rule is aimed at the case where the insurance agent performs more acts than he is allowed to by the insurer, be it because his authority has been restricted by notice or by the scope of his employment. In this context, the usual activity of the agent, and not his behavior in the particular case, should be considered relevant. However, this conclusion

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[66] PEICL, *supra* note 5, at art. 2:702.
[67] PEICL, *supra* note 5, at art. 3:301.

cannot be clearly drawn from the wording of PEICL. The fact that the restriction of the authority may only be achieved by written notice – without it being necessary that the policyholder knows or ought to know of the restriction – results from the legal powers given to the insurance agent, and it secures legal certainty.

Besides this, it is worth mentioning that the agent has the power to receive notices from the policyholder,[68] and that relevant knowledge which the insurance agent has, or ought to have, shall be deemed to be the knowledge of the insurer.[69]

A special provision concerning agents only purporting to be independent intermediaries can be found in Art. 3:102 PEICL. If such an agent acts in breach of duties imposed on him by law, it is not only he but also the insurer who is liable for such breach. The fact that the insurer is liable for the actions of the agent deserves approval, as in practice damages often cannot be obtained by the policyholder due to the absence of a liability insurance of the agent.

Despite the headline of Chapter Three, the requirements of the Directive concerning insurance brokering[70]have not yet been incorporated in the PEICL.[71]

C. THE RISK INSURED

1. Precautionary Measures

After a breach of an obligation, the insurer is only entitled to terminate the contract if the policyholder (or the insured) breached his obligation with the intent to cause the loss or if he acted recklessly and with the knowledge that the loss would probably result.[72] "Recklessness" has to be interpreted as being more than just grossly negligent; it is close to *dolus eventualis* (awareness of an action's possible outcome which the policyholder is willing to accept, rather than abstain, from the perilous action). The burden of proof lies with the insurer, who in practice will

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[68] PEICL, *supra* note 5, at art. 3:101(2).

[69] PEICL, *supra* note 5, at art. 3:101(3).

[70] *See* Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, 2002 O.J. (L 9).

[71] Heiss, *supra* note 2, at 229, 238 (objecting to incorporation).

[72] PEICL, *supra* note 5, at art. 4:102(1). Looking at the wording, it is not clear whether the intent of causing a loss is sufficient or whether an additional element, like the knowledge that the act will cause a damage, is required. It is more likely that this latter requirement only applies to the case of "recklessness." This is also evidenced by the clarifying comma in the parallel clause in art. 9:101.

often find it difficult to prove that the policyholder acted with the knowledge that the loss would probably result. As a policyholder who does not think about the losses caused by his behaviour is not in need of protection, it should be sufficient that the policyholder ought to know that he could probably cause losses.

Of great importance is the question under which circumstances the insurer is exempted from liability. According to Art. 4:103 (1) PEICL, this is only the case if the loss was caused by the non-compliance of the policyholder (or the insured). This deserves approval. However, the fact that the exemption depends on the knowledge of the policyholder that the loss would probably result should be criticised (see above).

In the case that the loss was caused by negligent non-compliance it is possible to reduce the insurance money according to the degree of fault by a "clear clause".[73] This rule is remarkable. The exemption depends on the degree of fault, proportionality, and a clause that has to meet (as the mention of "clearness"[74] superfluously suggests) special requirements. Yet, there are certain disadvantages of such a clause that cannot be denied. Firstly, there is no need for any reduction of the insurance money according to the degree of fault in case of simple negligence. Secondly, it will often be difficult to establish what grade of reduction should correspond to which kind of negligence. Thirdly, if the policyholder acts recklessly, but without knowing the loss that can result, Art. 4:103 (2) PEICL is, according to the wording, not applicable, although systematically this rule should apply. In addition, there seem to be only few situations in which the insurer is totally exempted from liability as the subjective elements refer to the loss and not to the breach of obligation.

Considering everything, the rule in Art. 4:103 (2) PEICL needs to be modified. Most importantly, in case of simple negligence, the breach of an obligation that aims at avoiding the occurrence of the insured event should not even partially lead to an exemption from liability.

