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Reduction of Contractual Penalty under Polish Law Against the Background of Supranational Legal Regulations

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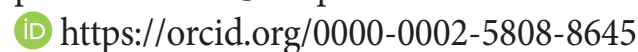
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Abstract: The article discusses the issue of the reduction of contractual penalty according to Polish law against the background of supranational legal regulations. The aim hereof is to determine whether the current regulation of contractual penalty reduction resulting from the provisions of Polish law (Article 484 § 2 of the Civil Code) is consistent with the standards that can be derived from supranational legal regulations, i.e. Resolution (78) 3 Relating to Penal Clauses in Civil Law, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference and the TransLex-Principles, as well as to formulate *de lege ferenda* conclusions. The article uses the logical-linguistic and legal-comparative method. At first, the legal regulation of contractual penalty reduction in Polish law is presented. Next, the reduction of contractual penalty in the aforementioned supranational *soft law* regulations is discussed. Lastly, the conclusions of the analysis performed are formulated. Despite some weaknesses, the regulation of contractual penalty reduction in Polish law seems be in line with the solutions contained in the supranational regulations in question. Some changes are required in the catalog of the prerequisites for the reduction of the contractual penalty and limitation of arbitrariness as to the extent thereof.

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1. Introduction

Generally, a contractual penalty is an additional contractual clause[1] on the basis of which the parties agree that the damage resulting from the non-performance or improper performance of a non-monetary obligation will be

[1] In the interwar period, contractual penalty, which in the legal language was referred to as contractual compensation, was included in the broader editorial unit of the Ordinance of the President the Republic of Poland of October 27, 1933 – Code of Obligations, Journal of Laws 1933 No. 82, item 598, as amended, hereinafter: CO, i.e. in Chapter VI, entitled "Additional contractual reservations", Section I, Title II, Articles 82–85 of the CO. Thus, apart from the deposit (Articles 74–75 of the CO), the contractual right of withdrawal (Articles 76–79 of the CO), the compensation fee (Articles 80–81 of the CO) and the interest (Articles 86–90 of the CO), it was treated as a part of the additional contractual reservations. On the basis of *legis latae*, the Act of April 23, 1964 – Civil Code, consolidated text: Journal of Laws of 2022, item 1360, as amended, hereinafter: CC, does not contain any editorial unit entitled "Additional contractual reservations," hence this term is no longer part of the legal language. Traditionally, however, for historical reasons, it has been used to designate institutions regulated in Art. 394-396 of the CC, in Title III of Book III entitled "General provisions on contractual obligations," i.e. the deposit (Article 394 of the CC), the contractual right of withdrawal (Article 395 of the CC) and the compensation fee (Article 396 of the CC), but also the contractual penalty, which is currently regulated elsewhere, i.e. in Section II of Title VII of Book III of the CC entitled "Effects of non-performance of obligations," in Art. 483-484 of the CC; Witold Czachórski, et al., *Zobowiązania. Zarys wykładu* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2009), 191; Krzysztof Falkiewicz and Michał Wawrykiewicz, *Kara umowna w obrocie gospodarczym* (Warsaw: Wydawnictwo Difin, 2001), 55; Zdzisław Gawlik, in *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna*, ed. Andrzej Kidyba (Warsaw: Wydawnictwo Wolters Kluwer, 2014), 752; Zdzisław Gordon, "Kary umowne w bieżącej praktyce zamówień publicznych," *Prawo Zamówień Publicznych*, no. 1 (2014): 127; Jacek Jastrzębski, *Kara umowna* (Warsaw: Wolters Kluwer Polska, 2006), 178; Anita Lutkiewicz-Rucińska, in *Kodeks cywilny. Komentarz*, eds. Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2022), 889; Adam Olejniczak, "Dodatkowe zastrzeżenia umowne," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 1203–1204; Wojciech Popiołek, in *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (Warsaw: Wydawnictwo C.H. Beck, 2021), 97; Zbigniew Radwański, "Dodatkowe zastrzeżenia umowne," in *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, ed. Zbigniew Radwański (Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981), 458; Zbigniew Radwański and Adam Olejniczak, *Zobowiązania – część ogólna* (Warsaw: Wydawnictwo C.H. Beck, 2018), 368; Elżbieta Skowrońska-Bocian, "Kara umowna – kompensacja czy represja?," *Zeszyty Prawnicze UKSW*, no. 3.2. (2003): 180; Hanna Witczak and Agnieszka Kawałko,

remedied through the payment of a specified amount.[2] Contractual penalty plays an increasingly important role in modern business transactions, mainly due to the important functions associated with them. On the one hand, it plays a compensatory role, thus constituting a substitute for a penalty, the reservation of which makes it easier for the creditor to claim damages due to debtor's non-performance or improper performance of their obligation. On the other hand, it has a protective and repressive function, and thus constitutes a contractually agreed civil sanction which strengthens the contractual relationship between the parties and safeguards performance of their obligations.[3] Therefore, despite the considerable body of doctrine and judicature concerning the issue of contractual penalty, the problems relating thereto still remain topical.

The subject matter of this article is a legal analysis of the regulation of contractual penalty reduction in the Polish legal system on the basis of supranational regulations on contractual relationships. This mainly concerns the principles of universal contracts, i.e. the UNIDROIT Principles

Zobowiązania (Warsaw: Wydawnictwo C.H. Beck, 2007), 75; Piotr Zakrzewski, in *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, eds. Magdalena Habdas and Mariusz Fras (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018), 925. However, apart from tradition, at present the function of additional contractual reservations is primarily the basis for their determination. This is due to the fact that they affect the degree to which the parties are bound by the obligation relationship, thereby influencing the performance or non-performance of the obligation. Additional contractual reservations should be qualified as *accidentalia negotii* of the content of a legal transaction, but unlike the condition and term, they may only be a component of a legal transaction in the form of a contract; Olejniczak "Dodatkowe," 1205; Radwański, "Dodatkowe," 458; Radwański and Olejniczak, *Zobowiązania*, 368; Witczak and Kawałko, *Zobowiązania*, 75.

2 Paweł Widerski, "Charakter prawny kary umownej według prawa polskiego na tle ponadnarodowych uregulowań prawnych," *Studia Prawa Prywatnego*, no. 2 (2018): 25.

3 Ibid., 28–29. It should be added that apart from the two main functions of the contractual penalty, the literature indicates other functions thereof; Przemysław Drapała, "Dodatkowe zastrzeżenia umowne," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 1285 et seq.; Wojciech Jan Katner, "Odpowiedzialność przedsiębiorcy za niewykonanie lub nienależyte wykonanie zobowiązania," in *System Prawa Handlowego. Tom 5A. Prawo umów handlowych*, ed. Mirosław Stec (Warsaw: Wydawnictwo C.H. Beck, 2020), 637–638; Lutkiewicz-Rucińska, in *Kodeks*, 890–891; Popiołek, in *Kodeks*, 98–99; Janusz Szwaja, *Kara umowna według kodeksu cywilnego* (Warsaw: Wydawnictwo Prawnicze, 1967), 350 et seq.

of International Commercial Contracts,[4] the Principles of European Contract Law PECL,[5] the Draft Common Frame of Reference DCFR[6] and the TransLex Principles,[7] but also the regulation relating solely and exclusively to the contractual penalty, namely the Council of Europe Resolution (78) 3 Relating to Penal Clauses in Civil Law of January 20, 1978.[8] The purpose of this article is to establish whether the current Polish regulations concerning reduction of the contractual penalty (Article 484 § 2 of the CC) are in conformity with the standards that can be derived from supranational legal regulations, as well as to formulate *de lege ferenda* conclusions resulting from the comparison of contractual penalty reduction under Polish law with the Resolution (78) 3 of the Council of Europe, UNIDROIT Principles, PECL Principles, DCFR and TransLex Principles. In the period of continuous modernization of the Polish contract law, in which the contractual penalty is of key importance, it seems that a need arises to address the research problem formulated in this manner. However, this introduction ought to emphasize that the present article does not discuss the contractual penalty in its broadest sense, but the research problem has been narrowed down to the issue of contractual penalty reduction only. As preliminary remarks, it should also be added, for the sake of accuracy, that the present analysis covers the reduction of the contractual penalty by way of court decision referred to in Article 484 § 2 of the CC. Civil law entities

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4 *UNIDROIT Principles of International Commercial Contracts* (Rome: International Institute for the Unification of Private Law, 2016), accessed on September 9, 2022, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, hereinafter: UNIDROIT Principles.

5 Ole Lando and Hugh Beale, eds., *Principles of European Contract Law. Parts I and II* (Hague–London–Boston: Kluwer Law International, 2000), hereinafter: PECL Principles.

6 Christian von Bar and Eric Clive, eds., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Volume I* (Munich: Sellier. European Law Publishers, 2009), hereinafter: DCFR.

7 *The TransLex-Principles*, accessed September 9, 2022, https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria).

8 Council of Europe Resolution (78) 3 Relating to Penal Clauses in Civil Law adopted by the Committee of Ministers on January 20, 1978, at the 281st meeting of the Minister's Deputies, accessed September 9, 2022, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505599, hereinafter: Resolution (78) 3 of the Council of Europe.

may, however, introduce unnamed contractual provisions into the concluded contracts, constructed on the basis of the principle of freedom of contract (Article 353[1] of the CC), which provide for the possibility of extrajudicial reduction of the contractual penalty stipulated in the contract.

