COMPARISON OF THE REGULATION OF CONTRACTUAL PENALTIES AND RELATED QUESTIONS IN THE CZECH AND POLISH LEGAL ORDERS

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Abstract: *This article deals with the presentation of the contractual penalty concept which is regulated in the Czech as well as Polish Civil Code. Then the two are compared, namely their individual aspects, in regard to the aforementioned measure within both legal systems. The first part primarily focuses on the interpretation of the content of measures of contractual penalty and the identification of elementary differences. What follows is the analysis of the functions of contractual penalties, again with emphasis on the comparison of the function of the Czech and Polish contractual penalties. The next part deals with the relationship of the contractual penalty with damages. This stage then deals with to what extent the contractual latitude may be applied in the Polish legal system when setting up the contractual conditions for the application of contractual penalty as well as the compensation of damages resulting from violation of obligation. In conclusion there are presented measures similar to contractual penalty such as penalties and interest on late payments, especially from the Polish legal code's point of view.*

Keywords: *contractual penalty, comparison, Polish Civil Code, Polish legal system, contractual penalty function, damage compensation, interest on late payment*

I. INTRODUCTION

Contractual penalty is a meritorious legal measure ensuring a debtor's fulfillment of obligations. In the Czech legal system the contractual penalty constitutes a tool which is used by a creditor in reference to his debtor's given contractual obligation for its functions which traditionally are ensuring, punitive or compensatory. Contractual penalty as an institution with stated functions is known and used across bodies of laws – therefore it is not surprising that it is also regulated by the Polish Civil Code.[1] Despite the fact that the legal orders of the Czech Republic and Poland are similar, meaning they have been formed based on identical foundations and principles of the continental law, it is possible to encounter significant differences when comparing the regulations of the contractual penalties.

The above differences may cause some issues concerning contractual relationships of Czech contractual parties along with the Polish ones; and that not only in the case of their business activities; however, the assumption is that most frequently such will be their interactions. Those contractual parties typically enter into contracts together in accordance with the legal order as agreed by the parties. Those contracts then institute the obligations of the parties whose fulfillment is ensured by means of the contractual penalties. If the case is of a contractual penalty in accordance with the Czech Civil Code,[2] as a rule it will

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[1] Act of 23 April 1964, the Civil Code, Dziennik Ustaw 1964, No. 16, item 93, with subsequent amendments. The Polish legal order designates this particular Kodeks cywilny (Civil Code).

[2] Act No. 89/2012 Coll., Civil Code, as amended. The Czech legal order or Civil Code designates this particular piece of legislation.

not cause too much trouble for the Czech party with at least average knowledge of the law to comprehend its meaning and objective. In contrast if the case is of a contractual penalty in accordance with the Polish Civil Code, the Czech party may be surprised at the consequences of accepting the contractual penalty in the contract as well as the violation of contractual obligations the contractual penalty pertains to.

Within the framework of this article I will compare the regulations of the contractual penalty in the Czech and Polish legal order, their practical applications, problems arising from the application as well as inherently also referring to the court's case law regarding the question. The aim of this article is not only to explain and compare the functioning of contractual penalties theoretically and practically, but also contribute by means of interpretation of some consequences of the failure to fulfill or violation of obligations which are compared along with the contractual penalties – respectively we are talking about their mutual relationships.

II. CONSTRUING OF CONTRACTUAL PENALTIES IN THE POLISH AND CZECH CIVIL CODES

In the Czech Civil Code the contractual penalty is regulated in § 2048 et seq., wherein the given contractual penalty is negotiated in the case of violation of a contractual obligation by a contractual party. If it comes to a violation of obligation the contractual penalty pertains to, the creditor may claim the contractual penalty regardless of whether the violation caused him/her any loss. The contractual penalty ensuring an obligation in accordance with the Czech Civil Code may ensure it by monetary as well as non-monetary means. It is also clearly stated that the contractual penalty may be constituted in other than monetary means.

