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An Optional Instrument for European Insurance Contract Law

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European Insurance Contract Law, European Insurance Contract, PEICL,Optional Instrument, European Commission, Rome I Regulation.

Abstract
The Principles of European Insurance Contract Law, also referred tousing the acronym PEICL, were published in September 2009. They are the result of ten years of academic work undertaken by the"Restatement of European Insurance Contract Law" Project Group. In the time since its establishment in 1999, the project has been transformed from being a stand-alone project to a part of the CoPECL (Common Principles of European Insurance Contract Law) network, drafting a specific part of the Common Frame of Reference. Having continually worked under the guiding principle that "the law of insurance [in Europe] must be one," it now represents a serious option for providing Europe with a single legal framework for insurance contracts.
Despite the European Council's proclamations that the Common Frame of Reference will remain a non-binding instrument, the implementation of one or more optional instruments in the future does not appear to beimprobable considering recent developments. The possibility of an optional instrument has been expressed more than once by the European Commission in its Action Plan and Communication on European Contract Law. Other indications in favour of an optional instrument include the European Parliament's repeated references to the Common Frame of Reference as providing, at the very least, a model for a future optional instrument, as well as the EESC's earlier proposal of an optional instrument as an alternative to standardising insurance contract law. The preparation by the EESC of another (own-initiative) opinion on European contract law is underway and its presentation is anticipated in 2010. Hence, the optional instrument is evidently the subject of serious political deliberation. Using Article 1:102, the Principles of European Insurance Contract Law represent a prototype for such an instrument.

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I. Introduction

The Principles of European Insurance Contract Law, also referred to using the acronym PEICL, were published in September 2009. They are the result of ten years of academic work undertaken by the "Restatement of European Insurance Contract Law" Project Group.[1] In the time since its establishment in 1999, the project has been transformed from being a stand-alone project to a part of the CoPECL (Common Principles of European Insurance Contract Law) Network, drafting a specific part of the Common Frame of Reference.[2] Having continually worked under the guiding principle that "the law of insurance [in Europe] must be one,"[3] it now represents a serious option for providing Europe with single legal framework for insurance contracts.

II. The Need for and Lack of Harmonisation

After the European Commission had withdrawn the amendment of the proposal relating to insurance contracts on 4 August 1993,[4] the harmonisation process in the area of substantive insurance contract law began to falter, despite advances being made in other areas of insurance law.[5] The initial incentive behind the Project Group's establishment was the opportunity to revive the harmonisation process in the field of insurance contract law. However, future attempts at harmonisation by the European Commission would, in the Project Group's opinion, require new impetus. Three milestones provided the necessary stimulus. First, in its decision of 4 December 1986,[6] the European Court of Justice allowed for the possibility of a single licensing system, which was later introduced formally by the Third Generation Insurance Directives.[7] Second, there was an increasing eagerness among insurance providers to offer cross-border services, which was proving costly for reasons detailed further below. Third, with a growing number of "euro-mobile citizens"[8] immigrating to, or temporarily residing in, other Member States, a greater demand was created for insurance products at a European level, i.e. insurance policies which could be taken from one Member State to another without legal hurdles along the way.[9]

Yet, hopes of achieving a complete internal insurance market by harmonising the conflict of laws had also been empty, as indicated by Fritz Reichert Facilides.[10] In fact, a comparison of the different insurance contract regimes in Europe has

1 Depending on the context involved, the group has been referred to using different names, such as "Innsbruck Group," "Insurance Group" or "Restatement Group"; for the purposes of this article the group shall be called the "Project Group."

2 For more information on this network, see www.copecl.org. The Common Frame of Reference is dealt with in more detail in point 3 below.

3 *Hans Möller* as quoted in Reichert-Facilides, F. 'Rechtsvereinheitlichung oder Rechtsvielfalt? Überlegungen vor dem Modell des Versicherungsvertragsrechts.' In Fritz Schwind ed. *Europarecht, IPR, Rechtsvergleichung* (Vienna: Verl. d. Österr. Akad. d. Wiss., p. 155, 1988).

4 Amendment of the proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contract [1980] OJ C355/30). With regard to earlier attempts of harmonisation of insurance contract law, see Basedow, J. 'The Optional Application of the Principles of European Insurance Contract Law.' In Fuchs, A. ed. *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)* (Heidelberg: Springer, 9:111, 2008).

5 Community legislation pertaining to insurance supervisory law established a system of single licensing, and issues regarding conflict of laws had been in part been unified/harmonised by the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consoli dated version) [1998] OJ C27/1 (see now the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1), the 80/934 /EEC: Convention on the law applicable to contractual obligations opened for sig nature in Rome on 19 June 1980 (consolidated version) [1998] OJ C27/34 (see now the 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) and the various directives on insurance law (for non-life insurance, see the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC [1988] OJ L172/1 and the Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228/1; for life assurance, the Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345/1; on 17 December 2009, article 7 of the Rome I Regulation replaced the conflict-of-law rules in the directives).

6 Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755.

7 The Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assur ance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) [1992] OJ L360/1 and the Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228/1.

8 The term "euro-mobile citizen" was coined by Jürgen Basedow in Basedow, J. 'Das österreichische Bundesgesetz über internationales Versicherungsvertragsrecht – Eine rechtspolitische Würdigung' in Reichert-Facilides, F. ed. *Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum (*Tübingen: Mohr Siebeck, p. 89, 1994).