2. Reduction of Contractual Penalty According to the Civil Code

Contractual penalty was already known in the Roman law. As Wiesław Litewski points out, it was a promise, usually stipulative (*stipulatio poenae*), of a benefit, mainly pecuniary, in the event of the promisor's failure to perform a certain act or omission.[9] In good faith trade, it could also take the form of a simple agreement (*pactum*).[10] Although in Polish law, the contractual penalty has its genotype precisely in the Roman penal regulations, which also played both compensatory and repressive function in business transactions,[11] when it comes to the possibility of reducing the amount of the penalty, the Polish legal order breaks with the axiological basis resulting from this penal regulation. As far as contractual penalty is concerned, following the principle of *volenti non fit iniuria*, the Roman law did not provide clear grounds for reducing the amount of the penalty, but it introduced prohibition on excessive interest on pecuniary debts.[12] Under Polish law, the exclusive contractual penalty is treated as a rule, which means that the creditor may claim a specific amount of contractual penalty that does not depend on the existence of damage and its degree (Article 484 § 1, sentence 1 *in fine* of

[9] Wiesław Litewski, *Rzymskie prawo prywatne* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2003), 262; see also: Bartosz Zalewski, "Stipulatio poenae," in *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia*, eds. Antoni Dębiński and Maciej Jońca (Warsaw: Wydawnictwo C.H. Beck, 2016), 353.

[10] Kazimierz Kolańczyk, *Prawo rzymskie* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2001), 355; see also: Wacław Osuchowski, *Zarys rzymskiego prawa prywatnego* (Warsaw: Państwowe Wydawnictwo Prawnicze, 1967), 392–393.

[11] Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 95.

[12] Drapała, "Dodatkowe," 1315; see also: Witold Borysiak, "Miarkowanie kary umownej," in *Prawo i Państwo. Księga jubileuszowa 200-lecia Prokuratorii Generalnej Rzeczypospolitej Polskiej*, ed. Leszek Bosek (Warsaw: Wydawnictwo Sejmowe, 2017), 449; Reinhard Zimmermann, "Agreed Payment for Non-performance," in *Commentaries on European Contract Laws*, eds. Nils Jansen and Reinhard Zimmermann (New York: Oxford University Press, 2018), 1541–1542.

the CC).[13] The contractual penalty may therefore be reserved in a far higher amount than the actual loss suffered by the creditor. Standing for values such as fairness and justice, the Polish legislator introduced a measure for the protection of the debtor in the form of contractual penalty reduction, designed to be a remedy for the excessive effects of the use of the contractual penalty in its repressive aspect by the more powerful party. Similarly, the doctrine indicates that the basis for reducing the contractual penalty is the need for judicial limitation of the negative effects of the incorrect assessment of the risk of sanctions assumed by the debtor for non-performance or improper performance of their obligation, due to the complexity of factors influencing the proper performance of such obligation.[14]

According to Article 484 § 2 of the CC, if the obligation has been performed in a significant part, the debtor may demand a reduction in the contractual penalty; the same applies to cases where the contractual penalty is grossly excessive. The legal norm stipulated therein is *iuris cogentis*, hence the provisions agreed on by the parties which exclude or limit the possibility of reducing the contractual penalty by the court pursuant to Article 484 § 2 of the CC, in particular those under which a party may wave the right to demand reduction of the contractual penalty in advance, are invalid.[15]

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13 Przemysław Drapała,, "Kara umowna (art. 483 k.c.) a odszkodowanie na zasadach ogólnych (art. 471 k.c.)," *Państwo i Prawo*, no. 6 (2003): 62; Zakrzewski, in *Kodeks*, 934.

14 Witold Borysiak, in *Kodeks cywilny. Komentarz. Tom III A. Zobowiązania. Część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2017), 1116; Paweł Dąbek and Aleksandra Nowak-Gruca, "Uwagi o karze umownej z perspektywy ekonomicznej analizy prawa (EAP)," in *Prawo kontraktów*, eds. Zbigniew Kuniewicz and Dorota Sokołowska (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2017), 72; Drapała, "Dodatkowe," 1315–1316.

15 Borysiak, "Miarkowanie," 455–456; Borysiak, in *Kodeks*, 1118; Marcin Ciemiński, *Odszkodowanie za szkodę niemajątkową w ramach odpowiedzialności ex contractu* (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2015), 304; Drapała, "Dodatkowe," 1319; Falkiewicz and Wawrykiewicz, *Kara*, 37; Jastrzębski, *Kara*, 309; Jacek Jastrzębski, "Nietypowe kary umowne – swoboda sankcji kontraktowych i ochrona dłużnika," *Przegląd Prawa Handlowego*, no. 6 (2014): 11; Marcin Lemkowski, in *Kodeks cywilny. Tom II. Komentarz. Art. 353–626*, ed. Maciej Gutowski (Warsaw: Wydawnictwo C.H. Beck, 2022), 1325; Agnieszka Rzetecka-Gil, *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna* (Lex/el., 2011), commentary on article 484, thesis 14; Jarosław Szewczyk, "O kryteriach miarkowania nadmiernych kar umownych w kontekście orzecznictwa Sądu Najwyższego", *Palestra*, no. 1–2 (2013): 299; Łukasz Węgrzynowski, "Wierzycielska kara umowna," *Przegląd*

As it is explicitly stated in Article 484 § 2 of the CC, reduction of the contractual penalty does not take place *ex officio*, but solely and exclusively upon debtor's request. It is not a creating competence, as its use by the debtor is only a prerequisite for the court to issue a decision changing the obligation relationship between the parties.[16] The request to reduce the contractual penalty should be made clearly and explicitly.[17] In principle, in legal proceedings, it takes the form of a substantive objection raised by the debtor against the creditor's claim for the payment of the contractual penalty.[18] However, the view that it may take the form of a legal action instituted by the debtor to form a legal relationship by reducing the contractual penalty needs to be accepted.[19] Also incorrect is the position concerning the request to reduce the contractual penalty, which is extremely liberal in nature, according to which the debtor's request for denial to consider the claim for the payment of the contractual penalty includes the request for its reduction.[20] Moreover, it needs to be added that from the point of view of procedural pragmatism, it is worthwhile that the request for

Sądowy, no. 6 (2022): 108; Zakrzewski, in *Kodeks*, 936; Szwaja, *Kara*, 151; Polish Supreme Court, Judgment of February 13, 2014, V CSK 45/13, Legalis.

16 Borysiak, "Miarkowanie," 481; idem, in *Kodeks*, 1125; Drapała, "Dodatkowe," 1317; Maciej Rzewuski, "Chwila złożenia wniosku o miarkowanie kary umownej (glosa do wyroku SN z 23 czerwca 2017 r., I CSK 625/16)," *Przegląd Sądowy*, no. 4 (2018): 116.

17 Borysiak, "Miarkowanie," 482–483; idem, in *Kodeks*, 1126–1127; Gawlik, in *Kodeks*, 762; Jastrzębski, *Kara*, 348–349; Katner, "Odpowiedzialność," 629; Popiołek, in *Kodeks*, 112; Szwaja, *Kara*, 136; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgments: of May 7, 2002, Ref. No. I CKN 821/00, reported in: Legalis; of March 23, 2006, Ref. No. IV CSK 89/05, reported in: Legalis; of 6 February 2008, Ref. No. II CSK 421/07, reported in: Legalis; of November 26, 2008, Ref. No. III CSK 168/08, reported in: Legalis; of April 16, 2010, Ref. No. IV CSK 494/09, reported in: Legalis; of July 23, 2014, Ref. No. V CSK 503/13, reported in: Legalis; of February 12, 2015, Ref. No. IV CSK 276/14, reported in: Legalis; of June 23, 2017, Ref. No. I CSK 625/16, reported in: Legalis; of February 28, 2019, Ref. No. I PK 257/17, reported in: Legalis.

18 Drapała, "Dodatkowe," 1317; Zakrzewski, in *Kodeks*, 937; Polish Supreme Court, Judgment of November 26, 2008, Ref. No. III CSK 168/08, reported in: Legalis.

19 Borysiak, "Miarkowanie," 484; idem, in *Kodeks*, 1127; Drapała, "Dodatkowe," 1318; Lemkowski, in *Kodeks*, 1330.

20 Drapała, "Dodatkowe," 1317–1318; Falkiewicz and Wawrykiewicz, *Kara*, 38; Polish Supreme Court, Judgments: of July 14, 1976, Ref. No. I CR 221/76, reported in: Legalis; of March 25, 1998, Ref. No. II CKN 660/97, reported in: Legalis; of July 16, 1998, Ref. No. I CKN 802/97, reported in: Legalis; of December 4, 2003, Ref. No. II CK 271/02, reported

reducing the contractual penalty, despite the lack of such requirement, states the amount by which the contractual penalty is to be reduced, so that in the event of an appeal against the judgment of the court of first instance, which reduced the contractual penalty, but to a small extent in the opinion of the debtor, the court of second instance has a point of reference in the case when it comes to the conclusion that it is legitimate to grant legal protection to the debtor's request. The right to demand a reduction of the contractual penalty expires upon the payment of the contractual penalty by the debtor.[21]

Contractual penalty is subject to reduction by way of a constitutive judgment, which has a law-making nature.[22] The court's competence is limited to reducing the amount of the contractual penalty, and the court cannot modify the binding relationship between the parties in any other way. The discretionary power of the judge includes the power to reduce the contractual penalty in its entirety,[23] although from the practical point of view, when certain special circumstances occur, contractual penalty is usually reduced to a symbolic amount. The concept of contractual penalty reduction does not appear in the legal language, therefore it is not regulated in the doctrine. The institution provided for in Article 484 § 2 of the CC is commonly referred to as the reduction of the contractual penalty.[24] It seems

in: Legalis; of January 22, 2010, Ref. No. V CSK 217/09, reported in: Legalis; of February 27, 2009, Ref. No. II CSK 511/08, reported in: Legalis.