As the effect of the new Civil Code the contractual penalty is not treated as a means of assurance, but as debt consolidation. This terminological alteration reflects the fact that the inclusion of the contractual penalty does not actually ensure the obligation of a debtor, but it rather changes the creditor's approach.[3] In particular this nuance is apparent in the case of an insolvent debtor when even negotiating a contractual penalty will not mean any more certainty of the debtor's fulfillment of obligations in comparison with, for instance, lien or third party's guarantee.

The Polish Civil Code regulates the contractual penalties (*kary umowne*) in the article 483 § 1 of the Polish Civil Code. According to its legal definition it constitutes an amount compensating a loss which may arise in the case of not fulfilling non-monetary obligation or fulfilling the obligation not properly. It is necessary to acknowledge the fact that such contractual penalty ensures only non-monetary obligations and in contrast its subject must be only monetary fulfillment as in reference to those two aspects only the most elementary difference may be noticed in contrast with the contractual penalty as it is known from the legal system of the Czech Republic. I am certain that differentiating – in general

[3] HULMÁK, M. a kol.. *Civil Code V. Law of Obligations. General part. (§ 1721–2054). Comment.* 1st edition. Prague: C. H. Beck, 2014, p. 1281.

– what is monetary and non-monetary commitment is not a problem. Although in Polish general courts there have been some trials whose gist lies in ascertaining what obligation a case is about and as non-monetary it may be ensured by means of contractual penalties, it proves that within legal practice it is not possible to talk about the uniqueness of dividing commitments into monetary and non-monetary. Yet contractual penalty (kara umowna) can typically apply to violating of obligation to deliver goods properly and on time, perform the work properly and on time, etc., it is indeed interesting to compare a case of a loan. As soon as the loan is monetary, the obligation to return the loan cannot be ensured by means of contractual penalties. However, in case of a non-monetary loan such an option is approved by the Polish law.

With regard to the contractual penalties in accordance with the Polish law contractual parties are not excluded from negotiating several contractual penalties in case of a variety of violations of non-monetary obligations. Apart from the main obligation (for instance implementation of the work by the contractor properly and on time), a contractual penalty may be negotiated in case the contractor will not keep a construction log book as it should be done or he/she won't conform to the safety regulations. Analogous to the contractual penalties regulated in the Czech Civil Code, also regarding contractual penalties in accordance with the Polish Civil Code, the contractual parties may negotiate contractual penalties in case of failure to fulfill at all or partly the obligation in general, i.e. in any manner, but they may also combine failure to fulfill or undesirable fulfillment by means of individual statements.[4]

Although the Polish Civil Code strictly confines contractual penalties only with non-monetary obligations, a question often arises whether contractual penalties might be contractually regulated also for monetary obligations. A majority opinion expresses that *kara umowna* in case of violations of monetary obligations is out of the question being in contradiction with provision § 58 of the Polish Civil Code.[5] However, among the Polish professional public a contrary opinion could be encountered, which was in minority, though. The discrepancy between the two thoughts has been put to an end ultimately by the Polish Supreme Court by the decision of 18 August, 2015 V CK 90/05 that stated that negotiating contractual penalties in case of monetary obligations is inadmissible for its manifest contradiction with provision of article 483 § 1 of the Polish Civil Code.[6] Based on my personal experience, the most frequent reason of invalid contractual penalties is the fact that by means of the aforementioned *kara umowna* the contractual parties ensure fulfillment of a monetary obligation.

On the other hand one might ask whether it is possible for a non-monetary obligation to be ensured by means of *kara umowna*, not as monetary sanction, but in its non-monetary form. As an example may be a situation when a debtor who is obligated to deliver

[4] Decision of the Supreme Court of the Republic of Poland (Sąd Najwyższy) of December 17, 2008, Ltd. I CSK 240/08.

[5] Ibid.

[6] Supreme Court of the Republic of Poland by the decision of 18 August, 2015 V CK 90/05. In: *sn.pl – Supreme Court of the Republic of Poland* [online]. 18. 8. 2005 [2021-07-01]. Available at: <http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/V%20CK%2090-05-1.pdf>.

a certain amount of goods in a given time does not meet the arrangement – delivery of larger amount of the goods could serve as a given sanction. Thus outlined circumstances are possible according to the Polish law. It will not be treated as a contractual penalty *(kara umowna*). Such a solution would be subject of a different contractual negotiation between parties.