1. Aggravation of Risk (Art. 4:201 – 4:203 PEICL)

Usually, insurance contracts contain a clause about the consequences of an aggravation of risk. Such rules may provide for the insurer not to be held liable if the insured event occurs as the result of an aggravation of a risk that has intentionally been caused by the policyholder or the insured, but there may be provisions on legal consequences in less obvious cases as well.

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[73] PEICL, *supra* note 5, at art. 4:103(2).
[74] PEICL, *supra* note 5, at art. 1:203.

At the beginning of the section of PEICL which deals with the aggravation of risk, there is a provision that limits the impact of clauses concerning the aggravation of risk. Those clauses shall have no effect unless the aggravation of risk in question is material and of a kind which is specified in the insurance contract.[75] This provision offers some kind of definition. It clarifies that immaterial aggravations of risk have no consequences for the insurance contract. In addition, it states that the clause only has effects if the aggravation of risk is of a kind specified in the contract. This seems problematic as the insurer is forced to foresee every kind of aggravation of risk that might occur in the future and describe it precisely in the insurance contract. This is hardly possible. Furthermore, the contract terms become lengthier, and thus, the policyholder risks excessive burden. There is no predominant interest of the policyholder to be protected from a termination of the insurance contract or an exemption of liability by an exhaustive enumeration of possible aggravations of the insured risk, especially as only material aggravations are concerned.

The further provisions concerning the aggravation of risk seem suitable. There is a duty to give notice of an aggravation of risk.[76] In the event of breach of the duty of notification, the insurer is not entitled to refuse to pay any subsequent loss resulting from an event within the scope of the coverage unless the loss was caused by the aggravation of risk. Furthermore, it is necessary that the policyholder is, or ought to be, aware of the aggravation and that the insurer would not have insured the aggravated risk at all. If, however, the insurer would have been prepared to insure the aggravated risk at a higher premium or on different terms, the insurance money is payable proportionately or in accordance with such terms.[77]

If the contract provides that in the event of an aggravation of the risk insured, the insurer is entitled to terminate the contract, further requirements have to be met.[78] However, it seems too strict that there is no possibility at all to continue the contract with adjusted conditions (e.g., higher premium, exclusion of risks). In fact, the PEICL forces the insurer, even if he is prepared to continue the contract, to terminate it as long as he is not willing to stick to the original terms. This is unsatisfactory for the policyholder as well as he is obliged to react in case of an "adjusting"

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[75] PEICL, *supra* note 5, at art. 4:201.

[76] PEICL, *supra* note 5, at art. 4:202.

[77] *See* PEICL, *supra* note 5, at art. 4:202(3); 4:203(3). The rule in art. 4:203(3) does not match with the headline of this article, particularly as it should not only apply to the termination of contracts; from a systematic perspective, it would be preferable to combine this provision with art. 4:202(3) and create a separate article with the headline "release from obligation to perform in the event of aggravated risk."

[78] PEICL, *supra* note 5, at art. 4:203(1), (2).

termination (termination combined with an offer to conclude a new contract adjusted to the new risks). If he does not react in due time, he will lose protection and will have to face all the risks of a new conclusion of contract (e.g., a new risk assessment and the consequences of a delayed payment of the first premium).[79]

2. Reduction of Risk (Art. 4:301 PEICL)

In the case of a material reduction of risk, the policyholder is entitled to request a proportionate reduction of the premium for the remaining contract period.[80] As the wording is not very precise, this rule implies a risk of uncertainty. It seems that the authors of the PEICL were well aware of this risk as paragraph two provides a right of the policyholder to terminate the contract in case the parties do not agree on a proportionate reduction of the premium within one month of the request.

The difficulties start with the need for a "material" reduction of risk. Contrary to the provisions concerning the aggravation of risk,[81] the hypothetic reaction of the insurer is of no importance in this context. Further uncertainty is caused by the term of "proportionate" reduction. This makes a quantification of the reduction of risk necessary, even if the tariff structure contains no such quantification. The provision therefore contradicts the insurer's principles of calculation. This may result in higher costs for calculation and administration, especially since according to the PEICL, the contract period may not exceed one year anyway. It would clearly be preferable to insert a provision which is modelled on the structure of the tariffs of the particular insurer with differentiations based on certain circumstances.

