Towards a European Insurance Contract Law: 
Restatement – Common Frame of Reference – Optional Instrument?

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A. Restatement of European Insurance Contract Law

I. History

A group of European experts on insurance contract law met at the University of Innsbruck/Austria at the invitation of the late Professor Fritz Reichert-Facilides in September 1999. He had previously announced this event in Basle/Switzerland in 1998 at a conference on European perspectives of insurance law.1 In his lecture Reichert-Facilides had presented a tour d’horizon of national insurance legislation in the EC, pointing out fundamental policies and perceptions common to all European jurisdictions.2 Based on this analysis he had proposed to unify mandatory rules of insurance contract law within the EU in order to accomplish a properly functioning internal insurance market.3 Reichert-Facilides was firmly convinced that academics working in the field of insurance law had to provide the European legislator with a model and therefore he proposed the elaboration of a Restatement of European Insurance Contract Law.4

His project was supported by Prof. Jürgen Basedow, who was also lecturing at the conference in Basle on European aspects of insurance legislation. Basedow held that in the European internal market cross border provision of insurance services was scarce as a result of the then current European regime of international insurance law.5 The Brussels Convention allowed the policyholder to bring action in his home

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1 The conference was hosted by Reichert-Facilides together with Prof. Anton K. Schnyder; the materials of the conference have been published in Reichert-Facilides/Schnyder (eds.), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, Bibliothek zur Zeitschrift für Schweizerisches Recht (ZSR) 2000 Beihet 34.
2 Reichert-Facilides, Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick, in Reichert-Facilides/Schnyder (note 1) 1 (6-9).
3 Reichert-Facilides (note 2) 1 (9 - 11).
4 Reichert-Facilides (note 2) 1 (10 - 11).
country. In addition, the private international law rules contained in the Directives on insurance law required in most cases to apply the law of the habitual residence of the policyholder. As a result, an insurance product sold cross border would have to comply with the mandatory rules applicable in the country of the habitual residence of the policyholder. Such interference of mandatory law with the contractual terms could disturb the balance between the risk covered and the premium paid and jeopardise the functioning of the law of large numbers which is essential to the insurance business.

Based on this analysis, the experts gathered at the Innsbruck meeting strongly felt the need for a Restatement to give impulse to the internal insurance market. Even though at that time it could not be foreseen whether the EC Commission would ever be interested in their work, they decided to start drafting a “Restatement of European Insurance Contract Law”.

At about the same time, as member of a Study Group on a European Civil Code, Basedow was charing a Hamburg team, which had taken over the chapter on insurance contracts. In spite of this engagement, Basedow decided to join the Project Group and lend support to its work, thus endowing the Innsbruck Group with his personal expertise. Simultaneously, Basedow also announced that the Hamburg project was, from then on, focusing on a comparative analysis of insurance contract law in Europe, leaving the drafting of a Restatement to the Project Group. As a consequence the Project Group can rely on the research work performed at the Max-Planck-Institute, providing them with a comparative legal guideline for its discussions.

Additionally, Reichert-Facilides was in a position to offer institutional support to the Project Group. The Austrian Science Fund granted the financial support which

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6 Regulation 44/01/EC, art. 9 par.1 lit b.; see Heiss, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG, in Pohlmann (ed.), Veröffentlichungen der Münsterischen Forschungsstelle für Versicherungswesen an der Westfälischen Wilhelms-Universität zu Münster (“Münsteraner Reihe”), Heft 99, 2005, 1 (8 et seq).
8 Clarke/Heiss, (note 7) 600 (601); see Heiss (note 6) 1 (5 et seq). European Economic and Social Committee (EESC), Opinion on “The European Insurance Contract”, of December 15 and 16, 2004, CESE 1626/2004, no. 4.2.4.1.
9 see Weber-Rey (note 7) 207 (210).
allowed him to maintain a Restatement Bureau at the University of Innsbruck. Two assistants were part time employed and took over the administration of the Project.

This is how the Innsbruck Group was born with Reichert-Facilides as founding chairman. He chaired the Project Group until his death on 23 October 2003. From then on the author of this article took over the chairmanship.

