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Follow-the-settlements of COVID-19 losses and follow-the-fortunes under the PRICL

*COVID-19: Challenges for (re-)insurance law
– a transnational perspective*

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Agenda

- I. General remarks and overview of PRICL Art. 2.4.3
- II. Business Closure, in particular follow-the-settlements
- III. Additional Duties under PRICL
- IV. Regulatory Demands (US and follow-the-fortunes)
- V. Block settlements

I. General remarks and overview of PRICL Art. 2.4.3

PRICL Art. 2.4.3:

To the extent a loss is covered by the contract of reinsurance, the reinsurer shall

- (a) follow the settlements of the reinsured if the losses are arguably within the cover of the primary insurance contract;
- (b) follow the fortunes of the reinsured.

II. Business Closure, in particular follow-the-settlements

- Unpredictable BI judgments: a classic of follow-the-settlements
- No ultimate answer under PRICL but guidance serves legal certainty
- **Comment 4 to Art. 2.4.3:** “Arguably covered” requires that the settlement of claims made by the reinsured is not collusive, fraudulent, deceptive, grossly negligent or reckless, clearly outside of coverage, or beyond the amount of limits set forth in the agreement.
- And: [...] If it cannot be said with positive assurance that [...] no reasonable person would support the amounts paid in settlement, the settlement should generally be considered sufficiently reasonable.
- **Comment 6 to Art. 2.4.3:** Follow-the-fortunes includes coverage judgments against the reinsured. [...] However, where the reinsured recklessly failed to put forward obvious defenses, the resulting judgment must be considered to have been rendered within the reinsured’s control

III. Additional Duties under PRICL

Most relevant additional duties surrounding follow-the-settlements:

- A duty of **utmost good faith** (Article 2.1.2) equaling a duty of good faith under a Civil law regime;
 - A duty of the reinsured to **provide the reinsurer with all information** of which it is or reasonably ought to be aware and which is material to the risks to be assumed by the reinsurer (Article 2.2.1);
 - A duty of the reinsured to give **adequate and timely notice** of claims (Article 2.4.1);
 - A duty to **act reasonably and prudently** when addressing claims by its insureds that may result in claims for reinsurance coverage (Art. 2.4.2).
- Consequence: Chapter 3, in particular damages – however, not an exemption for not following under Art. 2.4.3

IV. Regulatory Demands (US and follow-the-fortunes)

- Law that requires the primary insurer to pay COVID-19 business interruption claims regardless of the language of the policies and the existence of any virus exclusions in the policies.
- **Comment 8 to Art. 2.4.3:** A further example for an application of the follow-the-fortunes rule is a change in national law which has an impact on the cover under the underlying contract of insurance.

V. Block settlements

- Follow-the-settlements applies
- But the individual case is decisive for the liability of the reinsurer

Thank you very much for your attention!