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Principles of European insurance contract law (PEICL) as a settled and balanced system of policyholder protection

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Scientific Debate

Abstract

Within the framework of the Common Frame of Reference (CFR) of European Contract Law, which aims at the creation of a more coherent European contract law with common principles, terminology, and structure, PEICL is the specific contribution for insurance contract law.

PEICL is intended to serve as an Opt-in Instrument for parties contracting in an insurance contract, and presents a net of mandatory rules introduced for the protection of the policyholder. The binding nature of such rules and their interplay with the national rules on consumer protection and more specifically the definition of consumer, are discussed in this article.

Keywords: Insurance contract law, mandatory rules, consumer protection, cross-border transaction of insurance products

1. THE PRINCIPLE OF INSURANCE CONTRACT LAW (PEICL)

PEICL is the result of the work done and the work in progress by the Project Group «**Restatement of European Insurance Contract Law**»,¹ which is a project based on an initiative by a group of European Academics aimed at the drafting of ‘**Principles of European Insurance Contract Law**’ which started in

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1999 and joined the **European Network of Excellence on European Insurance Contract Law** established in 2005. PEICL’s principle constitutes a contribution to the **Common Frame of Reference² (CFR) of European Contract Law**. The CFR of contract law in the EU aims at the creation of a more **coherent** European contract law (common **principles, terminology, and structure**). The Insurance Contract is included.

The general part of the Insurance Contract Law, including **general rules** for all types of **indemnity insurance**, as well as for all types of insurance of **fixed sums**, has been already published and commented in 2009 by a special edition edited by members of the Restatement Group that constitute the Drafting Committee. The rest of the work, including **special rules for individual branches** of insurance, beginning with **life** assurance (including collective agreements) and **liability** insurance, is now ongoing and tomorrow as well as the day after a workshop of the Restatement Group is taking place for that purpose, in this city.

PEICL rules are translated into all EU languages and into Korean, Japanese and Turkish.

PEICL is intended to serve as a **draft Optional Instrument of European Insurance Contract Law**. It shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them. If the parties conclude to take advantage of PEICL, **its rules shall apply as a whole and no exclusions or particular provisions shall be allowed**.

The PEICL rules present a net of **mandatory rules introduced for the protection of the policyholder**. Actually, almost all of the rules are “semi – mandatory” meaning that derogation shall be allowed only for the benefit of the policyholder, insured or beneficiary.

² Common Frame of Reference, Chapter III, Section IX, *Insurance Contract*, Status 1 August 2009, available at: <http://www.restatement.info/>, 27. 1. 2013.

They are not aiming to present a complete and unified European Insurance Contract Law. Member States applicable law still applies as long as the policyholder's, insured's or beneficiary's rights granted by PEICL are not in detriment. PEICL in case it will be adopted as an EU Opt Regulation gives the possibility for **insurance products** to be sold cross-border within the EU without being necessarily adapted to the mandatory rules of the Member States' applicable law. The Member States impose different mandatory rules of their Insurance Contract Law and this is an obstacle for creating a **European insurance product**, i.e a policy governed by the same rules being able to be sold in all Member States. Nowadays, despite the implementation of Insurance Directives on freedom of establishment, freedom of services and passport rules, the Consumer Protection Directives (in particular, on distance marketing of consumer financial services³, Unfair Contract Terms⁴ and Unfair Commercial Practices⁵), the Injunctions⁶ and Gender⁷ Directives, the Brussels I Regulation on jurisdictions⁸, and the Rome I Regulation

³ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9. 10. 2002, p. 16–24.

⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, p. 29–34 as amended by the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council – Article 32: Amendment to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts by the new Art. 8a.

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11. 6. 2005, p. 22–39.

⁶ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1. 5. 2009, p. 30–36.

⁷ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21. 12. 2004, p. 37–43.

⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16. 1. 2001, p. 1–38.

on applicable law⁹, the different mandatory rules of each of the Member States do not allow the sale of a policy governed by the same rules for all of the Union. This obstacle can be put aside by the PEICL, if it was adopted as Opt Regulation.

