

Dariusz Fuchs*

**CONSISTENCY OF THE EUROPEAN PROJECT
PEICL WITH THE POLISH CIVIL CODE
IN VIEW OF ART. 807**

Abstract

This paper contains an analysis of the meaning of art. 807 of the Polish Civil Code in the context of the possibility of applying uniform international law to an insurance contract. The essence of the Project on Insurance Contract Law (PEICL) is presented in the text and a discussion about international reinsurance contract law (PRICL) is included. Attention is drawn to the current shortcomings of the content of art. 807 of the Civil Code, which is why the author also formulates a *de lege ferenda* conclusion regarding the content of art. 807 of the Civil Code to the concept of allowing an indication of substantive law prior to its latest amendment, with appropriate clarification. The paper also presents the possibilities of a codex interpretation of the current regulation of an insurance contract.

Keywords: insurance contract, PEICL, PRICL, uniform law

* Dariusz Fuchs, Ph.D., attorney-at-law, Cardinal Stefan Wyszyński University in Warsaw, member of the working groups preparing the PEICL and PRICL projects, e-mail address: d.fuchs@dariuszfuchs.pl. ORCID: 0000-0001-5853-2657.

Introduction

Article 807 of the Polish Civil Code is the norm of Title XXVII, Book 3, which, when compared to its original contents, underwent major changes, fundamentally inspired by the social and economic changes that occurred in the years since the Civil Code entered into force on 1 January 1965.¹ Even its current editorial structure suggests the evolution of the provisions (*vide* art. 807 §2 of the Civil Code is designated as repealed). Originally, this provision was restricted only (and as much as) beyond the trade among state-owned companies. Currently, its imperative function is formulated differently in relation to the original situation, which does not mean that this fact is in practice meaningless for the needs of insurance trade, both domestic and international. Therefore, its content in a natural way implies the assessment of possible absorption of international insurance standards, whether in the scope of commonly applied insurance terms and conditions, such as Institute Cargo Clauses, or solutions constituting in its substance ‘*soft law acquis*,’ such as PEICL (Principles of European Insurance Contract Law).

It is worth emphasising here that an example analogous to the above, referring to attempts at creating uniform international law, but now on the trans-European, global scale (regarding reinsurance and retrocession), is PRICL (Project on Reinsurance Contract Law). However, it must be noted that the current state of progress of works on this project has not reached beyond *status nascendi*.²

An issue cognitively interesting for the above reasons, given the subject matter of this study, is the possibility and scope of application of PEICL within the domestic legal order, both at the current stage (i.e., European project) as well as in case of possible entry into force of the EU legal act that will contain the contents of these clauses.³ Therefore, the thesis that the regulation of insurance contracts in Europe should be uniform and not divided according to the applicable law of particular countries would be the right *motto* of the works of the group preparing PEICL,⁴ and hence, it is a project of an act containing clauses regulating the rights

¹ Act of 23 April 1964 Civil Code, consolidated text: Dz. U. (Journal of Laws) of 2019 item 1145, as amended.

² Cf. tab PRICL: www.dariuszfuchs.pl. Accessed on 19.04.2020.

³ For interesting remarks in the context of the evolution of European civil law, see: Bronswold, R., *Contract Law. Themes for the twenty-first century*, Oxford 2006, pp. 173 et seq.; from the PRICL point of view: Fuchs, D., *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi-PRICL*, “Wiadomości Ubezpieczeniowe” 2019, No. 1.

⁴ Cf. Heiss, H., *Introduction*, in: Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H., Lockacker, L. (eds.), *Principles of European Insurance Contract Law (PEICL)*, Köln 2016, pp. 1–3.

and obligations of insurance contract parties. These provisions will make it possible, as a general rule, to apply them by the parties in the near future as the governing law for a concluded contract. In this understanding, the cross-border attribute occurs in substantive terms, the achievement of which, according to the author, would be the most desirable condition in Europe, particularly due to the interest of the insured, as well as the freedom of insurers in provided business services. It will also allow avoiding the troublesome situation of conflicting general conditions (so-called battle of forms) in the B2B insurance relationship.⁵

It should also be stressed that all members of the group preparing PEICL agree the contents of *Insurance Restatement* (i.e., the working term for PEICL) should constitute the point of reference for contracts that do not have a cross-border relation, although unfortunately, internal regulations might be an obstacle (at least partially), such as art. 807 of the Polish Civil Code. Simultaneously, an analogous situation might occur if, however, the insurance contract has a cross-border attribute but it will be the Polish substantive law that will constitute *lex causae*. Obviously, the remarks above do not refer to a situation in which the applicable law is foreign law, because art. 807 of the Civil Code can be considered neither a norm enforcing its applicability (the provision enforcing its validity), nor an example of the public order clause (*vide* further notes).⁶

The matter of the problem in the context of the importance of art. 807 of the Civil Code

In other words, the potential for such a conflict might (most probably in the actual and legal reality) exist *de lege lata* in case the parties to the insurance contract subjected to Polish law, performing absorption of *Insurance Restatement* clauses to the contract, cause a collision with mandatory provisions of art. 805–834 of the Civil Code.⁷ In this case, there is a visible (at least partial) lack of coherence between designed European solutions regarding substantive insurance law

⁵ Cf. O’Sullivan, J., Hiliard, J., *The Law of Contract*, Oxford 2006, pp. 41–43.

⁶ For an interesting analysis of the applicable law situation (in the context of conflict of laws), see, for example: Ciepła, H., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz*, Vol. 5, *Zobowiązania. Część szczegółowa*, Warszawa 2017, commentary to art. 807, note 10, LEX.

