
The Principles of Reinsurance Contract Law: an optional instrument of transnational reinsurance law

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I. The Principles of Reinsurance Contract Law research project

The Principles of Reinsurance Contract Law (PRICL) Project is aimed at providing the reinsurance industry with uniform soft law rules governing reinsurance contract law, which parties may choose to apply to their contracts. The rules may be viewed as an optional instrument that will only apply when parties agree to ‘opt in’. With that in mind, the ideas underlying the PRICL can nevertheless be likened to those of the Restatements of the American Law Institute (ALI) in the USA. The ALI were founded ‘to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work’.¹ It is the same aim, albeit at a transnational level, that is pursued in drafting the Principles of Reinsurance Contract Law.²

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¹ See the reference to the Charter at <<https://www.ali.org/about-ali/story-line/>> accessed 3 April 2020.

² See the Introduction to the 1994 edition of the UNIDROIT Principles of International Commercial Contracts, mentioning that the initiative of UNIDROIT goes in the direction of elaborating an international restatement of general principles of contract law.

1. The PRICL Project Group

Composed of a Principles Drafting Committee (PDC), Advisory Groups, and special advisors, the PRICL Project Group began developing the transnational³ Principles of Reinsurance Contract Law (PRICL) in early 2016.⁴ The PRICL Project Group is led by the Universities of Zurich, Frankfurt *am* Main, and Vienna, and its work, specifically that of the PDC, is sponsored by the Swiss National Science Foundation, the German Research Foundation, and the Austrian Science Fund. As the name of the Committee suggests, the work of drafting the Principles is conducted by the PDC, which is made up of professors from a number of different countries (Brazil, various European countries, Japan, Singapore, South Africa, and the USA), thereby representing a variety of legal families.⁵ The living law is represented by practitioners from reinsurance companies, primary insurance companies, and reinsurance brokers in the Advisory Groups,⁶ who also provide any data required and give practical feedback on the drafts of the Principles. The Project Group also has access to special advisors, who are experts in relation to specific questions and participate on an ad hoc basis.⁷

The Project Group published the PRICL including Comments and Illustrations in 2019. The PRICL 2019 can be accessed freely on the project homepage⁸ and via the International Institute for the Unification of Private Law's (UNIDROIT) website.⁹ However, this publication does not represent the end of the Project. Rather, the Swiss National Science Foundation and the German Research Foundation have extended their funding for a further project period (2019–22). The Project Group will, therefore, work on further chapters—for example, principles concerning back-to-back cover, non-contractual liability, prescription of claims arising from reinsurance contracts, and more. The final PRICL will be published in a second, expanded edition after the project ends in 2022.

³ On transnational insurance law in general, see Helmut Heiss, 'Transnationales Versicherungsrecht – Eine Skizze' in Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden - Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (Gieseking 2011) 803ff.

⁴ For details, see <<https://www.ius.uzh.ch/de/research/projects/pricl.html>> accessed 3 April 2020.

⁵ See <<https://www.ius.uzh.ch/de/research/projects/pricl/whoware/draftingcommittee.html>> accessed 3 April 2020.

⁶ See <<https://www.ius.uzh.ch/de/research/projects/pricl/whoware/agr.html>> for a list of the advisory group reinsurers and brokers, accessed 3 April 2020; see <<https://www.ius.uzh.ch/de/research/projects/pricl/whoware/agi.html>> for a list of the advisory group direct insurers, accessed 3 April 2020.

⁷ See <<https://www.ius.uzh.ch/de/research/projects/pricl/whoware/specialadvisors.html>> for a list of the special advisors, accessed 3 April 2020.

⁸ See <<https://www.ius.uzh.ch/de/research/projects/pricl.html>> accessed 3 April 2020.

⁹ See <<https://www.unidroit.org/89-news-and-events/2783-principles-of-reinsurance-contract-law-available-online>> accessed 3 April 2020.

2. UNIDROIT as a cooperation partner

The work is carried out by the PRICL Project Group in cooperation with UNIDROIT in Rome.¹⁰ Initially founded as an organization of the League of Nations in 1926, UNIDROIT was re-established as an independent intergovernmental organization following the League's demise.¹¹ Due to its status as an intergovernmental organization, only States can become members of UNIDROIT, which currently has 63 Member States.¹²

Its tasks and goals are described on the institute's website as follows: 'Its purpose is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives'.¹³ Hence, UNIDROIT aims to both produce treaties containing uniform international law and also to formulate transnational principles governing commercial law (soft law).¹⁴ It should be noted that reinsurance contract law had, in fact, previously attracted the attention of UNIDROIT. In 1935–6, efforts were being made towards standardizing reinsurance law. However, those efforts were thwarted by the circumstances at that time.

UNIDROIT, thus far, has produced a number of important principles of commercial law. One set in particular is of exceptional importance to the PRICL Project—namely, the Principles of International Commercial Contracts (PICC) in its current version from 2016.¹⁵ As stated in the preamble, the PICC contain 'general rules for international commercial contracts'. Hence, issues relating to general contract law—in particular, freedom of contract, which prevails in commercial law (Article 1.1 of the PICC)—are governed by these rules. Detailed rules of note are those laying down rules governing the formation of the contract in Chapter 2 of the PICC (Articles 2.1.1–2.2.10); those establishing uniform rules for contract interpretation in Chapter 4 of the PICC (Articles 4.1–4.8); those laying down rules governing non-performance in Chapter 7 of the PICC (Articles 7.1.1–7.4.13); and those providing for limitation periods in Chapter 10 of the PICC (Articles 10.1–10.11).

As noted above, the PICC are of immense importance to the PRICL Project for a number of reasons. First, the Project itself was partly inspired by the

¹⁰ See also the announcements on the UNIDROIT website: <<https://www.unidroit.org/work-in-progress/reinsurance-contracts>> accessed 3 April 2020.

¹¹ See <<https://www.unidroit.org/about-unidroit/overview>> accessed 3 April 2020; Stefan Vogenauer, 'Introduction' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2015) no 14.

¹² See <<https://www.unidroit.org/about-unidroit/membership>> accessed 3 April 2020; Vogenauer (n 11) no 14.

¹³ See <<https://www.unidroit.org/about-unidroit/overview>> accessed 3 April 2020.

