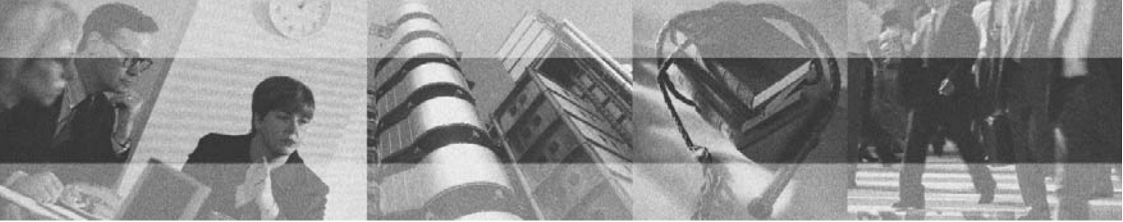

THE PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW: TOWARDS A EUROPEAN INSURANCE CONTRACT?

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This article is based on a lecture given by Jacquetta Castle at the Academy of European Law in Trier, Germany, on 24 March 2009 at its Annual Insurance Law Conference. On 11 September 2009, the British Insurance Law Association[1] hosted the official launch of the the Restatement of European Insurance Contract Law with a presentation by three of the professors[2] who are working on the project.

The Principles of European Insurance Contract Law (PEICL) are the product of the Restatement of European Insurance Contract Law project which was set up with the backing of the European Commission. The Project Group consists of some of Europe's leading academics[3] and it is they who have the task of bringing the concept of a pan-European insurance law to life.

The PEICL were first published in draft in December 2007. They were re-launched in final form, together with accompanying Notes and Commentaries, in September 2009. The PEICL are viewed by many as the means to achieve harmonisation of insurance law within the European Union.

English Insurance Law: Current Position and Reform

English insurance law is seen as the "odd man out" of Europe. Unlike the majority of countries that have codified civil law systems, our law largely derives from a combination of common law as created by judges over the years and the Marine Insurance Act 1906. Alongside this are an ever increasing body of regulations, principles, codes, agreements and exemptions.

The Law Commission is still in the process of conducting its review of large parts of our insurance law, although what is emerging now is largely restricted to consumer law.[4] If the Law Commission's proposals are adopted, English insurance law will certainly become closer to the majority of systems on the Continent, at least so far as consumer insurance is concerned.[5] This said, while the Law Commission proposals go some way to bridge the European divide, it would still be quite a step for us to adopt the PEICL.

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1 Jacquetta was the Chairman of BILA between 2006 and 2008 and continues to be actively involved with the organisation as Immediate Past Chairman and committee member.

2 Professors Helmut Heiss (Zurich University), Malcolm Clarke (University of Cambridge) and Herman Cousy (University of Leuvan).

3 It is led by Professor Helmut Heiss and its English members are Professor Malcolm Clarke and Professor John Birds of Manchester University.

4 A consumer bill is promised for this autumn and a preliminary draft is now in circulation.

5 Consumer proposals suggested include the introduction of a questions-only approach to disclosure; confining the avoidance remedy to cases where the non-disclosure has been deliberate or reckless; and proportional payment in relation to negligent non-disclosure.

European Insurance Law Reform

The European Insurance Law project is part of a more general European contract law initiative backed by the European Commission. Out of this came the Principles of European Contract Law (PECL).[6] The PECL and the PEICL are designed to sit side-by-side.

In 2004 the European Commission first highlighted insurance contract law as an area for attention and harmonisation. Although there have been some moves towards a single European insurance market, cross border provision of insurance services has apparently played a minor role in the internal European market outside the field of large commercial risks.

There are obvious advantages in adopting pan-European insurance laws. Global companies want global solutions, but equally have to comply with local regulations and laws. Until recently so-called "global wordings" were issued as a matter of course for companies conducting business in more than one country. Over the past couple of years, however, insurers have become increasingly alive to the risks involved in such an approach particularly since the *Kvaerner* case.[7]

Scope

Reinsurance is specifically outside the scope of the PEICL. The PEICL also refrain from saying much about intermediaries on the grounds that the PEICL are concerned with insurance law between the policyholder and the insurer and the intermediary is thought to be irrelevant to this. This is in contrast to the position in England, where that the role of the intermediary is an inherent part of many aspects of our insurance law.

"Optional" nature

The PEICL are drafted as an "optional instrument" and will only apply if the parties choose to opt out of national law in favour of the principles.