⁷ Commentary on the content of the project: Fuchs, D., *PEICL jako materialnoprawny projekt europejskiego instrumentu opcjonalnego o umowie ubezpieczenia*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), *Kontrakty na rynku ubezpieczeń*, Warszawa 2020.

and regulations of domestic law, which limit the substantive freedom of insurance contract parties. Consequently, this fact affects the systemic coherence between the most advanced – in terms of its contents (*AD 2020*) – European project of insurance contract law and Polish legislation regarding the insurance contract. As emphasised above (*Introduction*), the particular character of art. 807 of the Polish Civil Code is based also on the fact that it is the norm of Title XXVII of Book 3, which, when compared to its original contents, has undergone a major metamorphosis, fundamentally inspired by the social and economic changes occurring in the years since the Civil Code entered into force on 1 January 1965. Obviously, the question is still valid whether all the changes that occurred in the contents of this regulation really help the development of the Polish insurance market, and in particular in promotion of Polish insurance law institutions in the international trade (*vide*: further notes).

Historically speaking, at the beginning, due to the specificity of insurance activity, in the socialist state-controlled economy, what in reality should be an exception functioned in the halo of the rule.

At that time, the Civil Code stated that the general terms and conditions of insurance, if referring to an insurance contract and concluded by a state-owned company, then in the scope in which it referred to specifically listed institutions (such as the manner of contract conclusion, methodology of calculating and collecting a premium) could be shaped differently than the content included in Title XXVII of Civil Code (§ 1).⁸ In § 2, the cogency for contracts with the insurer other than a state-owned company (literally in other cases), under pain of nullity, was introduced as a particular deviation from the above.⁹ It was promptly modified on November 1, 1990.¹⁰

The basic reason was certainly the departure from the state-controlled economy and change to a free market economy and elimination of the special

⁸ An analogous evolution of the delivery contract, see: Polish regulation: Fuchs, D., Malik, A., in: Habdas, M., Frasz, M. (eds.), *Kodeks cywilny. Komentarz*, Vol. IV, Warszawa 2018, pp. 161–163.

⁹ Art. 807: ‘§ 1. General terms and conditions of insurance contracts concluded by state-owned companies may constitute the manner of concluding contracts, calculating and collecting premium, notifying about changes occurring after the conclusion of the contract, the commencement, scope and termination of insurance company liability, the manner of notification about the occurrence, determination of loss and compensation and its payment, other than regulations of this title. § 2. In other cases, the provisions of a contract of insurance inconsistent with the provisions of this title are void, unless further regulations provide for exceptions in this scope.’

¹⁰ Based on art. 1 of the Act of 28 July 1990, on the Amendment of the Civil Code, Dz.U. (Journal of Laws) No. 55, item 321.

status of state-owned companies but also a wish to obtain a higher status for the Polish insurance market compared to well-developed countries and economies. So, following the amendment, art. 807 of the Civil Code stated that ‘§ 1. The provisions of the General terms and conditions of insurance or the provisions of a contract of insurance inconsistent with the provisions of this title are void, unless further legislation provides for exceptions. § 2. In insurance related to foreign trade foreign terms and conditions of insurance may apply, other than the provisions of this title.’ Such a legal situation did not raise any objections concerning the core of the doctrine, since due to the legal framework of the functioning of the insurance market in Poland and the rules applicable in the international market, Polish law for a long time allowed the dichotomy regarding being subject to the regulations of Title XXVII of the insurance contract, subject to whether the given assurance contract included a foreign element (was bound by a legal area other than Polish legislation).¹¹ This solution allowed maintaining (at least partially) the attractiveness of Polish law as *lex causae*, since in the scope applicable to the parties of the contract they could *de facto et iure* lead to the exclusion of Polish legal standards unacceptable for a party through substantive indication of foreign insurance terms and conditions.

In this context, an attempt could be made at an interpretation of what foreign insurance terms and conditions meant at that time. Basically, it was possible to perform *litteram iuris* its dichotomic division into insurance terms used by domestic insurance companies, but applied to insure transborder risks, such as cargo insurance on international transport, in its contents based on Institute Cargo Clauses (referred to directly or through the contents of INCOTERMS provisions, in which the parties agree the delivery, e.g., on a CIF basis), and the terms of insurance used in practice by foreign insurance companies in relation to Polish civil law entities, regardless of whether their seat (after Poland joined the EU) was located in a member country or elsewhere, and the fact if the insurer operated within the territory of the Republic of Poland through its branch was irrelevant, or whether a Polish entity concluded the contract with it online. If this legal status remained until the current moment, then it would not be a problem to possibly refer to the PEICL clauses (in case of their adoption in an EU act) by the parties of

¹¹ Cf. representative opinion of Ogiegło, L., in: Pietrzykowski, K. (ed.), *Kodeks Cywilny. Komentarz*, Vol. 2, Warszawa 2000, pp. 440–441.

the insurance contract in the scope not covered by the contract,¹² which is, however, possible nowadays, but not on account of the contents of the Civil Code, in which art. 807 of the Civil Code in its current version constitutes a significant constraint for such a practice (in case of non-compliance of PEICL with Polish regulation about the insurance contract).¹³

The current temporary solution to this situation (apart from practical means of unravelling this matter – *vide An attempt at remedying the lack of compliance, or Conclusion*) can be sought by the fact of entry into force of the Rome I regulation, under which such practice is separately legitimated. In the preamble, the EU legislator *explicite* states, ‘This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.’¹⁴ Additionally, it must be emphasised that there is no doubt that in case of contracts (i.e., insurance operations) to which art. 807 § 1 of the Civil Code is not applicable, but which otherwise constitutes emanation of insurance operations acceptable in Polish law, such as a contract of insurance guarantee or reinsurance contract, the substantive indication of terms and conditions of the insurance other than the contents of Title XXVII is fully acceptable, the example of which for the reinsurance contract will soon additionally become the contents of PRICL clauses.¹⁵ The reason for that is that insurance guarantee is marginally regulated by the Civil Code (and it is not in art. 805–834 c.c. but art. 372, in conjunction with art. 473 c.c.), and the reinsurance contract, through art. 820 c.c. is excluded from the regime of cogent regulation of the abovementioned articles of the Civil Code about the insurance contract.

