Principles of Reinsurance Contract Law Project: enhancing the value of reinsurance cover—viewpoint of an industry practitioner

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Abstract

This short article discusses the benefits of the Principles of Reinsurance Contract Law project (PRICL) from an insurance industry perspective. The scope is fairly limited, in that this article focuses on changes in the regime of remedies available for contractual breach, particularly for pre-contractual non-disclosure, as well describing the underlying legal uncertainty when relying on industry custom as a source of law in reinsurance. In both of these areas, the PRICL stand to bring improvements to the industry, some dimensions of which are discussed in greater detail in this article by first describing a simple framework for value generation of reinsurance, where reduction in operational risks and lighter regime of remedies (proportional to the severity of the breach of duty), particularly in situations of pre-contractual non-disclosure, reduce the risk of re-insurance covers not responding at a time of need. This improves the certainty of cover and, ultimately, the value of reinsurance covers.

I. Setting the scene: value of reinsurance

In order to provide commentary on the Principles of Reinsurance Contract Law project (PRICL), it is useful to construct a loose description of business rationale of reinsurance against which the benefits of the PRICL can be assessed. In this simplified framework, reinsurance is defined as insurance purchased by an insurer to provide protection against risks—primarily, underwriting risks.[1] More interesting are the various motivations driving the purchase of such protection, and, in the following article, some of these motivations are briefly

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[1] Mirroring the International Association of Insurance Supervisors' (IAIS) insurance core principles definition of reinsurance (ICP 13.0.1). 9((IAIS) 2019).

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outlined to highlight how the PRICL stand to improve on the current legal framework on which reinsurance business is conducted.

In the simplest terms, reinsurance is protecting the insurance company against impairment caused by (high severity or high frequency of) losses. A more sophisticated view on reinsurance focuses on reinsurance as a substitute for capital, and, thus, reinsurance becomes a useful tool in optimizing the balance sheet, fund expansion, improved return on equity, and various other financial metrics. Whichever motive is driving the purchase of reinsurance, ultimately, the value of reinsurance purchased, apart from price, will depend on whether the particular reinsurance protection is well calibrated to serve the motive behind the purchase and whether the reinsurance cover will respond when the cover is triggered by a loss. While the main work behind the design of a reinsurance purchase usually remains within the scope of business planning and financial analytics, substantial room also remains for the legal profession to make a significant contribution to value generated by the reinsurance contract, and the PRICL framework is a new tool with which to enhance the value of reinsurance cover, as explained below.

II. Operational risks and reinsurance

Insurance and reinsurance—as an industry—is highly regulated. The solvency of the companies is under continuous scrutiny not only by national regulatory bodies but also by the rating agencies assessing the creditworthiness of companies. Both solvency regulations and analysis of credit risk have become gradually more sophisticated and, nowadays, also feature operational risk metrics as part of the solvency assessment.[2] In fact, the International Association of Insurance Supervisors' Insurance Core Principles note that 'the supervisor should remain aware that while reinsurance transfers insurance risk from the ceding insurer to the reinsurer, it also creates other risks. In a standard transaction, the ceding insurer reduces its insurance risk and assumes other risks such as credit, operational and basis risk'.[3] This is entirely natural, as it is in periods of peak loss activity when both the solvency of the insurance company as well as the functioning of the reinsurance covers purchased will be tested.

The duties and obligations of parties to a reinsurance contract place a high burden on the accuracy of information transferred to the reinsurance company to enable proper risk assessment and pricing by the reinsurer. Failure in this disclosure duty could result in a loss of reinsurance protection. Due to the combination of the high operational standard of quality and the crucial dependency on reinsurance at a time of peak loss activity, it would be a surprise if processes related to the purchase and placement of reinsurance covers would not be in

[2] IAIS Insurance Core Principles ((IAIS) 2019), paragraphs 8.1.3 and 16.12 both reference consideration for operational risks as being essential elements of a risk management system of an insurance company.