II. Current Composition of the Project Group

The Project Group has steadily grown since its foundation in September 1999. Today 18 members participate in the work and it is intended to invite some more members from countries which are not yet represented in the work. The current members are: Jürgen Basedow, Max-Planck-Institut for Foreign Law and Private International Law, Hamburg; Juan Bataller Grau, University of València; John Birds, University of Sheffield; Zdzislaw Brodecki, University of Gdansk; Diana Cerini, Università degli Studi di Milano; Malcolm A. Clarke, University of Cambridge; Herman Cousy, Catholic University of Leuven; Bill W. Dufwa, University of Stockholm; Helmut Heiss (Chairman), University of Mannheim; Jérôme Kullmann, University of Paris I; Jorge Pegado Liz, Lisbon/Brussels; Ioannis Rokas, University of Economics and Business, Athens; Bernhard Rudisch, University of Innsbruck; Anton K. Schnyder, University of Zurich; Jaana Norio-Timonen, University of Tampere; Peter Takáts, Eötvös Loránd University Budapest, Pedro Pais de Vasconcelos, University of Lisbon.

III. Working Method

1. Preparation of Drafts by Individual Group Members

Individual members of the Group take over commitments to draft Principles of European Insurance Contract Law (PEICL) along with Comments which explain the proposed rules, stating the grounds they are based on as well as illustrating them with examples. At the same time the Comments mention whether the existing acquis communautaire or the Principles of European Contract Law (PECL)11 already contain rules corresponding with the proposed draft.

2. Approval of Drafts in Workshops of the Project Group

Draftspersons present their drafts at workshops of the Group which take place three times a year. The Group discusses the proposals, alters them when necessary and finally approves a text.

3. Revision of Approved Texts by the Drafting Committee

In 2002 a Drafting Committee (DC) has been set up with Malcolm Clarke acting as head of the committee, together with Jürgen Basedow, John Birds, Herman Cousy and Helmut Heiss as members. The DC meets three times a year in Mannheim.

The object is to revise the texts approved by the Group in order to polish and unify the language used, not only to provide for proper English but also to ensure uniform and consistent application of legal terms, both within the Restatement of European Insurance Contract Law and in relation to the Principles of European Contract Law (PECL).

As far as the contents of the PEICL are concerned, the DC tries to eliminate incoherencies or even contradictions which may appear because different parts of the Restatement were drafted by different members and discussed at different stages in the development of the Project. When that happens, the DC elaborates a proposal on how to eliminate discrepancies and refers the matter back to the Group for final approval.

4. Drafting of Notes by the Max-Planck-Institute (Hamburg)

Principles and Comments are accompanied by Notes indicating the status quo of insurance contract law within each member state. These Notes are drafted by the Max-Planck-Institute for Comparative and International Private Law in Hamburg with the supervision of Jürgen Basedow and later revised by Group members contrasting them with their own national insurance law.

IV. Regulatory Approach
1. Internal Market Orientation: Principles of Mandatory Insurance Contract Law

In spite of the fact that the Restatement is academic in character and with no binding force, its regulatory aim is to provide the European legislator with a model law suitable to be enacted as a future European Insurance Contract Regulation. Since any possible future EC-regulation on insurance law must restrict itself to rules necessary for the proper functioning of the internal insurance market (see i.p. art. 95 EC-Treaty), the Project Group drafts European Principles only to the extent considered necessary to accomplish the internal market12.

The most important consequence of this internal market orientation is the restriction of the work to mandatory insurance contract law. As mentioned above, mandatory rules of insurance contract law are what impedes the proper functioning of the internal insurance market13. They force the insurer to adapt its products to the local laws of each member state where business is conducted14. On the contrary, non-mandatory rules appear to be of minor influence in the functioning of the internal market. Insurers are usually able to substitute differing non-mandatory rules in national insurance laws by using general contract terms, uniformly applied to all their insurance contracts15. Indeed, experience with non-mandatory insurance contract law in national legal orders shows that such rules are commonly replaced by the general contract terms of the insurer. Non-mandatory legal rules appear to be “dead