It should be additionally noted as well that the notion of foreign insurance terms and conditions was not to be understood as a synonym for foreign General Terms and Conditions of Insurance (i.e., contractual model, or just the insurance regulations), since due to heterogeneous practice in this matter in particular legal orders as well as a specific situation of the given insurance contract they could

¹² Details: Fuchs, D., *PEICL jako materialnoprawny projekt europejskiego instrumentu opcjonalnego o umowie ubezpieczenia*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit.

¹³ Details: Fuchs, D., in: Fuchs, D., Maśniak, D., Malinowska K. (eds.), op. cit., commentary to Art. 807.

¹⁴ *Vide*: recital 13 of the preamble to the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L 177/6.

¹⁵ Details: Fuchs, D., in: Fuchs, D., Malinowska, K., Maśniak, D., op. cit., commentary to Art. 820.

also mean foreign Specific Terms of Insurance, provided for the specific type of the recipient of services, or the clauses negotiated individually between a foreign insurance company and a Polish legal entity, or, determined by means of request for proposal by the potential insurer, risks located beyond the borders of Poland, contractual clauses, accepted as a result of including them in the offer by the Polish insurer. This way it may be assumed that any sort of connection with the foreign legal area of the given insurance contract (i.e., its cross-border aspect in the substantive meaning) allowed making a successful reference in the insurance contract to foreign contractual agreements, which might deviate from the contents of art. 805–834 of the Civil Code, regardless of whether the legislator *explicite* allowed it in its content.

This concept was maintained, as a general rule, even later, although a significant change was implemented in 2003 in relation to the solution established beforehand by the amendment of 1990. After several years of validity, consequently, most of all with regard to Polish membership in the EU, further liberalisation in the scope of foreign insurance trade was implemented – resigning from the adjective ‘foreign,’ hence allowing each provenance of deviations from the contents unconditionally binding art. 805–834 c.c., which further answered the needs of practice.¹⁶ This legal status was applicable until 10 August 2007, when art. 807 of the Civil Code in the current form was established by means of repealing art. 807 § 2 of the Civil Code.¹⁷ Obviously, the remarks above do not refer to the situation (as indicated in the *Introduction*) in which the applicable law, as indicated by the applicable rule of the conflict of laws, is the foreign law, as art. 807 of the Civil Code can be regarded neither as a norm enforcing its applicability (the provision enforcing its validity), nor, even more, as *mutatis mutandis* a public order clause.¹⁸

¹⁶ Which took place on January 1, 2004, based on changes implemented by art. 233 of the act of May 22, 2003, repealed, on insurance activity, Dz. U. (Journal of Laws) of 2015, item 1206, as amended.

¹⁷ Based on Art. 1 of the act of 13 April, 2007, on the amendment of the Civil Code, Dz. U. (Journal of Laws) 55, item 557; arguments supporting the implementation of the discussed amendment and against the previous legal status: Orlicki, M., Pokrzywniak, J., *Umowa ubezpieczenia. Komentarz do nowelizacji kodeksu cywilnego*, Warszawa 2008, pp. 37–38; Orlicki, M., *Reforma regulacji prawnej umowy ubezpieczenia*, in: Nowak, A., Fuchs, D., Nowak, S., *Umowa ubezpieczenia. Dyskusja nad formą prawną i treścią unormowań*, Warszawa 2007, pp. 44–45, as well as: Mróz, D., *Kodeks cywilny. Komentarz do zmian wprowadzonych ustawy z 13 kwietnia 2007 r. o zmianie ustawy – Kodeks cywilny oraz o zmianie niektórych innych ustaw*, LEX 2008.

¹⁸ Cf., Ciepla, H., op. cit., commentary to Art. 807, note 10.

This thread can, however, be tracked in the evolutionary approach, for instance, due to the *acquis* of EU law in order to search for regulations that could be recognised as enforcing its applicability, based on the concept of the general good.

This idea was *explicite* (*general good or general interest; intérêt general* in French) implemented by the Third Directive in the scope of applicable law for the contract of insurance of risks other than life (further: Third Directive).¹⁹ The very concept of the general good as a limitation of freedom of parties of the contract derives from the judicial practices of the then Court of Justice of the European Union, whose rulings regarding freedom to provide services suggest formulating the criteria allowing the application of limitations of autonomy to choose the law by the country of insured risk location based on applicable internal law regulations.²⁰

For the first time, this concept was applied in the Second Banking Directive (art. 21 section 5)²¹ and in the Investment Services Directive (art. 19 sentence 6).²² However, the limitation that the general good constitutes in these two Directives most of all refers to financial supervision and limitation of service provision. Only the Third Directive in art. 28 *explicite* introduced the notion of

¹⁹ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations, and administrative provisions relative to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), Official Journal of the European Union L 228/1992.

²⁰ Which is not a closed catalogue, cf.: Pearson, P., *Opening Address*, in: Reichert-Facilides, F.U., *Jessurun d'Oliveira H. International Insurance Law in the EC*, Deventer 1993, p. 8; id. Reproduced typescript, *New Trends in Insurance Market*, Brussels 1995, p. 6; Chance, C., *Insurance in the EEC*, London 1991, p. 48; also worthwhile, with reference to the very concept of a general good in the context of commercial insurance, cf.: Lasok, K.P., *The Professions and Services in the European Economic Community*, Deventer 1986, p. 730; etiam: Fuchs, D., *Dobro powszechne (ogólne) jako wyznacznik ewolucji wspólnotowego prawa ubezpieczeń gospodarczych*, in: Mik, C., *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku*, Toruń 2002, pp. 71 et seq., also: id. *Regulacja koasekuracji w prawodawstwie Unii Europejskiej*, "Radca Prawny" 1999, No. 2 (41), pp. 22–23; id. *Dyrektywy III generacji prawa ubezpieczeniowego oraz ich implementacja w wybranych prawodawstwach państw członkowskich Unii Europejskiej*, in: Mik, C. (ed.), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*, Toruń 1998, pp. 299–301.