21 Borysiak, "Miarkowanie," 475; idem, in *Kodeks*, 1124; Popiołek, in *Kodeks*, 107; Zakrzewski, in *Kodeks*, 942.

22 Borysiak, "Miarkowanie," 474; idem, in *Kodeks*, 1124; Drapała, "Dodatkowe," 1316; Lemkowski, in *Kodeks*, 1330; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 107; Zakrzewski, in *Kodeks*, 942; Polish Supreme Court, Judgments: of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of May 23, 2013, Ref. No. IV CSK 644/12, reported in: Legalis.

23 Borysiak, "Miarkowanie," 478–479; Borysiak, in *Kodeks*, 1125; Magdalena Wilejczyk, "Miarkowanie kary umownej *de lege ferenda*," *Transformacje Prawa Prywatnego*, no. 2 (2020): 191. Otherwise see: Lutkiewicz-Rucińska, in *Kodeks*, 893; Szwaja, "*Kara*", 149–150; Wiśniewski in "*Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, ed. Jacek Gudowski (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2018), 1240; Polish Supreme Court, Judgment of December 4, 2003, Ref. No. II CK 271/02, reported in: Legalis.

24 Marcin Lemkowski, *Odsetki cywilnoprawne* (Warsaw: Wydawnictwo Wolters Kluwer Polska, 2007), 323; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 9; Renata Tanajewska, in *Kodeks cywilny. Komentarz*, eds. Jerzy Ciszewski and Piotr Nazaruk

that it should be discussed in a pragmatic manner as a procedure aimed at contractual penalty reduction that is initiated upon debtor's request to reduce the contractual penalty, and also in apragmatic terms as the result of such a procedure, i.e. a reduction of the amount of the contractual penalty due to the creditor.[25] Not only may contractual penalty reduction be applied with respect to contractual obligations, but also to obligations arising from other sources.[26]

Article 484 § 2 of the CC provides for the grounds for contractual penalty reduction, i.e. performance of a significant part of the obligation or gross excessiveness of the contractual penalty. This is an inseparable alternative in which the basis for contractual penalty reduction is the occurrence of one of the aforementioned prerequisites, but it may also be the case that both of them occur at the same time, which in turn may

(Warsaw: Wydawnictwo Wolters Kluwer Polska, 2019), 889; Wiśniewski, in *Kodeks*, 1240; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgments: of October 15, 2008, Ref. No. I CSK 126/08, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

25 Reduction of the contractual penalty is usually identified only with the apragmatic approach, so that the reduction in question is defined solely as a reduction of the contractual penalty due to the creditor by way of a court decision; Ciemiński, *Odszkodowanie*, 306; Janina Dąbrowa, "Skutki niewykonania zobowiązania," in *System prawa cywilnego. Prawo zobowiązań – część ogólna*, t. III, cz. 1, ed. Zbigniew Radwański (Wrocław–Warsaw–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1981), 832; Falkiewicz and Wawrykiewicz, *Kara*, 37; Katner, "Odpowiedzialność," 625; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 9; Szewczyk, "O kryteriach," 299; Szwaja, *Kara*, 137; Wiśniewski, in *Kodeks*, 1240; Zakrzewski, in *Kodeks*, 936; Polish Supreme Court, Judgment of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis. It should be added, however, that there is also a view that provides a different definition of the contractual penalty reduction, i.e. as a substantive legal means of protecting the debtor against the creditor's request for the payment of the contractual penalty; Polish Supreme Court, Judgment of June 13, 2013, Ref. No. V CSK 375/12, reported in: Legalis; see also: Oskar Radliński, "Dopuszczalność zastrzeżenia kary umownej za zwłokę w wykonaniu zobowiązania w postaci określonego procentu wynagrodzenia umownego za każdy dzień zwłoki, bez wskazania końcowego terminu naliczenia kary umownej lub jej maksymalnej wysokości," *Monitor Prawniczy*, no. 12 (2022): 656; Michał Sehn, "Miarkowanie kary umownej w świetle najnowszego orzecznictwa Sądu Najwyższego w sprawach cywilnych," *Monitor Prawniczy*, no. 9 (2021): 491.

26 Borysiak, "Miarkowanie," 453; idem, in *Kodeks*, 1117; Drapała, "Dodatkowe," 1319.

affect the scope of the reduction of the amount of the contractual penalty.[27] The list of these prerequisites is exhaustive in nature.[28] The burden of proof of the prerequisites for contractual penalty reduction rests with the debtor (Article 6 of the CC).[29] As for the grounds for contractual penalty reduction consisting in the performance of a significant part of the obligation, the point of reference in this case is debtor's performance of the obligation in its entirety, whereas its performance in a significant part occurs when the creditor's interests in the performance of the obligation that are worthy of protection are almost entirely satisfied.[30] This prerequisite applies only to cases in which partial performance of the obligation satisfies to some extent the creditor's legitimate interests that are worthy of protection, thus it is not possible to invoke the aforementioned prerequisite in the cases where the creditor has no interest in partial performance of the obligation.[31] As for the prerequisite for contractual penalty reduction in the form of gross excessiveness of the contractual penalty, it should be pointed out that it is more flexible than the prerequisite of the performance of

[27] Borysiak, "Miarkowanie," 457; idem, in *Kodeks*, 1118; Drapała, "Dodatkowe," 1320; Jastrzębski, *Kara*, 323; Katner, "Odpowiedzialność," 625–626; Lutkiewicz-Rucińska, in *Kodeks*, 893; Rzetecka-Gil, *Kodeks*, thesis 11; Szwaja, *Kara*, 138; Tadeusz Wiśniewski, in "*Kodeks*," 1242; Polish Supreme Court, Judgments: of April 19, 2006, Ref. No. V CSK 34/06, reported in: Legalis; of 11 September 2019, Ref. No. IV CSK 473/18, reported in: Legalis.

[28] Borysiak, in *Kodeks*, 1118; Ciemiński, *Odszkodowanie*, 307; Dąbek and Nowak-Gruca, "Uwagi," 72; Drapała, "Dodatkowe," 1319–1320; Jastrzębski, *Kara*, 323; Popiołek, in *Kodeks*, 107; Rzetecka-Gil, *Kodeks*, thesis 12; Szwaja, *Kara*, 138; Sehn, "Miarkowanie," 493; Janusz Szwaja, "Miarkowanie kary umownej według polskiego kodeksu cywilnego," in *Odpowiedzialność cywilna za wyrządzenie szkody*, ed. Stefan Grzybowski (Warsaw: Państwowe Wydawnictwo Naukowe, 1969), 184; Tanajewska, in *Kodeks*, 889; Zakrzewski, in *Kodeks*, 941; Polish Supreme Court, Judgment of October 15, 2008, Ref. No. I CSK 126/08, reported in: Legalis.

[29] Borysiak, "Miarkowanie," 453; idem, in *Kodeks*, 1119; Falkiewicz and Wawrykiewicz, *Kara*, 38; Lemkowski, in *Kodeks*, 1329; Radwański and Olejniczak, *Zobowiązania*, 375; Radosław Strugała, "Wysokość kary umownej a możliwość jej markowania," *Monitor Prawniczy*, no. 3 (2016): 139; Szwaja, *Kara*, 147; Zakrzewski, in *Kodeks*, 942.

[30] Borysiak, in *Kodeks*, 1119; Dąbek and Nowak-Gruca, "Uwagi," 73; Drapała, "Dodatkowe," 1324; Jastrzębski, *Kara*, 325; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 108; Rzetecka-Gil, *Kodeks*, thesis 28; Szwaja, *Kara*, 146; Jastrzębski, *Kara*, 332–333; Szewczyk, "O kryteriach," 299; Tanajewska, in *Kodeks*, 889; Wiśniewski, in *Kodeks*, 1241.

[31] Borysiak, in *Kodeks*, 1119; Dąbek and Nowak-Gruca, "Uwagi," 73; Jastrzębski, *Kara*, 325; Rzetecka-Gil, *Kodeks*, thesis 29; Szwaja, *Kara*, 140; Polish Supreme Court, Judgment of March 25, 2011, Ref. No. IV CSK 401/10, reported in: Legalis.

a significant part of the obligation, since the legislator has not indicated any benchmark against which the excessiveness of the contractual penalty should be assessed and deemed to be gross. In view of the above, the court is competent to adopt on an *a casu ad casum* basis the most appropriate criterion, in its opinion, according to which the assessment will be made, e.g. the degree of damage, the amount of penalty under general rules, the degree of fault or the value of the principal benefit.[32] If, in the light of the criterion adopted by the court as a reference point for the assessment in question, the contractual penalty is grossly excessive, in an amount that is not acceptable in the sense of fairness and justice, then the prerequisite of gross excessiveness of the contractual penalty is met.[33] The contractual penalty may be grossly excessive as early as at the time of its reservation, but it may also turn out to be grossly excessive at a later time, in particular, only after failure to perform or improper performance of the obligation with respect to which it was reserved.[34]

Article 484 § 2 of the CC does not provide for any criteria for determining the scope of contractual penalty reduction. The doctrine indicates, however, that the scope of reduction should be determined considering the point of reference specified in the criterion which the court considered as grounds for reducing the contractual penalty.[35] Furthermore, it is also stressed that account should be taken of the function of the contractual penalty, which it is predominantly supposed to fulfill in a specific legal status in accordance with the will of the parties, i.e. whether it is designed to

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32 Regarding the criteria for assessing the gross excessiveness of the contractual penalty see: Borysiak, "Miarkowanie," 463 et seq.; idem, in *Kodeks*, 1120 et seq.; Ciemiński, *Odszkodowanie*, 311–312; Drapała, "Dodatkowe," 1321 et seq.; Falkiewicz and Wawrykiewicz, *Kara*, 40; Katner, "Odpowiedzialność," 626 et seq.; Lutkiewicz-Rucińska, in *Kodeks*, 893; Popiołek, in *Kodeks*, 108–109; Rzetecka-Gil, *Kodeks*, thesis 44 et seq.; Sehn, "Miarkowanie," 493; Szewczyk, "O kryteriach," 300; Szwaja, *Kara*, 142–143; Węgrzynowski, „Wierzycielska," 109; Zakrzewski, in *Kodeks*, 938 et seq.