Before January 1, 2014 there existed two regulations of contractual penalties in parallel within the Czech legal system, namely in the Civil as well as Commercial Code[7]. One of the more pivotal differences was the fact that the contractual penalty within the Civil Code had been based upon a subjective principle; meaning that the debtor had been required to reimburse the penalty in case the violation of the contractual obligations had been the debtor's fault; whereas the Commercial Code had been of the objective principle – namely regardless of fault. Since the breaking of 2014 the regulation of the contractual penalties has been uniform thereafter, incidentally it has been based on the Commercial Code and its objective principle. It would seem natural to turn away from the legal interpretation and regulate the contractual penalties differently from the law of responsibility. One could argue that the regulation of the contractual penalties in the Polish Civil Code presumes the debtor's fault and that the obligation has not been fulfilled properly and on time. It is necessary to note that the debtor's fault is presumed and it is entirely up to him/her to prove the violation of obligation has not resulted even from his/her unconscious negligence.[8] The contractual penalties includes the presumption of fault which the debtor must disprove. It would seem natural to conclude that as long as the causes of the debtor's violation of obligation are not clear, it is to the debtor's detriment and he/she must reimburse the negotiated contractual penalties. In the situation when the contractual penalties have been negotiated as legally binding and the creditor proves the occurrence of a violation of obligation, it remains the only alternative for the debtor how to avoid the obligation to reimburse contractual penalties is to prove that he/she is not responsible for the violation.

In conclusion it must be emphasized that both disproportionately high contractual penalties according to the Czech law as well as similarly disproportionately high *kara umowna* according to that Polish law may be moderated; the authority to moderate lies with the court; both cases are initiated by the debtor. The criterion for moderation in accordance with the Czech law is directly defined in provision § 2051 of the Civil Code which states that the value and importance of the ensured obligation is taken into account. In contrast with the Czech law, the criteria for the Polish judges had been defined by the Polish Supreme Court that in the resolution of January 22, 2015 CSK 690/13 adjudicated on the necessity to take into account the causes and reasons of a debtor's default, the creditor's involvement, the manner of the debtor's fault, the creditor's concern as to the obligation being fulfilled properly and on time, namely the degree of disruption of the creditor's interest. Prior to conclusion of mitigation the reasons of the debtor's failure to fulfill the obligations must be evaluated.

[7] Act No. 513/1991 Coll., Commercial Code, as amended.

[8] In accordance with § 471 the Polish Civil Code *"The debtor is obligated to reimburse damages resulting from failure to fulfill obligation properly or on time unless the failure to fulfill properly or on time is a result of circumstances the debtor is not responsible for."*

III. FUNCTIONS OF CONTRACTUAL PENALTIES

Legal theory as well as court's jurisprudence formulated several functions of contractual penalties among which the most frequently presented have been the preventive, compensatory and punitive functions.[9] The preventive function is interpreted in the fact that the prospect of the contractual penalties for the violation of obligations forces the debtor to fulfill obligations properly, that is to say a psychological as well as economical stimulus is implied. The preventive function is viable at the stage prior to the violation of obligation itself. The compensatory function is constructed in order for the contractual penalties to be of sufficient value as to cover any damages that may be reasonably expected within the contractual relationship, the damages resulting from the debtor's violation of obligation which would be covered from the debtor's financial resources. The punitive function means that the contractual party which violates a contractual obligation will be consequently persecuted by means of an occurrence of subsequent obligation to tender fulfillment in full. In my opinion the above is most concisely expressed in a manner that *"the objective of contractual penalties is to sanction the contractual party that does not fulfill its own obligations, motivate the party to fulfill obligations properly and provide compensation to the party suffering any losses resulting from the violation of contract."*[10]