9 For examples, see Heiss, H. 'Mobilität und Versicherung' *Versicherungsrecht* (p. 448, 2006).

10 See Reichert-Facilides, F. 'Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick'. In Reichert-Facilides, F. and Schnyder, A. K. eds. *Versicherungs recht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts.* (Basel: Helbing und Lichtenhahn, p. 10, 2000) and Reichert-Facilides, F. 'Europäisches Versicherungs vertragsrecht?' In Basedow, J. et al. eds. *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck, p. 119, 1998).

demonstrated that it is not possible to create an internal insurance market by means of private international law alone.[11] Jürgen Basedow, a founding member of the Project Group, and his research team in Hamburg undertook the comparative analysis and published the findings in three volumes as "*Europäisches Versicherungsvertragsrecht*"[12] in 2002 and 2003.

As a result of the lack of substantive harmonisation, the cross-border provision of insurance services is statistically still very rare.[13] Yet, even in the cases where a provider is internationally active, the business is typically carried out through subsidiaries or branch offices and the products sold in different countries are not the same as those on offer in the country of the insurer's domicile. This leads to insurance providers being restricted by the variations in national laws, consumers being prevented from having access to a full range of products, and the internal market consequently remaining incomplete.

Allowing the parties to determine, as the law applicable for the purposes of European international insurance contract law, the law of the insurer's domicile may be seen as a possible solution to these shortcomings. Yet, such a solution has its own inherent limitations. It would result in policyholders being deprived of the protection offered by the conflict-of-law rules, an outcome which is unacceptable on grounds of legal policy. Furthermore, this approach would in future lead to the policyholder, rather than the insurer (as at present), being reluctant to enter into cross-border transactions, especially due to the ensuing lack of legal protection. Thus, this solution clearly does not generate the desired effect of completing the internal market.[14]

II. The Common Frame of Reference

The Common Frame of Reference of European Contract Law was established following an announcement by the European Commission in its Action Plan on European Contract Law[15] in 2003 and Communication on European Contract Law[16] in 2004. Containing definitions and rules as well as accompanying comments and notes, the Common Frame of Reference is to be developed by using comparative legal analysis of the national contract laws in order to reach a set of rules forming a European contract law.[17]

While these rules will not be enacted as legislation and are therefore not binding in nature,[18] their importance should not be underestimated for the following reasons. First, the terminology and the systematic approach are clearly regarded as valuable and essential by the Commission for drafting future legislation with regard to contracts.[19] Second, the rules may prove to be a useful tool for the European Court of Justice in preliminary rulings[20] and national courts when interpreting legal provisions

11 See the analysis in Basedow, J. 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik.' In Reichert-Facilides, F. and Schnyder, A. K. eds. *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts (* Basel: Helbing und Lichtenhahn, p. 13, 2000).

12 Basedow, J. and Fock, T. eds. *Europäisches Versicherungsvertragsrecht,* (vols. I & II. Tübingen: Mohr Siebeck, 2002) and Basedow, J. and Fock, T. eds. *Europäisches Versicherungsvertragsrecht*, (vol. III. Tübingen: Mohr Siebeck, 2003).

13 See Basedow, J. 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik'. In Reichert-Facilides, F. and Schnyder, A. K. eds. *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts* (Basel: Helbing und Lichtenhahn, p. 17, 2000) in which a reference is made to data provided by EUROSTAT.

14 For more detail, see Basedow, J. 'Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik.' In Reichert-Facilides, F. and Schnyder, A. K. eds. *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts.*(Basel: Helbing und Lichtenhahn, pp. 20-21, 2000) and Heiss, H. 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG.' In Pohlmann, P. ed. *Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster* ("*Münsteraner Reihe*") (Karlsruhe: VVW. Issue 99, pp. 13-14, 2005).

15 Communication from the Commission to the European Parliament and the Council, 'A more coherent European contract law – An action plan', COM (2003) 68 final, 12 February 2003. For a detailed analysis, see Schulze, R. (2007) 'Gemeinsamer Referenzrahmen und acquis communautaire.' *Zeitschrift für Europäisches Privatrecht*, p. 130.

16 Communication from the Commission to the European Parliament and the Council, 'European Contract Law and the revision of the acquis: the way forward', COM (2004) 651 final, 11 October 2004.

17 Ibid., no. 2.2.1 and 3.1; see also Schulze, R. (2007) 'Gemeinsamer Referenzrahmen und acquis communautaire.' *Zeitschrift für Europäisches Privatrecht*, p. 135.

18 Communication from the Commission to the European Parliament and the Council, 'European Contract Law and the revision of the acquis: the way forward,' COM (2004) 651 final, 11 October 2004, no. 2.1.3.