However **not all policyholders, insureds and beneficiaries are extra protected under PEICL's "semi – mandatory" rules. Derogation shall be allowed to the benefit of any party, including the insurer, in contracts covering large risks** within the meaning of Insurance Directives. The **EU notion of large risk** has been introduced by the so called second generation Insurance Directive (it is now included in article 13 para. 27 [definitions] of the Directive 2009/138 [Solvency II] and has been adopted by article 7 of Rome I Regulation 593/2008 [on applicable law to contractual obligations] which refers to article 5 para. (d) of the first generation Directive 239/73 which para. has been added by the second generation Directive 88/357 article 4; see also, article 178 of Solvency II) in order **to protect policyholders as far the choice of law applicable to the insurance contract is concerned**. Only policyholders in contracts covering large risks enjoy full freedom of choice as to the applicable law.

Large risks include a) insurance classes of **railway rolling stock, aircraft, ships, goods in transport, aircraft liability, and liability for ships** as well as **credit and suretyship where the policyholder is engaged professionally in an industrial or commercial activity or in one of the liberal professions and the risks related to such activity**. Large risks include also b) insurance classes **land vehicles, fire and natural forces, other damage to property, motor vehicle liability, general liability and miscellaneous financial loss**, under the condition that the policyholder exceeds the limits of at least two of the following criteria: i) a balance-sheet 6.2 mio €, ii) turnover 12.8 mio € and iii) average number of 250 employees.

Thus the **criteria of PEICL as to the circumstances under which the policyholders, insureds and beneficiaries are worthy of enjoying increased and extra protection** are not based on the **nature** of the PEICL **rule**, since as said all the PEICL rules aim to protect policyholders etc, but on the **nature of the risk** as well as on the **profile of the policyholder in conjunction to the nature of the risk**. In other words, PEICL adopted the EU criteria as to which policyholder etc., is worth being extra protected – which are expressed only in the applicable law issues – to the whole of its rules and the same has been done by the

⁹ 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), OJ L 177, 4. 7. 2008, p. 6–16.

new German Insurance Contract Act dated 1. 1. 2008 para. 210.

2. POLICYHOLDER, INSURED AND BENEFICIARY PROTECTION RULES AND CONSUMER PROTECTION RULES AS AN EXPRESSION OF AVOIDANCE OF "THE STRONGER PARTY'S RIGHT IN CONTRACTUAL RELATIONS"

The mass sale of **products and packaged/standardized services**, resulting in the placement of the provider to a superior contractual position towards the customer, has forced the legislator to grant to the latter **extra rights**, in order to safeguard the balance of the contract between the parties. It is important to identify which customer and under what circumstances is in the **weaker contractual position** in comparison with its counterparty to the extent that it is worth introducing **extra rights** in favor of the customer in order to avoid situations where the general traditional law provides poor protection in this regard.

The expression of the principle of the **avoidance of stronger party's right in contractual relations** is the **consumer protection rules** which are provided, among others, under EU law in order to address typical contractual situations, whereby the position of the customer is weak, such as the rules on «**unfair terms in consumer contracts which have not been individually negotiated**».

This and most of the special sets of EU rules which introduce extra protection for the weaker party in mass sale contracts of products and standardized services denotes this party as "consumer" and define such term as.

"the person who acts for purposes which are outside his trade, business or profession".