12 see Clarke/Heiss (note 7) 600 (605).
13 see Clarke/Heiss (note 7) 600 (605); see also EESC (note 8) no. 2.2.4 et seq. and no. 3.4.5; Heiss (note 6) 1 (30); Weber-Rey (note 7) 207 (208); Communication of the Commission, COM (2003) 68 final para 26; Clarke/Heiss (note 7) 600 (605); as to the regulation in a European comparison see Clifford Chance LLP (ed.), Insurance Regulation in Europe (2002); as to the creation of an internal market for financial services see Schnyder, Europäisches Banken- und Versicherungsrecht (2005), § 1.
14 Heiss, (note 6) 1 (9 et seq, 12); Basedow (note 5) 13 (18); as to the so-called Umbrella-Contracts see Mächler-Erne, Internationale Versicherungsverträge – Formen und Inhalte, in Reichert-Facilides/Schnyder (ed.), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhundert, ZSR 2000, Beiheft 34, 153 (160 et seq).
15 see Clarke/Heiss (note 7) 600 (605); as to this aspect (from a historical point of view) see Reichert-Facilides, Europäischer Versicherungsvertrag, in Basedow/Hopt/Kötz (eds.), FS Drobnig (1998), 121; also Reichert-Facilides, Verbraucherschutz—Versicherungsvernehmerschutz: Überlegungen im Blick auf das Projekt Restatement des ‘Europäischen Versicherungsvertragsrechts’, in Eccher/Nemeth/Tangl (eds.), FS Mayrhofer (2002), p. 185; Heiss, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG, p. 13; as to the influence of general contract terms see also Communication of 11 October 2004 “European Contact Law and the revision of the acquis: the way forward” COM (2004) 651 final, no 2.2.1.
law”, whereas the general contract terms of the insurers are referred to as the “living law of insurance”16.

2. The relationship between the PEICL and the PECL

In essence, the PEICL are intended to regulate insurance contracts in the context of general European contract law. This is why the Project Group treats the PECL as lex generalis to the PEICL and applies as much as possible their legal terminology. Moreover, when the special nature of insurance does not require deviations from the PECL, no new rules are produced. Exceptionally, where a rule of the PECL is required to be mandatory to protect the policyholder, that rule is incorporated into the PEICL.

B. Common Frame of Reference of European Contract Law

I. The Common Frame of Reference of European Contract Law in general

The EC Commission published a Communication dated 11 October 2004 on “European Contact Law and the revision of the acquis: the way forward”.17 This Communication announces first steps towards harmonization of contract law in Europe, favouring the elaboration of a so called “Common Frame of Reference”.18

The goal is to establish a set of rules stating definitions, structure and contents of European contract law developed from a comparative legal analysis of national contract laws19. Strictly speaking, these definitions and principles will not be of a binding nature since they will not be enacted as law20. However, the Commission is

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16 Heiss, (note 6) 1 (30); Clarke/Heiss (note 7) 600 (605).
17 Communication of 11 October 2004 “European Contact Law and the revision of the acquis: the way forward” COM (2004) 651 final; see Heiss (note 6) 1 (26 et seq).
18 As to this aspect see von Bar/Schulte-Nölke, Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht, ZRP 2005, 165 et seq.; Weber-Rey, (note 7) 207 and 223 et seq.; for an overview on the functioning of the CFR-net, including 180 members, see Fricke, Entgrenztes Zivilrecht?—Zu den Perspektiven des Common Frame of Reference und der europäischen Schuldrechtsharmonisierung für die Versicherungswirtschaft, Versicherungsrecht (2005), 1474.
19 COM (2004) 651 final, no. 2.2.1 and 3.1.; see also EESC (note 8) no 6.1.
20 COM (2004) 651 final, no. 2.1.3.
clearly set out to adhere to the terminology and system of the Common Frame of Reference in any later legislation concerning contracts.21

The Common Frame of Reference could become an important aid for interpretation of the existing *acquis communautaire* to the European Court of Justice in procedures for preliminary rulings and also for national courts applying the *acquis*.

Last but not least, cross border academic discussion in Europe could be based on common rules such as those contained in the Common Frame of Reference. In a way, this instrument would give Europe a common legal language, as it was the case with Latin until national codifications replaced the *ius commune*. It would allow Law Faculties to teach contract law with a European and comparative perspective.

National legislators could contribute to harmonization by adopting the rules of the Common Frame of Reference on future reforms of national contract law. That applies in particular to former socialist countries, which are revising their contract law.22

Ultimately, one may regard the Common Frame of Reference as a European *lex mercatoria* and as such it may find application in arbitration proceedings.

II. Insurance Contracts within the Common Frame of Reference

Insurance contract law plays an important role in the Communication of the EC Commission of 2004. Regarding the structure of a Common Frame of Reference the 2004 communication states: “Two types of contract which were concretely specified were ... consumer and insurance contracts. The Commission expects that in the development of the common reference framework these two areas should receive

22 See also EESC no. 4.3.1.; as to the overall topic Heiss (ed.), An Internal Insurance Market in an Enlarged European Union (2002); as to the transformation of the market see Münchener Rück, Die mittel-osteuropäischen Versicherungsmärkte auf dem Weg zur EU (2000); Bayerische Rück, Primary insurance market Central and Eastern Europe – Overview (2000).
23 See also Art. 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; ...”. 
special attention”.24 This position is also reflected in the draft layout of the Common Frame of Reference, as it specifically mentions insurance contracts.25 This contract is part of chapter III, section IX of the Common Frame of Reference and —next to sales contracts— the only type separately treated.