33 Rzetecka-Gil, *Kodeks*, thesis 30.

34 Dąbrowa, "Skutki," 833; Drapała, "Dodatkowe," 1320–1321; Falkiewicz and Wawrykiewicz, *Kara*, 41; Jastrzębski, *Kara*, 334; Katner, "Odpowiedzialność," 629; Rzetecka-Gil, *Kodeks*, thesis 42; Szwaja, "Miarkowanie," 190; Wiśniewski, in *Kodeks*, 1241; Polish Supreme Court, Judgment of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis.

35 Drapała, "Dodatkowe," 1325; Jastrzębski, *Kara*, 345; Szwaja, *Kara*, 148.

act as a substitute for a penalty, or a civil law sanction motivating the party to properly fulfill their obligation.[36]

3. Reduction of Contractual Damages According to the Code of Obligations

Contractual penalty regulated in Articles 483–484 of the CC is a continuation of the Polish civil tradition from the interwar period, as it is related to the regulation of contractual damages contained in Articles 82–85 of the CO, which was also referred to in the literature as the contractual penalty.[37] Although there are significant substantive differences between the two aforementioned regulations, e.g. contrary to *legis latae*, contractual penalty provided for in the Code of Obligations could be reserved in the event of non-performance of any kind of obligations, not only non-monetary ones[38], but they are not fundamental enough to constitute two substantively different legal institutions.[39] This also applies to contractual penalty reduction in compliance with the Civil Code, the structure of which preserves the solutions concerning contractual penalty that are stipulated in the Code of

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36 Drapała, "Dodatkowe," 1325; Rzetecka-Gil, *Kodeks*, thesis 16; Szwaja, *Kara*, 148.

37 Ludwik Domański, *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna* (Warsaw: Marjan Ginter – Księgarnia Wydawnictw Prawniczych, 1936), 388; Roman Longchamps de Bérier, *Zobowiązania* (Lviv: Księgarnia Wydawnicza Gubrynowicz i Syn, 1938), 184; Jan Korzonek and Ignacy Rosenblüth, *Kodeks zobowiązań. Komentarz. Tom I* (Kraków: Księgarnia Powszechna, 1936), 202; Fryderyk Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, podręcznik poddany rewizji i wykończony przy współudziale Stefana Kosińskiego i Józefa Skąpskiego (Warsaw: Nakład Gebethnera i Wolffa, 1948), 87. On the other hand, on the basis of the current legal status, the term "contractual compensation" is used interchangeably with the term "contractual penalty"; Czachórski et al., *Zobowiązania*, 349; Falkiewicz and Wawrykiewicz, *Kara*, 10; Bartosz Fogel, "Kara umowna jako kontraktowa regulacja odpowiedzialności odszkodowawczej – wybrane zagadnienia," *Acta Universitatis Wratislaviensis*, no. 3161, Prawo CCCVIII (2009): 84; Jastrzębski, *Kara*, 58–59; Radwański and Olejniczak, *Zobowiązania*, 373; Szwaja, *Kara*, 13–14; Witczak and Kawałko, *Zobowiązania*, 176; Polish Supreme Court, Resolution of November 6, 2003, Ref. No. III CZP 61/03, reported in: Legalis.

38 Domański, *Instytucje*, 393.

39 Widerski, "Charakter," 29; see also: Anna Fermus-Bobowiec, "Od ryczałtu odszkodowania do miarkowania – kompensacyjny charakter kary umownej w prawie polskim na tle rozwiązań przyjętych w dziewiętnastowiecznym prawie cywilnym," *Studia Iuridica Lublinensia*, no. 3 (2016): 295.

Obligations. In the case of contractual penalty set forth in the Code of Obligations, it could be reduced at the request of the debtor in court proceedings, by way of a judicial decision, but not *ex officio*.[40] Pursuant to Article 85 § 1 of the CO, in the event that the contractual penalty is grossly excessive or if the contract has been performed in part, the debtor may demand a reduction of the contractual penalty, especially if they prove that the creditor has not suffered any damage as a result of the non-performance of the contract or the damage caused was minor. Thus, the main substantive difference between the regulation of the contractual penalty in the Civil Code as opposed to the Code of Obligations concerns the grounds for the reduction of the contractual penalty. However, as Janusz Szwaja rightly points out, these differences are not significant enough to state that the Civil Code did not copy these prerequisites from the Code of Obligations.[41] Moreover, it should be noted that the Civil Code retains the legal nature of the list of prerequisites, which was also exhaustive in the Code of Obligations. The burden of proving the prerequisites for the reduction of contractual damages rested with the debtor.[42]

The grounds for the reduction were formulated in Article 85 § 1 of the CO in a more liberal manner than in Article 484 § 2 of the CC. Both provisions provide for a prerequisite relating to the performance of the obligation, but in the case of contractual damages set forth in the Code of Obligations, the debtor's right to demand a reduction of the contractual damages was enforceable if the contract was performed at least in part, while in the current state of the law, not every partial performance of the obligation may be the basis for demanding a reduction of the contractual penalty, but only the performance of the obligation to a specific extent, as Article 484 § 2 of the CC provides for the performance of the obligation to a large extent. Hence, when applying the provisions of the Code of Obligations, it was easier to reduce the contractual penalty than when referring to the analogous prerequisites under the Civil Code.[43]

40 Korzonek and Rosenblüth, *Kodeks*, 208; Jan Namitkiewicz, *Kodeks zobowiązań. Komentarz dla praktyki. Tom I. Część ogólna. Art. 1–293*, opracowany przy współudziale Alfreda Samolińskiego (Łódź: Wydawnictwo "Kolumna", 1949), 124.

41 Szwaja, "Miarkowanie," 184.

42 Korzonek and Rosenblüth, *Kodeks*, 208.

43 Katner, "Odpowiedzialność," 625.

The first prerequisite for reducing the contractual penalty stipulated in Article 85 § 1 of the CO was its gross excessiveness. This prerequisite, in the same wording, was contained in Article 484 § 2 of the CC, and its aim was to regulate contractual penalty reduction. Nevertheless, it is necessary to point to a rather subtle difference in the understanding of the prerequisite in question in accordance with the present legal status. Currently, the prerequisite of the gross excessiveness of a contractual penalty is not clearly defined in normative terms,[44] showing a very high level of flexibility, because the legislator has not stipulated in the act any criterion that the court should take into account when assessing the penalty in terms of its gross excessiveness. Therefore, the court adjudicating in a case for the payment of a contractual penalty has considerable discretion, which is not limited solely and exclusively to evaluating the impact of the gross excessiveness criterion on the amount of the contractual penalty awarded to the creditor, but allows the court to choose such criterion as, in its opinion, will be the most appropriate in the light of the circumstances of the given facts to state whether the contractual penalty is grossly excessive. On the other hand, as far as the reduction of contractual damages according to the Code of Obligations is concerned, the criterion of the lack of damage or minor damage to the creditor was set forth in the act. Consequently, when it comes to the prerequisite of gross excessiveness in the case of contractual damages under the Code of Obligations, the court's freedom in the decision-making process was more limited due to the statutory criterion of the damage to the creditor, which thus needed to be taken into account by the court when assessing the gross excessiveness of contractual damages. Admittedly, the wording of Article 85 § 1 of the Code of Obligations does not lay any grounds to claim that the damage to the creditor is the only criterion to be taken into consideration by the court, therefore the damage criterion did not exclude considering other criteria for determining the gross excessiveness of the contractual penalty, which the court considered appropriate in the light of the circumstances of the given factual state. This position is confirmed by Roman Longchamps de Bérier, who claims that the proof that the creditor has suffered no or only minor damage is only an exemplary criterion, thus, despite even significant damage to

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[44] Drapała, "Dodatkowe," 1320.

the creditor, the judge may reduce the contractual penalty if they consider it too excessive.[45] In the current state of the law, in view of the absence of a similar legislative solution, the damage to the creditor ceases to constitute a statutory criterion when assessing gross excessiveness of the contractual penalty; only in the light of some part of the doctrine[46] and jurisprudence,[47] when determining whether the contractual penalty is grossly excessive, priority is given to the criterion of damage consisting in a comparison of the amount of the contractual penalty to the amount of the damage suffered by the creditor.

Contractual provision which excludes or limits the possibility of court's reduction of contractual damages was invalid. Unlike *legis late*, the mandatory nature of the legal norm contained in Article 85 § 1 of the CO was directly confirmed in Article 85 § 2 of the CO.