The widespread perception of the consumer concept as **the party in contracts who needs to be protected** leads to the common understanding that the consumer is **synonymous with** the weaker party ("**principle of the protection of the weaker party**"). However, this definition does not include the rules which grant extra protection to the policyholder which are broader and are not depended on the above mentioned common consumer definition. Not only PEICL and the German Insurance Contract Act dated 1. 1. 2008 introduce broader criteria as to which is the weaker party into an insurance contract, but also other national insurance

contract acts such as the French Code des Assurance law, the Greek law on insurance contract and the very recent draft Swiss Insurance Contract law. However, only PEICL and the German Insurance Contract Act introduce the specific EU notion of large risks while other jurisdictions in making the distinction between large and not large commercial risks do not apply the same concept. E.g. the Belgian Insurance Contract Act of 25. 6. 1992¹⁰ characterises all of its provisions as *ius cogens* but exempts the so-called non "simple risk" and in addition empowers the King to introduce exceptions of the mandatory character in specific cases. The article 98 par. 2 of the draft Swiss Insurance Contract Act provides that the Transport Insurer is exempted from its mandatory application of its rules. In addition, article 99 of this Act empowers the Federal Council of the Country to introduce exceptions of the mandatory character in specific branches of insurance. In the same direction is article 807 par. 1 of the Polish Civil Code. According to article 33 par. 1 of the Hellenic Insurance Contract Act, the insurance for the carriage of goods, non consumer credit insurance or guarantee insurance as well as marine or air insurance are exempted from the mandatory character of the provision of this Act.

3. THE BROADER SCOPE OF THE NOTION OF CONSUMER IN INSURANCE LAW DUE TO THE UNIQUE POSITION OF THE INSURANCE CUSTOMER

A number of ICAs¹¹, in particular the modern ones, introduce **mandatory rules** which serve the protection of the **policyholder etc.**, for example, rules which effect the avoidance of unreasonably hard sanctions in case of breach of terms and conditions like the loss of coverage, regardless if **policyholders etc.**, fall under the definition of consumer in the common consumer legislation. So, the underlying concept of the weaker party

¹⁰ Article 67 par. 2 characterizes as simple risks those which the value of the insured interest is 30 or 965 mio BF.

¹¹ This is the case with the new German ICA, dated 1. 1. 2008, which characterises by the end of its chapter the provisions included as semi mandatory in favour of the insured. The paragraphs which include the exceptions are the following: 32, 42, 87, 112, 129, 171, 191 and 208. Further, the draft Swiss ICA provides in article 98 par. 1 a number of its provisions, which exceptionally are non mandatory in favour of the insured. In the same direction the Greek ICA provides five cases of its provisions, which can be amended exceptionally to the detriment of the insured. The Italian Civil Code (article 1932) as well as the Austrian ICA (§§ 15a, 34a, 68a, 72, 108, 115a, 158p, 178 and 178n) also provide exceptions in specific cases they regulate from the mandatory character of their provisions.

under the special protective rules of ICAs is **partially broader** than the definition of the consumer under the common consumer legislation. In addition, some typical principles of consumer protection, which are included in many pieces of consumer legislation, such as the cooling off period and some information duties of products and services providers, are introduced in a number of ICAs.

4. POLICYHOLDER, INSURED AND BENEFICIARY, QUALIFIED AS CONSUMER ACCORDING TO EU COMMON CONSUMER LEGISLATION AND PEICL

Thus, the approach of ICAs regarding the implementation of the **principle of the weaker party's protection** in contractual relations, differs from the approach of consumer legislation. The rule is that all **policyholders etc.**, when it comes to mass sales, must enjoy an extra protection by mandatory rules introduced by ICAs, as far as they do not fall under the large risks exceptions. That's the concept of the PEICL also.

Policyholders etc., enjoy the extra protection under ICAs and PEICL, even if they do not qualify as consumers pursuant to the above mentioned consumer law definition. Not being consumer under the said definition, they however are protected by ICAs rules and PEICL, subject to the said exception. As regards to PEICL the exception is included in the EU criteria of large risk while other national ICAs include large commercial risks but not under the EU criteria, with the exception of the new German ICA as already mentioned. On the other hand, **policyholders etc.**, who fulfil the definition of consumer under consumer law, always enjoy the additional protection of the consumer rules. Thus, **policyholders etc.**, are additionally protected under the consumer protection rules, only if they receive the insurance benefit for purposes outside their trade, business and profession. However, PEICL includes almost all of the protection granted by EU legislation on consumer of services related to the insurance services as far as it includes the general rule of abusive clauses modelled on Directive 93/13, the cooling off period and the pre contractual documents to be provided by the insurer modelled on Directive 2002/65. Thus PEICL generally includes all protective EU consumer rules which (of course) can be applied to the customer of an insurance product while this is not the case as regard to other ICAs of Member States which does not cover all the EU consumer protective rules. This leads to a split of the notion as to the person

who is worth being protected in several ICAs, but not in PEICL.