III. Sponsoring under the FP6

The strong determination of the Commission to create a Common Frame of Reference may be seen in the fact that the Sixth Framework Programme is dedicated to European Contract Law.26 A Network of Excellence consisting of several research groups was set up effective from 1 May 2005.27 The Project Group “Restatement of European Insurance Contract Law” is among them and drafts the Common Frame of Reference on Insurance Contract Law. It will consist of two parts covering general rules for all types of insurance contracts as well as special rules for indemnity insurances. The Network will present its work by the end of 2007.

IV. The Common Frame of Reference and the Regulatory Approach of the Restatement Group

The Common Frame of Reference should state definitions, structure and contents of a European contract law. This applies for contracts in general and also for the chapter on insurance contracts. The Project Group drafts its Principles according to these requirements, defining technical terms of insurance contract law in the first chapter and structuring the rest in several Parts. Part One deals with “Provisions Common to All Contracts Included in this Restatement” and Part II with “Special Provisions for Indemnity Insurance”. These two Parts will form the Common Frame of Reference of insurance contract law. On completion of the Common Frame of Reference the Group will continue working on new chapters, covering “Group

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24 Communication of 11 October 2004 “European Contact Law and the revision of the acquis: the way forward” COM (2004) 651 final, no. 3.1.3; see Heiss (note 6) 1 (27 et seq).
26 Clarke/Heiss (note 7) 600 (604).
27 Regarding the Network and for more information see www.copecl.org.
28 see EESC (note 8) no 6.4. and 7.5.
29 Clarke/Heiss (note 7) 600 (606).
30 see above note 18; Clarke/Heiss, (note 7) 600 (602).
31 Heiss (note 6) 1 (33 et seq); see EESC (note 8) no 7.4. and 7.5.
Insurance and Insurance Based on Collective Agreements”, “Special Provisions for Insurances of Fixed Sums” as well as “Provisions for Specific Branches of Insurance”.

As mentioned before32, the internal market orientation of the Restatement Group restricts its work to mandatory rules of insurance contracts. E.g. the Restatement will not establish any legal consequences in case the insured risk is increased by the policyholder, limiting such possible agreements of the insurer and the policyholder on the subject only through mandatory rules. This approach keeps in line with the general observation that non-mandatory rules of insurance contract law play a minor role in the living insurance law because they are commonly replaced by contractual provisions, i.e. the general contract terms of the insurer33. As a consequence, the Common Frame of Reference of European insurance contract law will have a tendency just to limit freedom of contract and not so much to give positive rules on the subject34.

C. Optional Instrument of European Insurance Contract Law

I. Optional Instrument

1. What is an optional instrument?

An optional instrument of European contract law is characterized by the fact that its application depends on a choice by the parties to the contract35. Therefore, it would not replace national contract law but would provide the parties with an alternative36.

32 see A. IV., p. 5.
33 see above note 14; as to the idea of general contract terms of the insurer see Heiss (note 6) 1 (29 et seq); Clarke/Heiss (note 7) 600 (606 et seq).
34 Heiss, (note 6) 1 (30).
35 Heiss/Downes, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, ERPL (2005), 693 (695); Clarke/Heiss (note 7) 600 (605); some authors also mention a choice of the member state, see e.g. Grundmann/Kerber, European System of Contract Law – A Map for Combining the Advantages of Centralised and Decentralised Rule-making, in Grundmann/Stuyck (eds.), An Academic Green Paper on European Contract Law (2002), 295 at 310; this alternative will not be discussed in this article; as to yet another way of understanding ‘optional’ see Lando, Optional or Mandatory Europeanisation of Contract Law, ERPL (20002), 59.
36 Heiss/Downes (note 35) 693 (695); see Staudenmayer, , Ein optionelles Instrument im Europäischen Vertragsrecht?, ZeuP (2003), 828 at 832.
Thus, a possible future optional instrument has been called the 26th regime of contract law in Europe37. In general terms it may be compared to the UN-Convention on Contracts for the International Sale of Goods (CISG) which allows parties to opt out in its Art 6, i.e. to agree that the Convention will not apply to their contract38. However, in a European optional instrument it is quite likely that an opt-in-approach will be used by the European legislator as opposed to the opt-out-approach in Art 6 CISG39.