Regarding the contractual penalties (*kara umowna*) as regulated in the art. 483 § 1 of the Polish Civil Code, their functions are also formulated. They are largely in agreement with those in the Czech legal system. The compensatory function is a direct conclusion from the normative wording: *"The compensation for losses resulting from not fulfilling obligations or not fulfilling them properly is reimbursed be means of remuneration of the negotiated sum of money.[11]"* In this case it is operative for the contractual parties to negotiate the amount of the contractual penalties so that they would be adequate to the value of losses which may result from violating the obligations. A debtor certainly will attempt to avoid having to pay a contractual penalty exceeding the value of losses resulting from violating obligations whereas it will be in a creditor's best interests not to negotiate contractual penalties at exceedingly low value that would be highly inadequate to cover any possible losses. The default rule that may be modified by an agreement between parties is that the creditor is not entitled to claim compensation of losses resulting from violating obligations even though it is covered by the contractual penalties – in the case when the losses exceed the negotiated contractual penalties.

The second function of the contractual penalties – namely the repressive one – is closely related. It functions in a manner in which the contractual penalties cover losses, nevertheless the amount of the contractual penalties negotiated and required by the creditor does not correlate to the value of realistic losses; in that sense a situation may arise when the value of the actual losses are lower than the negotiated contractual penalties. In such a case what is presented is an application of the punitive function of contractual penal-

[9] The decision of the Czech Supreme Court of 28 January, 2010, Ref. No. 33 Tdo 2776/2008.

[10] The decision of the Supreme Court of the Czech Republic of 19th October 2011, Ref. No. 28 Tdo 2720/2011.

[11] GNELA, B. Kara umowna według Kodeksu cywilnego i według Zasad europejskiego prawa kontraktów. *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie.* 2009, No. 802, p. 7.

ties.[12] In this context it is essential to emphasize that the concern is not entirely regarding the repressive function as long as the actual value of losses does not exceed the negotiated contractual penalties, moreover the debtor's payment of the given contractual penalties only at the negotiated amount will conclude the reimbursement stage. Procedural function has also been mentioned which signifies the fact that in case of disagreement the creditor does not have to prove the value of the losses or whether they actually arose.[13] The creditor needs to prove only the fact that the contractual penalties have been negotiated and agreed upon by both contractual parties and that the debtor has violated his obligation the contractual penalties apply to. Interpreting the regulation of the contractual penalties as in accordance with the Polish Civil Code it is presented that the reimbursement of losses resulting from non-fulfillment or fulfillment of non-monetary obligations not properly will be remunerated by the debtor at the pre-negotiated amount of money. In the past there had been disagreements whether it is a decisive factor for a right to reimbursement that creditor's losses resulted from the debtor's violating obligations. The Polish Supreme Court concluded that the creditor is not obliged to prove whether losses have resulted and of what value in order to be entitled to receive contractual penalties.[14]

Last but not least, it is also necessary to point out the stimulating function as the debtor is motivated to fulfill obligations properly and thus serve to protect the creditor's legal interests.[15] What should function as a stimulus especially would be the fact that the debtor cannot be released from fulfillment of an obligation by paying the contractual penalties without prior agreement with the creditor. The debtor must simply take it into account that in order to fulfill the requirements for entitlement to contractual penalties he/she will be forced not only to reimburse the contractual penalties, but also to fulfill the obligations in the contract to which the contractual penalties related.[16]

At a closer examination of the functions of the contractual penalties as formulated by the doctrine – in the Czech as well as in the Polish legal systems – the compensatory and punitive functions take priority.

[12] GNELA, B. Kara umowna według Kodeksu cywilnego i według Zasad europejskiego prawa kontraktów. *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie*. 2009, No. 802, p. 7.

[13] In a surprising and contradictory to previous decisions of the Supreme Court of the Republic of Poland move, the Court of Appeal in Katowice decreed on 20 March 2013 in the case sp.zn. I ACa 132/13 against which no remedial measure had been applied that the claim for the payment of contractual penalties is not valid in the case of violating obligations or not fulfilling thereof properly if the creditor does not suffer any losses at the same time; thus happens because according to the regulations regarding contractual penalties it concerns a form of compensation of losses resulting from not fulfilling obligations or doing so not properly regarding non-monetary obligations, i.e. a manner of compensation of losses *ex contractu*.