²¹ Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and Amending Directive 77/780, EEC 89/646 O.J. L386/1z1989; Fojcik-Mastalska, E., *Prawo Bankowe Unii Europejskiej*, Wrocław 1996, pp. 48–49; Dassel, M., *Retail Banking Service in 1992*, in: Cranston, R. (ed.), *European Banking Law: The Banker-Customer Relationship*, London 1993, pp. 61–62; Szpringer, W., *Europejskie regulacje bankowe*, Warszawa 1997, pp. 27–28.

²² Investment Services Directive 93/22 of 10 May 1993 Official Journal of the European Union L141/27; Ashall, P., *The Investment Services Directive: What was the Conflict All About*, in: Andenas, M., Kenyon-Slade, S. (eds.), *E.C. Financial Market Regulation and Company Law*, London 1993, pp. 94–95; Szpringer, W., op. cit., pp. 94–95.

general good, however, as an additional limitation of freedom of the parties in the indication of the contract status, and first justified by the application of the so-called *general good test*.²³ According to the author, art. 807 of the Civil Code is not of similar importance; what can be done at best is to consider particular regulations of the Civil Code, such as arts. 833 or 834, in the context of regulations enforcing their applicability (i.e., validity), or making the given insurance as obligatory by the legislator in the given scope, the detailed discussion of which, however, goes beyond the limits of this study.²⁴ Additionally, given the current contents of art. 807 §1 of the Civil Code, it needs to be accepted as a general rule that the regulation concerning the insurance contract has an unconditionally binding character, and the only exclusions are provided in the content of the Title of Book III of the Civil Code (e.g. art. 814 § 1, art. 815 § 2 sentence 1 of the Civil Code).²⁵ The fundamental cause of this is the adhesion and large scale of legal relationships of insurance, which tempts the legislator to similar procedures as in the case of regulation of consumer law in the broad sense.²⁶ The convergence, moreover, is not accidental, since the legislator referred to it in art. 805 § 4 of the Civil Code.²⁷ This issue was also noticed in the judicature of common courts: '(I)n view of the universality of application of general terms and conditions of contracts to the ones concluded by insurance companies, they became adhesive contracts, where it is usually impossible for the other party of the contract to individually negotiate provided conditions. For this reason there is a need to ensure protection of the weaker party, which, in abidance to the will of the legislator, implements 807 § 1 of the Civil Code – allowing to repeal provisions of general terms and conditions of insurance in case they are inconsistent with the code provisions regarding insurance.'²⁸

²³ For a broader discussion with bibliography, see: Fuchs, D., *Dobro powszechne...*, pp. 71–95.

²⁴ The abovementioned issue is the subject matter of a separate study being prepared by the author.

²⁵ Fuchs, D., Szymański, Ł., *Zróżnicowanie zakresu ochrony poszczególnych kategorii nieprofesjonalnych uczestników rynku ubezpieczeniowego*, "Prawo Asekuracyjne" 2012, No. 3, LEX; cf. Dubis, W., in: Gawik, Z. (ed.), *Kodeks cywilny z komentarzem*, Warszawa 2010, pp. 1323 and 1346.

²⁶ Ogiegło, L., op. cit., p. 440; cf. also, in the context of the development of consumer law: Cooke, J., Oughton, D., *The Common Law of Obligations*, London 2000, pp. 45–46.

²⁷ Fuchs, D., in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit., commentary to Art. 805.

²⁸ Decision of the District Court in Kamienna Góra of March 1 2017, I C 377/16; LEX No. 2252831.

The above includes not only model insurance contracts created and applied by the insurers themselves but also those created by other participants of the insurance market, such as insurance intermediaries, the best practical example of which are brokerage clauses.²⁹ At the same time, it is worth emphasising that regardless of the current contents of art. 807 of the Civil Code, this is, as a general rule, a norm of a specific nature, and due to the nullity sanction it *explicite* includes, it should be applied *stricte* in case of collision with the content of the cogent norm included in arts. 805–834 of the Civil Code: The appropriate application of the provision of art. 807 § 1 of the Civil Code and using the nullity sanction it provides requires an unequivocal indication, in a manner beyond any doubt, with which provision of Title XXVII of the Civil Code related to the insurance contract the particular provision of the insurance contract or a particular provision of the General Terms and Condition of Insurance is inconsistent.³⁰

Such a collision may also take place regarding the contents of PEICL provisions, at least due to its specificity, by far exceeding the conciseness of Polish Civil Code regulations, which in particular refer to the regulation of the institution not referred to directly in arts. 805–834 of the Civil Code, such as group insurance. Further examples are specific regulations concerning period of prescription of claims resulting from the insurance contract, division of insurance for loss insurance and (fixed) sum insurance, or the regulation of the bonus-malus system for third-party liability insurance.

Legal nature of PEICL

For this reason, it must be emphasised that the specific justification of concentration of works of the expert group preparing PEICL (i.e., the Project Group on a Restatement of European Insurance Contract Law) on imperative norms is the conviction (both present in literature and represented by EU institutions) that exactly norms of this kind – varying according to admissible initiatives of particular member countries of the European Union – are a fundamental barrier of the internal development of the insurance market.³¹ This, in turn, leads to differentiation of the status of insurance protection for entities predestined to it,

²⁹ Serwach, M., *Klauzule brokerskie w umowach ubezpieczenia zawieranych w trybie zamówień publicznych (cz. 1)*, “Finanse Komunalne” 2008, No. 11, LEX, p. 1.