19 Ibid., no. 2.1.2.

20 Trstenjak, V. (2007) 'Die Auslegung privatrechtlicher Richtlinien durch den EuGH: Ein Rechtsprechungsbericht unter Berücksichtigung des Common Frame of Reference.' *Zeitschrift für Europäisches Privatrecht*, p. 145; In their opinions, Advocate-Generals have recently cited the Principles of European Contract Law and the Draft Common Frame of Reference either in support of their interpretation of Community law (see for example: M. Poiares Maduro, opinion of 21 November 2007 on Case C-412/06 *Annelore Hamilton* v *Volksbank Filder eG* [2008] ECR I-02383; Trstenjak, opinion of 6 March 2007 on Case C-1/06 *Bonn Fleisch Ex- und Import GmbH* v *Hauptzollamt Hamburg-Jonas* [2007] ECR I-05609) or to provide an overview of other proposals for arrangements which are different to some extent (for example, Trstenjak, opinion of 18 February 2009 on Case C-489/07 *Pia Messner* v *Firma Steffen Krüger* [not yet published]; Trstenjak, opinion of 4 September 2008 on Case C-445/06 *Danske Slagterier* v *Bundesrepublik Deutschland* [not yet published]).

and the *acquis communautaire* respectively. Third, using the rules in the Common Frame of Reference, a basis for academic discourse on the subject can be formed. A common legal language could furthermore be based on the instrument, furnishing the various Member States with a modern form of the *ius commune*, and allowing for European and comparative aspects of contract law to be included in law degree programmes. Notwithstanding its non-binding nature, the Common Frame of Reference could nevertheless further the harmonisation process through its direct adoption into national laws by legislatures, especially in those countries which are currently revising their laws.[21] Finally, the Common Frame of Reference might be regarded as a *lex mercatoria*[22] for Europe and be applied in arbitration proceedings.[23]

With regard to the necessity of harmonisation, a special emphasis was placed in the Action Plan on European Contract Law on the importance of insurance contract law. While in general "firms are unable to offer, or are deterred from offering, financial services across borders because products are designed in accordance with local legal requirements,"[24] according to the Commission "the same problems occur particularly with insurance contracts,"[25] The EESC supported this view in its own-initiative Opinion on 'The European Insurance Contract',[26] in which the progress towards an internal insurance market was considered. For the purpose of facilitating the cross-border provision of insurance services, the EESC opined the need for a European insurance contract law and suggested the instigation of measures by the Commission aimed at codifying such a law. The Commission's response, at least initially, was the proposal of a Common Frame of Reference of European Contract Law.

The need for harmonised insurance contract law was further acknowledged by the European Commission in its Communication on European Contract Law, in which it highlighted that the "two types of contracts which were mentioned specifically were consumer and insurance contracts. The Commission expects the preparation of the CFR to pay specific attention to these two areas."[27] The prioritisation of insurance contract law is also reflected in the European Commission's provisional proposal with regard to the structure of the Common Frame of Reference in Annex I ("Possible structure of the CFR") to the Communication on European Contract Law, in which the insurance contract is one of only two types of contracts which will be given specific treatment. It is however worth noting that the structure and the contents of the Common Frame of Reference has not yet been finalised.[28]

On its completion, the Common Frame of Reference could have a significant impact on the development of European contract, and in particular on insurance contract law. Yet, despite its usefulness for interpreting and revising the existing consumer *acquis*, it is liable to suffer under a major shortcoming: the rules in the Common Frame of Reference are not binding and will therefore be subordinated to mandatory provisions in national laws. Consequently, the barriers erected by the variety of national mandatory insurance contract laws, which prevent the completion of the internal insurance market, will remain. This evident inability of the Common Frame of Reference to guarantee the full functioning of the internal insurance market[29] has led to the conclusion that more is required. It is out of these circumstances that the idea of an

21 With regard to insurance contract law in particular, see the Opinion of the European Economic and Social Committee on 'The European Insurance Contract Law' [2005] OJ C157/1, no. 4.3.1; more generally on the topic, see Heiss, H. (Ed.) (2002) *An Internal Insurance Market in an Enlarged European Union*. Karlsruhe: VVW; on transforming the market, see Münchener Rück (2000) *Die mittel-osteuropäischen Versicherungsmärkte auf dem Weg zur EU* and Bayerische Rück (2000) *Primary insurance market Central and Eastern Europe – Overview*.

22 See Blaurock, U. 'Lex mercatoria und Common Frame of Reference,' *Zeitschrift für Europäisches Privatrecht*, p. 118, 2007; cf. also the reference to its 'soft law' characteristics in Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 292, 2009.

23 See also Article 1:101 PECL (Application of the Principles):
"…
(3) These Principles may be applied when the parties:
(a) have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; …".

24 Communication from the Commission to the European Parliament and the Council, 'A more coherent European contract law – An action plan', COM (2003) 68 final, 12 February 2003, no. 47.

25 Ibid., no. 48.

26 For an appraisal of this Opinion, see Heiss, H'Europäischer Versicherungsvertrag – Initiativstellungnahme des Europäischen Wirtschafts- und Sozialausschusses verabschiedet.' *Versicherungsrecht*, p. 1, 2005.

27 Communication from the Commission to the European Parliament and the Council, 'European Contract Law and the revision of the acquis: the way forward', COM (2004) 651 final, 11 October 2004, no. 3.1.3.

28 For more details, see the Press Release of the Council of the European Union, Justice and Home Affairs of 18 April 2008, Press: 96, No: 8397/08 as well as the European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law, P6_TA-PROV(2008)0397, both available at www.copecl.org.