[14] The decision of the Supreme Court of the Republic of Poland (Sąd Najwyższy) of 29th April 2014, Ref. No. V CSK 402/13.

[15] The decision of the Court of Appeal in Wrocław (Sąd Apelacyjny we Wrocławiu) of 27th January 2013, Ref. No. I ACa 99/13.

[16] GNELA, B. Kara umowna według Kodeksu cywilnego i według Zasad europejskiego prawa kontraktów. *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie*. 2009, No. 802, p. 8.

IV. CONTRACTUAL PENALTIES VS. REIMBURSEMENT

Contractual penalties in both legal systems share the same default rule that the creditor – as long as contractual penalties have been negotiated – cannot require the reimbursement of losses exceeding the contractual penalties or even the reimbursement of the losses in full as in accordance with the contractual penalties. Both with the presumption that the contract does not state otherwise. With regards to the fact that within both bodies of law the principle of contractual freedom takes ultimate priority, it is possible for the parties to modify the default rule.

The Polish doctrine even – based upon the mutual relationship between the contractual penalties and the reimbursement of losses – formulated four elementary "types" of contractual penalties. The types include (I) the contractual penalties which therefrom will be considered basic, (ii) countable contractual penalties (*kara zaliczalna*), (iii) alternative contractual penalties (*kara alternatywna*), (iv) cumulative contractual penalties (*kara kumulatywna*).[17]

The basic contractual penalties have been analyzed to a certain degree above. In a gist it boils down to the fact that the creditor is not entitled to claim compensation of losses if they exceed the value of the contractual penalties which had been negotiated in case of violating obligations that led to the losses.

As to the countable contractual penalties, they are not entirely unknown for the Czech person. It entails the agreement of the contractual parties that in case when the value of losses exceed the value of negotiated contractual penalties, the creditor may demand compensation of thus arisen losses, namely the difference between the value of contractual penalties and the realistic value of losses.

The alternative contractual penalties offer the creditor the right to choose whether to take the option of the contractual penalties or whether to demand compensation of losses in accordance with current regulations regarding loss compensation.

The last type is the cumulative contractual penalties whose justification of use is questionable in the Polish law[18]; however, they do occur in commercial contracts rather often.[19] I infer the frequency of its use from my own experience. The creditor may demand from the debtor both the reimbursement of the contractual penalties which here functions as punitive as well as compensation of losses in full.

At closer examination it is possible to apply such division also to the Czech reality. The Civil Code is based on the principle of contractual freedom and consequently the supplementarity of provisions. Even the cumulative contractual penalties which can be treated as problematic in the Polish law, in our legal system have been in heavy use while its justification of negotiating them is not disputed. As to the alternative contractual penalties, in the Czech Republic the type would not apparently be of much use for the creditor. In the case of the alternative contractual penalties, the choice is left to the creditor. It is hard to imagine a situation when it would be profitable for a creditor to renounce demanding

[17] Ibid., p. 14.
[18] Ibid, p. 15.
[19] ZAGROBELNY, K. *Kodeks cywilny Komentarz*. Warszawa: C. H. Beck, 2004, p. 1243.

a certain amount as indicated by the contractual penalties and voluntarily submit to the hardship of proving the emergence of losses and their value while in the case of contractual penalties it is sufficient to show them having been negotiated and violation of obligations the penalties apply to. Processually it will always be simpler for a creditor to claim the contractual penalties.

V. INSTITUTIONS OF POLISH LAW AS CONSEQUENCES OF DEBTOR IN DEFAULT

Within the Polish law there are legal institutes that are created as consequences of the debtor in default. These are (I) penalties (*kara ustawowa*), (ii) interest from default in the Civil Code (*odsetki*), (iii) interests from default in the Act on time limits in commercial transactions (*odsetki podatkowe*).