As regards the reduction of contractual damages, it is also worth paying attention to Article 531 § 1 of the Ordinance of the President of the Republic of Poland of June 27, 1934 – Commercial Code,[48] according to which if the merchant, in the performance of their business activity, has accepted an obligation to pay a contractual penalty, they may not demand its reduction. At the same time, Article 531 § 1 of the ComC provides for an exception to the general admissibility of contractual damages reduction. This exception applies solely and exclusively to a situation where the merchant has undertaken to do so in the course of conducting their business activity, i.e. when such obligation is a commercial act, namely the merchant's legal act relating to the running of their business (Article 498 § 1 of the ComC).[49] *De lege lata*, there are no such subjective limitations, therefore it is possible

45 Longchamps de Bérier, *Zobowiązania*, 188.

46 Borysiak, in *Kodeks*, 1120; Drapała, "Dodatkowe," 1321; Wiśniewski, in *Kodeks*, 1241–1242; Zakrzewski, in *Kodeks*, 938.

47 Polish Supreme Court, Judgments: of June 21, 2002, Ref. No. V CKN 1075/00, reported in: Legalis; of 12 May 2006 r., Ref. No. V CSK 55/06, reported in: Legalis; of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

48 Journal of Laws of 1934 No. 57, item 502, as amended, hereinafter: ComC.

49 Maurycy Allerhand, *Kodeks handlowy. Komentarz* (Lviv: "Kodeks" Spółka Wydawnicza z Ograniczoną Odpowiedzialnością, 1935), 775.

to reduce the amount of the contractual penalty also in relations between economic entities as part of their business activities.[50]

4. Reduction of Contractual Penalty According to Resolution (78) 3 of the Council of Europe

A supranational act that is devoted in its entirety to contractual penalties and clauses similar to those regarding contractual penalties is Resolution (78) 3 of the Council of Europe. This resolution is not directly applicable to the Council of Europe member states, but, according to its preamble, only recommends governments of the member states to take the principles concerning penal clauses in civil law contained in the appendix to this resolution into consideration when preparing new legislation on this subject; to consider the extent to which the principles set out in the appendix can be applied, subject to any necessary modifications, to other clauses which have the same aim or effect as penal clauses and to make this resolution, its appendix and the explanatory memorandum available to the appropriate authorities and other interested bodies in their countries. Therefore, Resolution (78) 3 of the Council of Europe, or rather the Appendix thereto, which sets forth specific rules on contractual penalties, provides a certain benchmark guiding the legislative work of the governments of the Member States with regards to the normalization of contractual penalties and clauses similar to those concerning contractual penalties.[51]

Reduction of contractual penalty is regulated in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe. According to this legal provision, the sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation. Any stipulation contrary to the provisions of this article shall be void. Resolution (78) 3 of the Council of Europe adopts the judicial reduction of

[50] Polish Supreme Court, Judgment of April 19, 2006, Ref. No. V CSK 34/06, reported in: Legalis.

[51] Widerski, "Charakter," 31.

contractual penalties.[52] However, as follows from the Explanatory Memorandum, the article does not include any rules concerning evidence, and in particular as regards the burden of proof. These questions are linked to the general rules of civil procedure and evidence in each member state and it would not be possible or desirable to attempt to harmonize them in the present context. Moreover, the article does not deal with the question whether or not the court should have the power to reduce *ex officio*, or of its own motion, the sum stipulated in the penal clause, for example in the situation where the promisor fails to take part in the proceedings. National systems should therefore be free to make provision for such an *ex officio* reduction in appropriate cases. There is, however, no suggestion that national systems which do not at present recognise such a power should change their law in this respect.[53]

Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe stipulates that the prerequisite for reducing a contractual penalty is its manifest excessiveness, which under Polish law corresponds to the prerequisite of gross excessiveness. Manifest excessiveness is an undefined normative term, characterized by even greater flexibility than the term used in the Polish civil law. In the Polish legal order, the performance of an obligation to a proper extent has always been treated as a prerequisite for the reduction of the contractual penalty that is equivalent to the prerequisite of the gross excessiveness thereof.[54] In Resolution (78) 3 of the Council of Europe, on the other hand, partial performance of the principal obligation is not an independent prerequisite for the reduction of the contractual penalty, but only a statutory criterion that courts need to take into consideration when determining whether the contractual penalty is manifestly

52 See also: Alessandra Mari, "Particular Remedies for Non-Performance," in *Principles of European Contract Law and Italian Law. A Commentary*, eds. Luisa Antoniolli and Anna Veneziano (Hague: Kluwer Law International, 2005), 474; Małgorzata Modrzejewska, "Rezolucja nr (78) 3 w sprawie kar umownych (klauzul karnych) w prawie cywilnym na tle unormowania polskiego kodeksu cywilnego," in *Standardy prawne Rady Europy. Teksty i komentarze. Tom II. Prawo cywilne*, ed. Marek Safjan (Warsaw: Oficyna Naukowa, 1995), 257.

53 *Penal Clauses in Civil Law: Resolution (78) 3 Adopted by the Committee of Ministers of the Council of Europe on 20 January 1978 and Explanatory Memorandum*, 22, accessed September 9, 2022, https://rm.coe.int/09000016804d1a18.

54 Borysiak, in *Kodeks*, 1118; Drapała, "Dodatkowe," 1320; Rzetecka-Gil, *Kodeks*, thesis 12.

excessive. Hence, in the light of Resolution (78) 3 of the Council of Europe, the prerequisite for contractual penalty reduction in the form of manifest excessiveness is so broad and flexible that its scope also includes comparison of the amount of the contractual penalty with the degree of performance of the principal obligation.

Resolution (78) 3 of the Council of Europe does not preclude the use of other criteria. The Explanatory Memorandum indicates that it is up to each legal system to determine under what precise circumstances the sum concerned should be considered to be manifestly excessive. It is, however, suggested that in a given case, the courts may have regard to a number of factors such as: damage pre-estimated by the parties at the time of contracting and the damage actually suffered by the promisee; the legilimate interests of the parties including the promisee's non-monetary interests; the category of the contract and the circumstances under which it was concluded, in particular the relative social and economic position of the parties at the time of its conclusion, or the fact that contract was a standard form contract; the reason for the failure to perform the obligation, in particular the good or bad faith of the promisor. This list of the criteria to be taken into account should not be regarded as exhaustive, nor does it indicate any order of priority.[55] *Ergo*, when assessing the contractual penalty in terms of its manifest excessiveness, the court should take into account any reduction of the penalty due to partial performance of the principal obligation, which, however, does not exclude considering other criteria that are not normatively provided for. Nevertheless, the most important case, according to the Explanatory Memorandum, is when the stipulated sum is clearly disproportionate to the loss suffered by the promisee. The mere fact that the loss actually sustained is less than the sum stipulated by the parties at the time of concluding the contract shall not constitute a sufficient reason for the reduction of the penalty.[56] According to the literature, the amount of damages must be more than merely disproportionate to actual damages; they must be "manifestly excessive."[57] Polish law does not specify

[55] *Penal*, 22; see also: Larry A. DiMatteo, *International Contracting: Law and Practice* (Alphen aan den Rijn: Kluwer Law International B.V., 2022), 144.

[56] *Penal,* 22

[57] DiMatteo, *International*, 144.

the lower limit to which the contractual penalty may be reduced, while on the grounds of Resolution (78) 3 of the Council of Europe, the authors stated that it is necessary to impose a limit on the court's power with regards to the reduction of the penalty.[58] Therefore, a provision to this effect has been included in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe. The lower limit of the contractual penalty reduction is provided for in the third sentence of this provision and it constitutes the damages payable for failure to perform the obligation.[59]

From the fourth sentence of Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe, it follows that contractual provisions inconsistent with this provision shall be invalid. *Ratio legis* of such a legislative solution is stated in the Explanatory Memorandum, from which it follows that the rules in Article 7 of the Appendix to Resolution (78) 3 of the Council of Europe concerning judicial control should be mandatory, otherwise the protection of the parties, which the provisions are designed to ensure, would rapidly become ineffective in practice, as standard form contracts would undoubtedly tend to include a clause excluding them from such control.[60]

5. Reduction of Contractual Penalty According to the UNIDROIT Principles

The UNIDROIT Principles are not a source of generally applicable law, and they are included in the model law that has no binding force (the so-called soft law).[61] The preamble declares that the UNIDROIT Principles set forth general rules for international commercial contracts. They may be applied

[58] *Penal*, 22; see also: Mari, "Particular," 476.

[59] See also: Falkiewicz and Wawrykiewicz, *Kara*, 71; Modrzejewska, "Rezolucja," 259.

[60] *Penal*, 22.

[61] Michael Joachim Bonell, *An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts* (New York: Transnational Publishers, 2005), 6; Adam Brzozowski, "Umowy," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warsaw: Wydawnictwo C.H. Beck, 2020), 486; Michał Romanowski, "Ogólne reguły wykładni kontraktów w świetle zasad europejskiego prawa kontraktów a reguły wykładni umów w prawie polskim," *Przegląd Prawa Handlowego*, no. 8 (2004): 11; Ewa Rott-Pietrzyk, "Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)," in *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: Wydawnictwo C.H. Beck, 2013), 50;

when the parties, within the framework of a substantive indication of the legal regulation,[62] have agreed that their contract will be governed by these principles, general principles of law, the *lex mercatoria* or similar.[63] In such situations, the UNIDROIT Principles become an integral part of the contract, and they shape the content of the obligation relationship within limits set by the substantive law governing this obligation relationship.[64] According to the preamble, these Principles may also be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform legal instruments and domestic law. Finally, they may serve as a model for national and international legislators.[65]

According to the UNIDROIT Principles, an institution that constitutes an equivalent of the contractual penalty is the agreed payment for non-performance (Article 7.4.13 of the UNIDROIT Principles). Article 7.4.13 (2) of the UNIDROIT Principles provides for the possibility of reducing the agreed payment. Accordingly, notwithstanding any agreement to the contrary,

Rina See and Dharshini Prasad, "The UNIDROIT Principles 2016: A Contemporary English Law Perspective," *Hamburg Law Review*, no. 2 (2018): 83–84.