[3] ((IAIS) 2019), paragraph 13.0.4.

high focus in most insurance companies as well as in the eyes of regulators and rating agencies.[4]

This is where the legal profession can contribute to the value generated by reinsurance covers—by both ensuring that the underlying design purpose of the reinsurance cover is well reflected in the reinsurance contract as well as by helping to oversee that the duties the parties to a reinsurance transaction have are properly fulfilled. Poor performance in these areas would bring substantial operational risk to the performance of reinsurance covers, whereas good contractual design and clarity of cover and of the underlying legal framework would ensure that the reinsurance protection purchased performs as intended. Ultimately, legal uncertainty implies risk, and risk is a cost. Increased contractual clarity and predictability of operation of the reinsurance contract reduces risk and, thus, enhances the value of reinsurance protection.

III. Role of industry custom as a source of law in reinsurance business

It is necessary to take a brief detour to describe the sources of law for the conduct of reinsurance business and the resolution of disputes to fully appreciate the benefits of the PRICL. The following account is a modest, superficial look into this subject, with no ambition to provide a full account but rather to provide enough background to appreciate changes that the PRICL would bring to the (re)insurance industry.

The conduct of reinsurance business requires a contract to execute the risk transfer. In a narrow sense, the contractual techniques mirror custom and usage in the field of reinsurance business, but, in a broader sense, reinsurance custom is more than just how the risk transfer is executed through contracts. In addition to contractual practices, the established practices within the industry form the supplementary framework for the interpretation of the contract.[5] However, the role of the custom and usage does not reduce itself to contractual interpretation (and, in some cases, supplementation of the contract where necessary); reinsurance custom plays a large role in how disputes arising in the field of reinsurance are resolved,[6] as there is a general lack of specific legislation relating to the conduct of reinsurance business in large parts of the world, with the notable and most relevant exception for this article being the United Kingdom.[7]

[4] ((IAIS) 2019), paragraphs 13.2.12 – 13.2.16 reference operational risks (as to contract documentation specifically) as part of the assessment of reinsurance protections of an insurance company, 'in order to reduce risk and scope of future disputes'. Risk and scope of future disputes of course exist outside pure focus on contractual documentation, and can be mitigated through the PRICL as is later demonstrated in this article.

[5] Hemmo, Mika. 2003. *Sopimusoikeus I (Contract Law I)*. Helsinki: Talentum, 2003, pages 564 – 565.

[6] Gerathewohl, Klaus. 1980. *Reinsurance Principles and Practice, Volume 1*. Karlsruhe: Verlag Vershicherungswirtschaft, 1980, pages 460-461.

[7] See Gerathewohl, 1980, pages 443 – 445 for more detail on geographic differences on existence of legislation directly applicable to conduct of reinsurance business.

Arbitration clauses have been the dispute resolution of choice in a large part of the world, and, historically, so-called honourable engagement clauses have been common.[8] These clauses extend the ability of the arbitrators to resolve disputes based on the custom and usage within the industry, strengthening the role of industry custom in conduct of business. It has to be noted that, in modern industry practice, the role of reinsurance custom is so ingrained that it could be argued that honourable engagement clauses might not materially change the outcome of the dispute resolution process.

Despite the prevalence of arbitration clauses, written sources of law referenced within an arbitration process, by nature, are frequently in the form of case law from open courts. Although, for many reasons, arbitration still remains the preferred dispute resolution mechanism in reinsurance contracts in most jurisdictions,[9] English court rulings, in particular, are frequently quoted in various contexts when the subject matter is the content of reinsurance custom. To a large extent, this is due to the interplay between the long history of the London market as a focal point for reinsurance business and the more frequent usage of open courts as a dispute resolution mechanism—both of which have led to the accumulation of industry expertise in the court system and to an evolving body of case law on the practical content of industry custom.[10]

Unfortunately, the application of reinsurance custom is not always as simple as applying a ruling from the established UK case law to the specific problem at hand—though sometimes it is. This is not a matter of accepting that UK case law would be in any way binding in a particular jurisdiction but, rather, a question of how broadly it is accepted that a specific UK case law embodies the applicable reinsurance custom.