D. INSURANCE PREMIUMS

The chapter on insurance premiums contains no provision which deals with modalities such as the date on which when the premium payment is due. Obviously, the more general provisions of the PECL/DCFR shall be applicable. This should cause no problems, even though those provisions are not specially designed for insurance contracts.

As to the consequences of non-payment of the premiums, the PEICL distinguish between non-payment of the first (or single) premium and subsequent premiums. In the case of non-payment of the first premium, stricter rules are justified than in the case of the non-payment of subsequent

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[79] *See* PEICL, *supra* note 5, at art. 5:101.
[80] PEICL, *supra* note 5, at art. 4:301(1).
[81] PEICL, *supra* note 5, at art. 4:202(3); 4:203(3).

premiums, as in the latter case the policyholder fulfilled his contractual duty to participate in financing the risk pool at least once. According to Art. 5:101 PEICL, it is possible for the insurer to make the payment of the first premium a condition of the formation of the contract or the beginning of the coverage. However, this requires that the condition be communicated to the applicant in writing and that a period of two weeks has expired after receipt of an invoice. The notice has to be in clear language. It remains an open question whether this means the same as the "plain and intelligible" language mentioned in Art. 1:203 PEICL. However, it seems more important whether the condition has to be accentuated (e.g., communicated by extra notice). The PEICL should clarify this issue. The warning that the applicant lacks coverage until the premium is paid has to be given.[82]

In accordance with the consideration made above, in case of non-payment of a subsequent premium, it is more difficult for the insurer to be relieved of his obligation to cover the risk. According to Art. 5:102 PEICL the insurer has to state the precise amount of premium due as well as the date of the payment and has to grant an additional period of payment of at least two weeks while he still has to cover the risks comprehensively.

According to Art. 5:103 PEICL, the insurer is entitled to terminate the contract by written notice, provided that the invoice or the reminder states his right to terminate the contract, no matter what kind of premium has not been paid. The contract is deemed to be terminated if the insurer does not bring an action for payment of the first premium within two months after expiration of the period mentioned in Art. 5:101 or Art. 5:102 PEICL respectively. This is meant to avoid requiring the policyholder to pay the premiums while he is no longer entitled to payment of the insurance money. The solution found in the PEICL seems easy to handle. Nevertheless, it is preferable to grant a right of rescission if the first premium is not paid because in this case the contract has never been fully executed. Furthermore, it is necessary to grant the right to terminate the contract only if the non-payment is due at least to negligence of the policyholder. Otherwise, the provision would be too strict.

According to Art. 5:104 PEICL, the premium is divisible. This is appropriate as Art. 5:104 PEICL has to be seen in the context of Art. 2:104 PEICL. That rule contains an exception to the principle of divisibility of the premium in the case that the policyholder is in fraudulent breach of a duty of disclosure. Here, there is an important pre-emptive effect if a policyholder has to pay the entire premium even though he is not being protected in case of the occurrence of the insured event.

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[82] PEICL, *supra* note 5, at art. 2:203 (without expressly referencing to the details of art. 5:101(a)-(b)).

At the end of the chapter on premium, Art. 5:105 PEICL states under which circumstances third parties are entitled to pay the premium. This is important because in case of non-payment of the premium, the insurer may be relieved from his obligation to cover the risk, and he may be entitled to terminate the contract. A third party is entitled to pay the premium if this party acts with the assent of the policyholder, or it has a legitimate interest in maintaining the coverage, and the policyholder has failed to pay or it is clear that the policyholder will not pay at the time the payment is due. The latter case should be laid down more clearly. Beneficiaries and insured persons usually have a "legitimate interest," as well as lien creditors. It is worth discussing if in addition, tenants and other only obligatorily entitled persons, as well as friends and relatives of the policyholders, have a "legitimate interest" in the payment. Furthermore, it is difficult to assess in which case it is "clear" that the policyholder will not pay at the time the payment is due. This leads to the question why it shall be necessary that the policyholder has failed to pay or will not pay the premium. In the relevant cases, there is no specific need to protect the policyholder. If he is not interested in having the premiums paid by a third party, this will be taken into account if the third party asserts its claims against the policyholder.