¹⁴ Cf Vogenauer (n 11) no 11.

¹⁵ See <<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>> accessed 3 April 2020.

UNIDROIT PICC. Creating a global Restatement¹⁶ or background law¹⁷ is a goal common to both initiatives. In structural terms, the PRICL are also closely based on the PICC with their system of classification using chapters, sections, and articles. Furthermore, the use of articles, comments, and illustrations in the PRICL replicates the internal structure of the PICC.¹⁸

Second, any restriction placed on the PRICL Project to reinsurance-specific rules would prevent the needs of reinsurance business from being adequately met. Since it is the differences between national general contract law rules that often gives rise to legal uncertainties,¹⁹ uniform reinsurance soft law must also provide general contract law rules. This is achieved in the PRICL by reference to, and thereby incorporation of, the PICC.²⁰

Global in nature and integrating the legal cultures of modern commercial law,²¹ the PICC reflect the international orientation and worldwide significance of reinsurance business. In contrast to national principles (for example, US American Restatements) and regional rules (for example, the principles, definitions and model rules of European private law—that is, the so-called Draft Common Frame of Reference of European Private Law),²² the PICC hence provide an ideal substantive basis as the general contract law applicable to contracts of reinsurance.²³ Another aspect is that, unlike the principles of European private law, which are not restricted to commercial matters and provide protection to the weaker contracting party, in particular consumers,²⁴ the PICC govern commercial contracts and have a commercial spirit.²⁵ This aligns with the focus placed by reinsurance business on genuine commercial contract law.²⁶

Using the PICC also has other advantages. One is that the Principles are updated on a regular basis to reflect changes over time. They have already been

¹⁶ Michael Joachim Bonell, *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 9ff.; Ralf Michaels, 'Preamble I' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2015) no 3.

¹⁷ Ralf Michaels, 'The UNIDROIT Principles as global background law' (2014) 19 *Uniform Law Review* 643-668.

¹⁸ Cf Vogenauer (n 11) nos 32ff.

¹⁹ Rolf Nebel, 'Internationale Rückversicherungsverträge aus der Perspektive des schweizerischen Rechts' (1998) 66 *Schweizerische Versicherungs-Zeitschrift* 60.

²⁰ See Ralf Michaels, 'Umdenken für die UNIDROIT-Prinzipien, Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts' (2009) 73 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 866-888, 885ff.

²¹ Michaels, 'Preamble' (n 16) nos 3, 14.

²² Michaels, 'Preamble' (n 16) no 14.

²³ Cornel Quinto, 'Reinsurance arbitration from a Swiss law perspective', *Jusletter* 1 December 2008, 3; Sieglinde Cannawurf and Andreas Schwepcke, '§ 8' in Dieter W Lürer and Andreas Schwepcke (eds), *Rückversicherungsrecht* (Beck 2013) § 8 no 20; Steven W Thomas, 'Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment' (1992) 41 *Duke Law Journal* 1548, 1556; Angus Rodger, 'Jurisdiction and Applicable Law' in Robert Merkin (ed), *A Guide to Reinsurance Law* (Informa 2007) 380.

²⁴ Cf Michaels, 'Preamble' (n 16) no 27.

²⁵ Official Comments to the UNIDROIT Principles of International Commercial Contracts (PICC), Preamble, no 2; Michaels, 'Preamble' (n 16) nos 26ff.

²⁶ Cannawurf and Schwepcke (n 23) § 8 no 43.

updated four times since the original version was published in 1994, with the most recent publication of the current fourth edition of the PICC in 2016.²⁷ Another advantage is that the PICC publication includes comments explaining the Principles and illustrations demonstrating how the Principles apply to typical cases.²⁸ The application of the PICC to specific situations is also facilitated by the fact that case law, including arbitration awards in particular, and legal commentary on the PICC are published on a website (<<http://www.unilex.info>>) maintained by UNIDROIT, together with other partners.²⁹

One further advantage of the PICC arises in combination with the PRICL. As the PICC do not contain rules governing special types of contracts, contracting parties often refrain from choosing the PICC as the applicable law.³⁰ This does not pose a problem when the PRICL and PICC are taken together. While the PRICL provide rules for a special type of contract (that is, reinsurance), the PICC will, pursuant to draft Article 1.1.2, govern any matters left ungoverned by the PRICL. Hence, once the PRICL have been published, a special contract type will, for the first time, also be governed by the PICC. Making a choice in favour of the PICC and PRICL as a uniform package of law applicable to reinsurance contracts is, therefore, likely to be viewed as an attractive option.

II. The aim of the PRICL: legal certainty

1. The law applicable as an uncertainty

Despite the fact that transparency in the contractual relationship between the parties helps to establish a degree of contract certainty, uncertainties surrounding a number of factors remain either entirely or partially beyond the parties' control. The legal rules governing the reinsurance contract constitute one such factor beyond the (full) control of the parties.³¹ The importance of these rules is clear: they govern essential elements of the contract (for example, conclusion, validity, interpretation, or the existence of implied terms)³² and also determine whether and which reinsurance customs may be applied.³³

The effects of applying different legal rules can be illustrated using the example of a reinsurance contract without a 'follow-the-settlements' clause. In

²⁷ Cf Michaels, 'Preamble' (n 16) nos 22ff; see also <<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>> accessed 3 April 2020.

²⁸ Vogenauer (n 11) no 32.

²⁹ See <<http://unilex.info/dynasite.cfm?dssid=2377&dsmid=14311>> accessed 3 April 2020.

³⁰ Michaels, 'The UNIDROIT Principles' (n 17) 663.

³¹ Cf William Hoffman, 'On the use and abuse of custom and usage in reinsurance contracts' (1997) 33 *Tort & Insurance Law Journal* 74; Rodger (n 23) 380; Nebel (n 19) 60.

³² The importance of the law applicable in relation to the interpretation of reinsurance contracts was indicated by Klaus Gerathewohl, *Reinsurance Principles and Practice*, vol I (Underwriter Printing & Pub Co 1980) 489; also see Nebel (n 19) 60.

