politischen Wertwandel mit dem damit verbundenen „Umstieg" für viele Berufe „auf der Kippe" steht. Deshalb ist es erforderlich, bezogen auf den konkreten Beruf und unterstelltem „Gesundbleiben" eine Zukunftsprognose anzustellen, ob eine Berufsfortsetzung wahrscheinlich war oder nicht. War sie nicht hoch wahrscheinlich, scheidet das „Hochrechnen" schon deshalb aus.

Weiter würde bei Rückgriff auf erfolgte Tarifsteigerungen zum einen unterstellt, dass der Versicherte daran teilgenommen hätte, was aber wie gesagt aus retrospektiver „Zukunftssicht" häufig eine Spekulation sein wird, und zum anderen, dass es – retrospektiv auf den Zeitpunkt des Eintritts der Berufsunfähigkeit bezogen – auch tatsächlich zu Tariferhöhungen gekommen wäre. Es gibt aber keinen Automatismus, dass jede Tarifverhandlung auch zu Gehaltserhöhungen führt. Außerdem ist zum Zeitpunkt des Versicherungsfalls in der Regel noch gar nicht klar, ob und wann überhaupt Tarifverhandlungen oder außerhalb von Tarifverträgen Gehaltsverhandlungen wieder aufgenommen werden.

Trotz der vielen unbeantworteten Fragen klärt der BGH einige „Nebenkriegsschauplätze":

So ist die von manchen Versicherern verwendete Klausel

„Die Verweisung auf eine andere Tätigkeit ist ausgeschlossen, wenn das jährliche Einkommen 20 % oder mehr unter dem Einkommen im zuletzt ausgeübten Beruf liegt; sollte die herrschende Rechtsprechung künftig nur geringere Einkommensreduzierungen für zumutbar erachten, so ziehen wir diese heran"

wirksam. Sie enthält keine Regelung, nach der die Verweisung auf eine Tätigkeit, in der das jährliche Einkommen weniger als 20 % unter dem Einkommen im zuletzt ausgeübten Beruf liegt, stets wirksam wäre. Vielmehr ist die Klausel so auszulegen, dass bei geringeren Einkommenseinbußen eine Verweisung nicht ausgeschlossen ist. Ob die Verweisung darüber hinaus auch wirksam ist, regelt die Klausel dagegen nicht.

Außerdem beantwortet der BGH die Frage, ob Einkommensschwankungen im Ursprungsberuf zu berücksichtigen sind: Bei ungleichmäßigen Einkommen im Ausgangsberuf – etwa durch zeitweise Arbeitslosigkeit oder kurzzeitigen Berufswechsel – darf kein fiktives Einkommen auf Basis der Haupttätigkeit als Ausgangspunkt für eine Vergleichsbetrachtung errechnet werden, weil es für die die Lebensstellung entscheidend ist, was tatsächlich regelmäßig monatlich an Einnahmen zur Verfügung stand und ein fiktives Einkommen die Lebensstellung nicht prägen kann. Das ist richtig, weil nur die tatsächliche Lebensstellung und nicht eine fiktive versichert ist. Maßgeblich können also nur die tatsächlich geflossenen Zahlungen sein.

5. Fazit und Ausblick

Angesichts der vom BGH ungeklärten Begrifflichkeiten wie „besonders langer Zeitraum" wird es auch künftig Diskussionen zwischen Versicherern und VN über die fiktive Anpassung des Ursprungseinkommens geben. Klarheit besteht nur insoweit, dass bei kurzen Zeiträumen (wie immer man nun auch „kurz" definiert – jedenfalls unter ca. vier Jahren) niemals Anpassungen erfolgen müssen, während bei längeren Zeiträumen ein weites Spektrum an diskutierbaren Fragen erhalten bleibt, etwa wann dieser Zeitpunkt überhaupt einsetzt, ob Einkommensentwicklungen sicher absehbar sind und mit welcher Methode die Berechnung zu erfolgen hat. Ein Obiter dictum des BGH wäre hier wünschenswert gewesen. 5 Jahre sind eine praktikable Zeitgrenze, und eine Inflationsanpassung führt als einzige Berechnungsmethode, die jeden Beteiligten „trifft", zu gerechten Ergebnissen. Selbst wenn Gerichte künftig eine andere Methode favorisieren sollten (etwa unzulässiger Weise „rein rückblickend" ermittelte Tarifsteigerungen oder gesetzliche Anpassungen beim Mindestlohn), lägen Versicherer damit in einem mathematisch halbwegs sicheren Bereich, da in die anderen Berechnungen häufig ohnehin Aspekte zur Inflationsbereinigung einfließen, so dass in der Berechnungsmethodik zumindest teilweise eine mathematische Deckungsgleichheit bestehen wird.

Materialien

The modern Guidon de la Mer: the Principles of Reinsurance Contract Law (PRICL)

Editorial remark: The Principles of Reinsurance Contract Law (PRICL) strive for worldwide recognition. Therefore, the German article »Der moderne Guidon de la Mer: die Principles of Reinsurance Contract Law (PRICL)«, which has originally been published in VersR 2019, pp. 1113–1121, is made available in English in the following.

I. Introduction

Reinsurance law is an area of law that has so far been insufficiently scientifically researched. Above all, reasons for this are the inaccessibility of the economic sector and the lack of statutory law. This results in a distinct lack of legal transparency, which, in practice, is also often associated with a certain degree of legal uncertainty even for experienced practitioners in the field of reinsurance. An international research group strives to achieve greater transparency and legal certainty since October 2015, committing to the development of the *Principles of Reinsurance Contract Law* (PRICL) on the basis of international reinsurance practice.

The PRICL group consists of scholars and practitioners from all continents. It is subdivided into a *Principles Drafting Committee*, various *Advisory Groups* (reinsurers, primary insurers and reinsurance brokers) as well as *Special Advisors*.[1] The group is funded by the research associations of Germany

1 Details are available at https://www.ius.uzh.ch/de/research/projects/pricl.html (last accessed 30th July 2019).

(DFG), Switzerland (SNF) and Austria (FWF) and cooperates with UNIDROIT, an independent intergovernmental organisation for the unification of private law with exclusive membership of States (currently 63).[2]

On the basis of this worldwide cooperation, these *Principles* are to be understood as a reflection of reinsurance practice. Therefore, they can be described as a modern *Guidon de la Mer*[3]. However, the PRICL are more than just a scientifically substantiated abstract of internationally recognised principles of reinsurance law, since they themselves are a tool of modern reinsurance law, for they are available to the contracting parties in the form of a selectable *Soft Law*.

This article's objective is to provide an initial overview of reason and method for the development of the PRICL, of their ends and means as well as key essentials of the *Principles*.[4] The English version of the PRICL – including explanatory *Comments* and *Illustrations* – is available online.[5]

II. Motive for the PRICL: Reinsurance Contract Law – a Legal Nullum?

So far, there has been no international or supranational reinsurance contract law. In addition, national contract law regimes regularly[6] show a lack of statutory regulation on the matter of reinsurance; as, e.g. in German law, sec. 209 VVG (*Versicherungsvertragsgesetz* – German Insurance Contract Act) specifically prescribes the inapplicability of the provisions of the VVG to reinsurance.[7] From this legal starting point, the prevailing opinion correctly deduces that an analogous application of VVG provisions is generally not possible either, in particular, since the statutory insurance law basically aims to protect the policyholder as a consumer (in a broader sense, expressly excluding only large risks and the open policy for commercial risks) being the weaker contractual party.[8] However, reinsurance contracts are concluded between professional, in the eyes of the law, typically equal partners.