F. INSURED EVENT (CHAPTER SIX)

The occurrence of an insured event has to be disclosed to the insurer without undue delay.[83] If the contract requires notice to be given within a stated period of time, such time shall be reasonable and no shorter than five days. The insurance money payable shall be reduced to the extent that the insurer proves that he has been prejudiced by undue delay,[84] no matter whether the policyholder has acted negligently or not. A comparable provision is contained in Art. 6:102 (2) PEICL, which concerns a breach of the duty to cooperate with the insurer in the investigation of the insured event. Both provisions appear to be too strict, especially as in other sections of the PEICL proportional reductions of the insurance money according to the degree of fault are common.[85]

Art. 6:103 (2) PEICL contains a fiction which is of considerable importance: any claim shall be deemed to have been "accepted" unless the insurer rejects the claim or defers acceptance by written notice giving reasons for his decision within one month after receipt of the relevant documents and other information. This provision is obviously meant to

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[83] PEICL, *supra* note 5, at art. 6:101(1)-(2).
[84] PEICL, *supra* note 5, at art. 6:101(3).
[85] *E.g.,* PEICL, *supra* note 5, at art. 2:102(3), (5); 4:102(1); 4:203(2)-(3).

speed up the insurer's decision about the claim. However, it seems questionable whether a period of one month is too short, especially as the beginning of the period depends on the receipt of the relevant documents and other information. The insurer will often need to be able to investigate the event carefully (e.g., by contacting authorized experts). In these cases, Art. 6:104 PEICL forces the insurer to give a notice (and, if necessary, prove its receipt by the policyholder) in order to avoid the fiction.

Furthermore, it is questionable that the beginning of the period depends on the receipt of the documents and information. If one keeps in mind the purpose of the provision, which is to give an incentive to the insurer to decide speedily, this can only mean the receipt of *all* relevant documents and information. In practice, however, the information given to the insurer by the policyholder often leads to further investigations and requests (which must be responded to).[86] This may lead to uncertainties about the beginning of the period.

Art. 6:103 (2) PEICL does not state expressly who shall be the addressee of the notice. While duties to give notice and to cooperate may bind the insurer, the policyholder or the beneficiary, the addressee of the notice should solely be the claimant. However, this is not completely self-evident, as the policyholder is party to the insurance contract. It seems necessary to clarify this point.

When a claim has been accepted, the insurer shall pay or provide the services promised without undue delay, meaning that the payment of insurance money has to be made no later than one week after the acceptance and quantification of the claim.[87] If the insurance money is not paid on time, the claimant is entitled to interest on that sum from the time when payment was due at a rate applied by the European Central Bank. Furthermore, he may recover damages for any additional loss caused by late payment. While a short period of only one week is appropriate according to the PEICL, the Directive on motor vehicle liability insurance[88] concedes a period of three months. Art. 6:104 PEICL therefore seems too strict, especially as the sanctions do not depend at least on negligence of the insurer. As far as the interest is concerned, PEICL are modelled on III.-3:708 DCFR (Art. 9:508 PECL), while according to those rules damages are only paid if the insurer acted at least negligently.[89]

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[86] PEICL, *supra* note 5, at art. 6:101(2).

[87] PEICL, *supra* note 5, at art. 6:104(1), (3).

[88] Directive 2000/26, art. 4, 2000 O.J. (L 181) 65, 70 (EEC).

[89] DCFR, *supra* note 1, at art. III-3:701 (stating creditor is entitled to damages for loss caused by debtor's non-performance of an obligation); PEICL, *supra* note 5, at art. 9:501.

D. PRESCRIPTION (CHAPTER SEVEN)

As to the limitations period or prescription, the PEICL distinguish between actions for payment of premiums (period of one year)[90] and actions for payment of insurance benefits (in general, a period of three years).[91] Art. 7:102 PEICL is modelled on the basic rule III.-7:201 DCFR.[92] One of the few passages in the PEICL that expressly refer to the PECL is Art. 7:103 PEICL. In this respect, further harmonization is necessary, as Art. 1:105 (2) PEICL states that any questions arising from the insurance contract which are not expressly addressed by the PEICL are to be settled in conformity with the PECL. The fact that there is no corresponding provision in other sections leads to the question of whether the provisions of the PEICL are meant to be exhaustive. If the PEICL will be integrated into the DCFR, Art. 1:105 (2) PECL will become obsolete.

