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# Contractual penalties in the CMR Convention and the Act – Transport Law

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## General comments:

Contractual penalty is one of the most commonly used so-called additional contractual reservations.

Pursuant to **Articles 483(1) and 484(1) of the Civil Code**:

- a contractual penalty constitutes a specific sum of money which may be reserved in a contract to compensate for damage resulting from non-performance or improper performance of a non-pecuniary obligation;
- in the event of non-performance or improper performance of an obligation, the contractual penalty is due to the creditor in the amount reserved in this case, regardless of the amount of the damage suffered;
- a claim for damages exceeding the amount of the reserved penalty is not permissible, unless otherwise agreed by the parties.

It has various functions:

1/ a compensatory (damages) function;
2/ disciplinary function;
3/ guaranteeing function;
4/ sanctioning function;
5/ symplifying function.

As the contractual penalty constitutes a surrogate for damages, its construction is based on the principles of liability for damages under Article 471 of the Civil Code.

**Article 471 of the Civil Code.** The debtor is obliged to compensate for damage resulting from non-performance or improper performance of an obligation, unless the non-performance or improper performance is a consequence of circumstances for which the debtor isn't responsible.

A presumption arises from this provision – which the debtor can rebut – that the debtor is responsible for the non-performance or improper performance of the obligation.

The creditor is in a privileged position, since the reservation of a contractual penalty for non-performance or improper performance of an obligation doesn't relieve the debtor from the obligation to pay it if it's shown that the creditor has not suffered damage (the resolution of 7 judges' panel of the Supreme Court of Poland of 6 November 2003, III CZP 61/03, „Orzecznictwo Sądu Najwyższego Izby Cywilnej" 2004, No. 5, item 69).

## The nature of the law of carriage goods by roads

Neither the CMR Convention nor the Act – Transport Law regulates the institution of a contractual penalty, thus the national provisions apply.

**Article 1(3) of the the Act – Transport Law.** The provisions of this Act shall apply to international carriage, unless an international agreement provides otherwise.

General rules:
1/ the CMR Convention doesn’t contain an exemption in this respect;
2/ nternational conventions don’t regulate a specific legal relationship in its entirety;
3/ international conventions should be interpreted autonomously;
4/ it’s the international convention that should, in principle, provide the answer to the problems that arise in its application;
5/ in the case of carriage of goods by road, consideration of a contractual penalty may only relate to non-performance or improper performance of the parties’ non-monetary obligations.

It’s crucial to consider the nature of the carriage law provisions relating to the carriage of goods by road.

**Article 41(1) CMR.** Subject to Article 40 (which has no relevance to contractual penalties), any clause which would directly or indirectly contravene the provisions of that Convention is void and of no effect, the invalidity of such clauses not implying the invalidity of the remaining contractual provisions.

1/ The provisions of this Convention (with the exception of Article 30) are mandatory (*ius cogens*).

2/ There is no analogous provision in the Act – Transport Law.

3/ Nevertheless, it’s generally agreed that the provisions of this Act are (with few exceptions) also mandatory in nature; this applies in particular to the provisions governing the carrier’s liability and the determination of the amount of damage (which is indeed limited).

## Inadmissibility of contractual penalties in the carriage of goods by road

**Article 353[1] of the Civil Code.** Parties concluding a contract may arrange the legal relationship at their own discretion, provided that its content or purpose doesn't contradict the nature (character) of the relationship, the Act or the principles of social co-existence.

1/ This is a principle of freedom of contract.

2/ Contractual provisions contrary to the provisions of the Act – Transport Law are invalid in whole or in part (Article 58 § 1 and 3 of the Civil Code); the provisions of the contract of carriage on matters not regulated by the law are valid and effective.

3/ Article 41(1) of the CMR restricts the freedom of the parties (Article 353[1] of the Civil Code) in determining the content of the contract to be concluded. This also applies to the possibility of stipulating contractual penalties.

- A. Messent, D. A. Glass; I. Koller; R.Th. Schmid; K. Wesołowski: clause concerning the carrier's obligation to pay such a penalty is invalid on the basis of Article 41 of the CMR, with the exception that it's sometimes allowed to reserve it for regulatory areas which aren't subject to that convention;
- H. Jesser-Huß: there is no justification for the emerging view that the admissibility of contractual penalties, as lying outside the CMR Convention, should be assessed solely in accordance with national law.

4/ An analogous principle should be applied to contractual penalties in domestic carriage.

5/ The parties may not regulate the liability for damages (in practice usually of the carrier) in the contract in a different manner than it results from these legal acts; this also applies to contractual penalties.

6/ In other words, to the extent regulated by the CMR Convention and the Act – Transport Law, contractual penalties are inadmissible.