Reinsurance contract law is globally dominated by the primacy of freedom of contract. The most important source of law is, therefore, the contract itself. Only when considering the comprehensive freedom of contract in reinsurance contract law, it becomes clear why German scholars expressly emphasise that, however, this freedom of contract does not go as far as granting an option for the non-applicability of, e.g. the principle of good faith (sec. 242 BGB [*Bürgerliches Gesetzbuch* – German Civil Code]) to the parties to a reinsurance contract.[9] Therefore, in the event of disputes between professional market participants, a true-to-fact and interest-oriented interpretation of the reinsurance contract is paramount.

In German contract law – provided it is applicable under the conflict-of-laws to an international reinsurance contract –, contract interpretation bases on secc. 133, 157 BGB, i.e. must be in line with good faith having regard to commercial practice. Even if German contract law does not contain specific regulations for the reinsurance contract, provisions of the General Part and the General Part of the Law of Obligations of the BGB, in particular sec. 242 BGB, are applicable. Apart from that, the statutory basis is limited to reinsurance practices applicable as trade usages (sec. 346 HGB [*Handelsgesetzbuch* – German Commercial Act]) and general principles of commercial law (such as the legal relevance of commercial letters of confirmation [*kaufmännisches Bestätigungsschreiben*]) – subject to variant clauses of the specific reinsurance contract.

Keeping this statutory *status quo* in mind, the observation of *Looschelders* speaks volumes: "Despite these specifics, legal considerations for reinsurance contracts are *not completely* irrelevant in German law" (emphasis added).[10] Plainly, this does not mean that a reinsurance contract operates within a legal vacuum, yet, this perspective vividly illustrates the lack of tangibility of reinsurance law. It is not by chance that reinsurance is referred to as "gentlemen's agreement", which is negotiated *in camera* not only amid its performance but also in the event of a dispute. Since the contracting parties regularly resort to courts of arbitration, whose judgments remain unpublished,[11] there is not only a lack of specific legal provisions but also a widespread deficit of case law. UK and US case law, which dominates the reinsurance sector internationally, is also limited to specific issues of reinsurance and offers by no means a compre-

2 UNIDROIT (*Institut international pour l'unification du droit privé*, International Institute for the Unification of Private Law) is an independent intergovernmental organisation founded in 1926 and based in Rome. Its purpose is to analyse the needs and methods for modernising, harmonising and coordinating private law, in particular commercial law, between States as well as groups of States and, to this end, to create uniform legal instruments in the form of principles and rules. See https://www.unidroit.org/about-unidroit/overview (last accessed on 30th July 2019). In their formal structure (*Articles, Comments* and *Illustrations*), PRICL follow the model of the *Principles for International Commercial Contracts* (PICC) developed by UNIDROIT; cf. also *Heiss*, From Contract Certainty to Legal Certainty for Reinsurance Transactions: The Principles of Reinsurance Contract Law (PRICL), Scandinavian Studies in Law, Vol. 64, 2018, p. 92 (103).

3 The *Guidon de la Mer* was written by an unknown author from Rouen (France) in the 16th century, printed in: *Pardessus*, Collection de Lois Maritimes Antérieures au XVIIIe Siècle, part 2, Paris 1831, reprint Bad Feilnach 1997, pp. 377 et seqq. This is the first known treatise on reinsurance law, which was also often the basis for codified reinsurance law (*Mossner*, Die Entwicklung der Rückversicherung bis zur Gründung selbständiger Rückversicherungsgesellschaften, 2nd edn. 2012, pp. 56 et seq. with further references).

4 See as well *Heiss*, From Contract Certainty to Legal Certainty for Reinsurance Transactions: The Principles of Reinsurance Contract Law (PRICL), Scandinavian Studies in Law, Vol. 64, 2018, p. 92 (92 et seqq.).

5 See https://www.ius.uzh.ch/de/research/projects/pricl.html (last accessed 30th July 2019). All *Articles* mentioned in this paper without specification are *Articles* of the PRICL.

6 English law is an exception with its Insurance Act 2015, which also covers reinsurance contracts; cf. *Law Commission*, Report No. 353 – Insurance Contract Law: Business Disclosure, Warranties, Insurers' Remedies for Fraudulent Claims, and Late Payment, para. 2.9, available at https://www.lawcom.gov.uk/project/insurance-contract-law-business-disclosure-warranties-insurers-remedies-for-fraudulent-claims-and-late-payment/ (last accessed on 30th July 2019).

7 Also e.g. sec. 186 Austrian Insurance Contract Act, Art. 101 sec. 1 No. 1 Swiss Insurance Contract Act; further references in *Heiss*, From Contract Certainty to Legal Certainty for Reinsurance Transactions: The Principles of Reinsurance Contract Law (PRICL), Scandinavian Studies in Law, Vol. 64, 2018, p. 92 (98 fn. 42).

8 Illustratively: Motive zum VVG 1908, reprint Berlin 1963, p. 246; i.a. *Franz/Keune*, Versicherungsrecht (VersR) 2013, p. 12 (21).

9 *Cannawurf/Schwepcke* in Lüer/Schwepcke (eds.), Rückversicherungsrecht, Munich 2013, § 8 para. 4.

10 *Looschelders*, Versicherungsrecht (VersR) 2012, p. 1 (1): *„Trotz dieser Besonderheiten sind rechtliche Erwägungen für Rückversicherungsverträge auch im deutschen Rechtsraum nicht völlig irrelevant"*.

11 With regard to arbitration in reinsurance *Gal* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, 2nd edn., Munich 2017, vol. 3, reference number 130 (Schiedsgerichtsbarkeit und Versicherung) paras. 5 et seqq.

hensive regulatory system for reinsurance contracts, which could be internationalised.

For legal practice, uncertainties also arise from the prevalent international dimension of a reinsurance contract. If, as is often the case, the parties to the reinsurance contract are domiciled in different countries or if the insured risk bears a cross-border connection, the substantive law applicable to the reinsurance contract must be determined in accordance with the principles of the conflict-of-laws in the absence of a uniform substantive law.[12] Thus, the "international" contract is subject to national legislation. Despite this nationalisation of the "international" contract, the frame of reference for the legal assessment remains, as already mentioned, mostly vague due to the absence of specific statutory law and jurisprudence. In other words: the "leap into the dark"[13] of the conflict-of-laws does not bring illumination of legal certainty within the applicable substantive law.

There is not only a scientific but also a considerable practical interest in making the practical particularities of the juridical non-transparent reinsurance market visible. Recently intensified by the EU-supervisory regime Solvency II, the supervision has considerably increased the interest in legal certainty and (economic) value of the reinsurance cover. E.g., sec. 298 (3) VAG (*Versicherungsaufsichtsgesetz* – German Insurance Supervisory Law) stipulates that the supervisory authority may "reject" a reinsurance contract as a means of solvability for particular reasons, that is to say: query it under supervisory law[14] and deny its supervisory effect. Even if this cannot mean that the validity of the reinsurance contract is at stake under contract law in a strict technical sense,[15] but rather in the sense of effectiveness for supervisory purposes,[16] the validity of the reinsurance cover under contract law is implicitly presupposed.[17] Finally, parties to reinsurance contracts also have an increased interest in legal certainty as disputes between primary insurers and reinsurers are likely to increase against the background of changing market conditions and increased regulation.[18]

III. Method of the PRICL: How Can Principles of Reinsurance Contract Law Be Derived in a Legal Void?

In the absence of specific statutory law and guiding jurisprudence, traditional comparative law quickly reaches its limits. The lack of tangible sources of law also leads to the fact that reinsurance contract law is only imperfectly permeated – even scientifically. In the absence of specific statutory law and evaluable case law, the few scholarly writings regularly rely on the description of (vague) trade usages and statements derived from general contract law. In most cases,[19] scholars also cling to their own respective national law. References to foreign law are often either across-the-board or quite sporadic. In view of the economic significance and internationality of reinsurance, this remarkably deficient baseline calls for redress and, at the same time, signals that this goal is extremely difficult to achieve in reinsurance contract law.