III. PROVISIONS COMMON TO INDEMNITY INSURANCE (PART II)

A. SUM INSURED AND INSURED VALUE (CHAPTER EIGHT)

Art. 8:101 PEICL contains the basic principle for the obligation of the insurer to make payments. According to this provision, the obligation is limited to the amount necessary to indemnify losses actually suffered by the insured. However, this provision is not mandatory.[93] Therefore, according to Art. 1:103 (2) sentence 1 PEICL, the contract may diverge from Art. 8:101 PEICL, as long as the derogation is not to the detriment of the policyholder.

As far as agreements about the subject-matter are concerned, Art. 8:101 (2) PEICL offers the parties quite a wide scope of choice. Even if the value agreed upon exceeds the actual value of the subject-matter, it is considered valid except for the case when there is operative fraud or misrepresentation on the part of the policyholder or insured. However, it has to be taken into consideration that the PEICL distinguish between indemnity insurance and insurance of fixed sums. Typically, an indemnity insurance is meant to provide compensation for a loss actually suffered (e.g., the destruction of a home caused by a fire where the insurance money enables the owner to rebuild the home or to buy another one) contrary to

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[90] PEICL, *supra* note 5, at art. 7:101.
[91] PEICL, *supra* note 5, at art. 7:102.
[92] PEICL, *supra* note 5, at art. 14:201.
[93] *See* PEICL, *supra* note 5, at art. 9:501. The PEICL in this version does not include any mandatory regulations.

the insurance of fixed sums (e.g., life assurance where the death of a person, as the insured event, does not cause the specific monetary loss which the insurance contract shall cover, so that no relation between an actual loss and the payment of the sum agreed by the insurer needs to be established). The higher the sum, the more the policyholder might find himself tempted to bring about the insured event. Keeping this in mind, it would be appropriate to implement a proportional reduction of the sum agreed upon in case it is much higher than the actual value.

Another provision that deserves special attention is contained in Art. 8:102 PEICL. According to this provision, the insurer is liable for any insured loss up to the sum insured even if the sum insured is less than the value of the property insured at the time when the insured event occurs. This is astonishing as it obviously results in an unequal treatment of different policyholders. A policyholder who correctly assumes that in most cases only a partial loss will occur and who therefore opts for a smaller sum is treated more favourably than a policyholder who opts for a sum corresponding to the value of the insured property and who consequently has to pay higher premiums. Art. 8:102 PEICL cannot be explained by stating that measures taken to increase the value of the insured property or inflation would make an adjustment necessary in due course. The first of these points cannot be generally assumed as value increasing measures result from individual decisions of the policyholder, while the latter (the effects of inflation) may be avoided by implementing a contract clause which contains an increase of the premiums in relation to inflation. Furthermore, the parties have the possibility to avoid the situation of underinsurance.

Obviously, the authors of the PEICL themselves have some doubts concerning Art. 8:102 PEICL as they entitle the insurer to offer insurance on the basis that the indemnity to be paid may be limited to the proportion that the sum insured bears to the actual value of the property at the time of the loss.[94] This kind of technique is unusual for the PEICL, while the provision itself is very reasonable. It should not only apply when agreed on and thus would correspond with the rule on over-insurance.[95] However, the right of termination granted in paragraph two in the case that no agreement can be reached is as questionable as in the case of aggravation of risk. Unfortunately, contrary to other provisions such as Art. 2:104 PEICL, there is also no special provision in case of fraudulent over-insurance.

Art. 8:104 (1) PEICL dealing with multiple insurance appears to be acceptable. However, a provision about the elimination of the multiple insurance should be added as well as a special provision dealing with fraudulent acts of the policyholder.

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[94] PEICL, *supra* note 5, at art. 8:102.
[95] PEICL, *supra* note 5, at art. 8:103(1).