Penalties (*kara ustawowa*)

By the name alone penalties or *kara ustawowa* suggests its nature. *Kara ustawowa* is regulated in the provision § 485 of the Polish Civil Code. It covers situations in which it is necessary to pay the creditor compensation resulting from a violation of obligations in the light of the law. The law stipulates in what situations the debtor – even without a special clause in the contract – should pay the creditor penalties for violating his own obligations. Penalties are always realized by monetary means. Their role within market economy is negligible, the concept is remnant of the socialist law and as such it is treated as a dead issue. In spite of that, in exceptional cases it can be encountered as sanctions for violating obligations as to securing naval, air and/or railway transportation.

Interest on late charges (*odsetki ustawowe, odsetki za opóźnienie*)

On the other hand, interests on late charges (*odsetki*) are a very much alive issue. In accordance with the Article 481 § 1 of the Polish Civil Code, in case when the debtor is late with the monetary performance he/she had been obliged to deliver, the creditor may demand interest on late charges even if he/she suffered no losses; also even if the case of the delay being a result of circumstances the debtor is not liable for. In the Czech law as well as in the Polish the interest on late charges may be negotiated by the parties. What is also admissible is to negotiate the claim for interest on late charges arises only when the debtor's delay is a direct result of only action based on fault; namely not regardless of fault as has been the usual practice. Unless the interest on late charges has not been negotiated by the parties, the debtor is obligated to pay the statutory interest.[20]

At the turn of 2015 and 2016 considerable changes were introduced concerning the interest on late charges and those changes are interpreted as revolutionary. The revolu-

[20] In accordance with the Art 481 § 2 of the Polish civil Code, it is stipulated that in a case when interest rate on late charges has not been established by the contractual parties, it is automatically established at the statutory rate. In a situation when the negotiated rate is higher that the statutory one, the creditor may demand the interest on late charges at that higher rate. The creditor may also demand compensation for losses based on current regulations.

tionary piece of legislation was the Act of 9 Oct 2015 on payment deadlines in commercial relationships in the Civil Code on alterations of other legislation (Dz.U. z 2015 r. pozn. 1830).

I will now attempt to outline the alteration effective up to the end of 2015 and the one that is effective since the beginning of 2016 in the field of the interest on late charges. I deem it appropriate to advise that in Poland the interest on late charges is divided into one that applies to relationships between non-businessmen (Civil Code) as well as one that applies to businessmen in their business activities as referred to below. This elementary amendment affected both alterations. The objective of the amendment has been the increase of the interest rate on late charges in order to strengthen particularly the weight of the interest on late charges. Another objective has been to increase the difference between interest rates on late charges for non-business people as well as businessmen in a manner that in the commercial-legal relationships between business people engaged in business activities the "spurring" effect could be maximized in order for the obligations to be fulfilled properly and on time. Last but not least, the rates are designed to react to the state of economy, but not too radically.[21]

Based on the Article 359 § 3 in the Polish Civil Code, the Polish government introduced a directive establishing the interest on late charges at 8% per year. The Polish legislator proceeded to establish the maximum interest rate which the contractual parties cannot exceed when negotiating the rate of the interest on late charges. This limitation of the rate presents a mandatory provision which the contractual parties cannot exclude from a contract. The maximum rate, or also *odsteki maksymalne*, are regulated in Article 359 § 2 of the Polish Civil Code; it states that the maximum interest rate on late charges should not exceed yearly quadruple of a yearly interest rate announced by the Polish National Bank (*Narodowy Bank Polski*).[22] The question that may arise in connection to that issue is whether – in a situation when the contractual parties negotiate a higher interest rate than the maximum – the negotiated issue is invalid in its entirety and the creditor has no claim for interests on late charges or whether, as the law states, the claim for the interests on late charges becomes reduced to the maximum or whether still lower to the level of the statutory rate. The statue itself gives an answer to this question in Article 359 § 2 of the Polish Civil Code – that in a case when the interest rate negotiated between contractual parties exceeds the maximum rate, the creditor is entitled to interests on late charges at the maximum rate as regulated by law.