³⁰ Decision of the Supreme Court of 18 December 2003 (I CK 365/02), LEX No. 599511.

³¹ Broader, see: Fuchs, D., *Dyrektywy III...*, pp. 287 et seq.

which affects both the consumer and the entrepreneur. Another important issue is the assumption that *Insurance Restatement* will continue the tradition developed in the directives of second- and third-generation insurance law, reaching the so-called co-insurance rulings, based on the guarantee of broad autonomy of will of insurance contract parties in case of so-called major risks, given the interests of the consumer of the insurance service justified the limitation of the above freedom with reference to the so-called mass risks.³² An analogous approach is adopted by the EU legislator with reference to the issue of prorogation and derogation agreements in the provision of EU regulation – so-called Brussels I bis.³³ At the same time, from the very beginning the intention of the authors of the *Insurance Restatement* was to develop a model for the European legislator and for legislators from particular member countries and to make the project a point of reference for enterprises undertaken by the European insurance market in order to harmonise the terms of insurance applied in trade and guarantee maintaining the public interest.³⁴

PEICL has only (and as much as) the feature of uniform regulation of substantive law, therefore one cannot expect they will solve, also after their implementation, the problems related to the applicability of court and state jurisdiction, or broader – civil procedure. Therefore, there are detailed solutions in force concerning court jurisdiction in disputes in insurance cases in the regulation Brussels I bis. This helps to eliminate the hazard that the Polish legislator seems to try to prevent by means of art. 807 of the Civil Code, since the assumed goal of PEICL is to protect the interest of the recipient of services in the insurance contract, and, in particular, the customer. This obviously refers to the substantive law, not the process or enforcement law. With regard to the last matter, the only solution that can be recalled refers to the European warrant,³⁵ namely the European project (PEICL) assumes that an authorised

³² Details, see: Fuchs, D., *Regulacja koasekuracji...*, pp. 18 et seq. In the context of the development of consumer law, cf.: Cooke, J., Oughton, D., op. cit., pp. 45–46.

³³ Details: Fuchs, D., *Jurysdykcja sądów powszechnych w zakresie ubezpieczeń gospodarczych zgodnie z rozporządzeniem nr 1215/2012 (Bruksela I bis) taking into account Lugano Convention II*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit.

³⁴ For detailed characteristics with reference to business insurance, see: Fuchs, D., *Dobro powszechne...*, pp. 71–95.

³⁵ Article is based on the contents of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (Official Journal of the European Union EC L 166, p. 51, as amended).

entity (defined in § 2, art. 1:301 of PEICL) is entitled to apply to the applicable domestic court or organ in order to prevent breaching the regulations of PEICL, in accordance with art. 1:102. The authorised entity means an organ or organisation included on the list drawn up by the European Commission based on art. 4 of Directive 98/27/WE of the European Parliament and of the Council of May 19, 1998, on injunctions for the protection of consumers' interests.³⁶ Therefore, the problems currently encountered by the policyholder and the insured remain unsolved.

There is hope that in accordance with the phrase *Iustitia est obtemperatio scriptis legibus institutisque populorum*,³⁷ the national legislator accepts this project as inspiration also for further work on reform of the whole of insurance law, also in particular with reference to the concept and range of insurance contract regulation in the Civil Code and the issue of detailedness of this regulation in the context of possible separate regulation, in a legal regulation other than the Civil Code (cf. *Conclusion*). Another possible solution would be regulating in Poland the complex matter of commercial insurance law in a separate legal regulation based on PEICL. In the European Union, despite the discrepancies, we may justifiably refer to a renaissance of European private law despite (unfortunately) the slowing down of the decision-making process of Union bodies in this regard, since originally the implementation of PEICL was assumed to take place within the Union legislative process until the end of 2012 and currently it is planned for about 2020–2022.

PEICL vs Polish ADR

At the same time, according to the author, PEICL is exceptionally useful to resolve disputes by arbitrators in international and domestic arbitration courts. These might include, for instance, domestic trade courts (e.g., Court of Arbitration at the Financial Ombudsman, Court of Arbitration at the Polish Financial Supervision Authority, and the Court of Arbitration at the Polish Chamber of

³⁶ Cf. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), Official Journal of the European Union, 1 May 2009, L 110/30.

³⁷ 'Justice is conformity to written laws and national institutions,' Latin and Polish version, in: Jędraszko, C., *Łacina na co dzień*, Warszawa 1983, p. 141.

Commerce).³⁸ In case the parties referred to PEICL in the insurance contract while simultaneously introducing an arbitration clause to the contract (it is not likely that such a possibility is provided for by GITC as domestic insurers have relatively rarely supported the ADR formula in insurance relationships), to resolve a possible dispute, such a condition would have a fundamental and – we must add – immensely positive meaning, at least because of the lack of uncertainty of contract parties regarding the law, but also it would constitute a balanced proposal for arbitrators in case of an *ex equo et bono* ruling. Moreover, PEICL includes in this scope a direct solution, according to which the application of regulation does not preclude access to an out-of-court complaint and redress mechanisms otherwise available to the policyholder, insured or beneficiary (1:302 PEICL). The authors' intention here is also the arbitral judiciary (so-called private arbitration).