³³ Cf Hoffman (n 31) with regard to US law; Clyde & Co LLP, *Reinsurance Practice and the Law* (Looseleaf, Informa 2018) nos 15.25ff, with regard to English law; Cannawurf and Schwepcke (n 23) § 8 nos 65ff, with regard to German law; Nebel (n 19) 58; Paul-Gabor Ondo, 'Gerichtsstandsklauseln, Rechtswahl und Schiedsgerichtsbarkeit in Rückversicherungsverträgen' (1995) 63 *Schweizerische Versicherungs-Zeitschrift* 41 fn 14, both with regard to Swiss law.

Germany, legal commentators³⁴ accept the reinsurer's duty to follow the settlement of its reinsured on the basis of a purportedly international reinsurance custom to that end.³⁵ In relation to the same example, some US courts will consider the duty to be an implied term,³⁶ while other US courts will not recognize it at all.³⁷ In English courts, the duty is completely rejected unless a corresponding agreement has been made in the contract.³⁸

The uncertainty does not, however, end there. The recognition in different jurisdictions of the duty to follow the settlements as an implied term does not guarantee that its content will be interpreted uniformly.³⁹ This has already been clearly stated by Klaus Gerathewohl:

Upon reflection, one sees that reinsurance customs are, in reality, not always as uniform as one might assume. Moreover, there are certain differences not only in customs—particularly between the Continental and the British market systems—but also in terminology: Terms which appear uniform at first sight may have a different meaning in different markets and, depending on the legal concepts applied, in different contexts.⁴⁰

This is because national laws often serve as a frame of reference for interpretation. Lawyers often perceive and deal with 'international' reinsurance customs using the principles of the national law with which they are acquainted. Two examples are provided in German legal commentary. Discussing the duty to follow, Andreas Schwepcke refers to it as a manifestation of the unauthorized management of the affairs of another (*negotiorum gestio*), thereby requiring the application of the respective provisions in paragraphs 677 of the German Civil Code

³⁴ For greater detail, see eg Dirk Looschelders, '§ 209 VVG' in Horst Baumann and others (eds), Bruck/Möller Versicherungsvertragsgesetz Großkommentar, vol 11 (9th edn, Beck 2013) § 209 no 62; Cannawurf and Schwepcke (n 23) § 8 nos 76ff; Gerathewohl (n 32) 473ff; Quinto (n 23) 10; cf also Philippe M Reymond, 'La réassurance: un domaine abandonné aux usages de la pratique et à la liberté des conventions' (1981) 49 Revue Suisse d'Assurances 403, discussing the Judgment of the Swiss Federal Supreme Court, BGE 107 II 196.

³⁵ This custom has, however, 'never been shown to exist' according to Hoffman (n 31) 78; for reinsurance customs in general, see eg Sergio Ruy Barroso Mello, *Contrato de Resseguro* (2013) 87ff with examples.

³⁶ *Eg International Surplus Ins v Underwriters at Lloyd*, 868 F.Supp. 917, 920, with regard to Ohio law; *Aetna Casualty and Surety Co v Home Insurance Co*, 882 F.Supp. 1328 (S.D.N.Y. 1995), 1350, with regard to New York law; according to Hoffman (n 31) 78, these cases erroneously suggested that the follow-the-settlements clause was implied in fact by a reinsurance usage that has never been shown to exist.

³⁷ Cf Cannawurf and Schwepcke (n 23) § 8 no 83; Erik Stenberg, '§ 12' in Dieter W Lüer and Andreas Schwepcke (eds), *Rückversicherungsrecht* (Beck 2013) § 12 no 55.

³⁸ *Commercial Union Assurance Company plc and Others v NRG Victory Reinsurance Ltd* [1998] C.L.C. 920, 935; Hermann Geiger, *The Comparative Law and Economics of Reinsurance* (Nomos 2000) 117; Terry O'Neill and Jan W Woloniecki, *The Law of Reinsurance in England and Bermuda* (3rd edn, Sweet & Maxwell 2010) no 5-013.

³⁹ Hoffman (n 31) 74f; cf Nebel (n 19) 58f; Paul M Hummer, 'Common Reinsurance Issues: Follow the Fortunes, Late Notice and Rescission' [1999] 66 *Defense Counsel Journal* 374, 374, where no distinction is drawn between follow-the-fortunes and follow-the-settlements. In this regard, see also *Aetna Casualty and Surety Co v The Home Insurance Co*, 882 F.Supp. 1328, 1345f.

⁴⁰ Gerathewohl (n 32) 488.

(BGB).⁴¹In defining the standard of care required of the reinsured in exercising its right to business management, reference to paragraph 677 of the BGB is also made by Dirk Looschelders.⁴²Hence, how the duty to follow is interpreted will depend on the national legal context concerned and, therefore, likely vary.

2. Differences in existing legal sources

The differences between national laws are not only restricted to customs but also arise in relation to the existence of both statutory law and case law in reinsurance matters. In civil law jurisdictions, the national codifications of insurance contract law often do not govern reinsurance contracts.⁴³ Furthermore, it remains unclear whether and to what extent the rules governing direct insurance contracts may be applied analogously to reinsurance contracts.⁴⁴ For the purpose of settling reinsurance-specific matters, there is therefore a lack of transparent standards. In contrast, it is clear under English law that both direct insurance and reinsurance are generally governed by the legislation concerning insurance contracts, notably the Marine Insurance Act and the relatively new Insurance Act.⁴⁵

In terms of case law, familiar factors causing uncertainty can be recognized. There is almost no case law in reinsurance matters in civil law jurisdictions.⁴⁶ The situation is better in England and other Anglo-American jurisdictions, where a considerable body of case law concerning reinsurance contracts is available. As with implied terms, however, case law is by no means uniform nor interpreted consistently across the jurisdictions. This means that a follow-the-settlements clause, for example, ‘may have a very different meaning when it is interpreted in the light of New York law than that of England’,⁴⁷ resulting in vastly different outcomes. It should also be noted that, where arbitration is

⁴¹ Cannawurf and Schwepcke (n 23) § 8 no 76.

⁴² Looschelders (n 34) § 209 VVG, no 60 with fn 100.

