

# Towards the harmonisation of European insurance law

Peter Mansfield, partner at law firm CMS Cameron McKenna LLP, discusses PEICL, the Principles of European Insurance Contract Law, and assesses their likely impact on insurance practice

The next few years have the potential to revolutionise insurance law and, as a result, the insurance industry in the UK. The winds of change are blowing. Indeed, it is no longer a question of whether there will be change, because there will be. The issue is what form that change will take and how extensive it will be. Some of the pressures for reform are internal, primarily from the Law Commission. However, the greatest pressure is from Europe and this article focuses on the latest proposals from Brussels.

## The drive to harmonise

The EC Commission has never hidden its desire to harmonise European insurance law. It has always been concerned with (what it perceives to be) the lack of cross-border services offered by insurers and the barriers to an internal market created by the matrix of regulations and laws in each member state. Papers addressing some of these issues were written by the EC in 2001, 2003 and 2004. However, the process has recently taken a giant leap forward with the publication in December 2007 of a document entitled "Principles of European Insurance Contract Law" (PEICL). This is a draft document. It is, therefore, a long way from becoming legislation. However, it is an indicator, and probably a strong indicator, of the way that the European Commission is viewing the topic.

Despite its rather austere title, PEICL is an extremely readable document. It is a laudable example of an official document being written in plain English. Its clarity is admirable. However, the result is that you recognise on a first reading quite how revolutionary this document may be if it were ever to be used in the UK.

This "if" is a huge "if", because PEICL is currently intended to be a voluntary set of principles. It will apply only where the parties have agreed to its use. In that sense, it is like the M6 toll road. There is no obligation upon anyone to use it, because the old M6 is still available. However, if you do want to use it, you will have to pay. And so it is with PEICL. If UK insurers choose to use PEICL, then the basic position is that PEICL must be applied in full. Like oysters, PEICL must be

swallowed whole or not at all. None of the clauses can be excluded. However, clauses can be derogated from in certain circumstances. Often the derogation will be allowed only if it is not "to the detriment of the policyholder". However, for some specialist policies and for some policies for large insureds, the derogation can be for the benefit of either party.

PEICL's scope is wide. It is intended that the principles will be used for all types of insurance contracts, except reinsurance. Furthermore, they cover every stage from the formation of the insurance contract through to the handling of claims. PEICL is therefore intended to provide a comprehensive legal framework that will run parallel to the existing national legal frameworks.

## Structure

PEICL is split into four parts and 14 chapters, of which Parts 1 and 2, which incorporate Chapters 1 to 12, are likely to be the most relevant. The index for these two parts is as follows:

Part 1: Provisions common to all contracts included in PEICL

Chapter 1: Introductory provisions

Chapter 2: Initial stage and duration of the insurance contract

Chapter 3: Insurance intermediaries

Chapter 4: The risk insured

Chapter 5: Insurance premium

Chapter 6: Insured event

Chapter 7: Prescription

Part 2: Provisions common to indemnity insurance

Chapter 8: Sum insured and insured value

Chapter 9: Entitlement to indemnity

Chapter 10: Rights of subrogation

Chapter 11: Insured persons other than the policyholder

Chapter 12: Insured risk

## Philosophy

As has been mentioned, the overarching purpose of PEICL is to harmonise European insurance law. This is an admirable aim. However, it is an aim that can be achieved in myriad ways. It could be achieved, for example, by adopting the UK system. More important than purpose, therefore, is philoso-

y. What is the philosophical approach adopted by PEICL? Article 1:104 provides the answer. It lists four factors that will guide the interpretation of PEICL. These include each uncontroversial (and therefore bland) sentiments as promoting good faith and fair dealing. However, as one reads PEICL, one cannot help but think that the fourth factor is the most important by far: "the adequate protection of the policyholder."

This desire to protect policyholders is evident in almost every clause of PEICL. For example:

Article 2:101 – the insured's duty of disclosure is limited to answering "clear and precise questions put to him by the insurer". If the insured innocently breaches this duty of disclosure, insurers cannot terminate the contract unless the insurer can prove it would not have otherwise concluded the contract.

Article 2:202 – during the formation of the contract, there is a duty upon insurers to highlight inconsistencies between the cover provided and the applicant's requirements of which the insurer is or ought to be aware. This duty may be reduced if there is a broker involved.

Article 2:304 – "a term which has not been individually negotiated shall not be binding on the policyholder... if...it causes a significant imbalance in his rights and obligations under the contract to his detriment...". This will cover all terms in standard contracts.

Article 2:602 – when the policy ends, the contract will automatically be prolonged unless the insurer has given written notice at least one month before the expiry of the contract stating the reasons for its decision.

Article 4:102 – insurers cannot terminate the contract for breach of a condition precedent unless the insured has breached its obligation "with intent to cause the loss or recklessly".

Article 6:104 – payment of insurance monies must be made within seven days after the acceptance and quantification of the claim. If there is delay, interest will accrue at 7% over the rate applied by the European Central Bank.

### Mechanisms

These various clauses, when analysed collectively, reveal that PEICL uses three main approaches in order to ensure that the insured's position is protected.

First, the approach adopted in PEICL is, in some respects, not dissimilar to the approach

adopted in the innocent non-disclosure clauses that you find in some professional indemnity policies. In other words, PEICL reflects the belief that insureds should not be penalised unless they have breached the contract deliberately or recklessly.

Second, PEICL links in neatly with some of the elements of contract certainty. This involves the use of plain English (article 1:203), the avoidance of unfair clauses (article 2:304) and the timely preparation of documentation (articles 2:501, 2:701 and 2:702). However, more importantly, during contract formation, the burden is upon insurers to ask the right questions (article 2:101) and to explain the policy, particularly where insurers know that it will differ from the insured's expectations (article 2:202).

Third, PEICL uses time limits to ensure that insurers make swift decisions. For example, if an insurer wants to deny cover for non-disclosure, breach of condition or fraud, then he must do so within periods of a month to two months (articles 2:102, 2:104, 4:102 and 6:103). There is no suggestion that insurers can defer this decision by raising a reservation of rights. The consequence is that insurers will have to take policy coverage decisions much earlier than is perhaps currently the case.

### Insurance without boundaries

As we have seen, PEICL will create a less favourable legal framework for insurers than existing UK law. Insurers will have fewer remedies available to them in the event of default by the insured. Their powers will be fettered. Furthermore, insurers will face tight timescales in which to make policy decisions. PEICL certainly contains many traps for the unwary insurer.

However, the concept behind PEICL is compelling. It will allow an insurer to sell its products across Europe without worrying about the various national rules and regulations. It provides one legal framework across all the member states. PEICL is insurance without boundaries. If any insurer has aspirations to expand in Europe then PEICL – for all its faults – will be a godsend.

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