B. ENTITLEMENT TO INDEMNITY (CHAPTER TWO)

According to Art. 9:101 (1) PEICL – under the somewhat vague title of "entitlement to indemnity" – neither the policyholder nor the insured is entitled to indemnity to the extent that the loss was caused by an act or omission on his part with intent to cause the loss or recklessly and with knowledge that the loss would probably result. The causation of loss includes failure to avert or to mitigate loss. This means that the policyholder has the duty to actively prevent the occurrence of an insured event even if the future losses have not at all been caused by him. This may lead to gaps in cases of negligence.[96]

Art. 9:102 PEICL that deals with the costs of mitigation, appears to be basically suitable. Those costs have to be reimbursed by the insurer to the extent the policyholder was justified in regarding the measures as reasonable under the circumstances even if they were unsuccessful in mitigating the loss. However, it is not easy to see why this rule shall not apply on costs meant to avoid the loss. At first sight, it seems possible to interpret "to mitigate insured loss" as including the case of avoidance of loss. However, Art. 9:101 (3) PEICL makes an express distinction between "mitigating" and "avoiding" the loss.

C. RIGHTS OF SUBROGATION (CHAPTER TEN)

According to Art. 10:101 (1) PEICL, the insurer is entitled to exercise rights of subrogation against a third party liable for loss to the extent that he has indemnified the insured. These "rights of subrogation" are structured differently; there is normal subrogation as well as the possibility for the insurer to claim in the name of the policyholder. The purpose of subrogation is to avoid unjust enrichment of the policyholder through two indemnifications for one and the same case of loss. Furthermore, the insurer has an interest in getting the revenues resulting from the insured event for the benefit of the collective of policyholders. Therefore, the insured is not allowed to waive his rights against third parties,[97] while the insurer must not exercise his rights of subrogation to the detriment of the insured.[98] In order to pursue his rights effectively, the insurer will often have to rely on the insured. Therefore a duty to cooperate – modelled on Art. 6:102 PEICL – should be added.

Quite a range of persons who may be liable for the damage are protected against subrogation by Art. 10:101 (3) PEICL. This rule not only

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[96] *See* PEICL, *supra* note 5, at art. 9:101(2).
[97] PEICL, *supra* note 5, at art. 10:102(2).
[98] PEICL, *supra* note 5, at art. 10:101(4).

concerns members of the household of the policyholder or the insured but also persons in an "equivalent social relationship" with the policyholder or insured, as well as employees. Especially the protection of persons in "equivalent social relationships" could lead to some problems as there is no definition of such a relationship and it seems hard to specify the persons protected. The provision offers an incentive for misuse as well. If there is any doubt, a court will have to disturb the privacy of the involved persons in order to assess whether a relationship is already "equivalent" to that of a household member. In contrast, the criterion of a member of the household is a clear and specified one, and it appears to be preferable that the protection should be limited to these persons.

D. INSURED PERSONS OTHER THAN THE POLICYHOLDER (CHAPTER ELEVEN)

The possibility to entitle a third party to request performance of a contractual obligation is dealt with in the DCFR.[99] Nevertheless, Chapter Eleven of the PEICL contains some special provisions (which are amended by several provisions in other Chapters such as Art. 5:105 PEICL).[100] In order to complete the provisions in accordance with Art. 1:105 (2) PEICL, the PECL as well as the DCFR must be applicable, including, e.g., the right to reject the right under the contract.[101]

According to Art. 11:101 (1) PEICL, the person for which the insurance has been taken is entitled to the insurance money. The provision does not use the words "insured" or "beneficiary" as defined in Art. 1:202 (1, 2) PEICL. Located in Part II of the PEICL, the provision is applicable exclusively to indemnity insurances and not to the insurance of fixed sums. This might cause some problems concerning the right of revocation: the policyholder is entitled to revoke the coverage unless the insured event has occurred.[102] On first glance, this seems to be necessary as in this case, the insured person is already entitled to the insurance money. The question, however, remains under which conditions does the policyholder have a right of revocation. The PEICL do not grant such a right nor do they mention what consequences the revocation might have. If in an insurance of fixed sums the policyholder only revokes without naming another third person, it is likely that the policyholder himself becomes the beneficiary, and Art. 11:101 PEICL would be not applicable then. However, this is completely different in the case of indemnity insurance. In that case, only a

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[99] DCFR, *supra* note 1, at art. II-9:301; PEICL, *supra* note 5, at art. 6:110.
[100] Weber-Rey, *supra* note 6, at 207.
[101] DCFR, *supra* note 1, at art. II-9:303; PEICL, *supra* note 5, at art. 6:110(2).
[102] PEICL, *supra* note 5, at art.11:101(2)(b).

person who has suffered a loss because of the occurrence of the insured event can be entitled to the insurance money. Therefore, a revocation of the coverage (not of the contract as a whole) granted by Art. 11:101 (2) PEICL only makes sense if the risk of damage has shifted to another person.