2. Advantages of an optional instrument

An optional instrument would allow parties to conclude their contract on the basis of European law instead of national law. This choice would offer advantages particularly to “multiple players” such as entrepreneurs doing business in the European internal market, who would not have to be concerned with the impact of diverging national contract law regimes on their transactions40. The costs of legal research and adaptation of the contract to each national system of contract law would disappear. Overall, a European optional instrument would facilitate transactions41.

However, the aforementioned advantages are not specific to an optional instrument. They could also be achieved by a non-optional European contract law replacing national systems. The predominant reasons in favour of an optional instrument are to be found elsewhere. First of all, an optional instrument is more likely to find political approval than a non-optional instrument. National legislators, encouraged by national representatives of the legal profession, would be more inclined to resist an instrument which would replace national contract law. They would, however, have no reason to resent to a 26th regime of contract law leaving national law untouched42. Secondly, an optional instrument appears to be economically more efficient because it does not

37 Heiss, (note 6) 1 (35); about the optional European Contract Law in general Staudenmayer, Ein optionelles Instrument im Europäischen Vertragsrecht?, ZEuP 2003, 828; regarding Insurance Contract Law Basedow, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, in Wandt et al. (ed.), FS Egon Lorenz (2004), 100 et seq.
38 Schlechtriem, Internationales UN-Kaufrecht (2005), 15 et seq.
40 EESC (note 8) no 4.2.3.; as to further disadvantages concerning the solution of a permission of general freedom of choice of law see Weber-Rey (note 7) 207 (222 et seq).
41 Heiss (note 6) 1 (36).
42 Heiss (note 6) 1 (36); as to the aspect of competition between legal orders see Heiss/Downes (note 35) 693 (696 and fn 11).
force parties to alter their traditional ways of doing business but only provides them with an additional choice\textsuperscript{43}. Entrepreneurs acting internationally will be more likely to take that chance than others acting only locally. In other words, there is no need to submit an everyday contract such as the sale of bread concluded between the owner of a bakery in London and his neighbour to the rules of European contract law. Replacing English common law of contract would only impose costs on the owner as well as the customer, since they would be forced to adapt their way of contracting with each other to new European rules without any advantage. On the other hand, the producer of electronic devices who sells cross border has a substantial interest to conclude all contracts on the basis of one and the same (i.e. European) set of rules of contract law, no matter whether he sells to an English, German or French customer.

II. The Optional Instrument and European Insurance Contract Law

1. The need for an optional European insurance contract law

The need for an optional instrument is particularly pressing in the field of insurance. Since the insurance business is based on the law of large numbers—i.e. the pooling of a magnitude of risks within a community of risk bearers, organised and managed by the insurer\textsuperscript{44}—the insurance business becomes easier as the individual risks get more similar. Risks depend, first of all, on factual circumstances such as the way a house is built, the general health of a policyholder etc. Such differences cannot be abolished, but taken into account they will decrease or increase the premium asked by the insurer. Furthermore, the risk of the insurer also depends on the law applicable to the insurance contract because insurance contract laws frequently regulate, or at least influence, the contents of the insurance cover\textsuperscript{45}. This is the reason why, when drafting products and calculating premiums, the insurer must take into consideration the insurance law of the Member State where he is doing

\textsuperscript{43} Heiss (note 6) 1 (36).
\textsuperscript{44} see Weber-Rey (note 7) 207 (233).
business. Quite frequently this will make it impossible for the insurer to sell the same insurance product in more than one Member State. On the contrary, if an optional instrument of European insurance contract law was enacted, the insurer could base all its transactions on community law and sell its insurance products in the same manner everywhere in the Community. Obviously, an optional instrument of insurance contract law would strongly support the establishment as well as the proper functioning of the internal insurance market.

2. Specialties of the insurance contract to be taken into account in the optional instrument

a. Scope of application of the optional instrument

The facilitation of insurance transactions in the single European market will only take full effect if all the contracts of a particular insurer may be submitted to the optional instrument. Therefore, parties must be given that option even in purely domestic contracts, i.e. insurance contracts between a policyholder and insurers having their seat or habitual place of residence in the same Member State and concerning a risk situated also in this Member State. Otherwise, domestic insurance contracts, which usually represent the biggest share of the business of an insurer, would have to be designed and calculated according to national law and only cross border insurance services could be submitted to the optional instrument. As a consequence the pooling of risks would be more burdensome and many insurers would most likely (in proper English “likely” as an adverb needs to be preceded by “most” “more” or “very” or similar) not enter cross border transactions.