29 On this point, see Basedow, J. 'Der Gemeinsame Referenzrahmen und das Versicherungsvertragsrecht.' *Zeitschrift für Europäisches Privatrecht*, p. 283, 2007 and Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 292, 2009.

optional instrument for European insurance contract law has emerged.[30]

III. An Optional Instrument

An optional instrument's application to a contract is entirely dependent on it being chosen by the parties.[31] This choice itself can be based on one of two approaches: "opt-in", where the parties must agree to the contract being made subject to the provisions; or "opt-out", where the parties agree that the optional instrument will not apply to their contract. The United Nations Convention for the International Sale of Goods (CISG)[32] is an example of an opt-out optional instrument, as demonstrated by its article 6.[33] For insurance contract law, however, an opt-in approach is likely to be chosen by the European legislature.[34] An optional instrument would thereby represent an alternative to national regimes of contract law,[35] hence the reference to a "28th regime."[36]

The advantages for the parties of concluding a contract on the basis of such a European, rather than national, law are manifold. First, it would alleviate "multiple players", for example entrepreneurs active in more than one EU Member State, from having to consider the various national regimes applicable to their cross-border transactions. By enabling one contract to be used in different countries, the expenses incurred for legal research would be significantly lowered or, in some cases, become non-existent. Second, the uniformity would facilitate the cross-border sale of standard insurance policies via the Internet. Third, euro-mobile policyholders would be provided with stability and legal certainty, since the law governing the insurance contract – the optional instrument – would not vary depending on the policyholder's current domicile.

Yet, a mandatory European contract law, replacing national regimes, could also effectuate these advantages. Therefore, the benefits of an optional instrument *per se* must be considered. One of the principal benefits is the increased political viability of an optional instrument. National legislatures, especially those of Member States in which comprehensive legislation has recently been enacted after lengthy deliberation, are more likely to reject an instrument which would supersede their national contract law than an optional instrument which merely provides for an alternative regime.[37] Furthermore, its optional character also makes it more economically expedient. Unlike under mandatory legislation, those who would gain no benefit from using such an instrument are not fraught with the costs of its implementation, while the opportunity to standardise contracts is nevertheless available to those wishing to take advantage thereof.

IV. The Principles of European Insurance Contract Law

A. General Remarks

Before addressing the suitability of the Principles of European Insurance Contract Law as an optional instrument, an overview of their scope and content shall be provided. The Principles of European Insurance Contract Law, like the Lando

30 See Basedow, J. 'Der Gemeinsame Referenzrahmen und das Versicherungsvertragsrecht.' *Zeitschrift für Europäisches Privatrecht*, p. 285, 2007. With regard to the impact of the Common Frame of Reference on a possible future optional instrument, see Flessner, A. 'Der Gemeinsame Referenzrahmen im Verhältnis zu anderen Regelwerken,' *Zeitschrift für Europäisches Privatrecht*, p. 112, 2007 and Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 293, 2009).

31 See Heiss, H. and Downes, N. (2005) 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:695 and Clarke, M. and Heiss, H. [2006] 'Towards a European Insurance Contract Law? Recent Developments in Brussels.' *Journal of Business Law*, p. 600. With regard to a choice of the Member States, see for example Grundmann, S. and Kerber, W. 'European System of Contract Law – A Map for Combining the Advantages of Centralised and Decentralised Rule-making.' In Grundmann, S. and Stuyck, J. eds. *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, p. 310, 2002)For a different interpretation of "optional," see Lando, O. 'Optional or Mandatory Europeanisation of Contract Law.' *European Review of Private Law*, 8:59, 2002.

32 United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), signed on 11 April 1980 at Vienna, 1489 U.N.T.S. 3.

33 Schlechtriem, P. *Internationales UN-Kaufrecht*, (Tübingen: Mohr Siebeck, pp. 15-16, 2005).

34 Basedow, J. 'Ein optionales Europäisches Vertragsgesetz – Opt-in, Opt-out, wozu überhaupt?' *Zeitschrift für Europäisches Privatrecht*, p. 1, (2004).

35 Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:695, 2005. See also Staudenmayer, D. 'Ein optionelles Instrument im Europäischen Vertragsrecht?' *Zeitschrift für Europäisches Privatrecht*, p. 832, 2003).

36 With regard to the optional European contract law in general, see ibid, p. 828; in respect of insurance contract law in particular, see Basedow, J. 'Der Versiche rungsbinnenmarkt und ein optionales europäisches Vertragsgesetz.' In Wandt, M. ed. *Kontinuität und Wandel des Versicherungsrechts. Festschrift für Egon Lorenz zum 70. Geburtstag*, (Karlsruhe: VVW, pp. 100-101, 2004).

37 Heiss, H. 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG.' In Pohlmann, P. ed. Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster ("Münsteraner Reihe"),(Karlsruhe: VVW. Issue 99, p. 36, 2005) In respect of the competition between the legal orders, see Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' European Review of Private Law, 13:696 and n. 11, 2005.

Commission's Principles,[38] are modelled on the American Restatements of Law[39] and consist of Rules, Comments, and Notes.

English was chosen as the working language for the project, yet efforts have been made to depart from using English *legal* terminology in order to evince the use of international legal, rather than common law, principles. For this purpose, international legal terminology in English has been drawn upon to draft the provisions. The internationality of the Principles of European Insurance Contract Law has also been ensured by the provision of (unofficial) translations at the end of the publication.

B. Substantive Scope

The Principles of European Insurance Contract Law contain general rules of insurance contract law, which in principle apply to all types of insurance, with the exception of reinsurance.[40] Hitherto, no special rules on individual branches have been drafted, although these are intended for the future. Included within the scope are the insurance of special risks and the insurance of mass risks, albeit subject to contrary agreement as provided for in the second sentence of Article 1:103 paragraph 2, according to which contractual derogation from the pertinent provisions is permitted.