⁴³ Germany: § 209 Versicherungsvertragsgesetz (VVG); France: Art L 111-1 Code des assurances; Luxembourg: Art 4 No 4 Loi du 27 juillet 1997 sur le contrat d’assurance; Finland: Section 1(3) Insurance Contract Act No 543; Switzerland: Art 101 Section 1(1) Versicherungsvertragsgesetz (VVG); Principality of Liechtenstein: Art 63 Versicherungsvertragsgesetz (VersVG); Austria: § 186 Versicherungsvertragsgesetz (VersVG); Belgium: Art 54 Loi relative aux assurances du 4 avril 2014; Netherlands: Art 7:927 Dutch Civil Code; for Brazilian law, see Mello (n 35) 82ff; exceptions: Italy: Arts 1928ff Codice Civile and Spain: Arts 77ff Ley 50/1980 de 8 octobre, de contrato de seguro, provide for statutory rules with regard to reinsurance contracts.

⁴⁴ Mello (n 35) 83; Cannawurf and Schwepcke (n 23) § 8 nos 38ff; cf Gerathewohl (n 32) 398ff; Geiger (n 38) 108ff; Reymond (n 34) 399.

⁴⁵ Nigel Brook, ‘Reinsurance’ in Clyde & Co LLP, Insurance Act 2015 – Shaking up a century of insurance law (2016) 50 <https://www.clydeco.com/uploads/Files/Admin/CC010256_Insurance_Act_2015_26-07-16-web.pdf> accessed 3 April 2020; Official Explanatory Notes to the Insurance Act 2015, Part 1, Section 1, no 36, available at: <<http://www.legislation.gov.uk/ukpga/2015/4/notes/contents>> accessed 3 April 2020; cf also Thomas (n 23) 1565.

⁴⁶ Cannawurf and Schwepcke (n 23) § 8 no 63; cf Gerathewohl (n 32) 453f; there are isolated court decisions on reinsurance law in Switzerland: Judgment of the Swiss Federal Supreme Court, BGE 107 II 196; Judgment of the Swiss Federal Supreme Court, BGE 140 III 115; Judgment of the Swiss Federal Supreme Court of 4 October 2017, 4A_150/2017.

⁴⁷ Clyde & Co LLP (n 32) no 20.1; Hoffman (n 31) 75, with regard to the different meanings of “follow the settlements” under German law and US law.

concerned, it is impossible even for industry experts to gain a complete overview⁴⁸ due to the restrictions placed on the publication of arbitration awards for the purposes of maintaining discretion.⁴⁹ Hence, if the same wording of a follow-the-settlements clause is used in different reinsurance contracts and the contracts are governed by different laws, it must ultimately be conceded that the same clause has likely not been used.

3. Implications for reinsurance contracts

In light of the considerations above, it is evident that there are implications for reinsurance contracts. Taking the example of a reinsurer concluding contracts to which the law at the registered office of the respective cedant is applicable, it becomes clear that contracts containing consistent wording, but concluded by the reinsurer in a number of different jurisdictions, will have varying effects. By adapting each contract to the law of the respective cedant, the reinsurer may surmount the differences in outcome. However, this is only partly possible, leaving the reinsurer exposed to the risk of such differences arising due to an application of foreign law.

It is enticing to believe that a reinsured is in a far superior position, as its own familiar law governs all of its reinsurance contracts. While this is true in principle, it does not hold true in practice and by no means provides a reinsured with legal certainty. Uncertainty exists, in particular, if a jurisdiction has no statutory law and case law concerning reinsurance because there is no clear indication of how a specific dispute will be determined by a court or an arbitration tribunal. This, in turn, creates further uncertainty in the parties' dealings.

One possible solution is to refer to the case law of foreign courts. Relying on such case law, however, is not a sound option for a number of reasons. In civil law jurisdictions, Anglo-American case law has no direct application and can, at best, be viewed as persuasive authority, making it difficult for civil law judges and arbitrators to have recourse to it.⁵⁰ Where the first obstacle is overcome and foreign case law can be consulted, it remains unclear which persuasive precedent should prevail. In such situations, it is, instead, more or less left to judges and arbitrators to interpret the wording, without any detailed rules, a frame of reference, and binding terminology to aid them in coming to conclusions.

On the basis of the above discussion, it can be asserted that a uniform system and standardized terminology would be helpful to achieve consistency in the interpretation of reinsurance contracts.

⁴⁸ Cf Gerathewohl (n 32) 452.

⁴⁹ Quinto (n 23) 4; cf Gerathewohl (n 32) 452; O'Neill and Woloniecki (n 38) no 1-024; Nebel (n 19) 59.

⁵⁰ Cf Judgment of the Swiss Federal Supreme Court, BGE 140 III 115, consideration 6.3 referring expressly to the English case law on reinsurance contracts.

III. The PRICL as an optional instrument

1. PRICL: transnational non-binding soft law

A well-known, but not uncontroversial concept,⁵¹ ‘soft law’ is used to denote rules that are not legally binding, but have *de facto* normative effect.⁵² The term originated in the field of international public law⁵³ but is now also prominent in private law—in particular, contract law. Examples of contract soft law instruments include the PICC, the Principles of European Contract Law (PECL), and the Principles of European Insurance Contract Law (PEICL),⁵⁴ all of which were drafted by academic project groups. As the initiators of the various projects to draft these principles lacked the legal competence and power to enact legally binding rules,⁵⁵ the soft law instruments have no binding force. In knowledge of this, the principles were drafted with their factual, rather than legal, effect in mind. Notwithstanding their classification as soft law, the different sets of principles may have legal consequences.⁵⁶

Such legal consequences may be attached to the soft law instruments by the parties agreeing to the application of a set of principles to their contract.⁵⁷ This is also made clear in the principles. From the preamble to the PICC, for example, it is clear that they ‘shall be applied when the parties have agreed that their contract be governed by them’. This is echoed in Article 1:101(2) of the PECL, which states that ‘[t]hese Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them’. In the same vein, Article 1:102 of the PEICL reads: ‘The PEICL shall apply when the parties... have agreed that their contract shall be governed by them.’ It is party agreement that bestows a normative force on the soft law instruments in each case.

Like the other sets of principles mentioned above, the PRICL are intended to provide a restatement of contract law.⁵⁸ The PRICL may be classified as soft law as they are designed to have *de facto* rather than a *de lege* impact.⁵⁹ The PRICL clearly have no legally binding force⁶⁰ because no lawmaker was involved in

⁵¹ Leander D Loacker, ‘Insurance soft law?’ (2009) 9 *Versicherungsrecht* 289–296, 289f.