For this reason, as far as insurance is concerned, restrictions of the scope of application of an optional instrument of European contract law to cross border transactions, as proposed by some authors, must be rejected.

b. Comprehensive instead of minimum standard regulation

46 Heiss (note 6) 1 (16 et seq).
47 Basedow (note 37) 108 et seq.; Heiss (note 6) 1 (38 et seq).
Insurance law is similar to consumer law in that it protects the weaker party.48 Several EC Directives have been enacted in the field of consumer contract law and most of them contain so-called minimum standard clauses which allow national legislators to provide consumers with a higher standard of protection than required, as long as such national rules do not violate the fundamental economic freedoms of the EC-Treaty.49 It is worth mentioning that, lately, in the Directive concerning the distance selling of financial services to consumers, the EC did not enact a general minimum standard clause. This may indicate a shift of the EC in legal policy. Be that as it may, in the case of an optional instrument in the insurance sector, a minimum standard clause would seriously jeopardise its fundamental purpose, i.e. to allow the insurer to sell and the policyholder to buy insurance anywhere in Europe, based on the same legal provisions. That objective would be frustrated if national legislators could impose higher levels of protection. The optional instrument must regulate the insurance contract comprehensively. This is not to say that a partial or minimum standard regulation would not help at all. It just would not be sufficient to achieve completion of the internal insurance market, which is, after all, what should be aspired.

c. Optional instrument and mandatory insurance contract law

In order to achieve its aims, an optional instrument must allow parties to opt out not only of non-mandatory but also of mandatory rules of national insurance contract law. In turn, the EC is obliged to apply a high level of policyholder protection in the

48 Reichert-Facilides in Reichert-Facilides/Schnyder (note 1) 1 (6 et seq); Heiss (note 6) 1 (32); Weber-Rey (note 7) 207 (208).
51 see Heiss (note 6) 1 (32 et seq); Weber-Rey (note 7) 207 (220); European Commission, Green Paper on Financial Services Policy, COM (2005)177; EESC (note 8) no 6.3.1.
52 Basedow (note 37) 104; EESC (note 8) no 7.3. and 7.4.
53 As to the proposal of unification of general policy conditions in the 2003 Communication see Clarke/Heiss (note 7) 600 (604).
optional instrument, in the same way as it must do with community acts based on Art 95 par 3 EC-Treaty. Consequently, the optional instrument must provide appropriate mandatory rules of insurance contract law, substituting the protection of the policyholder under national law.

It may appear to be contradictory to ask for an optional instrument which would only be applicable if parties opt in favour of it and at the same time to request a comprehensive regulation of mandatory rules on insurance contract law in such optional instrument. However, the apparent contradiction disappears when the option of the parties is restricted to choosing the instrument as a whole or not at all. Thereby a national system with a high protection of the policyholder would be replaced by a European system offering a different kind, although just as high a level, of protection.

Since a partial choice would be excluded, the insurers would not be allowed to pick and choose parts of each system to their own benefit. Thus, the optional instrument must exclude a partial choice.

d. Optional instrument and third parties

aa) Ex post choice of law

It is a general principle of European international contract law that a choice of law agreed by the parties after the contract is concluded (ex-post-choice) must not infringe the legal position of third parties. This rule should also apply to a European optional instrument of contract law in general and in insurance contract law in particular. The optional instrument must rule out the use of the option ex post to the detriment of third parties.

54 see EESC (note 8 ) no 6.2.
55 Heiss (note 6) 1 (39); as to mandatory rules in optional contract law in general see Heiss/Downes (note 35) 693 (697 at 699); EESC (note 8 ) no 6.3.; as to the aspect of private international law see Heiss, Das Kollisionsrecht der Versicherungsverträge nach Rom I und II, Versicherungsrecht (2006) 185 (186).
56 Basedow (note 37) 105; Heiss/Downes (note 35) 693 (709 et seq); Heiss (note 6) 1 (39).
57 Heiss/Downes (note 35) 693 (699).
58 Heiss/Downes (note 35) 693 (703).
59 See Art. 3 par. 2 of the Rome Convention.
60 Heiss (note 6) 1 (40).
61 Heiss/Downes (note 35) 693 (711).
bb) *Acquis communautaire* protecting third party victims in motor vehicle liability insurance

Moreover, the legal position of the third party victim in motor vehicle liability insurance has been subjected in the EC to intensive harmonisation endeavours. Currently, five Directives on motor vehicle liability insurance are in force62. In this area of insurance, offering the parties the chance to choose an optional instrument of European insurance contract law should not allow them to opt out of the *acquis communautaire* protecting third party victims, regardless of whether such choice was taken ex ante or ex post. This is why the optional instrument must either preserve the application of national laws transposing the motor vehicle liability insurance Directives or, preferably, straight implement the Directive in its regulation, preventing in that way that a choice of the optional instrument would entail opting out of the protection of third party victims provided for by the *acquis communautaire*63.