Nevertheless, the PRICL group has set itself the task of redressing this deficient *status quo* by developing transnational law[20]. The founding members were encouraged by their long-standing work on the PEICL (*Principles of European Insurance Contract Law*)[21], which, as transnational law, have achieved considerable international impact despite the European frame of reference – also thanks to the translation into 17 languages.[22] The draft of the PRICL follows the methodological approach of the preparation of the PEICL, which in turn was inspired by the *US Restatements of the Law of the American Law Institute*. The PRICL group scientifically reviewed the sources of law on the basis of a transnational approach in order to reflect a globally common acquis on reinsurance law. However, a common acquis on reinsurance law or the reinsurance practice cannot always be taken as a basis since known solutions are divergent and occasionally conflicting. However, it often becomes apparent that one of the practiced solutions tends to correspond to modern assessments and requirements more advantageously.

12 The contracting parties regularly agree on a binding choice of law. In the absence of a choice of law, the contract is subject to an objective connecting factor according to the conflict-of-laws. In this case, Art. 4 of the Rome I Regulation leads to the law at the seat of the reinsurer. However, it is highly controversial whether this rule should be deviated from by means of an escape clause in favour of the law at the seat of primary insurer. Cf. *Looschelders* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, 2nd edn., Munich 2017, vol. 3, reference number 30 (Internationales Versicherungsvertragsrecht) paras. 157 et seqq.

13 *Raape*, Internationales Privatrecht, 5th edn., Berlin 1961, p. 90 (*„Sprung ins Dunkle"*).

14 *Dreher* in Prölss/Dreher (eds.), VAG, 13th edn., Munich 2018, § 298 para. 120.

15 Expressly *Bähr* in Kaulbach/Bähr/Pohlmann (eds.), VAG, 6th edn. Munich 2019 § 298 para. 28; cf. *Brand* in Baroch Castellvi/Brand (eds.), VAG, Baden-Baden 2018, § 298 para. 12; supposedly as well *Dreher* in Prölss/Dreher (eds.), VAG, 13th edn., Munich 2018, § 298 para. 120.

16 Accordingly, No. 121 MaGo circular letter (BaFin-Rundschreiben 2/2017 (VA) – Mindestanforderungen an die Geschäftsorganisation von Versicherungsunternehmen [MaGo] of 25th January 2017, amended on 2nd March 2018) addresses the effectiveness of reinsurance contracts under stress conditions. Cf. *Bork*, Tension of Reinsurance: Die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers (translated: Tension of Reinsurance: Follow-the-Settlements and the Primary Insurer's Discretion in Claims Handling), Tubingen (in print), Kap. 7 B III.

17 *Wandt/Gal*, ICIR Annual Report 2016–2017, p. 60 (61): „Such obscurity of the contractual content of the reinsurance agreement poses a severe risk under the Solvency II-System as the uncertainty (of the scope) of coverage might be translated by the supervisor into the necessity of surcharges, capital add-ons and the like", available at http://www.icir.de/fileadmin/Documents/ICIR/Media_and_Annual_Reports/ICIR_Annual_Report_206-17__6MB_.pdf (last accessed 30th July 2019).

18 With regard to the reasons *Gal* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, 2nd edn., Munich 2017, vol. 3, reference number 130 (Schiedsgerichtsbarkeit und Versicherung) para. 8; cf. also *Geiger*, The Comparative Law and Economics of Reinsurance, Baden-Baden 2000, p. 165; *Noussia*, Reinsurance Arbitrations, Berlin/Heidelberg 2013, pp. 14 et seq.; *Stammel*, Waving the Gentlemen's Business Goodbye: From Global Deals to Global Disputes in the London Reinsurance Market, Frankfurt et al. 1998.

19 Exceptions include, e.g. the commentary by *Schwepcke* in Langheid/Wandt (eds.), Münchener Kommentar zum VVG, 2nd edn., Munich 2017, vol. 3, reference number 110 (Rückversicherungsrecht) paras. 57–59 (borrowed legal principles from non-German law for German contract law).

20 *Heiss*, Transnational Insurance Law – Eine Skizze in Kronke/Thorn (eds.), Grenzen überwinden – Prinzipien bewahren: Festschrift Bernd von Hoffmann, Bielefeld 2011, pp. 803 et seqq.

21 *Basedow/Birds/Clarke/Cousy/Heiss/Loacker* (eds.), Principles of European Insurance Contract Law (PEICL), 2nd edn., Cologne 2016.

22 See the references to the scholarly writings on the PEICL at https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/publications.html (last accessed on 30th July 2019) and *Wandt/Gal*, Europäisierung und Transnationalisierung im Versicherungsrecht in Law Faculty Goethe-University Frankfurt (ed.), 100 Jahre Rechtswissenschaft in Frankfurt – Erfahrungen, Herausforderungen, Erwartungen, Frankfurt 2014, pp. 629–654.

The absence of sources of law gives outstanding weight to international contract practice. In this respect, it is necessary to identify market practices and to review their appropriateness and fairness. Therefore, the draft of the PRICL is crucially based on the practical experience of various *Advisory Groups* (reinsurers, primary insurers and reinsurance brokers) and *Special Advisors*.

IV. Objectives and Purposes of the PRICL

Objectives and purposes of the PRICL have already been indicated by the remarks above. The PRICL are intended to provide the contracting parties with a globally-applicable set of rules, developed on a broad international basis. By means of their choice of law, the parties have the possibility to arm the PRICL with binding effect for their contractual relationship. A further objective is to create scientifically sound transparency of reinsurance contract law, in the academic interest, in the interest of the contracting parties and in the interest of insurance supervision as well as its protected objects.

The PRICL – if agreed as applicable law or *Rules of Law* by the contracting parties – facilitate the application of the law, create greater legal certainty and offer a legal framework neutral to all parties involved. The application of the law is simplified as the contracting parties can concentrate on eventual particularities of the specific reinsurance contract on the basis of the agreed applicability of the PRICL. The PRICL also provide greater legal certainty as they fill the vacuum of national laws with formulated and commented rules. Greater legal certainty is even achieved in cases where the contracting parties deviate from specific PRICL rules as the parties no longer contract in a legal vacuum but are now able to compare the contractual deviation with a formulated and commented frame of reference. In addition, the legal framework is neutral as it no longer is an expression of one specific national legal system dictated by one party – which would be the case (resp. is the case now) if, under the rules of the conflict-of-laws, the place of residence of one contracting party or according to a choice of law, depending on the stronger economic bargaining power of one of the contracting parties, is decisive.

Even in case of a reinsurance-specific dispute, which is not governed by the PRICL due to the absence of such a choice of law, the PRICL can provide guidance for courts and arbitral tribunals in the application of national law to the reinsurance contract as model rules of reinsurance practice furthering to arrive at globally recognised and practical solutions.[23]

V. Content and Structure of the PRICL

The model provisions, written in English, are divided into five parts (to date): *General Provisions, Duties, Remedies, Loss Allocation* and *Loss Aggregation*.