Obviously, nothing precludes PEICL from being applied also in the course of insurance mediations, whether with the participation of mediators listed at the Polish Chamber of Commerce, the Polish Financial Supervision Authority, or in case of *ad hoc* mediation. Particularly in this last case the authority or mediator may influence the application of specific solutions provided by PEICL by parties in case of reaching a consensus. With reference to mediation, it should also be noticed that mediation based on applicable judicial resolution has become increasingly popular, pursuant to the Code of Civil Procedure, which may also facilitate the application of clauses included in PEICL when reaching a settlement before a mediator (listed permanently at the applicable District Court). In this case, there is a need to consider yet again the matter of the consistency of PEICL with Polish legal provisions in force regarding an insurance contract, since in this case the court of law will grant the approval of the mediation agreement. It seems, however, that due to the current barriers of mediation development in the scope of business insurance, particularly with reference to the area of international trade in Poland, against overcoming them successfully (for instance, through specialisation of mediators with educational development paths for mediators in business, criminal cases, etc., clarification of mediator status regulation and stabilisation of this regulation at the statutory level, more flexible approach to remuneration of

³⁸ Although the significance of uniform law for arbitration courts judicature has obviously already been noted, an example is a speech by Zoll, F., *Projekty europejskiego prawa umów a praktyka arbitrażu*, given at a conference organised by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, Prawo Ekonomia Arbitraż, on 18 November 2010.

a mediator in business mediations, and/or elimination of the inconsistency with fees in other types of mediation proceedings, such as criminal or family cases, social education development with regard to possible mediation in insurance cases), the application of PEICL in mediation will be marginal.

An attempt at remedying the lack of compliance, or Conclusion

According to the author, the fundamental *de lege lata* rational solution to the problems signalled above, and sometimes the literal impossibility to square the PEICL project with the decisive will of the Polish legislator, visible in the contents of art. 807 of the Civil Code, would be the acceptance, according to prof. J. Łopuski, of a systemically logical view that Civil Code norms regulating an insurance contract in Title XXVII of Book 3 are of a semi-imperative nature for the insurer. This would consequently mean that there is the possibility of a derogation from the will of the legislator, but only in case this solution serves the good of the policyholder and of the insured, or possibly, the entity entitled to receive the benefits.³⁹ The policyholder and the insured might be particularly predestined to receive protection understood this way. Neither should the matter of the status of the injured be forsaken in *stricta* third-party liability insurance or hybrid insurance (such as D&O).

Obviously, the problem of assessment remains, first by contractual parties, and in case of dispute, by the appropriate court, whether *in casu* the actually absorbed solution is convenient for the policyholder compared to maintaining exclusively the *expressis verbis* characteristics of norms concerning the insurance contract from the Civil Code.

Recognising simultaneously that one of the main aims of the *Insurance Restatement* is the protection of the justified legal and economic interests of the policyholder, the insured and the beneficiary of the insurance benefit, and accepting the abovementioned concept of prof. J. Łopuski as most eligible, the author is certain about the possibility of the admissibility of acceptance of the *Insurance Restatement* in internal relations, particularly in case of B2C relations.

Simultaneously, due to the basic concept of the policyholder's protection – regardless of whether they are a consumer or an entrepreneur – it is necessary to support the justified application of *Insurance Restatement* clauses also in the case

³⁹ Łopuski, J., in: Winiarz, J., *Kodeks cywilny z komentarzem*, Vol. 2, Warszawa 1989, commentary to Art. 807, p. 726.

of B2B relations (entrepreneur–entrepreneur). Another argument supporting such an interpretation is the contents of art. 1:103(2) of PEICL: ‘When there is doubt about the meaning of the wording of any document or information provided by the insurer, the interpretation most favourable to the policyholder, insured or beneficiary, as appropriate, shall prevail.’

Hence, in light of the above, a postulate can be made as a *de lege ferenda* conclusion to return in the scope of art. 807 of the Civil Code to the concept of substantive permission of indicating the law from before its last amendment, having specified it appropriately.⁴⁰ It is beyond any doubt that a literal return to the solution of *acien regime* cannot be justified, mainly due to its lack of precision, whereas taking into account the concept expressed by the legislator beforehand would result in a more flexible insurance trade and increased attractiveness of Polish law as the applicable law.

It is worth emphasising here that international legal acts and various academic projects have created examples of norms that serve as worldwide model rules,⁴¹ both for legislators and for parties of various trade agreements, which – even if they do not indicate them as provisions regulating certain aspects of the agreements – may absorb these projects, which is explicitly emphasised in the contents of the Rome I regulation.⁴² This is a fundamental solution also for the application of PEICL, even at the present moment, only on the basis of the will of the contract parties, resulting from substantive indication, or rather based on the incorporation of specific PEICL project articles to the contract. Motive No. 13 of the Rome I regulation in the preamble, *expressis verbis* states, ‘This Regulation does not preclude

⁴⁰ For comprehensive arguments, along with a bibliography of literature against the validity of art. 807 § 2 of the Civil Code in the previous version, see the literature cited in footnote 14.

⁴¹ As the European Commission puts it in the Green Paper: ‘For example the Organisation for the Harmonisation of Business Law in Africa has been working on developing a Uniform Act on Contracts largely inspired by the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles and PECL have also inspired the Chinese Contract Act of 1999,’ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)0348 final, <http://eur-lex.europa.eu/legal-content/PL/TX-T/?uri=CELEX%3A52010DC0348> (footnote 9); additionally, it may be pointed out that PEICL was the inspiration for the Hungarian legislator while regulating the insurance contract in the Civil Code; the insurance contract modelled most widely on PEICL was implemented in the Civil Code by Turkey, whereas the consumer-related legislation valid in Scotland adopted some ‘consumer’ solutions of PEICL as its own.