C. Outside the Scope

The scope of the Principles of European Insurance Contract Law has however been circumscribed by the Project Group. Some related issues, such as the professional duties of intermediaries, do not fall within the scope at all, for example. Furthermore, matters relating to general contract law are not covered by the Principles of European Insurance Contract Law. In Article 1:105 paragraph 2, the Project Group has, in such instances, instead chosen to refer to the Principles of European Contract Law, as amended by the Lando Commission.[41] This approach offers two distinct advantages. First, it eliminates the need for any recourse to national law, which is prohibited in the first sentence of Article 1:105 paragraph 1. Second, it leads to the Principles of European Contract Law becoming the *lex generalis* of the Principles of European Insurance Contract Law, which has been facilitated by the fact that the terminology of the former was adhered to whilst the latter was being drafted. Moreover, in order to prevent provisions from merely being duplicated, an issue has not been regulated in the Principles of European Insurance Contract Law where a corresponding provision in the Principles of European Contract Law deals with the matter in relation to insurance appropriately. This did not, however, preclude the intentional replication of certain provisions. Some of the rules in the Principles of European Contract Law, which are generally of a non-mandatory nature, were transposed into the Principles of European Insurance Contract Law in order for them, in the context of insurance, to become mandatory pursuant to Article 1:103 paragraph 2 PEICL.[42]

Where neither the Principles of European Insurance Contract Law, nor the Principles of European Contract Law deal with a particular issue, it is to be resolved in accordance with the common principles underlying the laws of the Member States as stipulated in Article 1:105 paragraph 2 PEICL. Any lacunae are, in pursuance of Article 1:105 paragraph 2 PEICL, to be filled using comparative law methods.

However, one provisional exception has been made to the rule prohibiting recourse to national laws. With regard to the specific individual branches of insurance, there are thus far no provisions in the Principles of European Insurance Contract Law. Yet, some types of insurance, for example health or life, are governed closely by the mandatory national rules of Member States, in order to protect the policyholder. For this purpose, the mandatory provisions of the applicable national law regulating the special branches of insurance contracts may be applied pursuant to the second sentence of Article 1:105 paragraph 1. As indicated above, such recourse to national law will only be allowed until provisions for the specific types of insurance have been drafted into the Principles of European Insurance Contract Law.

38 Lando, O. and Beale, H (Eds.) *Principles of European Contract Law, Parts I and II*,(The Hague: Kluwer Law International, 2000) and Lando, O et al. (Eds.) *Principles of European Contract Law, Part III*, (The Hague: Kluwer Law International, 2003).

39 For more information regarding the American Restatement of Law, see the website of The American Law Institute at www.ali.org.

40 See Article 1:101 PEICL.

41 Lando, O. and Beale, H (Eds.) *Principles of European Contract Law, Parts I and II*, (The Hague: Kluwer Law International, 2000) and Lando, O et al. (Eds.) *Principles of European Contract Law, Part III*, (The Hague: Kluwer Law International, 2003); while no reference has yet been made to general rules of contract law within the Draft Common Frame of Reference due to reasons of publishing, this should not present a great problem as the general rules of contract law in the Draft Common Frame of Reference are based on the Principles of European Contract Law as presented by the Lando Commission.

42 See Basedow, J. 'The Optional Application of the Principles of European Insurance Contract Law.' In Fuchs, A. ed. *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, (Heidelberg: Springer, 9:114-115, 2008).

D. Acquis Communautaire

At this juncture, it is also worth noting that the Principles of European Insurance Contract Law have, in general, been drafted in conformity with the current insurance *acquis communautaire*. In the second sentence of Article 1:103 paragraph 2, "large risks" have, for example, been defined in accordance with the existing definition. Deviations may however be found where shortcomings in the *acquis* are clearly evident. While the Insurance Mediation Directive[43] was not transposed into the Principles of European Insurance Contract Law, as these do not cover intermediaries' professional duties at all,[44] the Directive was taken into account, especially when drafting the provisions relating to pre-contractual information and the insurers' duties to advise.

The Principles of European Insurance Contract Law also incorporate other directives, including those on consumer contract law,[45] the Unfair Contract Terms Directive,[46] and the Injunctions Directive.[47] In addition, the so-called Gender Directive,[48] which also provides for insurance contracts specifically, has been adapted into the Principles.

E. Mandatory Character

In order to achieve their purpose as an optional instrument, the rules must wholly bind the contractual parties, and exclude recourse to mandatory national law. This has been achieved for the Principles of European Insurance Contract Law by using two methods. The first is by incorporating provisions which, pursuant to Article 1:103 para.1, are "absolutely" mandatory, i.e. the parties may not contract out of these rules. Article 1:103 paragraph 1 was initially drafted to provide an exhaustive list of absolutely mandatory provisions, to which specific rules could be added as drafting progressed. To date, however, only a few rules have been deemed to require the status of being absolutely mandatory.

The other provisions have a "semi-mandatory" character, which means that a "contract may derogate from all other provisions of the PEICL as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary", as stipulated in the first sentence of Article 1:103 paragraph 2 PEICL.

F. Uniform Interpretation

In order to ensure the uniform interpretation of the provisions, Article 1:104 outlines general considerations for the courts to take into account when applying these.[49] This is particularly of importance as uniform application by the individual national courts will, in addition to a uniformly drafted text, largely determine whether the Principles of European Insurance Contract Law will be efficacious as a European insurance contract law.