62 Jadwiga Pazdan, "Czy można wyłączyć umowę spod prawa?," *Państwo i Prawo*, no. 10 (2005): 8–9; Maksymilian Pazdan, *Prawo Prywatne Międzynarodowe* (Warsaw: Wydawnictwo LexisNexis, 2012), 156–157; Maksymilian Pazdan, "Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań," in *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: Wydawnictwo C.H. Beck, 2015), 76; idem, "Materialno-prawne wskazanie a kolizyjnoprawny wybór prawa," *Problemy Prawne Handlu Zagranicznego*, no. 18 (1995): 108–109; idem, "Materialnoprawne wskazanie regulacji prawnej na tle konwencji rzymskiej z 1980 r.," in *Studia i rozprawy. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Całusowi*, ed. Andrzej Janik (Warsaw: Szkoła Główna Handlowa – Oficyna Wydawnicza, 2009), 327–328; Ewa Rott-Pietrzyk, "Zobowiązania umowne oraz wybrane instytucje wspólne prawa zobowiązań," in *System Prawa Prywatnego. Tom 20 B. Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: Wydawnictwo C.H. Beck, 2015), 121.

63 *UNIDROIT*, 1; see also: Bernadetta Fuchs, "Harmonizacja prawa prywatnego w aktach prawa modelowego (soft law)," in *System Prawa Handlowego. Tom 9. Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: Wydawnictwo C.H. Beck, 2013), 61; Michael Joachim Bonell, *The UNIDROIT Principles in Practice. Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (New York: Transnational Publishers, 2006), 44 et seq.

64 Pazdan, "Zobowiązania," 76–77.

65 *UNIDROIT*, 1; see also: Bonell, *The UNIDROIT*, 46 et seq.

the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. Although it is not set forth in the provision in question, the commentary to the UNIDROIT Principles states that the reduction of the amount reserved under the agreed payment falls within the scope of the so-called judiciary law, and thus the power to reduce the amount lies with the court.[66] We can, therefore, conclude that the structure of reduction adjudicated by the court is upheld by the UNIDROIT Principles. The agreed sum may be reduced, but not entirely disregarded.[67]

Similarly to Resolution (78) 3 of the Council of Europe, the UNIDROIT Principles provide for only one prerequisite for reducing the agreed sum, namely its gross excessiveness. Contrary to the Polish civil law, the UNIDROIT Principles do not mention partial fulfillment of the obligation as grounds for reducing the agreed payment for non-performance. Article 7.4.13 (2) of the UNIDROIT Principles indicates that the list of circumstances that may be taken into account in the assessment of the gross excessiveness is non-exhaustive, although one of the criteria is given priority and should always be considered by the court hearing a case for the payment, namely, the damage criterion which boils down to the comparison of the specified sum in relation to the loss resulting from the non-performance. This statement is confirmed in the commentary to the UNIDROIT Principles, according to which regard should in particular be had to the relationship between the sum agreed and the harm actually sustained.[68] Therefore, the prerequisite under Polish law of the performance of a significant part of the obligation may be relevant in the context of the reduction of the agreed payment for non-performance, but as a criterion that the court will take into account when assessing its gross excessiveness. Particularly valuable in the context of the problems posed by Polish law in determining the meaning of the concept of gross excessiveness of contractual penalty is the explanation contained in the commentary to the UNIDROIT Principles on how

66 *UNIDROIT*, 290; see also: Lars Meyer, *Non-performance and Remedies Under International Contract Law Principles and Indian Contract Law. A Comparative Survey of the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and Indian Statutory Contract Law* (Frankfurt am Main: Peter Lang GmbH, 2010), 245.

67 *UNIDROIT*, 290.

68 Ibid.; see also: Mari, "Particular," 476.

to understand the term "grossly excessive" in the context of agreed payment for non-performance. The amount agreed being "grossly excessive" means that it would clearly appear to be so to any reasonable person.[69]

As in the case of Resolution (78) 3 of the Council of Europe, the authors of the UNIDROIT Principles assumed that the scope of the reduction of the specified sum cannot be arbitrary, therefore the reduction limit should be defined in some way. Accordingly, it is stipulated that the limit of the reduction is a reasonable amount, as indicated in Article 7.4.13 (2) *in medio* of the UNIDROIT Principles. On the one hand, this is an undefined normative term with a high level of flexibility; on the other hand, it does not give the court absolute discreetion with regards to the scope of the reduction. From Article 7.4.13 (2) *in principio* of the UNIDROIT Principles, it follows that the possibility of reduction in accordance with the indicated rules may under no circumstances exclude such reduction on the basis of a different agreement between the parties.[70]

6. Reduction of Contractual Penalty According to the PECL Principles and the DCFR

Similarly to the UNIDROIT Principles, the PECL Principles also have no binding force.[71] Michał Romanowski and Ewa Rott-Pietrzyk talk about model law,[72] Piotr Machnikowski and Tomasz Pajor about model rules,[73] and Robert Stefanicki about a universal non-normative set of rules in the field of contract law.[74] The PECL Principles show that they are intended to be applied as general rules of contract law in the European Communities (Article 1:101 point 1 of the PECL Principles). The PECL Principles may be applied when: the parties have agreed to incorporate them into their contract or that their contract is to be governed by them; the parties have agreed that

[69] *UNIDROIT*, 290.

[70] Lars Meyer, *Non-performance*, 245.

[71] Brzozowski, "Umowy," 497.

[72] Romanowski, "Ogólne," 11; Rott-Pietrzyk, "Harmonizacja," 50.

[73] Piotr Machnikowski and Tomasz Pajor, "Prawo prywatne Unii Europejskiej i jego wpływ na prawo polskie," in *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, ed. Marek Safjan (Warsaw: Wydawnictwo C.H. Beck, 2012), 310–311.

[74] Robert Stefanicki, "Zasady europejskiego prawa umów (PECL)," *Studia Prawnicze*, no. 3 (2005): 114.

their contract is to be governed by the "general principles of law," the "*lex mercatoria*" or similar principles; the parties have not chosen any system or rules of law to govern their contract (Article 1:101 points 2–3 of the PECL Principles). Lastly, the PECL Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so (Article 1:101 point 4 of the PECL Principles).[75]

The PECL Principles have been incorporated into the DCFR with minor changes. The DCFR provides the basis for the Common Frame of Reference, which has been created by the European research community to define common principles, terminology and regulations that the EU legislator should use when drawing up or amending the *acquis communautaire*.[76] As for the application of the DCFR as a model act,[77] the case is analogous to that of the PECL Principles.[78] Subjecting a contract to the PECL Principles or the DCFR has the effect of a substantive indication of a legal regulation, and thus it produces an effect only within the limits of substantive contractual freedom, the limits of which are determined by the mandatory provisions of law applicable to a given contract. Therefore, the court will apply the provisions of model law, provided that they do not contradict the mandatory rules of law binding on the contract.[79]

Similarly to the UNIDROIT Principles, the PECL Principles and the DCFR also do not use the concept of contractual penalty. In the PECL

75 Lando and Beale, *Principles of European*, xxix; see also: Brzozowski, "Umowy," 497–498; Rott-Pietrzyk, "Harmonizacja," 53–54; Stefanicki, "Zasady," 115–116; Maria Anna Zachariasiewicz and Jarosław Bełdowski, "Europejskie prawo umów. Wprowadzenie," *Kwartalnik Prawa Prywatnego*, no. 3 (2004): 807 et seq.

76 Bar and Clive, *Principles, Definitions*, 3–4; Ewa Łętowska and Konrad Osajda, "Wprowadzenie do części ogólnej zobowiązań," in *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, ed. Marek Safjan (Warsaw: Wydawnictwo C.H. Beck, 2020), 85; Machnikowski and Pajor, "Prawo," 312; Rott-Pietrzyk, "Harmonizacja," 53; Reiner Schulze, "The Academic Draft of the CFR and the EC Contract Law," in *Common Frame of Reference and Existing EC Contract Law*, ed. Reiner Schulze (Munich: Sellier. European Law Publishers, 2008), 3 et seq.

77 Łętowska and Osajda, "Wprowadzenie," 85.

78 Ibid., 83.

79 In regard to the PECL Principles, see: Brzozowski, "Umowy," 498; Piotr Machnikowski, "Zasady europejskiego prawa umów a przepisy kodeksu cywilnego o zawarciu umowy," *Transformacje Prawa Prywatnego*, no. 3–4 (2006): 80; Rott-Pietrzyk, "Harmonizacja," 53–54; Zachariasiewicz and Bełdowski, "Europejskie," 807.

Principles, the equivalent of the contractual penalty is the agreed payment for non-performance, and in the DCFR, it is the stipulated payment for non-performance. Article 9:509 (2) of the PECL Principles provides for the possibility of reducing the agreed payment. Pursuant to this provision, notwithstanding any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and other circumstances. The provision contained in Article 9:509 (2) of the PECL Principles has, practically speaking, been repeated in Provision III. – 3:712 (2) of the DCFR, with minor changes introduced therein. According to Provision III. – 3:712 (2) of the DCFR, notwithstanding any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and other circumstances. As noted by Piotr Machnikowski and Tomasz Pajor, in the DCFR the central concept is no longer a contract, as it was in the PECL Principles, but an obligation,[80] the consequence of which is the stipulation contained in Provision III. – 3:712 (2) of the DCFR that the reduction may apply not only to the payment provided for in a contract, but also in another legal act, in particular, in a unilateral juridical act, as stated in the commentary to the DCFR.[81]

The provisions for the reduction of the stipulated sum according to the PECL Principles and the DCFR are very similar in lexical terms to the regulation set forth in the UNIDROIT Principles.[82] As is the case with the UNIDROIT Principles, according to the PECL Principles and the DCFR, the reduction in question is also within the exclusive jurisdiction of the court.[83] The commentary to the PECL Principles indicates that

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80 Machnikowski and Pajor, "Prawo," 312.