It is useful to provide (perhaps even slightly exaggerated) criticism of the current situation to better highlight the difference that the PRICL would make to industry practitioners. I would rank the opaque nature of reinsurance custom as the chief criticism against the role of industry practice as a source of law. Though reinsurance is a very international business, reinsurance custom is not as monolithic and uniform globally as one would at first assume,[11] and there is,

[8] An example from Gerathewohl 1980, page 527: 'The arbitrators shall make their award in accordance with the usages and customs of reinsurance practice and are relieved from all legal formalities'.

[9] Such reasons being for example confidentiality, shorter and streamlined process, avoidance of lay juries (or lay judges). See Stempel, Jeffrey W. 2017. 'Notes from a quiet corner: user concerns about reinsurance arbitration - and attendant lessons for selection of dispute resolution forums and methods.' *9 Arbitration Law Review 93* Article 22, page 4.

[10] See Carter, R.L., *Reinsurance (third edition)*. London: Reactions Publishing Group, 1995, page 92; where it is further argued that litigation in a commercial court in London may in fact be more advantageous than arbitration due to the expertise built up in the legal system.

[11] See, for example, Heiss, Helmut. 2018. *From Contract Certainty to Legal Certainty for Reinsurance Transactions: the Principles of Reinsurance Contract Law (PRICL)*. Scandinavian Studies in Law, Volume 64, the whole of chapter II, as well as more specifically, Gerathewohl, 1980, page 488: 'Upon reflection, one sees that reinsurance customs are, in reality, not always as uniform as one might assume. Moreover, there are certain differences not only in customs – particularly between the Continental and the British market systems – but also in terminology:

figuratively, an entire additional hidden dimension between the global industry custom and the local application of it—essentially, this is the varying extent to which the local legal principles and local laws blend into the global custom to form a local interpretation of it. Since the resolution of practical legal problems related to reinsurance cover depends on the concrete interpretation of the industry custom—which, in turn, depends on the influence of the underlying legal tradition governing the contract—the actual resolution to the dispute might be less interesting, when looking for globally applicable guidance to what the industry custom is, than the argumentation and principles applied in resolution of that dispute in a court or in arbitration. Through the argumentation and principles applied, we can try to determine how the applicable jurisdiction affects the local interpretation of global insurance practice and where the limits of possible local mutation of the global industry practice are. For example, we might ask to what extent certain generally accepted principles of insurance law in Finland would apply, by analogy, to the reinsurance business.[12] We can never directly observe the global reinsurance custom, except through the lens of a local applicable law, which ultimately reveals a localized interpretation of a global reinsurance custom. In the end, the required level of experience to reach an expert level in reinsurance custom is increased by this complexity.

If the current content of the industry custom is criticized as being opaque, even more intangible is the evolution and change of the industry custom. Is it possible to detect—and rely in a contractual setting on—something as intangible as change in reinsurance custom? Although reinsurance custom can evolve through the resolution of disputes, the results of which become public knowledge and thus become incorporated into the body of industry practice, this type of evolution is reactionary in nature. How does the custom change prior to a dispute? A case in point is the new Insurance Act of 2015 in England, which diverges from most other national insurance acts in that it also regulates important aspects of a reinsurance relationship. The new act materially changed many of the old reinsurance practices, which begs the question: for contracts not governed by English law, does the 'international practice of reinsurance' change due to legislative change in one country? What if that country is very influential in the formation of reinsurance custom? Does Brexit affect how influential a role London has and how much influence the London market would consequently have on the evolution of industry custom? There are no authoritative answers to these questions and, thus, no sufficient certainty to be able to rely on changed custom in a reinsurance contract.

Thus, while custom and usage do bring substantial influence to contractual interpretation, the resolution of disputes, and business practices that are

Terms which appear uniform at first sight may have a different meaning in different markets and, depending on the legal concepts applied, in different contexts'.