Since 1 January 2016 in a case when interest on late charges are not established in any other manner, its rate equals the rate of the Polish National Bank plus 5.5 percent points, .i.e. 7% p.a. The maximum rate cannot exceed the double of the rate, thus 14% p.a. overall. On 7 January 2016 the Ministry of Justice ordinance was introduced concerning the interest on late charges; it stated that based upon the legal authority of Article 481 § 1 of the

[21] RUDAK, O. Odsetki ustawowe I za opóźnienie – nowe zasady obliczenia. In: *legeartis.org – Lege Artis journal* [online]. 2015 [2021-03-04]. Available at: <http://czasopismo.legeartis.org/2015/11/odsetki-ustawowe-2016.html>.

[22] From 7th March 2013 it is at 19 % p.a.

Civil Code the Minister of Justice stipulated that the interest on late charges is 7% p.a. with it coming into effect on 1 January 2016.[23]

It seems relevant to ask when the claim for interest on late charges is limited. It is an issue which still has not been satisfactorily solved. When explaining the base of the argument two decisions of the Polish Supreme Court are often referred to which were made basically simultaneously at the present time. There is one dominant interpretation – that claim for interest on late charges is limited after three years regardless of the main obligation being limited.[24] Another opinion is that interests are limited along with the main obligation.[25] The former trend states that "the claim for interest on late charges is limited – as a claim repeated in its character – within the time constraints regulated in Article 118 of the Civil Code, namely the period of limitations is three years; however, the period of limitations of the main obligation is two years.[26] In contrast with the first one, the latter opinion *"referring to Article 118 of the Civil Code the stipulated period of limitations of the claim for repeating performance also relates to claims for the interest on late charges. The claim for the interest on late charges is limited at the latest when the claim for the main obligation is limited."* I would conclude this issue by saying that the beginning of the period of limitations of interest on late charges is identical to the beginning of the period of limitations of the main obligation. Nevertheless a claim for the interest on late charges is separate to a degree; therefore the end of its period of limitations does not have to be identical to the end of the period of limitations of the main obligation even though there exists quite an essential opinion of the Supreme Court which states otherwise. Even in the Czech Republic opinions on the subject has been evolving gradually. At the present time the Czech case law is already settled. The debtor's duty to pay the interest on late charges does not appear of its own volition (anew) for each day of the delay time, but once-off on the day when the debtor found himself in delay with the fulfillment of the obligation; from this day with this law the period of limitations begins to run, and when it has expired the law is limited "as entirety".[27]

In comparison with the regulation of interests on late charges in the Czech legal system, the Polish regulations differ in a number of points. Since 1 January 2014 the interest rate on late charges corresponds to the yearly repo rate stipulated by the Czech National Bank for the first calendar day of half-year during which the delay occurred increased by 8 percent points. The interest on late charges is stipulated at 8.05% p.a. This rate is higher than statutory interests stipulated in Poland. It is impossible to omit the fact that apart from the interests on late charges in Poland in case of delay one cannot negotiate nor demand any contractual penalties as it commonly happens in the Czech Republic.

[23] RUDAK, O. Odsetki ustawowe I za opóźnienie – nowe zasady obliczenia. In: *legeartis.org – Lege Artis journal* [online]. 2015 [2021-03-04]. Available at: <http://czasopismo.legeartis.org/2015/11/odsetki-ustawowe-2016.html>.

[24] Decision of the Supreme Court of the Republic of Poland (*Sąd Najwyższy*) of 19 November 2004, File No. II CK 175/04.

[25] Decision of the Supreme Court of the Republic of Poland (*Sąd Najwyższy*) of 26 January 2005, File No. III CZP 42/04.

[26] With the obligations arising out of business-legal relationships the period of limitations is two years in accordance with the Polish law.

[27] Decision of the Grand Chamber of the Supreme Court, of 10th March 2010, File No. 31 Cdo 4291/2009.