This overview already shows that the latest version of the PRICL covers the central parts of a reinsurance contract but does not represent a comprehensive codification of reinsurance contract law. The PRICL focus on central elements of a reinsurance contract. Completeness is dispensable, since reinsurance practice – in contrast to contract practice in mass contracts, particularly in the case of consumer participation – does not depend on an *en bloc* system of dispositive provisions.

1. General Provisions, Chapter 1

The *General Provisions* of the PRICL must be understood as a general part. Chapter 1 contains provisions on applicability, interpretation and interaction with different sources of law.

The PRICL are not an act passed by legislation but a so-called *Soft Law*[24] developed by practitioners and scholars. Therefore, they are not applicable by virtue of the existence of a reinsurance contract with the seat of the contracting parties in different States,[25] nor do they constitute applicable law in a narrow sense.[26] Instead, the PRICL are exclusively applicable by private autonomous agreement of the parties (so-called "opting in") to a reinsurance contract (within the meaning of Art. 1.2.1[1]).[27] The possibility to agree on the applicability of the PRICL results from two dogmatic approaches: On the one hand, the rules of private international law applicable to the individual case can allow the parties to choose the PRICL as applicable law.[28] If the applicable national law does not recognise a choice of *Rules of Law* as a choice of law, the PRICL, nevertheless, apply in the case of a contractual agreement; in this case, however, within the framework of the contract law applicable under conflict-of-laws, by way of private autonomous deselection of dispositive law.[29]

In the interest of legal certainty, the PRICL provide model provisions for their inclusion either by a conflict-of-laws choice or by a substantive-law choice.[30] However, a choice of the PRICL does not have to be expressly. The PRICL can also be chosen impliedly where the interpretation of the reinsurance contract as a whole points towards the application of the PRICL.[31]

If the parties agree on the PRICL, the PICC *(Principles for International Commercial Contracts)* drawn up by UNIDROIT shall also apply.[32] The PICC[33] are also *Soft Law* and, as such, only applicable via a choice of law (conflict-of-laws or substantive-law choice). They contain provisions on general questions of contract law for international commercial contracts *(lex mer-*

23 PRICL, Introduction, p. 5.

24 On the traditional classification of the term in international law *Weil*, Towards Relative Normativity in International Law?, American Journal of International Law, vol. 77, 1983, p. 413; on the applicability of *Soft Law* taking into account the current state of research *Guzman/Meyer*, International Soft Law, The Journal of Legal Analysis, vol. 2, 2010, p. 171; on the classifying presentation and perspective view of a European unification of insurance law *Loacker*, Versicherungsrecht (VersR) 2009, p. 289.

25 E.g. the UN-Convention on Contracts for the International Sale of Goods (CISG) as national law through ratification, Art. 1(1) CISG.

26 Art. 1.1.1 (C8).

27 Art. 1.1.1 *(Substantive scope of application)*.

28 Art. 1.1.1 (C7). See sec. 1051 (1) ZPO (*Zivilprozessordnung* – Code of Civil Procedure) as well allowing for the choice of internationally elaborated *Rules of Law*; *Voit* in Musielak/Voit (eds.), ZPO 16th edn., Munich 2016, § 1051 para. 2 with further references also outlining the contrary view.

29 Art. 1.1.1 (C9). The same then applies to the further reference to the PICC.

30 Art. 1.1.1 (C18); both in versions that provide for the applicability of PRICL including PICC in the form of a choice of law (I4) and in versions that provide for the applicability of PRICL as part of the reinsurance contract itself (I5).

31 Art. 1.1.1 (C17).

32 Art. 1.1.2 *(External gaps)*.

33 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (last accessed 30th July 2019).

catoria). Thus, they perfectly supplement the specific provisions of the PRICL for reinsurance contracts where questions of general contract law are at issue. This way, a choice of the PRICL will regularly render the recourse to national law redundant. With the PRICL and the PICC, the parties can subject their contractual relationship to comprehensive transnational law developed on a broad and balanced international basis.

The PRICL themselves are dispositive.[34] Therefore, the contracting parties may agree that only parts or even individual provisions of the PRICL are applicable to their contract. They can also modify the content of the PRICL provisions. The PRICL do not seek to restrict the freedom of the parties to the reinsurance contract. Their aim is to provide the parties with appropriate, balanced model provisions that are in line with their objective interests and international contract practice. The parties may choose these model provisions as *Soft Law* (as a whole or in parts) or they can make use of them as best-practice references when departing from the PRICL standards. However, it should be emphasised that the parties (having agreed on the applicability of the PRICL) may modify the details of the principle of good faith (in its reinsurance-specific form) but – just as at the level of national law – they cannot deselect it as a whole.[35]

The applicability of national, international or supranational mandatory provisions governing the specific reinsurance contract remains unaffected even if the PRICL are applicable.[36] This explicit reservation applies particularly to regulatory requirements, insolvency and data protection regulations.[37]

2. Duties, Chapter 2

Paramount for the legal practice is the second chapter of the PRICL, which provides for the *Duties* of both parties. Eventually, clauses on the duties of the contracting parties are at the heart of a reinsurance contract itself.

The model scheme of the central duties of the contracting parties is carried out on a different basis and with different objectives in comparison to other contract types defined in statutory law. In the case of classic contract types, e.g. sales contracts, the codification of duties is often the result of decades of contract practice, and more importantly: decades of legal practice and jurisprudence. On this basis, the legislator usually seeks to codify the duties (and the legal consequences of their violation) as comprehensive and detailed as possible. In addition, the scope and depth of a regulation of certain contract types, in particular consumer contracts, are determined – to a large extent – by the intention to protect a weaker party. Therefore, the classic contract types are typically concerned with the most comprehensive and detailed possible regulation of contractual duties, primarily for reasons of protection.

The reinsurance contract already lacks the basis for a comparable legislative and judicial approach (with the constant refinement of the provisions regularly associated with this approach). The PRICL's canon of duties is not directed towards protection-oriented detail but towards simplified and, yet, as safe as possible application of the law in the mutual interest of the professional contracting parties.

Section 1 initially lays down duties in general, which are reminiscent of general contract law but which are given particular attention within the framework of the PRICL, as specific reinsurance-related have to be considered.[38] The principle of utmost good faith *(uberrima fides)* is of outstanding importance for the reinsurance relationship and forms a specific extension of general contractual requirements (see below VI 3). For their part, other general duties are manifestations of the principle of good faith. Specifically, the confidentiality of the information provided during the performance of the contract[39] as well as making reasonable and diligent efforts in the event of a dispute[40] are paramount.

Section 2 addresses the primary insurer's pre-contractual duty of disclosure,[41] which also requires reinsurance-specific consideration even if the purpose is somewhat similar to the primary insurance.

Section 3 describes both duties of the primary insurer and duties of the reinsurer during the performance of the contract, including: premium payment, contractual documentation (particularly important in the light of commonly used *slips*), notification (particularly in the event of an increase in risk) and the reinsurer's right to carry out inspections.

Section 4 separately deals with duties during claims handling and performance. It addresses claims handling and notice of claims by the primary insurer as well as liability and timely payment of reinsurance claims by the reinsurer.

3. Remedies, Chapter 3

Necessary complements to the catalogue of duties are the provisions on *Remedies* for breaches of duties. On this, *Chapter 3* firstly contains a general provision, which principally applies to every breach of any duty.[42] This technique ensures that no breach of duty remains without legal consequence.

The available general remedies follow classical contract law instruments and exhaust in a claim for performance and/or damages. In this respect, the PRICL are largely synchronised with the remedies of the PICC. For this reason, the PRICL refer to corresponding sections of the PICC where questions of detail are affected (e.g. with regard to the definition of damage). Consequently, the PRICL restrict themselves to further explanations on how the referred PICC provisions match with reinsurance particularities in the *Comments* to Art. 3.1.