**III. The Option**

1. Choice of general principles of European contract law by the parties?

   a) Art 3 par 2 of the proposed Rome-I-Regulation

   It has been held that under the current European regime of international contract law, —Art 3 Rome Convention— the parties may not only choose the law of a country but


63 see EESC (note 8) no 6.5.2.4.; *Heiss/Downes* (note 35) 693 (711).
also “General Principles of Contract Law” such as the Lando-Principles (PECL) or the UNIDROIT-Principles as the law applicable to the contract64. This means that non-binding rules would become binding by the choice of the parties, replacing the national legal regime, which would have been applicable in the absence of a choice65. Of course, this view is still heavily disputed in legal literature and, so far, it has not been confirmed by any court decision. However, art 3 par 2 of the recently proposed Rome-I-Regulation66, which is intended to convert the Rome Convention into a Community instrument67, suggests the introduction of a choice by the parties of generally accepted non-binding rules of contract law68. Thus, parties could make the Principles of European Contract Law (PECL) the law applicable to their contract. In principle, the range of choice should also include the Principles of European Insurance Contract Law (PEICL). As a result parties would enjoy an “optional instrument” without being enacted as a binding Community instrument. Thus, the proposal of the EC Commission seems to be an easy way or even a shortcut towards the establishment of an optional European (insurance) contract law.

b) Structural deficiencies of the approach

Nevertheless, it has already been pointed out by Downes and Heiss that such an approach implies structural deficiencies, partly frustrating the purposes of an optional instrument69. This would occur mainly because a choice of law under art 3 Rome-I-Regulation would be subjected to several exclusions and restrictions. In purely domestic cases national mandatory rules must not be derogated from70. The choice of the parties would be excluded for consumer contracts71 and restricted in labour contracts72. National courts would be allowed to enforce internationally mandatory

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65 Heiss (note 6) 1 (13).
67 Heiss (note 55) 185.
68 Heiss (note 55) 185 (186).
69 Heiss/Downes (note 35) 693 (701 et seq).
70 Art 3 par. 4 Rome-I-Regulation.
71 Art. 5 par. 1 Rome-I-Regulation; see EESC (note 8 ) no 6.3.3.
72 Art. 6 par. 1 Rome-I-Regulation.
laws even if the optional instrument would be chosen73. It follows that national law would still have a high impact on contracts concluded in the Community74.

c) Special deficiencies in the insurance sector

Above all, the choice granted to the parties by art 3 par 2 of the proposed Rome-I-Regulation will not apply to insurance contracts related to the internal market”, i.e. insurance contracts covering risks situated within the EC and concluded with insurers seated in the EC. Article 22 (a) and the appendix I of the proposed Rome-I-Regulation excepts international insurance contract law contained in the Directives on insurance law, mainly, the 2nd Non-Life Insurance Directive as well as the Life Insurance Directive, from its scope of application. Strangely enough, as a result of the proposed art 22 and art 3 par 2 Rome-I-Regulation, an insurance contract may be governed by the Principles of European Insurance Contract Law if either the insurer is not seated or the risk covered is not situated within the EC. This is quite the opposite of what is required by the internal insurance market!

An alternative could be offered by art 7 par 3 of the 2nd Non-Life Insurance Directive as well as art 32 par 5 of the Life Insurance Directive. Both articles provide for a subsidiary application of the general rules of private international law to matters not regulated in the Directives. It may be inferred that art 3 par 2 of the proposed Rome-I-Regulation be considered a general provision of international contract law and thus applied also to contracts covered by the insurance Directives. However, the argument appears to be rather faulty75. The Directives on insurance law regulate and limit the choice of the parties in a rather detailed manner76. There is no regulatory gap in the Directives which would call for a subsidiary application of general rules such as art 3 par 2 of the proposed Rome-I-Regulation77.