[12] One of the conclusions of my Master's degree study (unfortunately in Finnish only (Kuitunen 2010)).

prevalent in the industry—for the good of all parties—weaknesses also remain when looking at clarity, predictability, and contractual certainty.

IV. The case of pre-contractual non-disclosure: practical benefits of the PRICL

In this section, we gradually move from the more general benefits in clarity and predictability in determining the content of industry custom towards a very practical example of a concrete benefit in the form of proportional remedies for breach of pre-contractual disclosure duty. Although the PRICL framework carries multiple small and large improvements throughout the framework, here we take one of them to demonstrate how the PRICL improve the status quo by essentially acting as a modernized codification of the reinsurance custom—which, in certain important areas, diverges from current reinsurance practices in seeking to solve issues that have frequently led to disputes in the industry.

In discussing the role of reinsurance custom and, particularly, the evolution of reinsurance custom in the prior section, problems in relation to the opacity of practical content of reinsurance custom have been highlighted. Drawing upon substantial expertise of participants on the PRICL project, the resulting work acts as a compressed codification of the current reinsurance practice, where a huge body of industry practice is distilled to contain the essential elements. This body of work is comprised of short articles along with (sometimes lengthy) commentary, bringing contextual help to the interpretation and application of the articles. As the PRICL can be chosen as the law governing the contract, the PRICL can be adopted in the reinsurance contract without uncertainty over the exact practical application of reinsurance custom—essentially, the PRICL framework will replace the multiple interpretative lenses of the locally applicable law to ensure uniform application globally. Furthermore, although years of experience are certainly of benefit, such long years of reinsurance expertise are certainly not required to understand and interpret the PRICL framework, given the almost user manual-like nature of the PRICL. Therefore, the opacity and the local variety of the current reinsurance practice can be avoided, which will increase the clarity of contractual obligations and substantially reduce legal uncertainty.[13]

As mentioned, in certain areas, the PRICL framework diverges from current reinsurance practice in an attempt to solve problems that have manifested in business practice, to improve the functioning of the market, and to enhance the value of reinsurance protection. This article highlights one of these areas in more detail: the remedies for breach of pre-contractual duty of disclosure.

[13] See (Heiss 2018) for more thorough look into this subject.

1. Remedies for breach of contractual duties

Parties to a reinsurance relationship owe each other a duty of utmost good faith, which manifests itself in different ways in the reinsurance relationship. Particularly important is the role of pre-contractual duty of disclosure—where, in most situations outside contracts governed by the laws of England and Wales (where the Insurance Act of 2015 altered disclosure rules), the prospective reinsured has a duty to disclose fully all material facts relating to the risk being reinsured, rather than only avoiding misrepresentation of fact.[14] This disclosure duty is, in many ways, at the core of reinsurance business, since reinsurers can normally only rely on information provided by the reinsured to conduct their underwriting (risk assessment, selection, and pricing). Strong disclosure duty is required to balance informational asymmetry of the parties, where the prospective reinsured holds much more information about the risk being reinsured. On the flipside, having received proper information to conduct their underwriting, reinsurers are strongly bound to the fate of the underlying risk—so that if a loss does happen, reinsurers have a strong obligation to compensate their share of the loss. The strict disclosure rules and the (strict) contractual clauses binding reinsures to the risk (which could even be called reinsurance principles) are both essential features of reinsurance: if risk assessment has to be made on a playing field with substantial informational disadvantage, this would mean a high safety margin on pricing of reinsurance and costly reinsurance. Conversely, if cover provided by reinsurance contract would be suspect and/or subject to considerable legal uncertainty when a loss occurs, the value of reinsurance as a risk transfer mechanism would diminish, reducing the reinsured's willingness to pay for reinsurance cover. In summary, reinsurance would risk becoming too expensive compared to the value it provides. Conveniently, reinsurance custom has evolved to solve these issues, so that should the reinsurer receive sufficient disclosure to conduct its underwriting, it will then be strongly bound to compensate its share of the loss if a claim does arise. This strengthens the value of reinsurance.

