BILA COLLOQUIUM: EUROPEAN INSURANCE CONTRACT LAW

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Introduction

On 15 May 2014 the British Insurance Law Association (BILA) hosted a panel presentation and discussion on European Insurance Contract Law, as part of BILA's 50th Anniversary Colloquium.

The panel, chaired by Professor Malcolm Clarke, considered the European Commission's Expert Group's report and the origin, purpose and development of the Principles of European Insurance Contract Law (PEICL) from several perspectives. Prof Clarke urged at the outset that the issue of European Insurance Contract Law was, like it or not, a matter that concerned all those connected with the British insurance industry.

The EC Expert Group

Professor Jurgen Basedow of the Max Planck Institute began the substantive discussion with a brief summary of the Expert Group on European Insurance Contract Law, set up by the European Commission following the EC Decision of 17 January 2013.

Interestingly, Prof Basedow's starting point was not the EC Decision itself. The background, he explained, lay in the failed attempts at harmonization in the 1970s. There continue to be numerous and divergent mandatory provisions of member states making it, at present, near impossible to draft a single policy for use in different member states. The problem this manifests is summarised by the EC Expert Group in the executive summary of its final report:

> *"Where the law applicable to the contract differs from that of the insurer's country of origin which has served as the basis for the design of the contract and is mandatory, the contract, its marketing, and/or its administration by IT, call centres and legal departments will need adaptation."*

It was this problem that led to the drafting of PEICL. Prof Basedow was careful to state, when introducing PEICL, that its aim was not to harmonize national laws but rather to provide an additional set of insurance contract law provisions alongside otherwise applicable national law.

Having narrated the composition and findings of the EC Expert Group, Prof Basedow finished with his own conclusions:

(1) The obstacles to cross border insurance trade were *"such that there can hardly be any doubt about the legitimacy of future EU action."*
(2) The interests opposing an EU initiative *"have made their protectionist ambitions clear."*
(3) The interests proposing an EU initiative have yet to voice their views strongly; they should grasp the opportunity to do so if and when the EC launches a public consultation.
(4) The fears that some member states have of Brussels embarking on a role to complete regulation are unfounded: several strategic papers of the EC have recommended optional instruments and not full harmonization.
(5) An optional instrument (PEICL) would contribute to facilitating business and strengthening the central position that London has within the insurance industry.

PEICL

Professor Helmut Heiss of the University of Zurich then discussed the project of creating PEICL, their origins and purpose.

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The original idea was to produce a work similar to a US Restatement of the law in order to give Europe a single voice in insurance contract law. This outcome had been achieved; although, it was acknowledged that PEICL in its present form goes *"far beyond"* a Restatement.

More fundamentally, Prof Heiss commented that *"any initiative from the EU could only be successful if it gives a comprehensive regulation for insurance contract law."* In this sense, although the academic purpose of PEICL had been achieved, what Prof Heiss termed its *"essential purpose"* was yet to come to fruition: to promote the single market and aid its functioning.

Once more, Prof Heiss (in addition to Prof Basedow) repeated that PEICL was not intended to replace national law. However, the rationale given behind this statement was that there was *"[n]o political chance to achieve this"*, and no good economic reason to require insurers and customers to adapt their practice to new rules incurring increased costs if they were not interested in cross border trade.

In his conclusion, Prof Heiss stated that PEICL was *"not a strange academic idea",* and drew similarities with the UN Convention on Contracts for the International Sale of Goods (CISG) – the essential difference being that CISG is "opt out", whereas PEICL is "opt in". Prof Heiss' view was that the market would decide whether or not to adopt PEICL and the market would also decide whether *"EU Insurance Contract Law would be living insurance contract law, or would remain forever the text within the journal of the EU".*

These conclusions were explored further in the questions that followed the discussion, in particular the question whether PEICL could ever be "opt out" rather than "opt in". Whilst Prof Basedow emphatically stated that "opt in" would *"completely change the character of the whole PEICL"* and that such a fundamental change was not foreseeable, Prof Heiss was more circumspect. His view was that whilst PEICL was never conceived of as "opt in", *"[i]f most parties start using it, it may in fact become the rule (even if structurally the exception), and thought could be given to making it opt out."*

The answers to this question reveal that irrespective of the stated origins and purpose of PEICL, it seems that the true position is one of political/economic/industry realities checking academic ambition.