There is no provision dealing with the question how a person entitled to the insurance money may prove his position to the insurer. Furthermore, the relationship between this person and the policyholder is not addressed.

A rule of considerable significance is Art. 11:102 PEICL. According to this provision, the knowledge of the person insured is not attributed to the policyholder (unless that person is aware of his status as insured) when the policyholder is obliged to provide relevant information to the insurer. A clarification is necessary concerning the question whether the person has to be positively aware of his status as insured. It seems appropriate to extend the rule to the case in which the person ought to be aware of his status but negligently fails to be. Otherwise, it could be difficult for the insurer to prove that the conditions of Art. 11:102 PEICL are met. If this extension is added, it seems acceptable that in any other case the knowledge of the person insured is not attributed to the policyholder.

Art. 11:103 PEICL contains the principle that the breach of duty by one insured cannot adversely affect the rights of other persons insured under the same insurance contract unless the risk is jointly insured.

E. INSURED RISK (CHAPTER TWELVE)

If at the time of conclusion of the contract the insured risk does not exist, no premium will be due.[103] Nevertheless, the insurer is entitled to a "reasonable" sum for expenses incurred. According to paragraph two, the contract is terminated by law if the insured risk ceases to exist during the insurance period at the time that the insurer is notified thereof. In this case, the insurer is entitled to the premium in respect to the period prior to termination. This is principally acceptable. However, the provision should include an exception for fraudulent acts of the policyholder. In this case, it would be highly inadequate to release the policyholder from his duty to pay the premiums. At least for the period of time until the insurer realizes that the risk has ceased to exist, the premiums should have to be paid.

The transfer of property as a special case of the risk ceasing to exist is dealt with in Art. 12:102 PEICL. According to this provision, the insurance contract is terminated by law one month after the time of the transfer if the title to insured property is transferred, unless the policyholder and transferee may agree on termination at an earlier time. Nevertheless, it

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[103] PEICL, *supra* note 5, at art. 12:101(1).

is possible that the insurer, policyholder and transferee agree otherwise.[104] In the absence of an agreement, the contract will be terminated. This rule makes the insurance more flexible. It takes into account that neither the insurer nor the transferee had the occasion to choose their potential contractual partner. Therefore, it appears justified to terminate the contract after an orientation period. However, it seems more suitable to grant the insurer and the transferee a right to terminate the contract instead. Thus, it can be assured that the risks are still covered which helps to protect the transferee. Especially as far as immovable property is concerned, this protection may be quite essential. At the same time, the flexibility of the parties is ensured by granting them a right of termination.

F. GROUP INSURANCE (CHAPTER THIRTEEN)

There are, as of yet, no provisions in the PEICL dealing with group insurance.

III. PROVISIONS COMMON TO INSURANCE OF FIXED SUMS (PART THREE)

As to the insurance of fixed sums, the PEICL only contains a description of the scope of application for the time being. According to Art. 14:101 PEICL, the insurance of the person (examples given include accident, health, life, marriage and birth) may be taken out as an insurance of fixed sums. This means that the parties alternatively may agree on an indemnity insurance. It becomes clear, vice versa, that the insurance of fixed sums is possible only as insurance of the person following the traditional perception. The reason is that the specific interest in an insurance of the person often can hardly be exactly determined as a sum of money especially as it depends on various individual factors and circumstances. In contrast, in indemnity insurance, due to the indemnity principle laid down in Art. 8:101 (1) PEICL, it is essential to fix the interest, even if the rule on the maximum sum payable is somewhat flexible.[105] Art. 14:101 PEICL therefore is appropriate.

A. SUMMARY

Considering everything, it can be stated that the PEICL in their current version contain a wide range of basic principles which are the fruits of a careful analysis of the different insurance contract laws in Europe.

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[104] PEICL, *supra* note 5, at art. 12:102(3)(a).
[105] *See* PEICL, *supra* note 5, at art. 8:101(2).