⁵² Andreas Schwartze, ‘Europäisierung des Zivilrechts durch “soft law” – Zu den Wirkungen von Restatements, Principles, Modellgesetzen und anderen nicht verbindlichen Instrumenten’ in Thomas Eger and Hans-Bernd Schäfer (eds), *Ökonomische Analyse der europäischen Zivilrechtentwicklung. Beiträge zum X. Travemünder Symposium zur ökonomischen Analyse des Rechts* (Mohr Siebeck 2007) 130–166, 135.

⁵³ Cf Wolfgang Vitthum and Alexander Proelß, *Völkerrecht* (7th edn, De Gruyter 2016) part 1 no 152; Schwartze (n 52) 135; Loacker (n 51) 290.

⁵⁴ See Helmut Heiss, ‘Optionales europäisches Versicherungsvertragsrecht’ (2012) 76 *RebelsZ* 316.

⁵⁵ Cf Schwartze (n 52) 144.

⁵⁶ Schwartze (n 52) 144; Loacker (n 51) 290f.

⁵⁷ Schwartze (n 52) 145.

⁵⁸ Heiss, ‘From Contract Certainty’ (n *) 103.

⁵⁹ Heiss, ‘From Contract Certainty’ (n *) 101f and 105f; cf Schwartze (n 52) 144.

⁶⁰ Cf Roy Goode, ‘International Restatements of Contract and English Contract Law’ (1997) 2 *Uniform Law Review* 231–247, 234; Schwartze (n 52) 144.

developing the Principles, nor have they been issued, endorsed, or implemented by a legislative body. The Project is, in fact, led by academics and was established on the basis of requests made by representatives of the reinsurance industry. With the goal of establishing a uniform reinsurance contract law in mind, the PRICL, therefore, are recommended to the reinsurance industry as a tool to achieve this.

Intentionally drafted as a soft law instrument, the PRICL are not designed to be adopted as traditional hard law at any level, be it national, international, or supranational.⁶¹ Nor is there any intention for the Principles to constitute an international convention requiring ratification by nation States, such as the United Nations Convention on Contracts for the International Sale of Goods.⁶² The initiators of the PRICL Project had a number of reasons for deliberately drafting the Principles as soft law rather than in a way that would enable their legislative enactment as hard law. Using national legislation to govern reinsurance contract law would be ineffective because such legislation would fail to overcome the legal uncertainties faced by the industry operating on a global scale,⁶³ nor would it prevent any legal uncertainty arising from differences in national regimes.⁶⁴ While the effects of such differences could be allayed by the adoption of an international treaty, this does not represent an adequate solution for this area of law, which concerns a highly complex, ever-evolving market. Due to the nature of an international treaty and the fact that any revisions require ratification by all of the contracting states concerned, it is a static instrument that would prevent market developments from being reflected by the rules of reinsurance contract law in a timely manner.⁶⁵ Any certainty provided by an international treaty would be at the cost of the dynamic flexibility required in this sector. A supranational law, which usually governs a certain region (such as the European Union), also appears inadequate to address reinsurance as a truly global market⁶⁶ due to its regional nature.⁶⁷

The PRICL, in contrast, constitute a global soft law instrument. The rules deal adequately with the issues discussed above. As the rules are not restricted to any nation or region, they have the potential to reach the entire global reinsurance industry and promote a uniform reinsurance contract law. Their design as soft

⁶¹ By contrast, especially the PEICL are intended to be transformed from soft to hard law. See Helmut Heiss, 'Introduction' in Jürgen Basedow, John Birds, Malcolm A Clarke, Herman Cousy, Helmut Heiss and Leander D Loacker (eds), *Principles of European Insurance Contract Law (PEICL)* (2nd edn Verlag Dr. Otto Schmidt, 2016) see furthermore Helmut Heiss and Mandeep Laxhan (eds), *Principles of European Insurance Contract Law: A Model Optional Instrument* (sellier 2011); in this regard, Loacker describes their "pre-law (making) function": Loacker (n 51) 290. See also Schwartze (n 52) 144.

⁶² Cf Schwartze (n 52) 144.

⁶³ Clyde & Co LLP (n 33) nos 3.1ff.

⁶⁴ Heiss, 'From Contract Certainty' (n *) 105.

⁶⁵ Cf Vogenauer (n 11) 8; cf Nigel Blackaby and others (eds), *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) no 3, 168.

⁶⁶ Quinto (n 23) 3; Cannawurf and Schwepcke (n 23) § 8 no 20; Clyde & Co LLP (n 33) nos 3.1ff.

⁶⁷ Heiss, 'From Contract Certainty' (n *) 105.

law allows enough flexibility for revisions in order to respond to market developments. An advantage of the academic nature of the Project is that the PRICL may be adapted without any protracted and arduous political debates in various States.⁶⁸

Another advantage presented by the PRICL, as already mentioned above, is that they do not have any inherent legally binding force, leaving it entirely up to the parties to a reinsurance contract to determine whether or not they should apply. It is by party agreement that the PRICL gain binding force. It is the market that will determine the fate of the PRICL. If the instrument fulfils the needs of reinsurance market participants, they will opt in to gain more legal certainty.⁶⁹

This approach of allowing the industry and its participants such freedom reflects the situation in civil law jurisdictions in respect of both the historical development and the current state of reinsurance contract law. It fits neatly with the fact that reinsurance contracts are generally excluded from the scope of national insurance law in many civil law jurisdictions.⁷⁰ With the exception of the default rules of general commercial contract law and trade usages in the reinsurance market, the parties to a reinsurance contract can extend full control over their transactions.⁷¹ There are two reasons that this approach makes sense. As discussed above, the first is that national legislation is not suited to govern international transactions. The second, more important reason is that the contracting parties to reinsurance contracts are usually professionals and of equal bargaining power. Unlike in the situation where a vulnerable party is involved, neither of the parties to a reinsurance contract require special protection.⁷² Instead, the principle of autonomy should prevail in such situations, permitting the industry and its participants to shape transactions to their needs.

Due to the international nature of most reinsurance transactions, the extent to which parties may choose the law governing their contract is generally determined by the private international law applicable in the country concerned. Under conflict-of-law regimes, a distinction is often made between litigation

⁶⁸ Cf for example Bonell (n 16) 362.