The viewpoint from London

There then followed a powerful and engaging discussion from Joanna Page (a partner in Allen & Overy), providing a viewpoint of a practitioner with a leading insurance litigation practice in London.

Ms Page was also on the EC Expert Group (as the lead expert for the Law Society), and stressed by way of introduction the need for practitioners in this country to fully understand PEICL and its implications. However, Ms Page's view was that one central question deserved more attention – whether there really is a problem with European insurance contract law.

It was common ground between all on the EC Expert Group that there were differences in member states' insurance contract laws. It was also not disputed that in the field of mass risks, member states have mandatory rules which consumers are very attached to. Differences between laws of member states do add to complexity, and do have potential to increase costs. If this is borne out then they are an obstacle for the purposes of EU law. But the question is whether this is the real problem; or put another way, whether the problems that do exist can be solved by having harmonised European insurance contract law.

Of the three examples that Ms Page centred her discussion on, one provided a particularly clear example of the difficulties in isolating whether the cause of a problem with cross border business lies in differences in insurance law in member states and whether the remedy would lie in harmonised European insurance contract law: the example was of a Belgian midwife (in Belgium professional liability insurance for midwifes is comparatively low) wishing to practise midwifery in France (where, as a result of the French law of damages which results in notoriously high awards for Claimants), unable to arrange appropriate and affordable cover through her insurers. The question was asked – is this an insurance contract law issue which could be resolved by EU law reform?

The answer seemed to be that, in fact, the French liability regime was at the root of the problem and not insurance contract law at all. As a general statement, in addition to insurance contract law, the wider factual, economic and social context clearly all contribute to the problem. Therefore, care should be taken when presenting European insurance contract law reform as a panacea.

This view, according to Ms Page, is reflected in the market where the opinion gleaned from the industry is that whilst not against a pan-European instrument, insurers do not see it as a priority; they simply do not feel that it will solve the issues identified, quite apart from their concern with the uncertainty that reform would entail.

During the panel discussion that followed, a delegate asked whether the need and desire for an instrument such as PEICL needed to be demonstrated before the EU should embark on such a project. Two answers were given by Prof Basedow and Prof Heiss respectively: that there was already a need and that there may be more need in the future; and that, yes, it is necessary to demonstrate the need. Notably, the question of whether a desire for such implementation must be demonstrated was left unanswered.

The view from Italy

The substantive session concluded with a presentation from Professor Alberto Monti of the Institute for Advanced Study IUSS Pavia highlighting the differences between member states' approaches to claims made liability insurance.

Prof Monti began by highlighting the discrepancies between the approach in the UK (where there is little or no interference with party autonomy concerning claims made policies) with those in France and Spain (where having initially been banned, claims made policies are now subject to strict regulation following legislative intervention). Apparently in Italy, whilst there had been no legislative intervention, there had been some *"judicial wandering around claims made clauses"* leaving little or no certainty as to the approach that the courts will take in the future.

In particular, Prof Monti drew attention to the example of a claims made policy subject to a deeming provision – where subsequent claims made after notice of an act are deemed to have been made against the insured at the time at which notice was given. The effect of such a provision could, it was suggested, lead to opportunistic behaviour by the policy holder. For example, giving notice of all board resolutions and all extraordinary company transactions made during that policy year.

The questions that arose from this example remain unanswered: are these clauses required to give business efficacy to claims made liability insurance policies? If absent, should they be implied? How should they be interpreted? What should be the content of a notice?

Prof Monti had begun by acknowledging that he was not a member of the EC Expert Group, and that as such his presentation would be confined to examining discrete issues of insurance contract law, whether or not they constituted obstacles to cross border insurance trade. His brief survey of claims made policies illustrated the lack of certainty presently troubling the market in Italy.

Conclusion

Professor Clarke concluded the panel discussion by briefly sketching out those areas of PEICL that English insurance lawyers may find useful: in particular, Article 2.101 (disclosure) and Article 4.101 (precautionary measures). He finished by urging the delegates to peer through the *"legal fog in the channel"* and examine PEICL in detail.

In his concluding remarks on the Colloquium as a whole, Lord Justice Aikens aptly summarised the session on European Insurance Contract Law as dominated by one central, as yet unanswered, question – whether there really is a problem that needs to be solved by law?