G. Enforcement

To enforce their rights, the policyholder, the insured, and the beneficiary will, in general, have to bring an action in court. There is no separate provision in the Principles of European Insurance Contract Law for alternative dispute resolution, yet neither is there any interference with the mechanisms presently available, such as ombudsmen. Quite the contrary, a duty for insurers to inform policyholders about such mechanisms has been incorporated into Articles 2:201 paragraph 1(k) and 2:501(k). In addition, "qualified entities" as defined by the European Commission in accordance with article 4 of the Injunctions Directive,[50] for example consumer associations, are allowed to seek at a competent national court or authority an order which either prohibits, or obliges the cessation of, infringements of the Principles of European Insurance Contract Law.[51]

43 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [2003] OJ L9/3.

44 The reasoning behind the decision not to regulate intermediaries' professional duties is outlined in point 6.e. below.

45 See in particular the 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 [2002] OJ L271/16.

46 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29.

47 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51.

48 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 [2004] OJ L373/37.

49 Article 7 CISG provides a similar rule.

50 See the reference to the Injunctions Directive in Article 1:301 para. 2 PEICL; Article 1:301 is the only provision of the Principles of European Insurance Contract Law whose application is limited to insurance contracts taken out by consumers.

51 Article 1:301 para. 1 PEICL.

V. Suitability as an Optional Instrument

A. Mandatory Character

As indicated above, the harmonisation of insurance contract law can only be achieved if the parties are able to opt out of both non-mandatory and mandatory rules of insurance contract law at national level.[52] The choice of opting out must moreover not be subject to the provisions of the conflict of laws. Thus, any optional instrument must include mandatory rules which protect the policyholder in place of national law.[53] This has clearly been achieved in the Principles of European Insurance Contract Law. For these to be effective as an optional instrument, it is important that a high level of protection is applied by the European legislature as is the case with other Community legislation in accordance with article 95(3) EC.

B. All-or-Nothing Approach

Since the purpose of an optional instrument is to provide contracting parties with a complete alternative to national law, it is not sufficient to allow parties to opt out of some rules of national insurance contract law and opt into advantageous provisions contained in the Principles of European Insurance Contract Law. In Article 1:102, the Principles of European Insurance Contract Law, which has been drafted as an optional instrument, therefore stipulate that the instrument be applied in its entirety, without the possibility of particular provisions being excluded from its application.[54] This ensures that the protection offered to a policyholder by the optional instrument can, despite being of a different kind, completely substitute the high, but nevertheless equivalent degree of protection provided by a national regime.[55] By excluding the possibility of a partial choice, insurers are prevented from selecting the most advantageous individual provisions from each system. The use of this approach is more likely to ensure that insurers choose the optional instrument in line with its purpose, namely being able to do business anywhere in Europe using one contract based on a single legal regime.

C. Comprehensive Regulation

Like consumer law, insurance law protects the weaker party.[56] Most of the EC directives concerning consumer contract law have introduced minimum standard clauses allowing national legislatures to enact higher standards, provided that these do not infringe upon the economic freedoms set out in the EC Treaty.[57] Such an approach would, however, undermine the underlying purpose of an optional instrument for insurance contracts. If higher levels of policyholder protection could be prescribed by national legislatures, it would not be possible for insurers to sell, and for policyholders to acquire, the same insurance policy governed by the same legal rules in different EU Member States.[58] In order to achieve the ultimate objective of completing the internal insurance market, the insurance contract must therefore be regulated comprehensively by the optional instrument.[59] Such comprehensive regulation is afforded by the Principles of European Insurance Contract Law.

52 Regarding mandatory law generally, see Martiny, D. 'Common Frame of Reference und internationales Vertragsrecht.' *Zeitschrift für Europäisches Privatrecht*, pp. 215-216, 2007.

53 With regard generally to an optional contract law containing mandatory provisions, see Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:697 and 699, 2005.

54 Basedow, J. 'Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz.' In Wandt, M. ed. *Kontinuität und Wandel des Versicherungsrechts. Festschrift für Egon Lorenz zum 70. Geburtstag*, (Karlsruhe: VVW, p. 105, 2004); Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:709-710, 2005.

55 Ibid., p. 699.

56 Reichert-Facilides, F. 'Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick.' In Reichert-Facilides, F. and Schnyder, A. K. eds. *Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts,* (Basel: Helbing und Lichtenhahn, pp. 6-7, 2000).

57 See article 8 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29; article 14 of the 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 [2002] OJ L271/16; and article 8(2) of the Directive 1999/44 /EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

58 Heiss, H. 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG.' In Pohlmann, P. ed. *Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster* ("*Münsteraner Reihe*"), (Karlsruhe: VVW. Issue 99, pp. 32-33, 2005); Weber-Rey, D. 'Harmonisation of European Insurance Contract Law.' In Vogenauer, S. and Weatherill, S. eds. *The harmonisation of European contract law: implications for European private laws, business and legal practice*,(Oxford: Hart Publishing, p. 220, 2006); Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 295, 2009; European Commission, Green Paper on Financial Services Policy (2005-2010), COM (2005) 177 final; and the Opinion of the European Economic and Social Committee on 'The European Insurance Contract Law' [2005] OJ C157/1, no. 6.3.1.

59 Basedow, J. 'Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz'. In Wandt, M. ed. *Kontinuität und Wandel des Versicherungsrechts. Festschrift für Egon Lorenz zum 70. Geburtstag*, (Karlsruhe: VVW, p. 104, 2004).