In accordance with reinsurance practice, the PRICL principally prioritise the maintenance of the reinsurance contract. Consequently, the adequate remedy is a right to terminate the contract which only arises if qualifying requirements (i.e. "if the party cannot reasonably be expected to uphold the contract") are met.

34 Art. 1.1.3 *(Exclusion or modification of the PRICL)*.
35 Art. 1.1.3 (C1).
36 Art. 1.1.5 *(Overriding mandatory rules)*.
37 In excerpts, see the Illustrations to Art. 1.1.5 (C5).
38 Cf. Art. 2.1.1 E.
39 Art. 2.1.3 (*Confidentiality*).
40 Art. 2.1.4 *(Dispute resolution)*.
41 Art. 2.1.2 *(Duty of utmost good faith)*.
42 Art. 3.1 *(Remedies for breach of contract)*.

An extension of these general remedies is only granted with respect to a breach of the primary insurer's pre-contractual duty of disclosure. Thus, Art. 3.2 provides for a more differentiated remedy, which will be examined in more detail in the context of the pre-contractual duty of disclosure (below VI 4 b).

4. Loss Allocation and Aggregation, Chapter 4 and 5

The risk description and coverage of a reinsurance contract must be reserved for the individual reinsurance agreement, i.e. they are not open to a standardised provision within the PRICL. However, some risk-specific clauses in reinsurance contracts can – at least partly – be generalised. In particular, this applies to *Loss Allocation*, i.e. agreements answering the question which losses (out of many) are covered, and *Loss Aggregation*, i.e. agreements on the confluence of losses into a single loss. In both areas, reinsurance practice is characterised by vague terminology, various understandings of terms and, as a result, a high degree of legal uncertainty.

Since agreements on loss allocation are individually formulated as part of the risk description in each reinsurance contract, the PRICL are confined to the description of the characteristics of the concepts "losses occurring during" and "risks attaching during", which are regularly used in reinsurance contracts, in order to ensure conceptual and dogmatic clarity as a basis of the contractual agreement.[43]

A similar restriction follows with regard to the aggregation of losses. Here, the popular methods of "event-based aggregation" and "cause-based aggregation" are addressed and the characteristics of these different methods are described. Cases in which the parties agree on a different aggregation criterion must remain unregulated. However, even in these scenarios the detailed *Comments* and *Illustrations* to the PRICL provisions may also provide valuable guidance.[44]

VI. Selected Features of the PRICL

In the following, selected features of the PRICL, which are either in the spotlight due to their significance for the reinsurance practice or due to their specific drafting in the PRICL, will be described in more detail.

1. Interpretation

The General Chapter of the PRICL contains specific interpretation rules specifying the way that the PRICL are to be interpreted.[45] When interpreting the PRICL, the international character of reinsurance must always be taken into account. Furthermore, the purposes pursued by the PRICL must also be observed, in particular, when promoting sensitivity for the principle of good faith and the uniform application of the PRICL. The uniform application of the PRICL is important against the background of the pursued purpose of the unification of law through optional transnational *Soft Law*. However, this methodological access is not PRICL-specific but corresponds to traditional rules of interpretation in international commercial law, such as Art. 1.6 PICC or Art. 7 UN-Convention on Contracts for the International Sale of Goods (CISG).

Only to a limited extent, the PRICL compete with reinsurance trade usages. When drafting the PRICL, reinsurance practice was taken into account. Yet, it became apparent that even widely accepted reinsurance trade usages are usually extremely vague and, therefore, not very helpful when deciding a reinsurance dispute. A good example of this is the follow-the-settlements obligation of the reinsurer, which describes the reinsurer's commitment to (settlement) decisions of the primary insurer. Although the follow-the-settlements obligation is generally recognised as a reinsurance trade usage,[46] there is no agreement on its specific content (see below VI 5). This is where the PRICL enter the stage in order to provide the follow-the-settlements obligation with substantial contours.

Generally speaking, this means that the PRICL integrate existing trade usages in their worded *Articles* and, if the PRICL are applicable, supersede them. However, trade usages also retain a specific significance within the framework of PRICL, as clarified by Art. 1.1.4. If there is a usage agreed between the parties or a practice established between the parties to the reinsurance contract, the PRICL call for the decisiveness of such usage resp. practice because the parties have agreed on their application.[47] In addition, generally accepted trade usages, even if they have not been agreed upon or have not been practised to date by the parties to the specific reinsurance contract, must always be taken into account when interpreting the contents of the contract.[48] However, in the interpretation of the PRICL one will have to keep in mind that the PRICL are intended to replace indefinite usages and practices in the interest of legal clarity and legal certainty.[49]

2. Closing Gaps

With regard to closing the gaps of the PRICL, the PRICL strictly[50] differentiate between internal and external gaps.

Issues of external gaps are issues of contract law outside the scope of the PRICL.[51] This affects all contractual issues that are not specific to reinsurance. According to Art. 1.1.2, the PICC qualify to fill (contractual) external gaps unless the parties have excluded their application. If the PICC themselves reveal gaps, internal gaps must be filled in accordance with Article 1.6(2) PICC, i.e. as far as possible in accordance with the basic general principles of the PICC and external gaps – in relation to the PICC – in accordance with the applicable law (determined by the conflict-of-laws).

43 Art. 4.1 *(Scope of application)*.

44 With respect to aggregation explicitly in Art. 5.1 (C4).

45 Art. 1.1.6 *(Interpretation and internal gaps)* und Art. 1.1.2 *(External gaps)*.

46 In summary, *Bork*, Tension of Reinsurance: Die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers (translated: Tension of Reinsurance: Follow-the-Settlements and the Primary Insurer's Discretion in Claims Handling), Tubingen (in print), Kap. 3 C II.

47 Art. 1.1.4(1) *(Usages and practices)*.

48 Art. 1.1.4(2) *(Usages and practices)*.

49 This must be seen as an essential difference to general principles of contract law, as expressed e.g. in Art. 1.6 (C6) PICC (Art. 1.1.4 [C5]).

50 Art. 1.1.6 (C2).

51 For non-contractual matters, the applicable law must always be determined independently (either as a uniform international law or out of conflict-of-laws).

By contrast, internal gaps of the PRICL are gaps that concern the area of application specified by the PRICL themselves („issues within the scope of the PRICL but not expressly settled by them").[52] Consequently, these gaps are unresolved issues specific to reinsurance, wherefore a recourse to the PICC cannot be feasible. As far as possible, internal gaps shall be filled in accordance with the basic general principles of the PRICL – methodically in parallel with the gapfilling of internal gaps in the PICC. According to the *Comments*, this can also require an analogous application of the provisions or even revealing of the core of a provision, which, thus, can be applied to instances not explicitly addressed by the PRICL.

3. Utmost Good Faith (Uberrima Fides)

According to PRICL, the parties to the contract are mutually obliged to utmost good faith during the entire contractual relationship (Art. 2.1.2). The outstanding significance of this provision is already apparent from its systematic position as an entry provision to the obligations in general and from the fact that numerous *Comments* on *Articles* on specific duties indicate that they are a result of the general duty of utmost good faith.[53]

In English law, more precisely in English insurance contract law, the principle of utmost good faith goes back to the ground-breaking decision of *Carter v. Boehm in* 1766.[54] There, the principle was initially pioneering the affirmation of a pre-contractual duty of disclosure on the part of the policyholder, which was motivated by a need of protection of the insurer. The significance of this decision becomes apparent against the background that in English general contract law there has been no principle of good faith up to that date (and also for a long time afterwards) comparable to the continental European tradition. However, since *Carter v. Boehm*, the concept of utmost good faith broke fresh ground in English insurance contract law and finally found its way into legislation.[55] Regardless of the frequently complained uncertainty of the concept, it has also influenced the legal development of the US and numerous *Common Law* States[56] as well as established itself internationally as *the* principle of reinsurance contract law.[57] Even the German reinsurance literature sometimes adopts the term "utmost good faith" by making a blanket reference (usually to English case law).[58] In view of the strong influence of English case law on international reinsurance practice and the resulting international spread of the utmost good faith doctrine, the PRICL are also following suit, not least because of the intended acceptance of its model in the Anglo-American legal area.