Many rules have to be assessed as being so essential for the functioning of the insurance contract that their necessity is beyond doubt. This is especially true for the pre-contractual duty of disclosure (Art. 2:101 PEICL) and to the consequences of the aggravation of risk (Art. 4:201 ff. PEICL).[106]

However, a number of issues should be subject to further discussion. This concerns especially those provisions that are not part of the basic principles of insurance contract law. As pointed out above, the provisions dealing with the duration of the insurance contract,[107] for example, and prescription[108] deserve further attention.

The basic concept of the PEICL, which consists in just drawing the limits of private autonomy without trying to impose a certain content of the contract on the parties, seems to be very appropriate. In certain matters, however, this idea is not consistently pursued (e.g., when it comes to the binding duration of the insurance contract, allowing different periods only if indicated by the nature of the risk).109 If the PEICL are supposed to be perceived by both parties as an attractive alternative to the application of national insurance laws, such strict provisions should be eliminated. Furthermore, the attractiveness of the PEICL could certainly be increased if the "reasonable insurer" were replaced by the particular insurer involved. Furthermore, it seems questionable that in some cases the contract is terminated if the parties do not reach an agreement about certain issues.110 This legal technique sounds better than how it works in practice. It will certainly be time-consuming and therefore result in high additional costs; thus, it does not appear suitable for the mass business of (non-industrial) insurance.

Another point is that it seems important to harmonize PEICL with DCFR, in which essential parts of the PECL have been included. The references to the PECL should be revised, as mentioned above, in order to avoid uncertainties resulting from the general reference in Art. 1:105 (2) PEICL and some special references in other Chapters. Should the PEICL be integrated into the DCFR, Art. 1:105 (2) PEICL will become superfluous while some special references will still be necessary.

Furthermore, it is of great importance to increase the amount of the provisions and to make them more detailed. As the PEICL are meant to offer parties an attractive alternative to national insurance laws and are supposed

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[106] *See also* Commission Proposal for a Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Insurance Contracts, art. 2-4, 1979 O.J. (C 190) 2, 3-4 [hereinafter Proposed Council Directive].

[107] PEICL, *supra* note 5, at art. 2:601.

[108] PEICL, *supra* note 5, at art. 7:101.

[109] PEICL, *supra* note 5, at art. 2:601.

[110] This kind of regulation can already be found in proposed Council Directive, *supra* note 106, at art. 3-4.

to be applicable all over Europe, it is obvious that certainty and feasibility are indispensable. There are many questions still awaiting answers. For instance, it should be laid down if there is a general duty of the insurer to give advice. Art. 2:202 and 2:203 PEICL only contain a number of special rules concerning this matter. They leave open if there is a duty to give advice after the contract is concluded. Just to name a few further questions that need to be tackled: Who has to bear the cost of investigations after the occurrence of the insured event? Who will be entitled to possession of the policy in case of insurance for the account of a third party? Which rules govern an open policy (i.e., coverage where the goods that are insured against loss or damage are not individually defined in the contract but where any kind of goods that fall under a general definition) (e.g., all goods transported by a specific carrier during a stated period) are covered? In addition, there are a number of problems that have been left to be solved by the courts in the Member states but which should, if possible, be addressed by the PEICL, such as the responsibility of the policyholder for the behaviour of other persons or the rules for interpreting insurance contract clauses.

Of course, the PEICL are only meant to be "principles." Provisions that are too comprehensive and detailed could limit private autonomy in an unacceptable manner. Yet, legal certainty and the possibility of specific, clear answers to questions of law are merits that must not be underestimated. In addition, the PEICL are meant to be an optional instrument for the parties much more than just a "restatement" (although the group of authors of the PEICL has been modestly named "Project Group Restatement of European Insurance Contract Law"). Therefore, it will be necessary to transpose all European Directives, including those dealing with specific insurance branches.

As law suits arising from the application of the PEICL will be decided by the regular courts in the Member states, a unitary mode of their interpretation[111] is essential as well as detailed provisions dealing with the most important problems. It should be kept in mind that the national insurance contract laws have the advantage that the courts already have had and used the opportunity to apply and interpret them, which leads to a comparatively high level of legal certainty. In any case, the PEICL, even as a draft that still needs completion, offers a very solid basis for further discussion in the European Union as well as in other countries such as the United States.

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[111] Heiss, *supra* note 2, at 229, 239.