81 Bar and Clive, *Principles, Definitions*, 963.

82 Drapała,, "Dodatkowe," 1283.

83 In regard to PECL Principles, see: Lando and Beale *Principles of European*, 454; Martijn W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe* (Hague–London–New York: Kluwer Law International, 2002), 130; Hein Kötz, *European Contract Law*, translated by Gill Mertens, Tony Weir (New York: Oxford University Press, 2017), 278; Lars Meyer, *Non-performance*, 245; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 962–963.

the court's power with regard to reducing the penalty has a limit. The court should not reduce the award to the actual loss, because it should respect the intention of the parties to deter default.[84] The same viewpoint on the stipulated sum reduction is shared in the commentary to the DCFR.[85] Thus, it can be concluded that in the light of both model acts, the reduced sum cannot be lower than the actual loss suffered by the creditor.

Consequently, as far as supranational legal regulations on contractual penalty are concerned, both the PECL Principles and the DCFR provide for one prerequisite for reducing the amount, namely gross excessiveness. However, Article 9:509 (2) of the PECL Principles and Provision III. – 3:712 (2) of the DCFR do not state that the list of circumstances that may be taken into account in the assessment of gross excessiveness is exhaustive. On the contrary, it is non-exhaustive, but as in the case of the UNIDROIT Principles, one of the criteria is given priority and should always be taken into consideration by the court adjudicating a case for payment; namely, the damage criterion which boils down to the comparison of the specified sum with the loss resulting from the non-performance. Actual loss suffered by the creditor is the point, which is confirmed in the commentaries to the PECL Principles and the DCFR. They clearly present that, if there is a gross disparity between the specified sum and the actual loss suffered by the aggrieved party, the court may reduce the sum, even if at the time of the contract it seemed reasonable.[86] Thus, the performance of a significant part of the obligation does not constitute grounds for the reduction of the penalty in the light of the PECL Principles and the DCFR, but, similarly to the UNIDROIT Principles, due to the considerable flexibility of the "gross excessiveness" prerequisite, fulfillment of the obligation to a significant degree may constitute a criterion that the court will take into consideration during its assessment.

According to Polish law regulations, the contractual penalty may turn out to be grossly excessive following non-performance or improper performance of the obligation for which it was reserved, but it may be grossly

84 Lando and Beale, *Principles of European*, 454.

85 Bar and Clive, *Principles, Definitions*, 963.

86 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 454; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 962–963.

excessive as early as at the time of its reservation. The approach to this issue is different in the PECL Principles and the DCFR, where it is clearly stated that the purpose is to control only those stipulations which are abusive in their effect. Hence, the allocation of a special place in the reduction of the criterion of the actual loss, so that the court's power can beexercised where it is clear that the specified sum substantially exceeds the actual loss.[87] When it comes to understanding the prerequisite of "gross excessiveness," the commentaries to the PECL Principles and the DCFR emphasize that the crucial point is the relationship between the specified sum and the loss actually suffered by the creditor, as opposed to the loss legally recoverable taking account of the foreseeability principle. The calculation of actual loss should take into acount that element of the loss which has been caused by the unreasonable behavior of the creditor.[88]

In the light of both model acts, the extent of the said reduction is not entirely arbitrary on the part of the court. As in the case of the UNIDROIT Principles, the reduction is restricted by an undefined term – the "reasonable amount." Nevertheless, it should be added that the meaning thereof under the PECL Principles and the DCFR is less flexible than under the UNIDROIT Principles due to the fact that, as indicated above, the sum cannot be reduced to less than the actual loss of the creditor.

Neither the PECL Principles nor the DCFR explicitly prohibit the exclusion of reduction rules by way of an agreement between the parties, as is the case under the UNIDROIT Principles. In the author's opinion, in view of the great similarity between the regulations, this issue ought to be considered in line with the regulation contained in the UNIDROIT Principles. Thus, it should be stated that the reduction rules provided for in Article 9:509 (2) of the PECL Principles and Provision III. – 3:712 (2) of the DCFR cannot be excluded by the parties.

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87 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 454; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 963.

88 In regard to the PECL Principles see: Lando and Beale, *Principles of European*, 455; in regard to the DCFR see: Bar and Clive, *Principles, Definitions*, 963; see also: Zimmermann, "Agreed," 1552.

7. Reduction of Contractual Penalty According to the TransLex Principles

The information on the website points out that TransLex Principles are a systematic online collection of principles and rules of transnational commercial law. They are used by counsels and arbitrators in international arbitrations as well as contract drafters, academics and participants of moot court competitions in international arbitration across the globe.[89] The TransLex Principles can be used in a way that is characteristic of many other soft law acts.[90]

The TransLex Principles do not use the concept of contractual penalty, nor do the UNIDROIT Principles, the PECL Principles and the DCFR. In TransLex Principles, the equivalent of the contractual penalty is a promise to pay in case of non-performance. These rules provide for the possibility of reducing the amount. According to the TransLex Principles No.VI.4 sentence 2, if the amount is grossly excessive in relation to the loss resulting from non-performance and other circumstances, the specified sum may be reduced by an arbitral tribunal or court to a reasonable amount, notwithstanding any agreements of the parties to the contrary. Consequently, in relation to the supranational legal regulations discussed hereinabove, the TransLex Principles also take the position of the agreed sum reduction by the court.[91] These rules provide for only one prerequisite for the reduction, i.e. in the case of gross excessiveness of the agreed sum. The commentary to the TransLex Principles specifies the manner in which this prerequisite should be construed. According to it, the agreed sum is grossly, i.e. clearly and obviously, excessive in relation to the loss caused by the non-performance and also in relation to other circumstances of the case.[92] The criterion according to which gross excessiveness of the specified sum is determined is the creditor's loss resulting from non-performance, which does not exclude other criteria that the court may take into account when deciding on the reduction.

89 "Principle: No. VI.4 – Promise to pay in case of non-performance," University of Colognem, accessed September 9, 2022, https://www.trans-lex.org/945000.

90 Rott-Pietrzyk, "Harmonizacja," 64.

91 "Commentary to Trans-Lex Principle, thesis 4," University of Cologne, accessed September 9, 2022, https://www.trans-lex.org/945000.

92 Ibid.

The commentary to the TransLex Principles indicates that in determining whether the sum is grossly excessive, the court or arbitral tribunal necessarily enjoys a certain degree of discretion. The power of the court or arbitral tribunal is limited to a "reduction" of the sum, which excludes both a total elimination (a "reduction to 0") and an increase of the agreed sum.[93] Hence, although it is not explicitly stated in the TransLex Principles No.VI.4, it may be concluded that total reduction is inadmissible. Most of all, however, it should be emphasized that the scope of the reduction is not arbitrary due to the fact that the sum can be reduced to a reasonable amount. This is consistent with the solutions adopted in the UNIDROIT Principles, the PECL Principles and the DCFR. The commentary to the TransLex Principles states that even if the parties have excluded in the contract the right to demand a judicial reduction of the specified amount, such exclusion cannot be deemed to be effective.[94]

8. Conclusions

The institution of contractual penalty reduction has a well-established place in the Polish civil law tradition, as it was already provided for in the Code of Obligations, and the present regulation contained in Article 484 § 2 of the CC undoubtedly draws onArticle 85 § 1 of the CO. This, of course, does not mean per se that adapting the institution in question to modern standards of legal transactions is not necessary. First of all, the fact that Polish private law allows for contractual penalty reduction deserves a positive assessment, and it draws on modern legislative solutions that are reflected in supranational model acts. The existence of the possibility of reducing the contractual penalty is not evident from a historical point of view, for in terms of the civil tradition, such reduction was an unprecedented phenomenon.[95] Today, according to Michael Joachim Bonell, the possibility of reducing the agreed sum is recognized under most of the civil law systems that provide for clauses known as "penalty clauses," as opposed to the common law systems that traditionally distinguish between penalties and liquidated

93 Ibid.

94 Ibid.

95 Zimmermann, "Agreed," 1551.

damages clauses.[96] Even today, not all legal systems allow for the possibility to reduce the contractual penalty.

At the supranational level, there is a discussion whether the contractual penalty may be reduced only upon request of the debtor, or whether the court may reduce the contractual penalty *ex officio*. Reinhard Zimmermann's position is convincing. He opts for the first solution and argues that there is no need for the law to impose its protection upon a debtor who is not willing to be protected. Also, it is not conductive to legal certainty if a judge can *mero motu* consider a reduction of a penalty.[97] The Polish regulation of contractual penalty fits into this rightful trend, as Article 484 § 2 of the CC manifestly states that the contractual penalty is reduced at the request of the debtor. What is more, the prevailing view is that the request for reduction of the contractual penalty should be made explicitly.

It seems that Polish law requires some changes with respect to the prerequisites for the reduction of the contractual penalty. In the Polish civil law tradition, there are two equal prerequisites for the reduction of the contractual penalty, i.e. partial performance of the obligation and gross excessiveness of the contractual penalty. In view of the analysis performed, a conclusion can be drawn that this constitutes a certain peculiarity of the Polish legal order as far as contractual penalty reduction is concerned, since the uniform supranational solutions provide for one criterion for the reduction in question, namely gross excessiveness of the penalty,[98] while an independent prerequisite of the partial performance of the obligation does not function.