In any case, we face two grades of protection:

a. any **policyholder insured, beneficiary**, except for the cases mentioned above (including some or all of the EU notion as to large risks) who could be called

“consumer within the meaning of insurance contract law”.

It includes the policyholder etc., protection rules provided by ICAs and PEICL.
and

b. any **policyholder etc.**, who has the additional characteristic of

“consumer within the meaning of common consumer legislations”.

It further, generally includes the policyholder etc., protection rules provided by the entire PEICL.

National insurance law legislation, such as the new Swiss ICA (2011), the new German ICA (2008), the Greek ICA (1997), the Italian ICA, the French ICA, the Israeli ICA **distinguish between rules which are set for the protection of the policyholder etc., and do not allow any contractual deviation to the detriment of the policyholder etc.**, (semi mandatory rules), **regardless whether the latter purchased the insurance with the purpose to cover professional needs**, (i.e regardless if it falls within the definition of consumer) and non-mandatory rules which are neutral and allow such deviation, while **PEICL**, as said, does not introduce neutral rules but **only mandatory rules** and generally includes the protection given by the EU consumer legislation for all policyholder etc., with the exception of large risks.

5. POLICYHOLDER, INSURED BENEFICIARIES

The EU aim of **insurance supervision** is the protection of the policyholder **and the insured** (article 27, Solvency II), but the criteria as to who should be termed as the **strong party** in the contract, when it comes to the application of the large risks rule, is focused on the policyholder **only** (article 13, nr. 27 of Solvency II). As already said, this is because the EU notion of large risks is introduced **in order to exempt policyholders from restrictions as to the applicable**

law that governs the insurance contract, and, thus, they only refer to the contacting party and leave outside the rule the insured and/ or the beneficiary, where these differ from the policyholder. In addition, for the purpose of **insurance portfolios' transfer**, the protected person according to EU law is the policyholder, the insured **and the beneficiary** (article 39, par. 6 of Solvency II).

For the full application of the principle of freedom of contracts, the new German ICA (§ 210 VVG and article 10 Abs 1.S. 2 Einf. Ges. zum VVG) totally adopted the EU notion of large risks. Lastly, the Principle of European Insurance Contract Law (article 1: 102 3) applies the EU's notion of large risks in order to define the borderline between the weak and the strong party, exempting the mandatory application of its rules in cases of insurance contracts falling under the said large risks concept. Policyholder, insured and beneficiary are the "consumer" within the meaning of PEICL, unless they fall under the EU definition of large risks.

6. RESULT

It is clear, that the issue as to who is the protected person and to what extent, as well as the issue of the grades of protection that should be followed under the EU insurance and consumer legislation and under modern ICAs, have not been completely settled. In addition in several Member States laws, two grades of the weaker party's extra protection are being faced in an insurance contract: a) the policyholder's, insured's and beneficiary's, with the exception of large commercial risk, who might not be necessarily defined in a similar way, and b) the policyholder's etc., who falls additionally under the common definition of consumer.

The Principle of European Insurance Contract Law presents a complete settlement of that issue with one grade of protection

SUMMARY

If PEICL is adopted as an EU Opt-in Regulation, it will provide the possibility for insurance products to be sold across the EU without being necessarily adapted to the mandatory rules of the Member States' national laws. The differing approaches in national consumer protection laws can thus be left aside and in that way remove an important obstacle of the transborder sales of insurance products.