This approach is not, however, entirely new. In more recent directives, such as the Distance Marketing Directive,[60] the Consumer Credit Directive,[61] and the Timeshare Directive,[62] a minimum standard clause has been omitted.[63] It should also be noted that, pursuant to article 4 of the Proposal for a Directive on Consumer Rights, "Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection."[64] This provision for full harmonisation is yet another indication of the shift being made by the European legislature away from minimum standards. The approach taken in the Principles of European Insurance Contract Law thus corresponds to the developments in the *acquis*.

D. Purely Domestic Contracts

A fully functioning internal insurance market can, however, not be achieved unless the optional instrument can be applied to every contract offered by an insurer. The scope of the instrument should therefore not be restricted to cross-border transaction, but rather include insurance contracts covering purely domestic situations, i.e. those between a policyholder and an insurer in the same Member State and covering a risk located in the aforementioned Member State.[65] The two types of contracts would otherwise have to be drafted differently: domestic contracts in accordance with national law and transnational contracts pursuant to the optional instrument. Risk pooling would, consequently, continue to be onerous and insurers still unlikely to conclude cross-border contracts. To avoid this result and facilitate insurance transactions, the scope of the Principles of European Insurance Contract Law extends to all contracts, including purely domestic contracts.

E. Enforcement by Third Parties

Since the Principles of European Insurance Contract Law are intended to form an opt-in instrument, most of the effects of the rules are in principle also limited to the contracting parties, i.e. the insurer and the policyholder. The beneficiary and the insured are also included as their rights are dependent on the parties' agreement, however only insofar as the parties' choice does not affect them adversely. As intermediaries are not parties to the insurance contract, the parties' choice will also not affect their legal position, especially as only the liability of insurers for their agents (including those purporting to be independent),[66] and not intermediaries' duties are governed by the Principles of European Insurance Contract Law.

VI. The Choice

A. General Principles

It has been asserted that contracting parties are not limited, under existing European international contract law, to choosing the law of a country as the law applicable to a contract. The choice of "General Principles of Contract Law," for example of the Principles of European Contract Law or the UNIDROIT Principles, is also open to them.[67] Such a choice would lead to non-binding rules becoming the law applicable and replacing the national provisions. The principles would represent a 28th contract law regime in Europe.[68] It should be noted, however, that there is still no consensus on this point in legal literature,[69] and neither has a court decision been made on the matter. A choice in favour of general principles of law had been provided for by the European Commission in the proposed article 3(2) of the proposal for the Rome I Regulation,[70]

60 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 [2002] OJ L271/16.

61 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102 /EEC [2008] OJ L133/66.

62 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance) [2009] OJ L033/10.

63 See Reich, N. 'Der Common Frame of Reference und Sonderprivatrechte im "Europäischen Vertragsrecht."' *Zeitschrift für Europäisches Privatrecht*, p. 171, 2007.

64 Proposal for a directive of the European Parliament and of the Council on consumer rights, COM (2008) 614 final – 2008/0196 (COD), 8 October 2008.

65 Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:702-703, 2005; see also Martiny, D.'Common Frame of Reference und internationales Vertragsrecht.' *Zeitschrift für Europäisches Privatrecht*, p. 221, 2007 and Basedow, J. 'The Optional Application of the Principles of European Insurance Contract Law.' In Fuchs, A. ed. *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, (Heidelberg: Springer, 9:116, 2007).

66 See Articles 3:101 and 3:102 PEICL.

67 Basedow, J. 'Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz.' In Wandt, M. ed. *Kontinuität und Wandel des Versicherungsrechts. Festschrift für Egon Lorenz zum 70. Geburtstag*, (Karlsruhe: VVW, pp. 108-109, 2004) and Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 296, 2009.

68 With regard to this point, see Basedow, J. 'The Optional Application of the Principles of European Insurance Contract Law.' In Fuchs, A. ed. *European Contract Law – ERA Forum Special Issue 2008 (ERA Forum scripta iuris europaei)*, (Heidelberg: Springer, 9:115, 2008).

69 Martiny, D. 'Common Frame of Reference und internationales Vertragsrecht.' *Zeitschrift für Europäisches Privatrecht*, p. 217, 2007.

70 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final –

yet it is missing from the enacted version, suggesting that the choice has been discarded. While Recital 13 stipulates that any incorporation by the parties' agreement of a "non-State body of law" is not precluded, it does not positively sanction a choice of non-mandatory rules. As a result, Recital 13 does not augment the existing freedom of a contracting party to determine that general principles of contract law will substitute non-binding rules. The conflict-of-law rules remain unaffected. Furthermore, the objectives of implementing an optional instrument would in part be thwarted by a choice of non-mandatory rules due to inherent shortcomings.[71] A choice of law under article 3 of the Rome I Regulation would not be free of a number of restrictions and exclusions. For example, derogations from national mandatory provisions in purely domestic cases are not permitted.[72] This would affect consumer,[73] labour,[74] and insurance[75] contracts. Furthermore, despite an optional instrument having been chosen, internationally mandatory laws could be enforced by national courts.[76] Contracts, especially insurance contracts, concluded within the European Community would still be largely subject to national laws.[77]

B. Enactment

The Principles of European Insurance Contract Law could alternatively be enacted as an EC regulation. This would give the parties access to a choice of an optional instrument, which would be directly applicable in the Member States.[78] This would result in the Principles of European Insurance Contract Law forming a 2nd regime of insurance contract law, rather than a 28th regime, in every Member State.[79] This approach is favoured as the inherent shortcomings mentioned above would thereby be avoided. A choice in favour of the optional instrument would not be affected by the restrictions of conflict of laws, and the national law would be wholly substituted by the Principles of European Insurance Contract Law, even in the case of purely domestic contracts.