7/ This also applies to other situations of liability (than in the event of damage to the consignment or for delayed carriage) regulated by convention or act – such as when:

- the goods have been delivered to the consignee without collection of the credit which the carrier should have collected under the contract of carriage;
- the consignment note doesn't contain a statement that the carriage, notwithstanding any clause to the contrary, is subject to the provisions of the CMR Convention;
- documents mentioned in the consignment note and attached thereto or given to the carrier have been lost or misused;
- the carrier fails to comply with instructions given in due course or fails to comply with such instructions without requiring the first copy of the consignment note to be produced.

8/ In all of the above situations, the amount of damages is limited (and the contractual penalty may be higher than the damage caused by the specific event).

9/ It's irrelevant whether the amount of the contractual penalty corresponds to, is lower than or higher than the stipulated amount of compensation possible under the given title, and thus whether the reservation of such penalty is advantageous for the entitled party.

10/ It would be possible to stipulate contractual penalties if the provisions of the CMR Convention and the Act – Transport Law were semiimperative (unilaterally mandatory) – then:

- contractual penalties equal to at least the amount of potential compensation, as well as lower than it, but with the reservation of the possibility to claim additional compensation (Article 484 § 1 sentence 2 of the Civil Code), would be admissible,
- in the case of a contractual penalty lower than the potential compensation, the possibility to claim supplementary damages, i.e. damages in excess of the contractual penalty, would have to be provided for.

11/ It isn't possible to stipulate a contractual penalty in the aforementioned situations also if there has been a declaration in the consignment note of the value of the goods (Article 24 of the CMR and Article 40 of the Act – Transport Law) or a declaration of a special interest in the delivery (Article 26 of the CMR).

## Admissibility of contractual penalties in the carriage of goods by road

### (1) Intentional fault or gross negligence of the carrier

**Art. 29(1) CMR.** The carrier shall not be entitled to avail himself of the provisions of this Chapter which exclude or limit his liability or which shift the burden of proof to the other party if the damage was caused by the carrier's bad faith or negligence which, under the law of the forum, is considered as equivalent to bad faith.

**Art. 86 Act – Transport Law.** The limitations on compensation provided for in the Act do not apply if the damage was caused by the carrier's wilful misconduct or gross negligence.

The occurrence of the prerequisites set out in the provisions referred to above results in the transition to the general rules for the determination of damage and the amount of compensation.

The judgment of the Cour d'Appel de Paris of 4 July 1984, BT 1985, p. 158; the judgment of the Oberlandesgerich Hamburg of 7 February 1991, TranspR 1991, p. 294
It's incumbent upon the entitled person, pursuant to Article 6 of the CC, to prove all the prerequisites for liability for damages, as well as the fault or gross negligence of the carrier or its employees or agents.

1/ Where the provisions referred to are applicable, the person entitled may claim compensation from the carrier to the full extent of the damage (Article 361 § 2 of the Civil Code).

2/ If the right holder proves wilful misconduct or gross negligence on the part of the carrier, contractual penalties are also admissible as regards liability as described in the CMR Convention and the Act – Transport Law.

3/ In transport practice, intentional fault of the carrier is very rare; it refers to extreme negligence, bordering on intentional fault (*dol*), signifying the carrier's inability to fulfil the mission it has accepted under the contract of carriage.

The judgment of the Bundesgerichtshof of 16 February 1984, „Versicherungsrecht" 1984, p. 551
Gross negligence (*Grosse Fahrlässigkeit*) occurs when there has been a particularly grave breach of due diligence, which was clear to all in the specific case, which prevented the carrier from performing the contract in accordance with the agreement.
The judgment of the Cour d'Appel de Paris of 8 April 1994, BT 1994, p. 424
*Faute lourde* is extreme negligence, bordering on intentional fault (*dol*), occurring, for example, in a situation where alcoholic beverages were being transported that were covered only with a tarpaulin and, during a stopover at night, the driver slept in the car and the goods were stolen.

## 2. Other cases of reserving contractual penalties

There is also no obstacle to reserving contractual penalties in cases not regulated in these acts, and therefore as to:
1/ events occurring prior to acceptance of the goods consignment for carriage or after its delivery to the consignee – e.g. from the title for a delay in placing the car at the place of loading;
2/ events other than those related to transport damage or other events regulated by the CMR Convention or the Act – Transport Law – e.g. from the title:

- non-compliance with a non-compete,
- the performance of the carriage by means of a means of transport other than the agreed one (which may be of importance especially if the contract concerned the carriage of specific products requiring appropriate conditions of carriage, with the use of an appropriate means of transport meeting specific requirements),
- failure to ensure continuous telephone contact with the driver performing the transport,
- violation of the prohibition on reloading of goods,
- violation of the prohibition to load goods which don't belong to the sender onto the vehicle,
- breach of an order to transport with increased security measures (e.g. escorted by armed guards).

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