The principle of utmost good faith *(uberrima fides)* – apart from occasional references in German reinsurance contract law – is uncharted in German law.[59] Hence, for a German user of the PRICL, the question arises as to the significance of the adjectivistic supplement to the requirement of good faith (i.e. "utmost" good faith). In this regard, it should be noted that the understanding of said principle does not differ from the principle of good faith in German insurance contract law. The decisive factor for this conclusion is that the principle laid down in sec. 242 BGB is sufficiently far-reaching to give allegiance duties specific characteristics, depending on the type of contract in question. In German law, it is established that the principle of good faith is of particular importance for the insurance contract in general[60] and for the reinsurance contract in particular[61].

The PRICL should also be understood in this way as they recognise the reason for "utmost" good faith in the aleatoric character of insurance and reinsurance in particular.[62] Therefore, within the framework of the PRICL, the German legal practitioner must not expect excessive allegiance duties. As is the case under German law, primary insurers and reinsurers must appropriately take into account the interests of the other party, i.e. in a reinsurance-specific manner.[63]

52 Art. 1.6.1(2).

53 This idea is repeated declaratorily in Art. 2.1.4 (C1), Art. 2.2.1 (C1), Art. 2.3.1 (C4), Art. 2.4.1 (C1) and Art. 2.4.2 (C1).

54 *Carter v. Boehm* [1766] 3 Burr 1905 (1909). See the contributions in Han/Pynt (eds.), Carter v Boehm and Pre-Contractual Duties in Insurance Law, Oxford 2018.

55 Sec. 17 of the Marine Insurance Act 1906 (as amended on 12th August 2016).

56 With reference to the situation in other countries Art. 2.1.2 (C3 et seq.).

57 With regard to „utmost good faith" in German reinsurance law, *Bork*, Tension of Reinsurance: Die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers (translated: Tension of Reinsurance: Follow-the-Settlements and the Primary Insurer's Discretion in Claims Handling), Tubingen (in print), Kap. 6 D; *Gerathewohl et al.*, Rückversicherung – Grundlagen und Praxis, vol. 1, Karlsruhe 2018, p. 458; *Cannawurf/Schwepcke* in Lüer/Schwepcke (eds.), Rückversicherungsrecht, Munich 2013, § 8 para. 47.

58 *Looschelders*, Versicherungsrecht (VersR) 2012, p. 1 (2 et seq.), who explains the parallelism of utmost good faith and good faith but assumes different meanings. See also *Liesegang*, Die vorvertragliche Anzeigepflicht im englischen Versicherungsvertragsrecht, Karlsruhe 1994, p. 124.

59 The principle has, however, been reflected in sec. 13 of the *Allgemeine Deutsche Seeversicherung-Bedingungen* (ADS) of 1919, which, in the absence of a statutory regulation of maritime insurance in German law, had acquired quasi-statutory significance. According to this provision, all parties involved must act in good faith „to the highest degree" – but already relativised with regard to German law *Schlegelberger*, Seeversicherungsrecht, 1960, § 13 paras. 1 et seq. In this context, *Carter v Boehm* is referred to as an exception in the more recent German doctrine and it is complained that no one in Germany has dealt more closely with the concept of *utmost good faith*; see *Remé*, Das Seeversicherungsrecht bleibt Kaufmannsrecht, lecture held on 26th June 2007 before the *Deutscher Verein für internationales* Seerecht, available at http://www.seerecht.de/wp-content/uploads/dvis-vortrag-20070626-das-seeversicherungsrecht-bleibt-kaufmannsrecht.pdf (last accessed on 30th July 2019).

60 RGZ 3, p. 21 (23); RGZ 16, p. 121 (122); RGZ 19, p. 216 (227); BGH of 17.12.1986 – IVa ZR 78/85, BGHZ 99, p. 228 = Versicherungsrecht (VersR) 1987, p. 278; BGH of 3.11.1999 – IV ZR 155/98, VersR 2000, 171; BGH of 12.3.2003 – IV ZR 278/01, BGHZ 154, 154 (170) = VersR 2003, p. 581; BGH of 21.9.2005 – IV ZR 113/04, VersR 2005, p. 1673; BGH of 29.4.2009 – IV ZR 201/06, VersR 2009, p. 980. Cf. *Wandt/Bork*, Pre-Contractual Duties under the German Insurance Law, pp. 261 et seqq. in Han/Pynt (eds.), Carter v Boehm and Pre-Contractual Duties in Insurance Law, Oxford 2018.

61 *Gerathewohl et al.*, Rückversicherung – Grundlagen und Praxis, vol. 1, Karlsruhe 2018, p. 458; *Cannawurf/Schwepcke* in Lüer/Schwepcke (eds.), Rückversicherungsrecht, Munich 2013, § 8 paras. 46 et seqq.; *Looschelders*, Versicherungsrecht (VersR) 2012, p. 1.

62 Cf. Art. 2.1.2 (C7).

63 *Cannawurf/Schwepcke* in Lüer/Schwepcke (eds.), Rückversicherungsrecht, Munich 2013, § 8 para. 49.

4. Pre-contractual Duty of Disclosure and Legal Consequences of its Breach

a) Pre-contractual Duty of Disclosure

First of all, with regard to the pre-contractual duty of disclosure as a unilateral duty of the primary insurer,[64] Art. 2.2.1 states the supposed obviousness: even before the conclusion of the contract, the primary insurer as the future reinsured must notify the reinsurer of all information, which are known to it or should have been known to it, provided that the knowledge of said information is material for the reinsurer's assumption of the risk. „Material" information means information that affects the decision of a reasonable and prudent reinsurer as to whether, and if so, on what terms and conditions it accepts the risk. The materiality of the information is, thus, an unconditional prerequisite for the primary insurer's duty of disclosure. One does not need to glance into the crystal ball to assume that, above all, controversies will arise in practice with regard to the criterion of materiality and the soft factors defining it. Therefore, the PRICL put forward numerous *Illustrations*, which draw a non-conclusive but meaningful picture of materiality.[65]

However, with this supposedly obvious provision, the PRICL set the course of the pre-contractual duty of disclosure. Hence, it is not only positive knowledge of the primary insurer that is important,[66] but also whether the primary insurer should have recognised that the undisclosed information would have influenced the reinsurer's decision on the contract.[67] The decisive factor for assessing materiality is not the subjective view of the specific reinsurer but the objective standard of *a* reasonable and prudent reinsurer.[68]

b) Legal Consequences of the Breach of this Duty

Art. 3.2 attaches the legal consequences to the breach of the pre-contractual duty of disclosure. These specific remedies displace the general remedies already presented in Art. 3.1 and are restricted to a breach of Art. 2.2.1 only. Art. 3.2 is also predominated by the guiding principle to maintain the contract. This special provision intends to offer the reinsurer tailor-made legal remedies which are equivalent to the importance of the duty of disclosure. The differentiated provision balances the interests of the parties and reflects the content of modern developments in primary insurance and reinsurance as in particular recently defined in Chapter 4 Schedule 1 UK Insurance Act 2015.

