

Abstract

Contractual Penalty under the Commercial Code

(with focus on the discretionary power of a judge to reduce a contractual penalty)

Contractual penalty is a concept frequently used by the parties to consolidate the position of the creditor as well as to motivate the debtor to fulfill the obligation as agreed. Not different from the other institutes of private law, the practical application of contractual penalty arises many questions with no uniform answers.

The purpose of the thesis is to analyze selected contentious issues concerning the contractual penalty, especially discretionary power of a judge to reduce its unreasonable amount, to confront controversial theoretical opinions as well as non-conforming conclusions drawn from the juristic theory and established practice of the courts and add own opinion on the discussed matters. The paper does not include the exhaustive construction of contractual penalty, and therefore the general aspects are outlined only to the necessary extent. Greater attention is paid to the creation and existence of the right and claim to the contractual penalty. The study shifts the focus on the discretionary power of a judge to mitigate its inappropriate amount comprising different opinions on the related issues.

The concept of contractual penalty has been used in private law since the Roman times. Its nature rests in the agreement on contractual penalty, agreed upon by the parties to the main contract, as a collateral contract. The contractual penalty itself is a specific payment or other specific performance that has to be paid or performed upon the breach of the contract as agreed.

The thesis is composed of five chapters. Chapter One, which is introductory, is dealing with the topic on the general level, with the definition, systematic classification, functions and accessory nature of the contractual penalty. The next chapter examines relevant Czech and briefly European legislation. The following chapter describing the creation of right to the stipulated penalty is subdivided into six subchapters. The first three of them are dealing with the obligatory conditions of the creation of the right – the content and the validity of the agreement and the breach of the obligation. This chapter discusses the fault of the debtor and the issue of the different moment of the creation of the right and the creation of the claim to the penalty. Chapter Four regarding the existence of the right and the claim to the penalty

deals mostly with the issue of the limitation of actions and the effect of the withdrawal from the contract on the existence of the claim.

The last main chapter of the thesis deals with the issue of the discretionary power of a judge to reduce unreasonably high contractual penalty. It is subdivided into seven subchapters, some of which are further subdivided. Firstly, it examines the relevant provision, section 301 of the Commercial Code, as well as its peremptory character. Next follows the brief description of the conditions under which a judge reduces the penalty. The third subchapter analyzes the criteria for deciding if the penalty is reasonable or not. The following subchapter focuses on the contractual penalty as a subject of the reduction. The aim of subchapter five is to answer the question if the 'mitigation power' is the privilege or the duty of the judge and if the motion of the party is necessary. Next subchapters are dealing with the criteria of the mitigation, legal limitation of the judge, consequential damages and the consequences of the court's decision on mitigation. The conclusion discusses the possibility of increasing the contractual penalty that would be unreasonably low *de lege ferenda*.

'Mitigating power' is the concept that is not very characteristic for private law. It gives a judge the power to reduce a contractual penalty which he considers unreasonably high concerning the value and the importance of the obligation in breach. A judge is limited by the damage caused until the moment of his decision. Since the 'mitigation power' is a serious interference with the contractual liberty of the parties to the contract, the existence of the certain rules for court deciding is necessary. These rules can be found mainly in the legal theory and the practice of the courts.