⁶⁹ Cf draft Art 1.1.1 PRICL.

⁷⁰ Germany: § 209 *Versicherungsvertragsgesetz* (VVG); France: Art L 111-1 *Code des assurances*; Luxembourg: Art 4 No 4 *Loi du 27 juillet 1997 sur le contrat d'assurance*; Finland: Section 1(3) *Insurance Contract Act No 543*; Switzerland: Art 101 Section 1(1) *Versicherungsvertragsgesetz* (VVG); Principality of Liechtenstein: Art 63 *Versicherungsvertragsgesetz* (VersVG); Austria: § 186 *Versicherungsvertragsgesetz* (VersVG); Belgium: Art 54 *Loi relative aux assurances du 4 avril 2014*; Netherlands: Art 7:927 *Dutch Civil Code*; for Brazilian law, see Mello (n 35) 82ff; exceptions: Italy: Art 1928ff *Codice Civile* and Spain: Art 77ff *Ley 50/1980 de 8 octobre, de contrato de seguro* which provide for statutory rules with regard to reinsurance contracts.

⁷¹ Dominik Klimke, '§ 209 VVG' in Erich R Pröls and Anton Martin (eds), *Versicherungsvertragsgesetz: VVG, Kommentar* (30th edn, Beck 2018) § 209 no 3c; § 8 nos 37ff and 65ff.

⁷² Dirk Looschelders, '§ 9 Das Internationale Privatrecht der Rückversicherung' in Dieter W Lürer and Andreas Schwepcke (eds), *Rückversicherungsrecht* (Beck 2013) § 9 no 68; Dirk Looschelders, '§ 209' in Theo Langheid and Manfred Wandt (eds), *Münchener Kommentar zum VVG* (2nd edn, Beck 2016) § 209 no 1; Roland Rixecker, '§ 209' in Theo Langheid and Roland Rixecker, *Versicherungsvertragsgesetz: VVG, Kommentar* (Beck 2016) § 209 no 1.

and arbitration. In comparison to parties in State court proceedings, parties to arbitral proceedings are given a larger pool of options to choose from when selecting which rules should govern their contract.⁷³ Depending on whether the parties to a contract confer jurisdiction over their contract to a court of law or an arbitral tribunal, a choice made in favour of the PRICL may lead to slightly different outcomes.⁷⁴ This distinction between reinsurance contracts subject to arbitration and those subject to litigation, therefore, will be taken into consideration in the discussion below.

2. The effects of the PRICL in litigation

While parties to a contract may choose a so-called State body of law to govern their contract under most private international law regimes, they may not select a non-State body of law if disputes are to be adjudicated by a court of law.⁷⁵ An example is provided by Recital 13 of the Rome I Regulation,⁷⁶ in which it is stated that the Regulation ‘does not preclude parties from incorporating by reference into their contract a non-State body of law’. By implication, this means that the parties may not choose a non-State body of law to govern their contract under the Regulation.⁷⁷ If parties choose to incorporate a non-State body of law—that is, soft law—into their contract, this does not constitute a choice of law in respect of the contract. The State law applicable will, namely, still govern the contract ‘so that mandatory state law provisions oust incompatible provisions of the non-State body of law’.⁷⁸

An exception to this seems, at first glance, to be provided by the Hague Principles on Choice of Law in International Commercial Contracts, which appear to stray from this basic premise by giving contracting parties the option of

⁷³ Cf David Oser, *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?* (Martinus Nijhoff Publishers 2008) 71ff; Blackaby and others (n 65) no 3.188; Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 2754; Looschelders, ‘Rückversicherung’ (n 72) § 9 no 70; on this subject in general, Halpern v Halpern [2007] APP.L.R. 04/03; Judgment of the Swiss Federal Supreme Court of 20 December 2005, 4C.1/2005, consideration 1.4; Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] APP.L.R. 01/28; Graf-Peter Calliess, ‘Article 3 Freedom of Choice’ in Graf-Peter Calliess (ed), *Rome Regulations Commentary* (2nd edn, Kluwer 2015) Art 3 Rome I Regulation, no 33.

⁷⁴ Heiss, ‘From Contract Certainty’ (n *) 110ff; cf Ralf Michaels, ‘Non-State Law in the Hague Principles on Choice of Law in International Contracts’ (2014) 2f, available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5913&context=faculty_scholarship> accessed 3 April 2020.

⁷⁵ Helmut Heiss, ‘Article 7: Insurance contracts’ in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome I Regulation – Commentary*, vol 2 (Otto Schmidt 2016) no 234; Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials* (2nd edn, OUP 2015) no 16:09; Schwartze (n 52) 145.

⁷⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

⁷⁷ Robert Merkin, ‘The Rome I Regulation and Reinsurance’ 2009 *Journal of Private International Law* 69–84, 76; Looschelders, ‘Rückversicherung’ (n 72) § 9 no 70.

⁷⁸ Heiss, ‘Article 7’ (n 75) no 234; Looschelders, ‘Rückversicherung’ (n 72) § 9 no 70; Halpern v Halpern [2007] APP.L.R. 04/03; Judgment of the Swiss Federal Supreme Court of 20 December 2005, 4C.1/2005, consideration 1.4; Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC [2004] APP.L.R. 01/28.

choosing a non-State body of law to govern their contract.⁷⁹ This is suggested by the wording in Article 3, stating that ‘the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules’. On reading the final part of the sentence, it becomes clear, however, that the law chosen only applies to the extent permitted by the law of the forum.⁸⁰ As many States’ laws provide otherwise, the final part of the sentence will apply as a restriction on the law chosen.⁸¹

As the law governing the contract is determined pursuant to the private international law applicable in most jurisdictions,⁸² courts in these jurisdictions would not accept the PRICL or the PICC as the law governing a reinsurance contract. Instead, both sets of principles would be incorporated into the contract and constitute mere contractual terms.⁸³ The principles, therefore, would take precedence over any default rules of the law applicable,⁸⁴ but not by its prevailing mandatory rules.⁸⁵

Considering that there are very few mandatory rules in commercial contract law⁸⁶ and, in particular, reinsurance contract law⁸⁷ due to their very liberal nature, incorporation of the PRICL and the PICC into a reinsurance contract will, nonetheless, render them effective.⁸⁸

3. The effects of the PRICL in arbitral proceedings

For parties wishing to settle any potential disputes arising from their reinsurance contract by arbitration, more options are available where the law applicable is concerned.⁸⁹ In Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985/2006), it is clearly stated that ‘[t]he

⁷⁹ Ralf Michaels, ‘Non-State Law in the Hague Principles on Choice of Law in International Contracts’ in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) 43–69, 44.