Since the duty of disclosure is so central to proper risk selection and pricing of the reinsurer, harsh penalties have been part of the reinsurance custom for failure to fulfil this duty. Material non-disclosure or misrepresentation traditionally leads to the right of avoidance for the reinsurer (*ab initio*).[15] While, in some scenarios, this penalty would indeed be very much suitable and would reflect the degree of harm and/or culpability of the prospective reinsured, in many situations complete avoidance of contract would be regarded as disproportionately harsh compared to the degree of fault and/or damage caused by the non-disclosure (which could also happen despite best intentions and efforts of the prospective reinsured).

[14] See for example (Carter 1995) pages 116–17 and particularly, (Gerathewohl 1980), pages 408–10 for German/continental law tradition perspective.

[15] See (Gerathewohl 1980), page 818.

The reinsurance world, however, has been led towards an approach that is more in line with how non-disclosure or misrepresentation is handled in insurance contract acts in many parts of the world, in that some type of criteria for proportionality of penalty to damage caused by the breach is part of the overall assessment. The Insurance Act of 2015 in England and Wales[16] represents an almost complete overhaul of the old regime concerning penalties for non-disclosure in a reinsurance relationship; for the first time bringing proportional remedies to the reinsurance community in this jurisdiction. This is a legal framework for operation of reinsurance business that discards the all-or-nothing nature of the past, arguably to the benefit of all parties,[17] and rather adopts proportional remedies for breach of duty of disclosure. This is a development that the PRICL have embraced, and they adopt a similar system of proportional remedies with some differences.

2. *Remedies for breach of contractual duties under the PRICL*

The remedies for breach of contractual duties under the PRICL are split into two subcategories: remedies for breach of contract (in general) and a specific provision for remedies for breach of pre-contractual duty of disclosure. Remedies for breach of contract largely mirror the Principles of International Commercial Contracts (PICC) rules,[18] with contract termination available as a remedy only in the rare case that the contract cannot reasonably be expected to be upheld following the breach. In this article, the focus is on the remedy for breach of pre-contractual duty of disclosure, which will be described in more detail. Following a breach of pre-contractual non-disclosure under the PRICL, the remedies that are available for the reinsurer are described in Article 3.2 as follows:[19]

1. If the prospective reinsured breaches its duty of disclosure and if the reinsurer, had it known the undisclosed information, would have entered into the contract on different terms and conditions other than the premium, the reinsurer is entitled to retroactively adjust the contract to these different terms and conditions.
2. Subject to paragraph (1), if the prospective reinsured breaches its duty of disclosure and if the reinsurer, had it known the undisclosed information, would have entered into the contract on a higher premium, the reinsurer is entitled to:
   a. proportionally reduce the amount to be paid on any claim arising from a loss that occurred before the reinsurer became aware of the breach and

[16] The UK insurance act of 2014 is available for example from: <http://www.legislation.gov.uk/ukpga/2015/4/pdfs/ukpga_20150004_en.pdf> (20 March 2020).

[17] In many situations, too harsh prescriptive penalties could lead to unfair outcomes, which in turn could create a difficult predicament to judges and arbitrators – if the resolution to a dispute feels unfair, even if such resolution would be right by law and by custom, there might be an incentive for pro-reinsured bias to avoid unfair outcomes.

[18] Principles of International Commercial Contracts (PICC) (UNIDROIT).

[19] Slightly edited from final draft PRICL version for better presentation as an isolated article.

b. claim the higher premium for the remaining contract period while providing full coverage according to the adjusted contract for all claims arising from a loss that occurred after the reinsurer became aware of the breach.

If the reinsured notifies the reinsurer, within reasonable time after adjustment, it is entitled to pay the higher premium retroactively to the formation of the contract and to full coverage for losses of which it was not aware prior to notification.

3. A breach of the duty of disclosure by the prospective reinsured entitles the reinsurer to avoid the contract retroactively if
   a. the duty was breached fraudulently, or
   b. the reinsurer would not have entered into the contract at all had it known the undisclosed information.