First of all, the PRICL distinguish, for the purposes of the legal consequences, terms and conditions under which the reinsurer would have concluded the contract had it known the undisclosed information at the time of conclusion of the contract:[69]

If the reinsurer had concluded the contract at the same premium but under different terms and conditions (in particular, different risk descriptions and risk exclusions), the contract remains in force and is merely amended, Art. 3.2(1). The "other conditions" retroactively become part of the contract by the declaration of the reinsurer. This applies also to an exclusion clause with the consequence that risks (formerly) covered are excluded even if they have already materialised before this adjustment of the contract.

If the reinsurer had concluded the contract on the same terms and conditions but demanded a higher premium with full knowledge of the risk, retrospective adjustment of the premium is usually not a solution that is in line with the interests of the reinsurer. In view of the purpose of the pre-contractual duty of disclosure, which is to provide the reinsurer with the basis for an appropriate equivalence between risk and premium, it is obvious that the primary insurer cannot simply be placed in a position as if it had duly fulfilled its duty of disclosure by adjusting the premium. This solution would have no preventive effect whatsoever and would ignore the legal fact that breaches of the duty of disclosure often remain unknown to the reinsurer, to its economic disadvantage. Therefore, it is generally accepted for the reinsurance contract – with no difference to the primary insurance contract – that the remedy for a breach of the pre-contractual duty of disclosure must take account of the preventive concept by means of a noticeable sanction that controls behaviour in a preventive manner. On the other hand, it is in the interest of the parties to a reinsurance contract to uphold the contract even in the event of a breach of the pre-contractual duty of disclosure – if possible with adapted content. This leads to the following differentiated legal consequences of Art. 3.2(2) in case that the premium would have been higher:

The reinsurer is entitled to reduce the amount to be paid on a claim arising from a loss that occurred before becoming aware of the breach of the duty of disclosure proportionally to the premium, which would have been owed if the duty of disclosure had properly been fulfilled (sanction for the past).

The contract is adjusted for the remaining contractual period after becoming aware of the breach of the duty of disclosure, i. e. the reinsurer must grant full coverage for the future against payment of the *pro rata* increased premium (adjustment for the future).

Additionally, the primary insurer may inform the reinsurer within reasonable time after the contract has been adjusted that it will pay the increased premium not only *pro rata* for the future but for the entire contractual period; as a result, the primary insurer will also obtain full reinsurance coverage for losses that have already occurred, of which it had no knowledge when notifying the reinsurer that it wished to pay the full premium. The primary insurer's counterclaim is an innovative PRICL-solution. It is the result of the fundamental interest of both parties to the contract in keeping the consequences of a breach of contract as low as possible, in other words: to come as close as

64 Art. 2.2.1 (*Duty of disclosure*).

65 E.g. under Art. 2.2.1 (C8) (I3-I7).

66 Art. 2.2.1 (C16 et seq.).

67 Art. 2.2.1 (C6 et seqq.).

68 Art. 2.2.1 *(Duty of disclosure)*. However, Art. 2.2.1 (C9) clarifies that information is also not material (with the consequence that a duty of disclosure does not arise) if it is proven that the specific reinsurer would not have made its decision to conclude a contract dependent on the respective information. This reservation, which is not covered by the wording of the provision, can only be justified by a teleological interpretation based on good faith. Eventually, such a reservation is not even necessary as the legal consequences provided by Art. 3.2 always presuppose causality for the decision of the specific reinsurer.

69 Art. 3.2 *(Remedies for breach of pre-contractual duty of disclosure)*.

possible to the actual purpose of the contract even in the event of a breach of contract.

A reinsurer's right to avoid the contract only exists in the event of a fraudulent breach of the duty of disclosure or if the reinsurer would not have concluded the contract at all had it known the undisclosed information (Art. 3.2 [3]). In these extraordinary constellations, it is necessary to protect the reinsurer's freedom to conclude contracts against the primary insurer having breached its duty.

The reinsurer may demand additional compensation for damage resulting from the breach of the duty of disclosure, which have not already been compensated by the adjustment or avoidance of the contract (i.e. additional damages) (Art. 3.2[4]).

5. Follow-the-Fortunes and Follow-the-Settlements

The PRICL distinguish between follow-the-fortunes and follow-the-settlements.[70] Both obligations decisively determine the conditions of the reinsurer's liability. The follow-the-fortunes obligation of the reinsurer relates to the underwriting risk of the primary insurer in which the reinsurer participates through reinsurance. The follow-the-settlements obligation, which is no less significant for the quantitative scope of the reinsurer's liability, describes the reinsurer's commitment to the primary insurer's contractual decisions, in particular, its decisions in claims handling in the primary insurance relationship.

With the separation between follow-the-fortunes and follow-the-settlements, the PRICL are in line with German reinsurance contract law, knowing that German law does neither provide clarity to the requirements, which trigger the follow-the-settlements obligation, nor to its scope (limits).[71] The terms "follow-the-fortunes" and "follow-the-settlements" are also used in Anglo-American legal systems, although there is not always a difference in meaning as referred to above. Often, the terms are charged with the same or a similar content and are not differentiated precisely.

The PRICL strive for unambiguous terms and connotations in the interest of legal certainty. The conceptual differentiation, which is described in detail in the *Comments* to the provision, already promises more accuracy and clarity on contractual agreements referring to these concepts.[72] The wording of Art. 2.4.3, only stipulating specific requirements for the follow-the-settlements obligation, and the *Comments* also emphasise – particularly with regard to English case law – that the different terms also stand for different meanings.[73]

The requirements for the reinsurer's follow-the-settlements obligation are that the primary insurer's payment is covered by the reinsurance contract and that the assumption of coverage under the primary insurance contract is reasonable ("arguably covered by the primary insurance contract"). Thus, the PRICL follow the solution favoured by the majority in English law, even though (with regard to the contours of the follow-the-settlements obligation) most diverse approaches are globally represented. The adaptation of English law is well justifiable in terms of content and – in view of the international influence of English reinsurance law – serves the desired unification of law through the acceptance of the PRICL. On the issue of which payment is "arguably within", the PRICL name individual criteria,[74] but on the other hand, strongly emphasise the primary insurer's discretion in claims handling.[75] As a result, the PRICL knowingly do not lead to a reassessment of the follow-the-settlements obligation but limit themselves to the reiteration of the *status quo*.

6. Cooperation Between Primary Insurer and Reinsurer

Only general cooperation duties are deliberately explicitly addressed by the PRICL – which, again, could also be derived from the principle of (utmost) good faith.[76] They refer to reinsurance claims handling – and, thus, do not stipulate an obligation to cooperate in claims handling in the primary insurance relationship, as opposed to the reference point of the follow-the-settlements requirements of Art. 2.4.3.

Therefore, the PRICL abstain from a concrete catalogue of cooperation obligations, as is regularly laid down in practice, depending on the type and form of reinsurance and the expectations of the reinsurance parties, individually and by means of various contractual clauses. Individual characteristics, common in reinsurance practice, are described in the *Comments* to Art. 2.4.1 and Art. 2.4.4, including, e.g. the timely and comprehensive notice of claims by the primary insurer as well as the immediate processing of a notification and reasonably prompt payment of the amounts to be paid on a claim by the reinsurer. It becomes clear that the PRICL do not provide for an extended cooperation duty on the part of the primary insurer or even for a right to control on the part of the reinsurer ("claims cooperation" and "claims control"). Due to the dispositive nature of the PRICL, however, an extended influence of the reinsurer may be contractually agreed upon. This often corresponds to the interests of the modern reinsurer having an interest in further control rights (again, depending on the type and form of reinsurance).