⁸⁰ Official Comments to Article 3 of the Principles on Choice of Law in International Commercial Contracts, no 3.14, available at: <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#text>> accessed 3 April 2020; for a detailed analysis, see Michaels, ‘Non-State Law’ (n 79) 43–69.

⁸¹ Michaels, ‘Non-State Law’ (n 79) 44; Art 3 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations; Art 116 Swiss Federal Act on Private International Law.

⁸² Michaels, ‘Preamble’ (n 16) no 59; Oser (n 73) 71; Cannawurf and Schwepcke (n 23) § 8 no 21; Official Comments to the UNIDROIT Principles of International Commercial Contracts (PICC), Preamble, no 4.a.

⁸³ Heiss, ‘From Contract Certainty’ (n *) 110f.

⁸⁴ Official Comments to the UNIDROIT Principles of International Commercial Contracts (PICC), Preamble, no 4.a.

⁸⁵ Looschelders, ‘Rückversicherung’ (n 72) § 9 no 70; Heiss, ‘Article 7’ (n 75) no 234; Goode, Kronke and McKendrick (n 75) no 16:09; Schwartz (n 52) 145.

⁸⁶ Michaels, ‘Umdenken für die UNIDROIT-Prinzipien’ (n 20) 870.

⁸⁷ Looschelders, ‘Rückversicherung’ (n 72) § 9 no 70; Heiss, ‘Article 7’ (n 75) no 234.

⁸⁸ Cf Heiss, ‘From Contract Certainty’ (n *) 110f; Heiss, ‘Article 7’ (n 75) no 234.

⁸⁹ Cf Michael Scherer, ‘Preamble II: The Use of the PICC in Arbitration’ in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2015) no 4.

arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'. In Point 39 of the Explanatory Note provided by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration (as amended in 2006), it is clarified that:

by referring to the choice of 'rules of law' instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum, but have not yet been incorporated into any national legal system.⁹⁰

Unlike under the Rome I Regulation as discussed above, soft law or non-State bodies of law may be chosen as the law governing the contract under the Model Law.⁹¹ The importance of this Model Law also should not be understated as it has influenced many national lawmakers across Europe and the world who were tasked with reforming or creating their own arbitration laws.⁹² In Germany, for example, the Model Law's proposition was adopted unchanged in paragraph 1051(1) of the German Code of Procedure.

In a similar fashion, the International Institute for the Unification of Private Law (UNIDROIT) has prepared model clauses to facilitate the use of the PICC. It is clearly stated on its website that:

[p]arties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. Domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties' freedom of choice to domestic laws.⁹³

In order to allow parties to make a choice in favour of the PRICL as the law governing their reinsurance contract, a set of model clauses will also accompany the PRICL. By virtue of these model clauses combined with an arbitration agreement, the PRICL and the PICC will become the law governing the reinsurance contract. In this way, no national law, not even mandatory rules of national law, will govern the reinsurance contract.⁹⁴ Only so-called overriding mandatory

⁹⁰ Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 3 April 2020; for the position under the English Arbitration Act 1996, see O'Neil and Woloniecki (n 38) no 14–105.

⁹¹ Cf Michaels, 'Preamble' (n 16) no 59; Scherer (n 89) no 1; cf Oser (n 73) 27 and 71; Official Comments to the UNIDROIT Principles of International Commercial Contracts (PICC), Preamble, no 4.a; Michaels, 'Umdenken für die UNIDROIT-Prinzipien' (n 20) 869.

⁹² Currently, 80 states in 111 jurisdictions have based their arbitration law on the UNCITRAL Model Law for International Commercial Arbitration, see <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 3 April 2020.

⁹³ UNIDROIT Model Clauses for the Use of the PICC, available at: <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>> accessed 3 April 2020; for more details, see Michael Joachim Bonell, 'Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts' (2013) 18 Uniform Law Review 473–489.

⁹⁴ Heiss, 'From Contract Certainty' (n *) 111f; cf also Official Comments to the UNIDROIT Principles of International Commercial Contracts (PICC), Preamble, no 4.a.

rules of national, international, or supranational law form an exception. Such rules are dealt with specifically in Article 1.1.5 of the PRICL.

IV. An overview of the general provisions

The PRICL are structured into chapters, sections, and articles as mentioned previously. In Chapter 1 of the PRICL, rules pertaining to structure and the relationship between the PRICL and PICC are set out. The substantive scope of the Principles is stated in draft Article 1.1.1: ‘The PRICL apply to contracts of reinsurance where the parties have agreed that their contract shall be governed by them.’ This makes it clear that the PRICL will not apply to a reinsurance contract if the parties have not chosen their application. The term ‘contract of reinsurance’ is defined in draft Article 1.2.1 as a ‘contract under which one party, the reinsurer, in consideration of a premium, promises another party, the reinsured, cover against the risk of exposure to insurance and/or reinsurance claims’.

External gaps are dealt with in draft Article 1.1.2, pursuant to which ‘[i]ssues not settled by the PRICL shall be settled in accordance with the UNIDROIT Principles of International Commercial Contracts 2016 (PICC)’. Hence, reinsurance contract matters are governed by the PRICL and general contract law issues are dealt with by the PICC. The advantage of taking the PRICL together with the PICC is that each set of rules deals with particular issues of law in a manner that complements the other. Where an internal gap arises (that is, if there are no rules governing an issue specific to reinsurance), such gap will be ‘settled in accordance with their underlying principles’ (compare with draft Article 1.1.6(2)). In this way, the reference to the PICC in draft Article 1.1.2 does not lead to their application to issues of reinsurance law but, rather, restricts their scope to general contract law issues.