Nevertheless, Member States may open the choice of the PEICL to a certain degree. According to art 7 par 1 lit a 2nd sentence and lit d) 2nd Non-Life Insurance Directive

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73 Art. 8 par. 2 Rome-I-Regulation; see also Art. 3 par.5 Rome-I-Regulation; Heiss (note 54) 185 (186).
74 see Schnyder, Parteiautonomie im europäischen Versicherungskollisionsrecht, in Reichert-Facilides (ed.), Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum (1994), 49 (66 et seq) who speaks in favour of greater freedom of choice.
75 Heiss (note 54) 185 (186).
76 see Schnyder (note 73), 49 (54 et seq).
77 see Art. 7 par. 1 lit. g and h of the 2nd Non-Life Insurance Directive.
as well as art 32 par 1 Life Insurance Directive Member States parties may be
granted a greater freedom of choice under certain circumstances. Following the
enactment of art 3 par 2 of the proposed Rome-I-Regulation this option of Member
States should include the extension of the choice to generally accepted Principles of
Insurance Contract Law. This option of the Member States, however, would not
satisfy the needs of the internal market. It can hardly be expected that all Member
States would avail themselves of this option and allow a choice of the PEICL.
Consequently, insurers will not be able to conclude all their transactions on the basis
of one and the same rule of insurance contract law within Europe. The internal
insurance market will remain incomplete.

2. EC-regulation

Another way to provide the parties with a choice of the PECL and/or PEICL as
optional instruments would be to enact them as EC-regulations78. As a result, the
PECL and the PEICL would not represent a 26th regime of (insurance) contract law
in Europe but a 2nd regime of (insurance) contract law in each Member State79. The
EC-regulations could at the same time grant an option to the parties by way of a
unilateral conflict norm allowing them to replace the applicable national (insurance)
contract law with the PECL and/or the PEICL. An analysis conducted by Downes and
Heiss indicates that this approach will avoid the structural deficiencies mentioned in
the context of art 3 par 2 of the proposed Rome-I-Regulation80. It is, therefore, a
preferable solution.

IV. Political Chances of an Optional Instrument

It has been mentioned that the political chances of an optional instrument are higher
than those of a European Contract Law replacing national laws. Nonetheless, that
does not mean that an optional instrument will in fact be enacted. Its chances will
depend on the willingness of the EC-Commission to take action and the Member
States as well as the interested parties (the insurance industry and the consumer

78 Basedow (note 36) 109; Heiss, (note 6) 1 (30 et seq); Clarke/Heiss (note 7 ) 600 (605 et seq).
79 see Heiss (note 6) 1 (38).
80 Heiss/Downes (note 35) 693 (707 et seq).
protectionists) to cooperate for the sake of a properly functioning internal insurance market.

There are, however, affirmative signals coming from EC-Institutions. The European Economic and Social Committee published an own-initiative opinion on “The European Insurance Contract” at the end of 2004. In this opinion the EC Commission was encouraged to consider legislative harmonisation of insurance contract law in Europe and the Member States were invited to cooperate. Furthermore, two communications of the EC Commission of 2003 and 2004 on European contract law mentioned the possibility of an optional instrument. Finally and most important, the proposed Rome-I-Regulation shall not prejudice the adoption of Community acts which “govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations” according to art 22 lit b). This is the first legislative proposal explicitly referring to an optional instrument. It promises exciting years of discussions on European contract law with a particularly prominent position for the insurance rules to come.

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Although progress has been made towards a single European insurance market, relatively little cross-border insurance business is actually being done outside the field of large commercial risks. Differences in national laws and regulations mean that insurers still need to tailor their wordings to meet local requirements. Article 8.101 is a restatement of the indemnity principle. The insurer is not obliged to pay out more than the amount necessary to indemnify losses actually suffered by the insured. Agreed values are valid even if higher than the actual value, provided no fraud or misrepresentation was involved when the value was agreed. The European Commission's consultation on the Common Frame of Reference for European contract law closes at the end of January 2011. 4.5. Project Group Restatement of European Insurance Contract Law. 4.6. European Research Group on Existing EC Private Law (Acquis Group). One major suggestion proposed by the action plan and subsequent reports was for the creation of a Common Frame of Reference (CFR) that would include common principles, definitions, and model rules for European contract law. Following on the heels of the DCFR, in 2010 the European Commission issued a green paper on European contract law [Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (July 1, 2010)]. The green paper suggested a number of potential policy options on how to strengthen the internal market. The Principles of European Contract Law (PECL) is a set of model rules drawn up by leading contract law academics in Europe. It attempts to elucidate basic rules of contract law and more generally the law of obligations which most legal systems of the member states of the European Union hold in common. The Principles of European Contract Law are based on the concept of a uniform European contract law system and were created by the self-styled Commission on European Contract Law set up by Ole Lando...