Penalties and contractual liability

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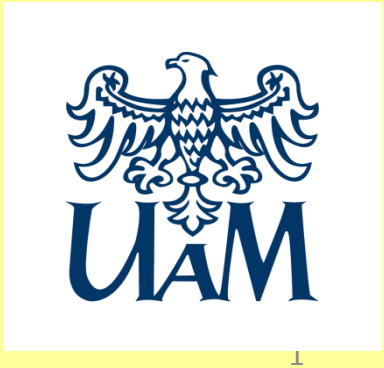

Functions of penalty clauses

- Common law tradition
- - liquidated damage clauses

- Roman law – civil law tradition
- - in terrorem function
- - compensatiory function

1. Functions of penalty clauses

- „Modern systems have generally eschewed the rather inflexible Roman position on excessive penalties”

Andrew Borkowski

2. Two main questions to penalty clauses in the light of Roman legal experience

- 1. The premises of the payment of penalty sum;

- 2. The problem of inadequacy of penalties amount to the fair contractual expectation

3. Penalty clause and debtors liability - discussion of Roman jurists

- D.18,7,6 – Sabinus (late Roman republic) / Papinian (II/III a. Chr.)
- Jestliže si prodávající od kupujícího vymínil, aby nebyla otrokyně propuštěna na svobodu ani dána k prostituci, a jestliže jedno z těchto ustanovení nebylo dodrženo, a následně byla tato otrokyně na soudě odejmuta třetí osobou (evinkována) nebo v jiném soudním řízení prohlášena za svobodnou, a bude žalováno na základě stipulace (která byla uzavřena v souvislosti s kupní smlouvou), **pak mají někteří právníci zato, že nabyvateli bude příslušet námitka podvodu (*exceptio doli)* a Sabinus má zato, že nebude**. Ale samotný rozum dosvědčuje, že stipulace, „otrokyně ať není propuštěna na svobodu“ nebude účinná, protože je nepravděpodobné, aby někdo zakázal propustit otroka na svobodu a neměl by současně na mysli účinek tohoto propuštění. Jistě, pokud bylo ujednáno, aby nebyla otrokyně nucena k prostituci, nic nebrání tomu, aby mohl být žalována a získána pokuta od kupujícího, protože on zneuctil otrokyni a současně zpochybnil záměr prodávajícího....

Penalty clause and debtors liability - discussion of Roman jurists

- D.22,2,9 – Labeo (I. b. Chr./I. a. Chr.)
- Jestliže je sjednána pokuta při mořské zápůjčce (jak je obvyklé), dokonce i tehdy, pokud v ten den, kdy poprvé měly být zaplaceny peníze, nežije nikdo, kdo by byl povinen zaplatit peníze, **přece může být požadována pokuta, jako kdyby byl dědicem dlužníka.**

Penalty clause and debtors liability - discussion of Roman jurists

- D. 19,2,54,1 - Paulus (II/III a. Chr.)
- Mezi nájemcem pozemnku a pronajímatelem bylo dohodnuto, že po dobu trvání nájmu nebude nájemce Sius proti své vůli vyhnán z pozemku, a jestliže by byl vyhnán, bude poskytnuta pronajímatelem pokuta deset. Bylo také domluveno, že pokud by chtěl nájemce Seius ukončit nájem dříve, bude muset rovněž zaplatit Titiovi deset. K výše řečenému se zavázali vzájemnými stipulacemi. Ptám se, zda v případě, že by Seius neplatil dvě po době jdoucí léta nájem, zda je možno jej vyhnat bez obavy z peněžité pokuty? **Paulus odpověděl – ačkoliv nebylo ve stipulaci nic ujednáno o placení nájemného, přece je pravděpodobné, že bylo ujednáno tak, že není možné vyhnat nájemce před uplynutím doby pouze tehdy, jestliže platí nájem a řádně pečuje o pronajatý pozemek. A tak, jestliže by nájemce na soudě vymáhal pokutu a nezaplatil by nájemné, je možné poskytnout Titiovi námitku podvodu (*exceptio doli*).**

Penalty clause and debtors liability - discussion of Roman jurists

The penalty clauses has been stipulated in Roman contractual practice for three purposes: to enforce a specific non-pecuniary interest; as guarantee of payment in a high risk transaction and to secure the specific contractual duty.