Interests on late charges arising out of business relationship

The statutory regulation of the interests on late charges is contained in the law on payment deadlines in commercial transactions of 8 March 2013.[28] These interests on late charges may be demanded only in the law in business binding relationships; at the same time the law clearly states what entities may demand the interests as currently business entities are concerned. We are namely discussing relationships arising out of business activities of both contractual parties. This law stipulates in Article 4 what is construed by commercial transaction as it is *"a contract whose subject is a paid delivery of goods or services as long as contracts are concluded with a contract within the business or commercial activity."* This law does not apply to contracts between business people within their business activities as one party and the consumer as the other one.

A creditor may demand this type of interests on late charges in a case when within the framework of committed relationships he fulfilled his non-monetary obligation (typically delivered goods) while the debtor got into delay with his fulfillment of his monetary obligation (typically for instance he did not reimburse the purchase price properly and on time). Two conditions must be met cumulatively (i) the existence of non-monetary fulfillment of the creditor and (ii) the creditor has not received payment from the debtor within the prearranged period negotiated in the contract[29] or in a situation when the deadline had not been specified in the contract, thus within a period stipulated in an additional notice authored by the creditor. This additional notice to fulfillment may well be submitted by means of electronic mail as long as the contractual parties have agreed to it in their contract.

In accordance with the Article 7 of the law on payment deadlines in commercial transactions if the debtor delays payment to the creditor who fulfilled his contractual non-monetary obligation, the creditor is entitled – without the need for an additional summons – to interests on late charges at the value of interests on arrears stipulated in Article 56 of Taxes Act of 29 August 1997. In the light of the law the contractual parties are able to set those interests at higher rates. It must be amplified that the notion is not valid without exceptions. If the period for payment of the monetary performance of the debtor has not been negotiated already in the contract, the creditor must call upon the debtor to pay what is due. Only since the call the creditor is entitled to basic interest (*odsetki podstawowe)*. After the period of 30 days since the day when the creditor fulfilled his non-monetary obligation until the debtor has received the notice from the creditor, the creditor is not entitled to the basic interest (*odsetki podstawowe*), but to the statutory interest on late charges *(odstetki ustawowe)*.

In the Article 56 § 1 of the Tax Act it is stipulated that the interest rate on late charges equals the sum of 200% of the basic loan rate calculated in accordance with the Polish National Bank's provisions, and 2% on the assumption that the given rate cannot be lower than 8%. The above was valid until 2015. Beginning from 2016 the interest rate on late

[28] Act of 8th March 2013 r. on deadlines of payment in the context of commercial transactions (Dz. U. 2013. Ne. 139, entry. 1323).

[29] The due date cannot be longer than 60 days since the delivery of invoice.

charges is stipulated as equal to the reference rate of the Polish National Bank increased by 8 percent points.

VI. CONCLUSION

As far as the regulation of the contractual penalties are concerned, I find the solutions decided upon by the Polish legislator that relates the contractual penalties chiefly to non-monetary obligations as conceptually more advantageous for the debtor; especially if we take into account the fact that default in monetary obligations are more frequent than default in non-monetary ones. There the contractual penalties are tied only to non-monetary obligations; however, in the context of the monetary obligations the interest on late charges acquire the sanctionative role. Those interests on late charges, namely their rate, may be stipulated by means of contract, even in relationships between non-business people or relationships with consumers. In the Polish law there is no stipulation similar to the Czech § 1972 of the Civil Code which states that it is possible to invoke the inefficiency of the concord on interests on late charges which deviates from the law in a manner that in the view of all circumstances and the conditions of the case deteriorates its status without any justifiable reason for the deviation. In contrast, in the Polish law a statutory limit is stipulated for the maximum interest rate on late charges. It is true nonetheless that thanks to the statutory limitation in the context of default, the debtors in Poland pay lower "sanctions" than their counterparts in the Czech Republic where apart from the claim for frequently high contractual penalty, debtors cover also those interests on late charges. To balance the above, a creditor in the Czech Republic is entitled to a compensation of losses resulting from non-fulfillment of a monetary debt only when the interests on late charges are not covered. In Poland a creditor is entitled to a compensation of losses apart from the claim for the interests on late charges.