Pursuant to draft Article 1.1.3 of the PRICL, parties who choose to apply the PRICL to their reinsurance contract still retain an option to ‘exclude the application of or derogate from or vary the effect of any of the provisions of the PRICL’. With the exception of the duty of utmost good faith (draft Article 2.1.2), the Principles are entirely non-binding due to their soft law nature. Binding force may only be conferred to the PRICL by means of an agreement between the parties concerned. Hence, an agreement between the parties to use a specific product or include a certain clause deviating from the PRICL will prevail over the provisions set out in the PRICL.⁹⁵ This illustrates the purpose of the PRICL as default rules promoting legal certainty for the industry, while aligning with the principle of party autonomy. It should be noted, however, that the PRICL and the PICC do affect such clauses. In interpreting individual clauses, it will be necessary to have regard to the context of the PRICL, as would be the case if a national law were concerned.⁹⁶ The influence of the latter on the

⁹⁵ Heiss, ‘From Contract Certainty’ (n *) 105f and 108.

⁹⁶ Heiss, ‘From Contract Certainty’ (n *) 106.

interpretation of a particular clause is difficult to predict due to the lack of settled national reinsurance contract law. In contrast, this is where the PRICL excel. They contain clearly stated black-letter rules as well as comments and illustrations to explain and exemplify those rules. As such, the PRICL provide a solid basis for greater predictability in construing contract clauses and thereby increase legal certainty.⁹⁷

The effects of reinsurance usages and practices are dealt with in draft Article 1.1.4 of the PRICL. Under section 1, the parties will 'be bound by any usages to which they have agreed and by any practices which they have established between themselves'. Hence, an agreement between the parties as to a particular reinsurance usage will afford it binding force. The same is true of a practice established between the parties, although the agreement between the parties as to the binding force of the practice is established indirectly by the application of the PRICL and specifically by draft Article 1.1.4. Under section 2, any other trade usages are implicitly not deemed to be binding; they will only play a role if they are 'regularly known to and observed by the parties', in which case they will be taken into account when interpreting the reinsurance contract.⁹⁸ The provision in the PICC differs from the prevailing PRICL in that '[t]he parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable' under Article 1.9(2) of the PICC. The difference can be explained by the fact that the reinsurance usages cannot be considered uniform and global as these are often tinged by regional traits.⁹⁹ Nor is there even a standard concept of the term 'trade usage' among different jurisdictions, which makes determining a specific rule as an international trade usage almost impossible.¹⁰⁰ It is, therefore, necessary to regard reinsurance customs and usages as a source of legal uncertainty. Due to the variety of usages, the PRICL would have little application if trade usages were to take precedence over the specific rules in the PRICL.¹⁰¹ Unlike the PICC, trade usages are codified and thereby unified in the PRICL, and, thus, the unified principles must prevail over existing trade usages. Consequently, provision has been made in draft Article 1.1.4(2) that, unless parties expressly agree for a specific reinsurance usage to bind them (draft Article 1.1.4(1)), the black-letter rules in the PRICL will prevail over trade usages.

The provision in draft Article 1.1.5 serves to determine that overriding mandatory rules in national, international, or supranational law prevail over the PRICL. National supervisory law provides an example where restrictions may be imposed on the choice of the law applicable to the contract. For instance, the parties to a reinsurance contract in Australia are obliged to apply Australian law

⁹⁷ Cf Heiss, 'From Contract Certainty' (n *) 106.

⁹⁸ Heiss, 'From Contract Certainty' (n *) 107.

⁹⁹ Cannawurf and Schwepcke (n 23) § 8 no 66.

¹⁰⁰ Cannawurf and Schwepcke (n 23) § 8 no 66.

¹⁰¹ Heiss, 'From Contract Certainty' (n *) 107.

to the non-life insurance sector under paragraph 34 of the General Insurance Prudential Standard GPS 230.¹⁰² In some cases, a choice of foreign law is not directly prohibited under supervisory rules but is indirectly made unattractive by attaching detrimental economic consequences to it. An Australian example again illustrates the point. In the Australian life insurance sector, solvency rules require parties to take out reinsurance with reinsurer carriers licensed in Australia, which generally lead to the application of Australian national law.¹⁰³ The situation is similar in Brazil, where contracts of reinsurance covering risks situated in Brazil must contain a choice of law clause favouring Brazilian law under Article 38 of Resolution 168/07 of the Conselho Nacional de Seguros Privados (Brazilian National Council of Private Insurance).¹⁰⁴

Principles for the interpretation and any gap-filling of the PRICL are set out in draft Article 1.1.6. In essence, the provision is consistent with Article 1.6 of the PICC. The only difference is that promoting ‘the observance of good faith and fair dealing’ has been added in respect of the reinsurance sector.¹⁰⁵

V. Conclusions

The PRICL represent a private codification (soft law) of transnational reinsurance contract law. In particular, the Principles lead to a standardization of reinsurance contract law and usage. This should provide reinsurance markets with a greater degree of legal certainty for two main reasons. First, the legal uncertainty arising from the differences between jurisdictions and relevant trade usages is eliminated by such standardization. Second, the PRICL provide precisely worded rules, which are explained in comments and illustrated by examples of use. In contrast to national reinsurance legislation in many jurisdictions, they offer a greater degree of transparency and, therefore, easier access to law. As the PRICL incorporate the UNIDROIT PICC, all of these considerations also apply in relation to general contract law. In this way, reinsurance markets are presented with a closed system of reinsurance contract law.

In line with their conception as a private codification (soft law), the PRICL shall only apply if their application has been agreed in the contract. Hence, the PRICL will not be imposed on the parties but are made available to the parties as an option (optional instrument). It is, therefore, the parties’ private autonomy that drives the desired legal standardization, and it will be the market that ultimately determines the actual effect of the PRICL. In most jurisdictions, the legal means required to do so in conflict of laws are in particular provided to market participants as a choice of law. This applies namely if the parties combine their choice of law with an arbitration clause.

¹⁰² Heiss, ‘Article 7’ (n 75) no 233; Heiss, ‘From Contract Certainty’ (n *) 113.

¹⁰³ See Heiss, ‘Article 7’ (n 75) no 233; Heiss, ‘From Contract Certainty’ (n *) 113.

¹⁰⁴ See Heiss, ‘Article 7’ (n 75) no 233.

¹⁰⁵ Heiss, ‘From Contract Certainty’ (n *) 107; cf Art 7(2) of the United Nations Convention on Contracts for the International Sale of Goods for a similar provision.