The liability for penalty sum was always grounded on the formalistic nature of Roman stipulatio;

Roman jourists have identified two bounduaries of enforcability of penalty clauses – accessoriness of such clauses and the abuse of right

Penalty clause and debtors liability - developments in the pre-codification era

- - In the modern time the *stipulatio* lost the practical relevance as a result of adoption of the principle of contractual freedom since the 16 century.

- - The penalty clauses became the part of contractual liability which has been elaborated in modern contract theories and codified in European countries during the 19 and 20 centuries.

The liability for penalty sum in the modern civil codifications - Code civil

- art. 1226 CC The penal clause is that by with a person, in order to assure the performance of an agreement, binds himself to something in case of non-performace .

The liability for penalty sum in the modern civil codifications - Code civil

- Art. 1230 CC:
- Whether the original obligation contain, or whether it do not contain a term within which it must be accomplished, the penalty is not incurred until he who is bound either to deliver, or to take, or to do, is in delay.

The liability for penalty sum in the modern civil codifications - German civil code (BGB)

A. the initial draft of the law of obligations (Franz Kübler)

… The principle of fault liability results from the concept of the delay in performance. The objective liability for penalties has been confirmed for rare cases the liability for omission.

B. Par. 339 BGB: Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default. If the performance owed consists in forbearance, the penalty is payable on breach

The liability for penalty sum in the modern civil codifications - Polish codifications of the law of obligation

- Art. 82 KZ When debtor had obliged to pay a sum of money for non-performance of contractual duty (…) the payment of such sum repalces the compensation of loss.

- Art.. 483 KC The parties to contracts may include a special clause stating that the redress of any damages resulting from non-performance or improper performace of the obligation will take place by means of the payment af a contractually specified sum of money.

The liability for penalty sum in the modern civil codifications -

F	D	PL
The liability for penalty sum is grounded under a general model of responsibility for the breach of contract which is based on the fault's principle	In the line to the regulation of the delay of performance in the original version of BGB as well after the modernization of the law of obligations in 2002 the liability for the penalty sum follows the fault's principle.	The penalty sum will be exactable in accordance to the general principles of responsibility for the breach of contract

The doubts related to the fixed by parties objective liability for penalty

- The allocation of risk in warranty agreement becomes different as in the system of penalty clauses.

The doubts related to the fixed by parties objective liability for penalty

- 1. The mentioned modern controversies and doubts results from complete including the penalties into the general system of liability for breach of contract;

- 2. In the light of presented legal experience the question arises:
- - should be reasonable to allow a limited derogation a penalty clauses from the general system of liability for breach of contract in favor of an effectiveness tool to secure the contractual duties till to the objective line adopted for penalty clauses?
- - Perhaps, the acceptance this possibility in the frame of penalty clauses institute would be useful to make the probability of the fulfillment of creditor expectations higher?

The doubts related to the fixed by parties objective liability for penalty

- With sense makes the increase of the probability of the fulfillment of creditors expectations without the transition from the penalty clauses institute to other guarantee agreement?

The problem of excessive penalty sum – ancient Roman law

- D.45,1,38,17 – Ulpian (II/III a. Chr.)

- Nikdo se nemůže stipulací zavázat za jiného, kromě otroka, který se zavazuje za svého pána, a syna, který se zavazuje za svého otce. Byly tedy vynalezeny (zřízeny) takové obligace, aby jeden každý mohl pro sebe získat to, co je v jeho zájmu: neboť zajisté není v mém zájmu, abych dával jinému. Je jisté, že pokud chci něco takového učinit, je vhodné vložit do stipulace pokutu, aby pokud tak nebude učiněno, stane se stipulace účinnou, dokonce i ve prospěch osoby, která nemá na věci zájem. **Protože když je sjednána pokuta, nezkoumá se zda je tomu, kdo ji sjednal na prospěch, ale v jaké byla sjednána výši a jaké jsou podmínky jejího použití.**