VII. Prospects

The PRICL will still have to assert themselves in reinsurance practice. However, it can already be said that with the choice of the PRICL, contracting parties are making a decision for greater clarity and greater legal certainty. With the PRICL, vague commercial practices, whose determination in the event of a conflict is dependent on arbitrators' and experts' potential ar-

70 Art. 2.4.3 *(Follow-the-settlements and follow-the-fortunes)*.

71 Comprehensively *Bork*, Tension of Reinsurance: Die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers (translated: Tension of Reinsurance: Follow-the-Settlements and the Primary Insurer's Discretion in Claims Handling), Tubingen (in print).

72 Art. 2.4.3 (C1-C11).

73 In particular Art. 2.4.3 (C2).

74 Art. 2.4.3 (C4): "In determining what constitutes an unreasonable settlement, due regard should be given to the risks faced by the reinsured if it does not settle, including bad faith suits by policyholders, investigation and punishment by regulators, the risk of worse outcomes at trial, and increased disputing costs".

75 So Art. 2.4.3 (C4): "If it cannot be said with positive assurance that after consideration of these factors, no reasonable person would support the amounts paid in settlement, the settlement should generally be considered sufficiently reasonable in amount and terms".

76 Art. 2.4.2 *(Claims handling by the reinsured)*.

bitrariness, regularly rendering the decision on the dispute unpredictable and occasionally also incomprehensible for the parties to the reinsurance contract,[77] are replaced by transparent model provisions, which are pre-formulated and explained in detail. The numerous reasons for more contract certainty[78] will not be repeated here.[79] In any case, it is time to take account of changing framework conditions, in particular, in supervisory law[80] but as well in reinsurance contract law. This is not an imposed juridification of the reinsurance sector but an offered simplification of the contract design, which still is in the hands of the contracting parties.

It can already be said that the PRICL, as a uniform reference framework with a uniform legal terminology, will considerably intensify the scientific discourse on reinsurance law. This is supported by the fact that the work on the PRICL has created a worldwide network of legal scholars and practitioners with an interest in the further development of reinsurance law on a project-by-project basis. The first scientific fruits of the collaboration in the PRICL research group – and the findings of these explorations – in the form of an in-depth scientific study of central questions of reinsurance contract law are already available,[81] others are close to completion.

With respect to the future of the research project itself: the PRICL do not aim for a complete system of reinsurance contract law but limit themselves to the areas relevant to reinsurance practice. These include, however, a number of contractual issues that are not yet addressed in the current version of the PRICL – such as back-to-back coverage, coverage for extra-contractual liability of the primary insurer or limitation periods. To this end, further model provisions will be developed in the second phase of the research project (2020–2022), fortunately with research funding already approved by the national funding institutions of Germany and Switzerland, and again in cooperation with UNIDROIT.

Dr. Kevin Bork / Prof. Dr. Manfred Wandt, Frankfurt/M.*

77 *Gumbel*, Zeitschrift für Versicherungswesen (ZfV) 1988, p. 528 (528), who assumes that both reinsurance parties will always succeed in finding a suitable expert in the event of a conflict, who will prove a trade usage supporting the respective party's argument.

78 *Heiss*, From Contract Certainty to Legal Certainty for Reinsurance Transactions: The Principles of Reinsurance Contract Law (PRICL), Scandinavian Studies in Law, Vol. 64, 2018, p. 92 (92 et seqq.).

79 See above II–IV.

80 *Wandt/Gal*, ICIR Annual Report 2016–2017, p. 60 (reference provided in fn. 17).

81 *Bork*, Tension of Reinsurance: Die Folgepflicht des Rückversicherers im Licht des Regulierungsermessens des Erstversicherers (translated: Tension of Reinsurance: Follow-the-Settlements and the Primary Insurer's Discretion in Claims Handling), Tubingen (in print).

* The authors are members of the PRICL research group and rapporteurs of the third chapter (*Remedies*). *Dr. Kevin Bork*, trainee lawyer in the district of the Higher Regional Court Frankfurt/Main, accompanies the project as research assistant and holds a doctorate degree in reinsurance law. *Prof. Dr. Manfred Wandt*, Managing Director of the Institute for Insurance Law, is co-founder of the research group. The authors thank *Steven Schindler* for his valuable support.

Buchbesprechungen

Dirk Looschelders/Christina Paffenholz, Versicherungsvertragsrecht

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Sieben Jahre ist es her, seit *Dirk Looschelders* und *Christina Paffenholz* die Erstauflage des Buchs „Versicherungsvertragsrecht" auf den Markt gebracht und die zuvor bestehende Lücke geschlossen haben: Ein überschaubares und zugleich fundiertes, verlässliches Lehrbuch zum Versicherungsvertragsrecht fehlte seinerzeit. Anlass für die jetzt erschienene Neuauflage gaben vor allem die Umsetzung der IDD-Richtlinie (Versicherungsvertriebsrichtlinie[1]) durch Gesetz vom 20.7.2017[2], das durch die Solvency-II-Richtlinie veränderte Versicherungsaufsichtsgesetz (VAG) vom 1.4.2015[3] und die Fortentwicklung von Rechtsprechung und Literatur.

Dem Anspruch, allen Lesern den Einstieg in das Versicherungsvertragsrecht in seinen maßgeblichen Ausprägungen durch eine systematische, auf das Wesentliche beschränkte Aufbereitung zu ermöglichen, wird das Werk mehr als gerecht. Die gelungene Gliederung und der bewährte Aufbau der Erstauflage wurden beibehalten: Das Lehrbuch enthält neun Kapitel, angefangen mit Grundlagen, Ausführungen zum Versicherungsvertrag und zu AVB, einer Erläuterung der Versicherung für fremde Rechnung, einem Überblick zur Versicherungsvermittlung, zur Prämienzahlungspflicht des VN, zu den wichtigen Obliegenheiten und Risikoausschlüssen, der Rechtsstellung des Versicherers und zu besonderen Versicherungszweigen. Dem Leser wird das Versicherungsvertragsrecht einschließlich der Versicherungsvermittlung anschaulich nähergebracht und immer wieder anhand kleinerer praxisrelevanter Fälle veranschaulicht.

Dank des zum Buch gehörigen Download-Materials, das insbesondere Schaubilder sowie Fragen und Fälle umfasst, eignet sich das Werk hervorragend zum Einstieg in das komplexe Versicherungsvertragsrecht sowie zur kurzen Auffrischung des Wissens für Studierende und Auszubildende im Versicherungswesen. Aber auch dem „fertigen" Versicherungsrechtler und Praktiker kann das Buch durchaus Unterstützung sein, etwa um kurz noch einmal einzelne Problembereiche zu rekapitulieren. Denn trotz der gemäß Vorwort adressierten breiten Ziel-

1 Richtlinie (EU) 2016/97 des Europäischen Parlaments und des Rates vom 20.1.2016 über Versicherungsvertrieb (Neufassung) ABlEU 2016 L 26/19.

2 Gesetz zur Umsetzung der Richtlinie (EU) 2016/97 des Europäischen Parlaments und des Rates vom 20.1.2016 über Versicherungsvertrieb und zur Änderung weiterer Gesetze BGBl. 2017 I 2789.

3 Gesetz zur Umsetzung der Richtlinie (EU) 2016/97 des Europäischen Parlaments und des Rates vom 20.1.2016 über Versicherungsvertrieb und zur Änderung weiterer Gesetze BGBl. 2017 I 2789.