Resolution (78) 3 of the Council of Europe refers to the partial fulfillment of the obligation, however not as a prerequisite for the reduction that is equivalent to gross excessiveness of the contractual penalty, but as a criterion to be applied in the course of the assessment thereof. In the author's opinion, it is reasonable to abandon the prerequisite of the "performance of the obligation in a significant part" as stipulated in Article 484 § 2 of the CC

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96 Bonell, *An International*, 163; see also: Borysiak, "Miarkowanie," 449; Hesselink, *The New European Private Law*, 130; Jastrzębski, *Kara*, 306; Lando and Beale, *Principles of European*, 456; Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (New York: Oxford University Press, 2012), 633 et seq.

97 Zimmermann, " Agreed," 1552; see also: Wilejczyk, "Miarkowanie," 176 et seq.

98 Zimmermann, "Agreed," 1551–1552.

as an independent prerequisite for the reduction of contractual penalty, because it is inadequate and may lead *in concreto* to unfair and unjust judicial decisions, in particular, the contractual penalty may be reduced due to performance of the obligation in a significant part, while it is not at all grossly excessive. J. Szewczyk rightly draws attention to the risk posed by the prerequisite of the performance of the obligation in a significant part by indicating that the damage suffered by the creditor may be several times higher than the value of the principal service.[99] As a matter of fact, even the non-performance of an insignificant part of the obligation itself may inflict a relatively large damage on the creditor, especially when it comes to *lucrum cessans*, and despite this, on the grounds of *legis latae*, there is the possibility of reducing the contractual penalty due to performance of the obligation in a significant part, i.e. the prerequisite for contractual penalty reduction that is independent of gross excessiveness. In addition, this prerequisite weakens one of the two main functions of the contractual penalty, which is the repressive function. Within the framework thereof, the contractual penalty is designed to motivate the debtor to properly perform their obligation, thus fulfilling it in its entirety, while at the same time it is possible to reduce the contractual penalty on the grounds that it was performed in a substantial part. Thus, the applicability of the prerequisite of the performance of the obligation in a significant part may demotivate the debtor, who, hoping to reduce the contractual penalty, may strive to perform the obligation in a substantial part rather than in its entirety. Recognizing the disadvantages of the prerequisite of the performance of the obligation in a significant part, the judicature also advocates its application with great caution.[100] Therefore, *de lege ferenda*, only one prerequisite for the reduction of the contractual penalty should be maintained, namely gross excessiveness, as is the case in all the unified supranational legal regulations on contractual penalty that have been discussed herein. At the same time, it would be optimal, so as not to completely break with the tradition of the Polish civil law, to reformulate the prerequisite of the "performance of a significant part of the obligation" from being an independent prerequisite

[99] Szewczyk, "O kryteriach," 301.

[100] Polish Supreme Court, Judgment of September 15, 1999, Ref. No. III CKN 337/98, reported in: Legalis.

for reducing the contractual penalty into a normative criterion that ought to be considered when assessing the prerequisite of gross excessiveness of the contractual penalty. With such a solution, performance of the obligation in a substantial part would not be devoid of relevance when it comes to contractual penalty reduction, but it would be one of the possible criteria that the court may consider when determining whether the contractual penalty is grossly excessive.

In addition, another criterion should be introduced in Article 484 § 2 of the CC. Currently, in the context of the prerequisite of gross excessiveness of the contractual penalty, only the doctrine and judicature indicate that it is primarily a matter of comparing the amount of the contractual penalty with the criterion of the extent of the damage suffered,[101] or possibly compensation.[102] It would be worthwhile to clarify this issue normatively, which would relate to the solutions adopted in the model acts subject to the present analysis (the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles). Undoubtedly, the statutory definition of the criteria to be taken into account in the assessment of gross excessiveness of the contractual penalty should not be exhaustive in nature, so that the court could consider other circumstances it deems appropriate as assessment criteria.

Clearly, the fact that Article 484 § 2 of the CC does not set forth any criteria on the grounds of which the issue of gross excessiveness of the contractual penalty should be resolved has one advantage, namely a very high level of flexibility of this normative term, which leaves the court virtually unlimited normative discretion in the selection of evaluation criteria,

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101 Borysiak, in *Kodeks*, 1120; Drapała, "Dodatkowe," 1321; Jastrzębski, *Kara*, 337; Węgrzynowski, "Wierzycielska," 109; Wiśniewski, in *Kodeks*, 1241–1242; Zakrzewski, in *Kodeks*, 938; Polish Supreme Court, Judgments: of June 21, 2002, Ref. No. V CKN 1075/00, reported in: Legalis; of May 12, 2006, Ref. No. V CSK 55/06, reported in: Legalis; of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis; of February 13, 2014, Ref. No. V CSK 45/13, reported in: Legalis.

102 Ciemiński, *Odszkodowanie*, 314–315; Falkiewicz and Wawrykiewicz, *Kara*, 40–41; Lutkiewicz-Rucińska, in *Kodeks*, 893; Modrzejewska, "Rezolucja," 259; Strugała, "Wysokość," 137; Szwaja, *Kara*, 144–145; Polish Supreme Court, Judgments: of June 13, 2003 r., Ref. No. III CKN 50/01, reported in: Legalis; of November 11, 2007, Ref. No. IV CSK 181/07, reported in: Legalis.

in the court's opinion the most appropriate *ad casum*, for the reduction of the contractual penalty. It is aptly noted that the legislator intentionally did not explicitly indicate the criteria that would determine the excessive amount of the contractual penalty, and also did not provide a hierarchy of such criteria, wishing in this way to ensure the possibility of flexible application of the institution of contractual penalty reduction, based largely on judicial discretion, taking into account the specific circumstances of a given case.[103] However, the statutory indication of the two criteria that should be considered when assessing gross excessiveness as part of contractual penalty reduction, without excluding the possibility of the court taking into account other assessment criteria, in principle does not depreciate the main advantages of using the undefined term of "grossly excessive" contractual penalty in Article 484 § 2 of the CC. Such formulation of the prerequisite for the reduction of the contractual penalty was already used in Article 85 § 1 of the CO, which referred to the damage to the creditor as a criterion for reducing the contractual penalty due to its gross excessiveness. This structure is used in all the supranational regulations subject to the present analysis. In the light of Resolution (78) 3 of the Council of Europe, this statutory criterion is partial performance of the principal obligation, while in the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles it is the damage resulting from non-performance thereof.

As for a more precise definition of the second statutory criterion for assessing gross excessiveness, in addition to the "performance of the obligation in a substantial part," despite the fact that, as the analysis conducted shows, the damage to the creditor, not compensation, is indicated as this criterion, it is nevertheless necessary to opt for compensation, which still refers in large part to the well-established criterion of damage due to the fact that the main factor in determining creditor's compensation is precisely the damage to the creditor. However, compensation does not always correspond to the magnitude of the loss, for instance, when the creditor himself contributed thereto (Article 362 of the CC), and therefore the compensation criterion is more adequate than the damage criterion in assessing

[103] Polish Supreme Court, Judgments: of November 30, 2006, Ref. No. I CSK 259/06, reported in: Legalis; of May 23, 2013, Ref. No. IV CSK 644/12, reported in: Legalis.

gross excessiveness of the contractual penalty. It is necessary to agree with the position of the Polish Supreme Court in the judgment of November 21, 2007, which indicated that the *ratio* of the amount of the penalty to the damage cannot be the criterion as the penalty corresponds to compensation, and the compensation may be, as a result of the applicability of various institutions of civil law (e.g. Article 322 of the the Act of November 17, 1964 – Code of Civil Procedure[104]), in a different amount than the damage suffered.[105]

Another weak point of the Polish regulation of contractual penalty reduction is the absence of any indication in the act of any directives as to the extent of the reduction of the contractual penalty as part of its adjustment, while the extent of the reduction cannot be completely arbitrary. It seems that setting a specific limit on the reduction in question, e.g. to the amount of the damage suffered by the creditor, would be unreliable in the spectrum of the factual situations which could involve contractual penalty reduction. In addition, the reduction of the contractual penalty is not intended to bring the contractual penalty to any specific legal parameter, e.g. the amount of damage, but as the Polish Supreme Court rightly states in its judgment of May 12, 2006, the purpose of reducing the contractual penalty is to set it by the court in such an amount that it loses its feature of "gross excessiveness" within the meaning of Article 484 § 2 of the CC.[106] It seems that with regard to the extent of the reduction of the contractual penalty, reference should be made to the sense of fairness and justice, and as in supranational regulations, i.e. the UNIDROIT Principles, the PECL Principles, the DCFR and the TransLex Principles, Article 484 § 2 of the CC ought to include a regulation according to which the contractual penalty should be reduced to a reasonable amount.

Some of the supranational regulations of contractual penalty discussed hereinabove expressis verbis provide for the prohibition of excluding the possibility of judicial reduction of the amount of contractual penalty

104 Journal of Laws 2021 item 1805, as amended.

105 Polish Supreme Court, Judgment of November 21, 2007, Ref. No. I CSK 270/07, reported in: Legalis.

106 Polish Supreme Court, Judgment of May 12, 2006, Ref. No. V CSK 55/06, reported in: Legalis; see also: Jastrzębski, *Kara*, 345; Popiołek, in *Kodeks*, 110.

on the basis of an agreement between the parties. In Polish law, there is no such prohibition explicitly stipulated in Article 484 § 2 of the CC, but the position of the doctrine and judicature is evident as to the absolutely binding nature of this legal norm. Therefore, it seems that there is no need for the legislator's intervention, especially since, for example, such a prohibition is not explicitly stated in the PECL Principles and the DCFR.

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