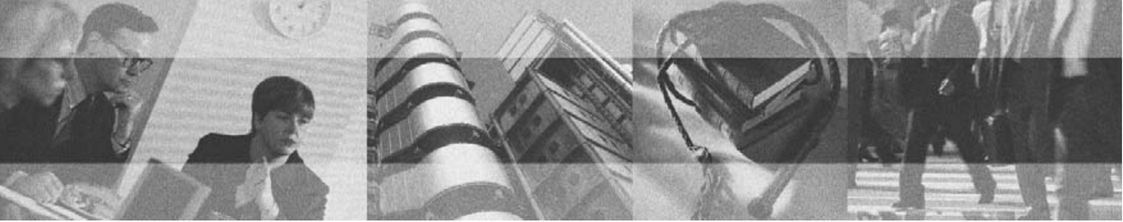
If the parties opt in, they have to accept the rules as a whole and cannot pick and choose according to what suits them. In other words, the principles are put forward on a "take-it-or-leave-it" basis. The PEICL are intended to provide comprehensive protection to the policyholder and replace national law. It would be incompatible with this approach to allow the parties to exclude particular provisions. Selective exclusion is seen as allowing insurers to undermine the basic protection given by the rules.

In due course, the PEICL will contain a full list of rules that are "absolutely mandatory", but so far the only main rule that has been designated as mandatory is in relation to avoidance for fraudulent non-disclosure. If a rule has been specifically designated as mandatory, derogation is totally forbidden.

Where a rule is not specified as "absolutely" mandatory, the parties have a limited freedom to reject particular rules on an individual basis as long as this is not to the detriment to the insured.

6 And subsequently the Draft Common Frame of Reference (or DCFR).

7 *Kvaerner plc v Statssecretaris van Financien* 2001 (Case C- 191/99) [2001 STC 1007] where the European Court of Justice ruled that a London-based insured had to pay premium tax on part of its global professional indemnity policy that covered a subsidiary in the Netherlands.



Derogation is, however, allowed to the benefit of either party in certain types of large commercial risks.

As a matter of interpretation, parties cannot have recourse to national law to restrict, supplement or interpret PEICL. Any gaps have to be filled by using the PECL (the parallel Principles of European Contract law) or failing that, the acquis communitaire.

General Observations

It has to be borne in mind that the PEICL are the work of a committee of approximately 20 of Europe's top law professors. Their starting point seems, quite sensibly, to have been to study each other's different systems and choose what they considered the best from each system. As a result, the PEICL are a veritable mix of what's on offer across the different European menus.

From an English lawyer's standpoint, there are a number of concepts which seem unfamiliar.

In common with many European systems, the PEICL spell out details that one might expect to see covered by consumer regulation or left to the parties in the contract. For example, the PEICL list the specific information that has to be set out in any insurance contract. Similarly, the PEICL give policyholders a two week "cooling off period" to withdraw after receipt of the documentation.

Sometimes the fact that details are spelt out in this way can be explained by the fact that brokers on the Continent do not tend to have the same key role as in England. So the PEICL provide that an insurer has a duty to warn the applicant of any inconsistencies between the cover offered and the applicant's circumstances. Conversely, PEICL is often sketchy or even silent when one might expect to see more.

Even as the final draft stands, there are also a number of inconsistencies and other practical points that have not been fully addressed. For example, Article 2:101 refers to the applicant informing insurers of *"circumstances of which he is or ought to be aware …"*. The Article immediately afterwards qualifies this by defining such circumstances as including those of which the applicant *"was or should be aware"*. The expression *"is or ought to be aware"* appears to have the same meaning as *"was or should be aware*" and one wonders why it was necessary to insert both. Similarly, Article 203 provides that if the insured mistakenly believes that cover commences at the time of his application rather than the contract, the insurer must warn him that this is not the case. As a practical point, it is difficult to comprehend how an insurer could be expected to guess what is in the insured's mistaken mind.

From an English insurance lawyer's perspective, the PEICL appear to be unashamedly pro-insured. Article 1:203 states *that "where there is any doubt as to the meaning of the wording of any document or information provided by the insurer, the interpretation most favourable to the policyholder, insured or beneficiary, as appropriate, shall prevail*".

Disclosure/non-disclosure

The PEICL adopts a questions-only approach with regards to disclosure. Article 2:101 states

that "the applicant shall inform the insurer of circumstances which he is or ought to be aware, and which are the subject of clear and precise questions put to him by the insurer". The Law Commission proposes a similar approach for consumers, but at present businesses will be left with a duty to volunteer information.

Under the PEICL the insurer can propose a reasonable variation or terminate the contract if it discovers a non-disclosure on the part of the Insured. In order to terminate or vary, the insurer has to give notice one month after the breach became known or apparent. The termination/variation remedy specifically applies whether or not a loss has yet occurred. If the policyholder is in innocent breach, the insurer cannot terminate unless he proves he would not have entered the contract at all.

