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ABSTRACT OF DOCTORAL DISSERTATION

"Contractual penalty - evolution of the institution after 1989

in legislation, jurisprudence and doctrine"

prepared under the scientific supervision of dr hab. Andrzej Szlęzak prof. of SWPS University

The purpose of the dissertation was to present the evolution of the institution of contractual penalty after 1989 in legislation, jurisprudence and doctrine. The dissertation is based on three basic theses, which are the answers to three fundamental questions. The first thesis involves answering the question of whether, as a result of the evolution of the institution of contractual penalty taking place at the turn of the 20th and 21st centuries, the premise of fault and the premise of damage are still fundamental in the category of determinants of the emergence of a claim for contractual penalty and how the concept of "surrogate damages" used to define this institution should be understood in the Polish legal system today. The second thesis concerns the issue of what should now be the catalog of determinants of judicial mitigation of contractual penalty and how should the premise of mitigation in the form of gross exorbitance be understood. The third thesis involve answering the question of the structural and functional correctness of the contractual penalty for non-payment or untimely payment of remuneration to a subcontractor in a construction contract under a specific public procurement regime. Answering the questions posed in this way sheds light on the possible need for the legislator to intervene in the regulation of the institution of contractual penalty in the Polish legal system.

The desideration consists of seven chapters and a conclusion.

Chapter I presents the historical roots of the institution of contractual penalty. The author presented the construction of this institution in Roman law, where the contractual penalty was independent of the premise of damage and the premise of fault. Next, the primary concept of a contractual penalty independent of the creditor’s damage and the debtor’s fault, adopted in the first draft of the Polish Code of Obligations by E. *Till*, is presented. Finally, the final form of

contractual compensation in the Code of Obligations, owed without the need for the creditor to prove any damage and with the presumption of the debtor's fault, that is, constructed on the same principles as *ex contractu* damages, but without the obligation to prove damage, was presented. The legal comparative remarks in this chapter focused on identifying the various models of contractual penalty in European legal culture that influenced the formation of Polish private law. The regulations of the French legal order, in which the contractual penalty is due without the need to justify any loss and also the regulations of the German and Austrian legal orders, where it is unanimously accepted in doctrine and jurisprudence that the contractual penalty is independent of the demonstration of damage, are approximated. In this chapter, the author also presents the characteristics of the uniform construction of contractual penalty in the Polish legal system, raising issues related to reasonable doubts about the relation of contractual penalty with monetary obligation, as well as issues related to the contractual obligations incumbent on the creditor.

The considerations contained in Chapter II focus on the premise of the creditor's damage presented in the construction of a contractual penalty as a natural or general damage (property and non-property), which is a violation of the creditor’s legitimate (worthy of protection) interest. The dissertation proposes – following the example of the European model rules (Resolution (78)3, PECL, DCFR and UNIDROIT) and the solutions adopted in the European legal orders (French, German and Austrian), as well as in accordance with the legal principle expressed in the resolution of the Supreme Court (7) of 6.11.2003 (III CZP 61/03) – the construction of a contractual penalty which is independent to the damage understood in this way, that is, a contractual penalty due to the creditor in the amount reserved by the parties without the need to prove any damage.

Chapter III focuses on the presentation of contractual penalty liability from the point of view of the debtor's failure to performing with due diligence in the performance of an obligation and the legal construction of a rebuttable presumption in this regard, applied by analogy to contractual responsibility, which has been approved and established both in the jurisprudence and the doctrine. The issue of the contractual extension of liability for contractual penalty under Article 473 § 1 of the Civil Code to circumstances not attributable to the debtor is also presented, and such a construction is compared with the construction of indemnity liability and guarantee lability.

Chapter IV discusses issues related to contractual penalty in court proceedings. It also considers issues related to the method of specifying the contractual penalty in the contract and the amount of the claim asserted in the lawsuit, the permissibility of cumulation of contractual penalties and issues related to the plea of limitation of the claim for contractual penalty and possible objections against the claim for contractual penalty based on general clauses. Also analyzed are the active forms of debtor's defense against liability for contractual penalty in the form of an action to establish a legal relationship or right. Referring to the issue discussed in this chapter of the permissibility of cumulative contractual penalties, the author proposed to consider *de lege ferenda* changes in the wording of Article 483 § 1 of the Civil Code to the order of the debtor's behavior giving rise to liability under the contractual penalty, and to replace the normative functor "or" (joint alternative) linking the state of improper performance of an obligation with the state of default with the functor "either" (disjoint alternative), which could help to regulate the prohibition of cumulative contractual penalties linked to the same circumstances related to the breach of the same obligation.

Chapter V presents the substantive and formal aspects of mitigation and classifies the prerequisites of judicial mitigation, indicating the subjective and personal criteria of mitigation, including the relationship of the institution of contractual penalty mitigation to Article 362 of the Civil Code. The author suggested that *de lege ferenda* be considered leaving only one premise of contractual penalty mitigation, following the example of European model rules (Resolution (78)3, PECL, DCFR and UNIDROIT) and solutions adopted in European legal orders (German and Austrian), which is its gross excessive. It also points to the need to consider the interests of both parties in the judicial mitigation process.

Chapter VI is devoted to the construction of a contractual penalty in public law, where the doctrinal concept of a contractual penalty for failure or late payment of contractual remuneration to a subcontractor in a public construction works contract (Article 437(1) (7a) of the Public Procurement Law Act) is presented, and focuses on issues related to the correctness of this legal construction in the current state of the law. The author proposed to consider *de lege ferenda* replacement of the defective legal construction of the contractual penalty due to the ordering party for failure or late payment of remuneration to a subcontractor the construction of statutory compensation for the payment to a subcontractor made by the

ordering party, which will be a regulation *lex specialis* in relation to Article 485 of the Civil Code.

Chapter VII discusses current issues, especially in pending litigation, related to limitations on the recovery of contractual penalty claims in public law in connection with the COVID-19 situation, consisting of statutory suspension of the beginning and suspension of the statute of limitations period for contractual penalty claim, statutory limitation on deduction of this claim, and statutory limitation on its satisfaction from the performance bond.

The basic research method in the dissertation is the dogmatic method. This method was supplemented in Chapter I by elements of the historical method and the comparative legal method, which was used in functional terms. In interpreting the law, in addition to linguistic interpretation, authentic interpretation was taken into account, as well as systemic and functional interpretation. Chapter III uses elements of the philosophical understanding of the term "responsibility," and Chapter V uses elements of the methods appropriate in the economic analysis of law.