⁴² For more about the interdependence of substantive and conflict law autonomy, as well as a broader discussion of the Rome conventions, cf.: Dragun-Gertner, M., *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 89–90.

parties from incorporating by reference into their contract a non-State body of law or an international convention.’ This is additionally underlined in art. 3 of the Regulation, which respects the autonomy of parties of the given contract, also in this scope.⁴³ For the same reasons, teams of scientists from university centres developed Principles of European Contract Law (PECL), the aim of which is to create uniform contract law for the domestic market,⁴⁴ which the PEICL regulation corresponds to.⁴⁵ Since differences between contract law systems cause difficulties in international trade, various international and regional organisations worked to limit these difficulties by means of implementation of uniform model regulations. The United Nations Commission on International Trade Law (UNCITRAL) created norms of sales of goods between enterprises. Similarly, the effect of works of the United Nations is the UN Convention on Contracts for the International Sale of Goods, giving the parties of such contracts subjected to this convention an option of excluding the convention from use (so-called opt-out right).⁴⁶ The International Institute for the Unification of Private Law (UNIDROIT), in turn, prepared rules for international trade agreements that constitute model regulations concerning the sales of goods and provision of services.⁴⁷

Simultaneously, it corresponds to the prevailing view in the world doctrine of civil law that the legal relationship is defined by the regulations of positive law, standard contract terms and conditions (templates), and most of all, respecting the rules of contract autonomy, individual arrangements between the parties.⁴⁸

⁴³ Fundamental consideration in this scope, cf.: Skąpski, J., *Autonomia woli w prawie międzynarodowym prywatnym w zakresie zobowiązań z umów*, Kraków 1964, pp. 31 et seq.; for the Anglo-Saxon *acquis*: Jaffey, A.J.E., *Introduction to the Conflict of Laws*, London 1988, pp. 268 et seq.; for the so-called Rome convention of 1980 (‘predecessor’ of the EU Rome I Regulation); and the still up-to-date Plender, R., *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts*, London 1991, pp. 87 et seq., as well as Jaffey, A.J.E., *op. cit.*, pp. 268 et seq.

⁴⁴ ‘The network, entitled “Commission on European Contract Law”, was composed of academics from all the Member States and activated, under the chairmanship of Ole Lando, between 1982 and 2001’; cf., Green Paper..., footnote 7.

⁴⁵ Cf. art. 1:105 (2) PEICL and further notes. Polish translation by Fuchs, D., Szymański, Ł., Boguska, M., *Zasady europejskiego prawa ubezpieczeń (ZEPU)*, in: Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H., Loacker, L. (eds.), *op. cit.*, pp. 657 et seq.

⁴⁶ Cf. art. 6 of the UN Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April, 1980, Dz.U. (Journal of Laws) of 1997, item 286, as amended; cf. also notice the Minister of Foreign Affairs of September 30, 2011, concerning correction of an error, Dz.U. (Journal of Laws) item 1374.

⁴⁷ Cf. *UNIDROIT Principles of International Commercial Contracts 2010*, Rome 2010.

⁴⁸ Instead of many: Smith, S. *Contract theory*, Oxford 2004, in particular pp. 303 et seq.

It should also be emphasised that PEICL are applied, as a general rule, to commercial insurance *stricte*, not excluding mutual insurance, and simultaneously they are not applicable in indirect insurance (reassurance and retrocession). This last exclusion is present *de lege lata* in Polish law (art. 820 of the Civil Code) and other legal orders of European countries.⁴⁹

Consequently, the discussed provisions will be applied to the co-insurance contract, which was not excluded from the scope of the given project and also corresponds to the views of domestic doctrine and judicature concerning the application of art. 805 of the Civil Code to the co-insurance contract (regardless of whether it is internal or external).⁵⁰ This matter is strictly related to the matter of interpretation of PEICL provisions. According to the authors of the discussed clauses, PEICL 'should be interpreted in accordance with the contents, context, aim, and results of comparative legal analysis. Attention should be paid in particular to the principles of good faith, good market practices, as well as homogenous application and applicable protection of policyholders' (art. 1:104). Therefore, the key interpretation should be the autonomous interpretation, fundamentally devoid of the context of provisions of particular member countries since the contradictory conclusion would lead in practice to the breach of the postulate of consistency of applicability.⁵¹

The abovementioned interpretation directives refer, according to the author, to the consequences resulting from the applicability of yet another act of international law, namely the Vienna Convention on the Law of Treaties of May 23, 1969 (further Vienna convention).⁵² Therefore, the relationship occurs here granting the priority to PEICL, and only the lack of its appropriate regulation justifies the application (possibly) of norms of other international conventions.⁵³ The above means that the provisions need to be interpreted according

⁴⁹ Details: Fuchs, D., in: Fuchs, D., Maśniak, K., Malinowska D. (eds.), op. cit., Warszawa 2020, commentary to Art. 820.

⁵⁰ Details, cf.: Fuchs, D., *Umowa koasekuracji – stan obecny i postulowany*, in: Pazdan, M., Popiołek, W., Rott-Pietrzyk, E., Szpunar, M. (eds.), *Europeizacja prawa prywatnego, Vol. I*, Warszawa 2008, pp. 225 et seq.

⁵¹ Fuchs, D., *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń*, in: Kowalewski, E., (ed.), *O potrzebie polskiego kodeksu ubezpieczeń*, Toruń 2009, p. 142.

⁵² Vienna Convention on the Law of Treaties. 1969. Vienna, 23 May 1969, Dz.U. (Journal of Laws) of 1990, item 439. Details: Fuchs, D., *PEICL jako materialnoprawny projekt...*