There are also other advantages of using this solution. It namely corresponds to the approach for the optional instruments currently in use with regard to its system. The European forms of business association, for example, were enacted as EC regulations enabling individuals to choose between national and European forms,[80] and an option of registering a Community, rather than a national trademark is provided by the Community Trademark Regulation.[81]

Procedurally, there are also benefits because an EC regulation would represent secondary legislation. Interpreting the optional instrument would therefore fall within the competence of the European Court of Justice, thereby ensuring legal uniformity across Europe.[82] This would not be the case for non-binding rules, for which the European Court of Justice is not competent, regardless of whether they were the *lex contractus* by the parties' choice. National courts and supervisory authorities would, moreover, apply an EC regulation in the same way as domestic law. General principles of law, on the other hand, would be determined and applied in accordance with special rules, thus a burden of asserting and proving non-domestic law would be placed on parties. Review of first or second instance decisions regarding non-domestic law by supreme courts would also be limited in a number of Member States. Lastly, cases concerning foreign law may not, or in some instances must not, be accepted by insurance ombudsmen.[83] These alternative dispute resolution mechanisms could therefore remain inaccessible by parties who have chosen general principles of contract law. This problem would not arise under an EC regulation as it

2005/0261 (COD), 15 December 2005.

71 Heiss, H. and Downes, N. 'Non-optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective.' *European Review of Private Law*, 13:701-702, 2005 and Loacker, L. D. 'Insurance soft law?' *Versicherungsrecht*, p. 293, 2009.

72 Article 3(3) of the Rome I Regulation.

73 Article 6 of the Rome I Regulation.

74 Article 8 of the Rome I Regulation.

75 Article 7 of the Rome I Regulation.

76 Article 9 of the Rome Convention.

77 See Schnyder, A. K. 'Parteiautonomie im europäischen Versicherungskollisionsrecht.' In Reichert-Facilides, F. ed. *Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum*, (Tübingen: Mohr Siebeck, pp. 66-67, 1994) in which he espouses a greater freedom of choice.

78 Basedow, J. 'Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz.' In Wandt, M. ed. *Kontinuität und Wandel des Versicherungsrechts. Fest schrift für Egon Lorenz zum 70. Geburtstag*, (Karlsruhe: VVW, p. 109, 2004) and Clarke, M. and Heiss, H. 'Towards a European Insurance Contract Law? Recent Deve lopments in Brussels.' *Journal of Business Law*, pp. 605-606, 2006.

79 Heiss, H. 'Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG.' In Pohlmann, P. ed. Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster ("Münsteraner Reihe"), (Karlsruhe: VVW. Issue 99, p. 38, 2005).

80 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/1 and Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) [1985] OJ L199/1.

81 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark (codified version) (Text with EEA relevance) [2009] OJ L078/1.

82 See article 234 EC.

83 An example can be provided using s. 8(3) of the German Code of Procedure for the Insurance Ombudsman, which allows the ombudsman to refuse to deal with complaints at every level of the procedure if the claim must be determined decisively in accordance with foreign law.

would have equal standing with domestic law, and consequently be applied *ex officio*, be open to revision by national supreme courts, and also be applied by national ombudsmen bureaus.

C. Future Prospects

Despite the European Council's proclamations that the Common Frame of Reference will remain a non-binding instrument, the implementation of one or more optional instruments in the future does not appear to be improbable considering recent developments. The possibility of an optional instrument has been expressed more than once by the European Commission in its Action Plan and Communication on European Contract Law.[84] Furthermore, the Rome I Regulation[85] was adopted on 17 June 2008 by the European Parliament and the European Council. Notwithstanding the fact it only deals with issues relating to the conflict of laws, according to its Recital 14 "[s]hould the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules." On making this choice, the national law otherwise applicable must be construed as being excluded if the Principles of European Insurance Contract Law are adopted as a Community act. The national law applicable under the Rome I Regulation would otherwise determine the extent to which the choice is valid. Yet, if this were the intended result, it would not have been necessary to make a special reference in a recital. Hence, the implementation of the Principles of European Insurance Contract Law, or adaptations thereof, as an optional instrument is envisaged in Recital 14 of the Rome I Regulation.

Other indications in favour of an optional instrument include the European Parliament's repeated references to the Common Frame of Reference as providing, at the very least, a model for a future optional instrument,[86] as well as the EESC's earlier proposal of an optional instrument as an alternative to standardising insurance contract law.[87] The preparation by the EESC of another (own-initiative) Opinion on European contract law is underway, and its presentation is anticipated in 2010. Hence, the optional instrument is evidently the subject of serious political deliberation. Using Article 1:102, the Principles of European Insurance Contract Law represent a prototype for such an instrument.[88] ■

84 See also Annex II.

85 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.

86 See the European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law, P6_TA-PROV(2008)0397.

87 Opinion of the European Economic and Social Committee on 'The European Insurance Contract Law' [2005] OJ C157/1, no. 6.5.

88 See Opinion of the European Economic and Social Committee on 'The European Insurance Contract Law' [2005] OJ C157/1, no. 6.2.