   If the reinsurer exercises a remedy pursuant to paragraphs (1) to (3), it may claim additional damages.

In paragraph (1), the reinsurer is given a right to retroactively adjust the contract terms to reflect what the contract would have been had the non-disclosure not occurred. This includes a situation where, had the reinsurer known a non-disclosed fact, it would have inserted an exclusion to the contract and, thus, could lead to loss of coverage. The difference to the remedies for non-disclosure available under existing reinsurance custom is that this is not a full avoidance of contract, but, rather, only the part of the contract that is tainted by the non-disclosure is affected. While paragraph (1) seeks to restore contractual balance (in terms of conditions) to what the contract would have been had the non-disclosure not occurred, paragraph (2) seeks to restore contractual balance in monetary terms. It should be noted that both paragraphs (1) and (2) can apply at the same time.

In restoring the financial balance of the contract, it is important to distinguish between claims that have already occurred and claims that have not yet occurred (but may occur in the future). In paragraph (2)a the reinsurer is given the right to proportionally reduce payment on a claim that has already occurred prior to the reinsurer becoming aware of the breach; if absent non-disclosure, the reinsurer would have entered into the contract with the higher premium. This part of the article ensures that where claims have occurred, substantial financial impact of the non-disclosure will be felt by the reinsured—to the extent that it would be entirely possible to see situations where claims would be entirely not covered—had the reinsurance cost been 100 per cent more if there was no non-disclosure. Although it could be argued that the quality of disclosure might reduce because reinsureds would not have as high financial motivation to maintain good quality under a regime of proportional remedies, the proportional reduction of existing claims is still a harsh—but just—remedy, and it would be hard to see any company willingly choose to take risk for the quality of disclosure even under a proportional remedies regime.

Paragraph (2)b allows for the reinsurer to claim the higher premium with which he would have entered into the contract for the remaining period of the contract, after which he will provide full coverage for claims arising from losses that occur after the reinsurer became aware of the breach. This paragraph should not be overlooked, both because this is where the PRICL deviates from the remedies available under the Insurance Act of 2015 as well as because this is where an important underlying principle behind remedies in the PRICL shines through. Reinsurance covers are crucial for the risk management frameworks of insurance companies and operational risks in this regard are high. The PRICL allows for full restoration of the contract after a breach, which is not serious enough to qualify for avoidance of contract for claims that have not yet occurred. This is crucial since it would be hard to imagine that the management of insurance companies would accept partially functioning reinsurance contracts to remain in place—more likely, the defective covers would need to be replaced, and supplemental reinsurance cover purchased. Such a break in the normal operation of reinsurance covers comes with multiple complications, and restoring the reinsurance covers to former operational level could—depending on the types of covers in place—be a very complex and costly endeavour. Under the PRICL, there is a mechanism to restore the impaired reinsurance cover to former functionality, even if (rightly) claims that have already occurred will carry a harsh adjustment of cover. For the reinsurer, this should be the preferable outcome as well: the reinsurer will be able to charge the premium it would have charged without non-disclosure, and, after the contractual balance is restored, one would expect the business relationship to be much less damaged compared to contractual avoidance or an impaired coverage scenario.

The second part of paragraph (2)b is relevant for long tail reinsurance covers, where losses may occur years after the original reinsurance period has run out and is still impacting reinsurance covers of prior years. These are frequent in casualty lines where, to provide an example, underlying business could be written with losses occurring during the trigger, and reinsurance cover would be on a risk-attaching basis. What this combination results in is a situation where the insurance cover essentially remains open for potential loss occurrences forever, and reinsurance cover, in turn, covers the insurance policies written during the period of reinsurance cover. In this case, then, the reinsurance cover will also remain open for claims that could occur years after the reinsurance period itself has run out. In these situations, it would be inappropriate to charge an additional premium based on the remaining contract period since, in many cases, the reinsurance period would have already passed, yet, despite this, the cover would still remain open for potential future claims. In these types of scenarios, the reinsured is given the possibility of paying a full premium for the full contractual period and, thus, would restore the contract for losses of which the reinsured was not yet aware.

