

Interaction of the PRICL with reinsurance standard clauses

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Overview

- The PRICL, still in draft form, provide a set of non-binding rules on reinsurance which the parties may freely choose to govern their contract. The rules aim at certainty, comprehensiveness and uniformity of interpretation
- The PRICL operate in close interrelation with the UNIDROIT Principles of International Commercial Contracts (PICC)
- The PICC will apply on a default basis where issues are not settled by the PRICL (article 1.1.2 PRICL), i.e., where there are external gaps
- The PRICL do not provide rules on reinsurance contract formation or standard clauses as such; hence, reference should be made to PICC which do contain provisions on such matters. However, the PRICL contain provisions in respect of certain clauses which are typically used in reinsurance and could be described as standard (with reservations)

Standard clauses in PICC

- The PICC provide for rules on contracting under standard clauses (articles 2.1.19 through 2.1.22)
- Standard clauses are defined as provisions prepared in advance for general and repeated use by one party and which are actually used **without negotiation with the other party** (article 2.1.19)
- Irrespective of form, drafter and volume, the decisive note is that they are drafted in advance for general and repeated use and that they are actually used in a given case by one of the parties without negotiation with the other party. The non-standard terms of the contract, if any, may well be the subject of negotiation between the parties
- In principle, these default rules would apply to reinsurance contracts

Standard clauses used in reinsurance

- For ease of reference no distinction is made herein between clauses used in proportional or non-proportional reinsurance, or treaty or facultative reinsurance, or otherwise
- Wide variety of standardized clauses in reinsurance practice. Some examples: full reinsurance clause; as original; follow the fortunes and follow the settlements; claims cooperation clause; claims control clause; cut through clause; audit and inspections; deposits clauses; Error and Omissions clauses
- Purpose: so that the parties can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts *without the need for detailed negotiation or discussion [Pioneer Shipping Ltd. And Others v. B.T.P Tioxide Ltd (The Nema)]*
- Issues: Are the so called “standard” clauses standard in the sense of the PICC? That is, drafted in advance for repeated use in many contracts and not negotiated with the other party? Are varieties of so called standard clauses standard clauses themselves?
- Would it not be better to refer to these varieties as “typical” instead?

Standard clauses in PRICL

- The PRICL contain a number of provisions which could be described with some reservations as standard or typical, as follows:
 - Timely notice of changed circumstances (art. 2.3.3)
 - Right to inspect the records of the reinsured (art. 2.3.4)
 - Adequate and timely notice of claims (art. 2.4.2)
 - Follow the fortunes and follow the settlements (art. 2.4.3)
 - Cooperation in claims handling (art. 2.4.4)

Non-PRICL standard clauses and PRICL

- No interference of PRICL with non-PRICL standard or model clauses included in contracts
 - Art. 1.1.3 “Exclusion or modification of the PRICL”:
“The parties may exclude the application of or derogate from or vary the effect of any of the provisions of the PRICL”
- If nothing is said in the contract, the PRICL rules involving standard clauses would apply. If the contract provides for so called standard or typical clauses which conflict with the PRICL rules involving standard clauses, the former would prevail

Brief analysis of some PRICL rules involving standard clauses

- Draft article 2.4.2 of PRICL (Follow-the-Fortunes and Follow-the-Settlements):
“The reinsurer shall follow the fortunes of the reinsured and follow the settlements of the reinsured by reimbursing the reinsured for payment of loss covered by the reinsurance contract and arguably covered by the primary insurance contract.”
- Two requirements:
 - The loss must be covered by the reinsurance contract;
 - The loss must be *arguably* covered by the primary insurance contract.
- Issue: has the reinsured been released from the obligation of acting in an honest and businesslike manner in handling and settling the insured’s claim, or this obligation is encompassed in the duty of good faith (art. 2.1.4)?

Analysis (Cont.)

- Draft article 2.4.4 of PRICL (Cooperation in claims handling):
“The parties to a reinsurance contract shall engage in reasonable cooperation regarding all aspects of the handling and administration of reinsurance claims”
- Very simple and light clause. Varieties in the market frequently impose cooperation as a condition precedent to the reinsurer’s liability, or provide for tighter duties
- No mention in the PRICL rules of claims control clauses, which are also frequently used in the market

Conclusions and questions

- The PRICL will apply if the parties freely choose them to govern their contract. The parties can derogate, amend or exclude any of the Principles
- The PICC will apply on a default basis where issues not covered by the PRICL arise, e.g., formation of the reinsurance contract
- The PRICL do contain rules on standard or typical reinsurance clauses
- These rules are expressed in very soft or light terms
- The question arises: will the market use them? Possibly, it will depend on who has the upper hand in the negotiation

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