⁵³ Cf. along with the subject literature, also Fuchs, D., *Jurysdykcja sądów...*

to their normal meaning, taking into account the teleological interpretation. At the same time, specific, special (differing from normal, usual meaning) understanding of the given term should be assigned to the meaning used in the given act of international law in case it was determined this was the parties' intention. Additionally, it needs to be borne in mind that, if necessary, there is a need to apply so-called ancillary means of interpretation, which include the *expressis verbis* results of preparatory works to a given act of international law and circumstances of its conclusion. The postulates above reinforce the directive of autonomous interpretation of PEICL as *principium*. Therefore, it should be emphasised due to the claim of insurance-service-consumer-interest protection that, as a general rule, PEICL should be applicable if parties – taking into account possible limitations of choice of law – decided so, and then they should also be applied as a whole, without the possibility of excluding particular clauses. There is a significant deviation from the above principle with regard to the so-called major risks, since in accordance with art. 1:103 section 2 of PEICL, 'The contract may derogate from all other provisions as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary'. The above means that the exclusion is unacceptable for consumer risks, in particular if it refers to art. 1:102 sentence 2, art. 2:104, 2:304, 13:101, 17:101, and 17:503, which are binding unconditionally. Additionally, the proponent stated that the remaining articles of PEICL are unconditionally binding as long as they refer to sanctions due to unfair and wilful acts (i.e., subjects of the insurance relationship). Ultimately, such exclusions may be applied in contracts regarding risks described in art. 12 section 27 of the Solvency II Directive⁵⁴). It is also noteworthy that the principle of autonomous interpretation of PEICL, many times emphasised above, is subject to a significant and, it seems, rational limitation in the contents of art. 1:105, according to which the legal provisions of a member country may be applicable despite the contents of PEICL, if they are absolutely binding provisions of domestic law, specific for the given kind of insurance, provided there are no PEICL regulations referring to the given issue. Additionally, 'Questions arising from the insurance contract, which are not expressly settled in the PEICL, are to be settled in conformity with the Principles of European Contract Law (PECL) and, in the absence of

⁵⁴ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (amended version), Official Journal of the European Union of 17 December 2009, L 335/1.

relevant rules in that instrument, in accordance with the general principles common to the laws of the Member States' (art. 1:105 sentence 2).

Another possible direction of PEICL absorption for Polish practice (apart from the acceptance of prof. Łopuski's concept), even without direct implementation in Civil Law or without adoption of the contents of the Principles of European Insurance Law as Union law valid in all member states, is the interpretation of their current and – anticipatory – future importance in light of art. 56 of the Civil Code: 'A legal act gives rise not only to the effects expressed therein but also to those that stem from the law, principles of community life and established custom.' The practice of the Polish insurance market will decide whether PEICL will become a vital reference point for insurance relations in the regulation of rights and obligations of insurance contract parties. The provision of art. 65 of the Civil Code will also be meaningful: '§ 1. A declaration of intent should be interpreted in view of the circumstances in which it is made as required by principles of community life and established custom. § 2. In contracts, the common intention of the parties and the aim of the contract should be examined rather than its literal meaning.' In view of the above, if in the foreseeable future the project becomes popular in European practice, then in the Polish reality the policyholder and the insured (as well as the insurer) will be able to refer to it even when there is no *expressis verbis* reference to the project (or the contents of Union legislation valid in this respect) in a particular insurance contract.⁵⁵ It needs to be emphasised here that the insurer, according to the law applicable in Poland, was obliged (art. 25 of Act on Insurance and Reinsurance activity⁵⁶) – in case the policyholder is a natural person, regardless of whether the insurance contract will be concluded in relation to the performed business or professional activity or not) to inform the policyholder before entering into the agreement about:

- a) applicable law of the contract, in case the parties are not free to choose the law;
- b) applicable law proposed by the insurance company, in case the parties are free to choose the law.

⁵⁵ Cf. also Fuchs, D., *Konsument w ubezpieczeniach. Szczególne unormowanie w europejskiej regulacji umowy ubezpieczenia*, in: Monkiewicz, J., Orlicki, M., *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce*, Warszawa 2015, pp. 218–219.

⁵⁶ The Act on Insurance and Reinsurance activity of 11 September 2015, Dz.U. (Journal of Laws) of 2019, item 381, as amended.

This duty does not occur in case the insurer's contractor is a civil law entity other than a natural person. Therefore, according to the author, the insurer is primarily responsible for the appropriate recognition of limits of the conflict-of-law freedom available to the parties of the contract, as well as proper substantive indication, since this will be the nature of the reference of the parties of the insurance contract to clauses included in the *Insurance Restatement*, if the contract is related to international trade. It is beyond any doubt, however, that the thesis put forward above that PEICL undoubtedly will in a fundamental way allow in practice to avoid mistakes and faults concerning improper notification of the other party of the agreement about the applicable law of the contract, or improper use by parties of the freedom of choice of law in the situation, when such freedom is not granted, which is also a common case in Poland nowadays.

There is no doubt, however, that for the practice, the most desirable manner of obtaining coherence between PEICL and the legislation would be either restoring the possibility of application other than cogent Civil Code solutions about the insurance contract in international trade or, which would be the author's best wish for participants of the insurance market in Poland, *explicite* implementation of PEICL in civil law. The answer to the question whether this implementation should be done by means of a separate act and not the Civil Code, or rather by means of an amending act, will constitute the derivative of the fact, whether the Polish legislator decides to adopt the concept of the insurance code or the decision is made to remain with the traditional approach valid so far in which the regulation of an insurance contract causes it to be referred to as the insurance code.

Nonetheless, possible legislative changes in the Civil Code, inspired by PEICL, will have a direct impact also upon the application of regulations about the obligatory insurance contract, even in case of a lack of their amendments *explicite*, namely through the contents of art. 22 section 1 of the obligatory insurance act,⁵⁷ according to which Civil Code regulations apply to obligatory insurance contracts in cases unregulated in the act.

Summing up, hope remains that in case of further legislative initiatives with respect to the insurance contract, the legislator will notice the theoretical, and most of all, practical significance of standardisation of the Polish insurance mar-

⁵⁷ The Act of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund, and the Polish Motor Insurers' Bureau – Dz.U., (Journal of Laws) of 2019, item 2214.

ket in accordance with the best available models. According to the author, PEICL is just an example of this, and only the lack of adequate reflection may explain maintaining solutions that make applicable absorption to the Polish legal order difficult. Unfortunately, art. 807 of the Civil Code in its current form is an example of this.

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