Finally, in paragraph (3), the reinsured is given the possibility of retroactive avoidance—with an effect that is similar to the current reinsurance custom; however, this right is reduced in scope of application only to fraudulent breaches or situations where the reinsured can show that he would not have entered into the contract at all. At this point, it should be underlined that the chosen design principle behind the remedies in the PRICL is to uphold the contract whenever possible: the PRICL commentary emphasizes this at several points. For example:

> Article 3.2 is based on the assumption that both parties to the contract have an interest in upholding it regardless of the breach. Therefore, the PRICL take the approach to uphold the contract. Accordingly, adjustment is the favored remedy and avoidance is the remedy of last resort available only where strict requirements are met.[20]

Therefore, the possibility of full avoidance is reserved for situations that could be described as falling outside the norms of normal business practices (such as fraud) or cases where the risk was that the reinsured would have fallen so completely outside the allowed risk appetite of the reinsurer that he would not have entered into the contract at all had he known the true nature of the underlying risk.

Generally, then, when it comes to remedies, the PRICL are moving with the times and adopting a proportional remedies breach of pre-contractual disclosure, much in line with the UK Insurance Act of 2015. However, important design decisions concerning the restoration of contract after a breach for claims that has not yet occurred could not be emphasized enough. The fact that this restoration is expressly prescribed strengthens the functionality and solidity of reinsurance covers and reduces operational risks, not only through the provision of proportional remedies rather than full avoidance but also by introducing robustness into the reinsurance covers in the sense that they are more repairable following a breach than even under the UK Insurance Act of 2015. These features should be highly attractive to insurers and could even carry weight in operational risk and solvency assessments, considering that the regulators also note operational risks related to reinsurance covers as being an important element of their assessment.

V. Conclusions

The PRICL are a great opportunity to effectively modernize the international practice of reinsurance—much like what was undertaken in the new Insurance Act of 2015 in the United Kingdom—and make it available for use to the reinsurance industry globally. As a private codification of law (thoroughly

[20] Comment C7 under the Article 3.2 (Remedies for breach of pre-contractual duty of disclosure), PRICL publication.

described by Helmut Heiss),[21] the PRICL can help bring legal certainty through one global interpretation of reinsurance custom, applicable in all jurisdictions, thus improving on the current situation in which multiple local interpretations of the global insurance practice exist.

Keeping opaqueness of reinsurance custom, particularly in terms of its evolution, in mind, we now have a situation where reinsurance contracts governed by the laws of England can enjoy a modernized framework for duty of disclosure and remedies, bringing substantial benefits, I would argue, to both reinsurers and reinsureds. However, for contracts not governed by the laws of England, the industry custom cannot reliably be trusted to contain such modernized elements to a sufficient degree of certainty as to be relied on in a commercial context. This is where the PRICL bring a unique benefit to the reinsurance market; the PRICL give the ability to contract in to proportional remedies for breach in duty of disclosure without having to use English law to govern the contract. The underlying principle in the PRICL is to preserve the existence and functioning of the reinsurance contract as far as possible, which in turn will act to enhance the value of reinsurance protection and reduce operational risks for reinsureds. In many ways, the PRICL embrace the same underlying trends that have driven the development of the industry custom in the past—towards solutions that streamline the conduct of reinsurance business and enhance the value of reinsurance cover. By making reinsurance cover more resilient, even after the breach of disclosure duty, operational risks are reduced, and reinsurance covers become more robust and, thus, more valuable as they are more likely to function as intended when losses do occur. This is to the benefit of all parties, as the more value reinsurance covers have, the higher the willingness is expected to be to pay for such covers.

[21] Helmut Heiss: From Contract Certainty to Legal Certainty for Reinsurance Transactions. Scandinavian Studies in Law 64, 2018.