VII. Summary in English

CONTRACTUAL PENALTY AND ITS RELATIONSHIP TO THE DAMAGES PURSUANT TO THE (Czech) COMMERCIAL CODE

The purpose of my thesis is to analyse (i) contractual penalty; (ii) damages; and (iii) relation between these afore-mentioned institutes pursuant to the Czech Commercial Code. The reason for my research is that, basically, the use of the contractual penalty excludes the claim for damages. Despite of these, there are several issues coming out from the application of these two instruments among. The paper is not only describing current legislation; it also takes into the account the continuing process of adopting the new Commercial Code, provided that the current is more than forty years old. The paper provides also an outline of the relevant Czech case law regarding each institute; as well as their mutual connexion.

The thesis is composed of five main chapters. Chapter I. is introductory and defines the scope of this work.

Chapter II. examines the relevant Czech legislation regarding the contractual penalty. This Chapter consists of thirteen parts, each of which describes particular aspects of the contractual penalty. Firstly, the current legislation governing the contractual penalty may be found in this Chapter. The contractual penalty is mentioned just in five sections of the acts: in Section 544 and 545 of the Civil Code, and in Sections 300, 301 and 302 of the Commercial Code. This part of the paper focuses on conditions under which the penalty might be concluded. The contractual penalty does not arise out of the act; however, it has to be explicitly agreed.

Moreover, it has to secure only the breach of (contractual) obligation. Definitely, the penalty shall not be applied, for example, when the party

withdraws from the agreement. Such behaviour shall be considered only as performance of the party's rights. Further in Chapter II. is described the eligible legislation covering the contractual penalty.

Chapter III. contains the regulation of damages pursuant to the Czech law. The chapter is divided into thirteen parts, which analyze particular aspects of damages. Contradictory to the Civil Code, fault (culpability) is not compulsory in business relationships. Under the Commercial Code just two conditions shall be fulfilled: (i) existence of the damage; and (ii) causal nexus between breach of the (contractual) obligation and caused damage. The most common types of damages are actual damage (damnum emergens) and loss of profit (lucrum cessans). Also other types of damages are recognized.

Unlike with the contractual penalty, the party is entitled to damages under the law - no agreement has to be entered into. Moreover, certain paragraphs deal with the (non)possibility of contractual limitation of the damages, which is recent topic of legal discussions in the Czech Republic.

Relation of the application of the contractual penalty and damages together is dealt with in Chapter IV. I endeavour to summarize its relationship in effective legislation. I mention that these provisions are (mostly) directory; i.e. they might be a subject of the change by the parties. Further, I propose the wording of relevant agreement which shall enable to claim the contractual penalty as well as damages. I find very close link between the contractual penalty and contractual limitation of damages. Shortly, the agreed the contractual penalty disables to claim damages. Therefore, it can serve as legally allowed limitation of damages. However, too small contractual penalty might cause invalidity of the agreement for circumvention of laws. I add also a few relevant court decisions regarding this matter. I have to point out that we do not have the case law system in the Czech Republic; the decisions do not become precedents, therefore they

are not binding erga omnes. However, especially the decisions of the Supreme Court are mostly followed and respected.

I describe certain complexion of the relationship between the contractual penalty and damages in connection with discretionary power of a judge to reduce the amount of the contractual penalty (so called moderation right). This right is given to the courts only pursuant to the Commercial Code. This provision – Section 301 of the Commercial Code – is mandatory; the parties can not agree otherwise.

The conclusions are drawn in Chapter V. I do not suggest any new legislation, rather I compare possible changes of the institutes in the new Civil Code, which is almost ready in paragraph version and which is expected to be passed in a few years.

Despite the new legislation, the most important issue of my thesis shall not be changed. The parties shall be entitled to claim either of the contractual penalty and damages only when they specifically agree so in the contract. I recommend wording of a provision enabling both institutes; for example, "The parties faithfully agree that the right to the contractual penalty does not affect the right to claim the damages."

The annexes (wording of the laws) form Chapter VI., and the List of Resources can be found in Chapter VII.