The problem of excessive penalty sum – ancient Roman law

- C.7,47,1 - Justinian, 530
- Protože již mezi starými právníky bylo mnoho pochybností ohledně úplné náhrady škody, zdá se nám nejlepším, pokud je to možné, vykázat tuto hojnost případů do užších mezí.
- Proto nařizujeme, aby ve všech případech, kdy je jasně dané množství nebo povaha, jako třeba u prodeje nebo u nájemní smlouvy nebo u všech kontraktů, náhrada škody ať nepřekročí dvojnásobek hodnoty věci.
- V ostatních případech, kde je plnění neurčité, musí soudce, který rozhoduje případ obezřetně určit skutečnou výši ztráty a (náhrady) škody, ke které bude žalovaný odsouzen, a tato výše nemá být snižována žádnými úklady a nepřiměřenými sníženími hodnoty, které by vedly ke spletitému zmatku, což vede k tomu, že pokud je výpočet donekonečna redukován, zhroutí se a nevede k žádným výsledkům. **Pokud víme, je v souladu s přírodou stanovovat pouze takové pokuty, které mohou vymáhány s potřebným stupněm přiměřenosti, nebo takové, které jsou zcela jasně určeny zákonem.**

The problem of excessive penalty sum – ancient Roman law

No one did not object to *stipulatio poenae* simply because the stipulated sum was too high

The amount of penalty should be not irrelevant for judge decided regarding to the validity of a penalty clause

The problem of excessive penalty sum – the pre-condifcation era

liberal approach

- - Glossa magna
- - Baldus de Ubaldis
- - Bartolus de Saxoferrato
- - Cujacius
- - Arnold Vinnius
- - Johannes Voet
- - Adam Struve
- - Samuel Stryk
- - Christian Glück

Limitation of exccesive penalties

- - Canon law
- - Andrea Alciato
- - Hugo Donellus
- - Cornellius Bznkershoek
- - Jean Domat
- - Robert Pothier

The problem of excessive penalty sum – Code civil

- **The reasoning of the drafters of Code civil**

- 1. The excessive penalties results only from unusual unreasonable agreements;
- 2. the law is made for ordinary cases;
- 3. makes no sense to ignore fundamental principle “agreements have a force of law over their parties” for few exceptional cases.

- *The right to modification of penalties by judges has been restricted to cases when the principal obligation has been executed in part*.

The problem of excessive penalty sum – Code civil

Original version of Code civil

The amendment of art. 1152 CC from year 1975

The problem of excessive penalty sum – German civil code

The initial draft of the German law of obligations

Par. 343 BGB adopted by the parliment in 1896

The problem of excessive penalty sum – Polish codifications of the law of obligations

- The drafters of Polish Code of Obligations from 1933 have carefully considered the approaches to the excessive penalty clauses in the codes which were in force in Polish territories, among other totally different French and German solutions.

The problem of excessive penalty sum – modern codifications

F	D	PL
As a result of the amendment of art. 1152 CC in year 1975 the judges are entitled to modify the penalties if it is manifestly excessive or ridiculously low	Par 343 BGB allows a court to reduce the penalty which is disproportionately high	Art. 85 KZ has allowed judges to alter a penalty if it is manifestly excessive or the original obligation has been executed in part. This rule has been repeated in art. 484 par. 2 the Civil Code from 1964

Final remarks

- The legal experience and the doubt related to the fixed by parties objective liability for penalty

Final remarks - modern context of the proposal of a limited derogation of penalty clauses from the general system of liability for breach of contract

1. Derogation of standard terms liability from general principles liability for breach of contract;

2. The autonomy of parties in the judical practice related to the aleration of excessive penalty sums.

Final remarks - the legal experience and the doubt related to the fixed by parties objective liability for penalty

- the legal experience results from the control of penalty clauses in Germany and Poland allows specify two objective criteria conformity of penalty to the social value:
- - the seriousness of in terrorem function
- - the general principle of good faith.

Final remarks - the legal experience and the doubt related to the fixed by parties objective liability for penalty

- In wide historical perspective the main trends in development of penalty clauses from the Roman time to this days are:

- from the invalidity of clauses restricted to the specific cases of contrary to public moral and an abuse of right by creditor (promisee) to the requirement of conformity penalty clauses to principle of good faith;
- from the objective liability for penalty sum to the integration of penalty clauses into system of contractual liability and specific regulation to penalties in standard forms of contract.

Final remarks - the legal experience and the doubt related to the fixed by parties objective liability for penalty

- The more simple shape of penalty clause requires the breaking one of the historical trends in development of penalty clauses.

Final remarks - the legal experience and the doubt related to the fixed by parties objective liability for penalty