In the case of negligent breach, the PEICL remedy is proportionate. Article 2:102(5) provides that if an insured event is caused by an element of the risk which is the subject of non-disclosure or misrepresentation by the policyholder (so, unlike the Law Commission, causation is required), and occurs before termination or variation takes effect, no insurance money is payable if the insurer would not have concluded the contract had it known the information. If the insurer would have concluded the contract at a higher premium or on different terms, the insurance money is paid proportionately in accordance with such terms. In other words, the insurer would be entitled to be put in the position it would have been in had it known the information. This proportionate remedy is similar to what already happens in a number of Continental countries but is also in line with the Law Commission consumer proposals.

In cases of fraud, the PEICL entitle the insurer to avoid the contract and retain the premium. Avoidance for material non-disclosure, at least as it is in this country, is unknown in Continental jurisdictions. The remedy as it emerges in PEICL, however, is considerably watered down. Apart from only applying where there has been fraud, a specific time limit is imposed – two months after the fraud becomes known.

Precautionary measures

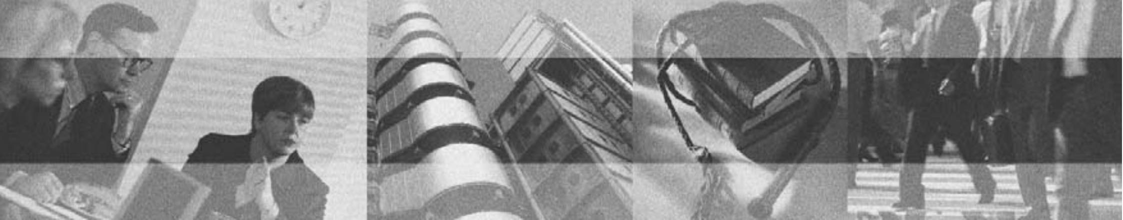
The PEICL deliberately avoid referring to warranties and instead introduce the concept of the "precautionary measure", which is defined in Article 4:101 as "*a clause in the insurance contract, whether or not described as a condition precedent to the liability of the insurer, requiring the policyholder or the insured, before the insured event occurs, to perform or not perform certain acts*".

Precautionary measures can include warranties and, unlike the Law Commission proposals, conditions precedent.

A breach only allows the insurer to terminate the contract if the insured acted *"with intent to cause the loss or recklessly and with knowledge the loss would probably result."* Mere negligence is not enough. Therefore the insurer has no remedy, either by termination or by withholding payment on any subsequent claim, against a careless insured who fails to comply with the basic policy provisions.

Abusive clauses

An "abusive clause" is part of the PEICL terminology and simply means a standard term.



Article 2:304 defines an "abusive clause" as a term which has *"not been individually negotiated"*. Abusive clauses are not binding on the insured if they create a "*significant imbalance*" in the rights and obligations under the contract to the insured's detriment. The contract will remain valid if it can stand without the offending clause. If not, the clause will be substituted by one *"which reasonable parties would have agreed upon had they known the unfairness of the term"*. This effectively gives a licence to rewrite terms of the contract after the risk has been agreed.

The PEICL "abusive clause" provisions could very well catch many standard insurance wordings (such as a professional indemnity policy issued on a company's usual form), which are accepted in the insurance industry. This is so even if an insured might specifically have consented to such terms and had them fully explained to him.

Automatic renewal

Under PEICL, insurance contracts shall last one year (unless there is a prior agreement to the contrary). Article 2:602 then goes on to provide for the automatic renewal of the contract at the end of the year unless written notice has been given. Where the insurer, as opposed to the insured, is opposing the automatic renewal, the notice has to specify its reason for the decision not to renew.

This Article seems to have come straight from French law. Underwriters in England are understandably wary about such automatic restatements. The PEICL provisions in particular raise many questions. If the explanations given are considered to be unreasonable, would insurers have a prolongation forced on them?

PEICL – current position and implementation

Whilst it is understood that the European Commission is firmly behind the project, there is a question as to whether further legislation is required to bring PEICL into effect. The Rome I Regulation allows parties to incorporate a set of non-State rules into their contracts as contract terms (subject to any restrictions imposed by the law otherwise applicable). However, it does not permit the parties to a cross-border contract to choose a set of non-State rules as the applicable law governing the contract. Thus, it would appear that the PEICL cannot come into effect even as an optional instrument without further EU legislation.[8]

It was clear from the Restatement Group's presentation to BILA that the future of the PEICL largely depends on the level of political will for their introduction in Europe. For this reason the implementation of PEICL is by no means a foregone conclusion.

Conclusion

It is very easy to find inconsistencies and generally pick holes in the PEICL. It is also easy to dismiss the PEICL as being of academic interest only. This said, the Restatement Group's goal is indeed a worthy one. With companies increasingly looking for cross-border solutions, the concept of the voluntary pan-European insurance code should not be dismissed out of hand.

8 There is some academic debate on this and the answer is not clear.