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THE CONCEPT OF THE PENALTY CLAUSE IN POLISH AND SPANISH LAW – A COMPARISON

Abstract

The article focuses on the main similarities and differences regarding the concept of the penalty clause and the manner in which it is exercised in the Polish and Spanish legal systems. The aim is to conduct an analysis of selected issues relating to penalty clauses (contractual penalties), in particular their characteristics, the relationship between the claim for payment of contractual penalty and the occurrence of damage, as well as establishing a contractual penalty for withdrawal from a contract. The views of representatives of the judiciary and the role of the judge in shaping the concept of the penalty clause in both jurisdictions, in particular as regards moderation of contractual penalties, will also be analyzed.

Keywords

civil law – penalty clause – contractual penalty – Spanish law – Polish and Spanish law comparison

INTRODUCTION

The notion of the penalty clause is a subject of constant interest in doctrine and jurisprudence. Both in Polish and Spanish law, the idea of the penalty

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clause has changed considerably over the last decades. The scope of legislation related to this topic is not very detailed and leaves much room for interpretation, which often leads to different or even contradictory results.

There are no uniform rules governing contract penalties in Continental Europe, and historically there has been no real political initiative to unify contract law within the European Union¹. The diversity of concepts of the penalty clause regulations results not only in interpretation problems in the context of national relations, but also in private international relations².

While the Polish legislation remains relatively stable, Spanish jurists call for a major reconstruction of the concept of the penalty clause. Spanish authors emphasize that regulation of the penalty clause is not sufficient and precise enough. The most important amendment they call for is the application of a dualistic concept of contractual damages and contractual penalty, as well as expanding the catalogue of prerequisites for moderating the contractual penalty³.

The Author focuses on the main similarities and differences regarding the concept of the penalty clause and the manner in which it is exercised in the Polish and Spanish legal systems. The views of representatives

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¹ I. Marín García, *Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties*, "European Journal of Legal Studies" 2012, vol. 5, p. 98–123, <http://www.ejls.eu/10/127UK.htm>, [last accessed: 24.09.2017]

² P. Manik, *O jednolity karę umowną* [For the uniform penalty clause], "Monitor Prawniczy" 2001, vol. 5, p. 302–305.

³ C. Fuenteseca Degenefee, *Diversos matices de la regulación de la cláusula penal en el ordenamiento español y alemán* [Various nuances of the regulation of the penal clause in the Spanish and German legal system], "Foro. Revista de Ciencias Jurídicas y Sociales, Nueva Época" 2011, vol. 13, p. 92; J. Feliu Rey, *Cláusula penal: naturaleza de la pena, moderación judicial y su posible configuración como título ejecutivo* [Penalty clause: nature of the penalty, judicial moderation and its possible configuration as an executive title], "Anuario De Derecho Civil", volume LXVII, Madrid 2014, p. 187–191; N. Fenoy Picón, *Niewykonanie zobowiązania umownego i środki ochrony wierzyciela na gruncie projektu nowelizacji hiszpańskiego kodeksu cywilnego z 2009 r.* [Failure to meet contractual obligations and measures to protect the creditor on the grounds of the draft amendment to the Spanish Civil Code of 2009], "Transformacje Prawa Prywatnego" 2013, vol. 1, p. 39.

of the judiciary and the role of the judge in shaping the concept of the penalty clause in both jurisdictions will also be analyzed.

I. LEGAL BASIS OF THE PENALTY CLAUSE IN THE POLISH AND SPANISH LEGAL SYSTEMS

The Polish civil law regime regulates the penalty clause in articles 483–485 of the Civil Code⁴. It states that parties to a contract may stipulate that damage resulting from non-performance or improper performance of a non-pecuniary obligation shall be redressed by the payment of a specified amount. However, the debtor may not release himself from the obligation through the payment of the contractual penalty without the creditor's consent. In the case of non-performance or improper performance of an obligation, the contractual penalty shall be due to the creditor in the amount reserved for such a case, regardless of the amount of damage suffered. It shall not be admissible to demand damages exceeding the amount of contractual penalty, unless the parties have agreed otherwise. The Polish law regime allows reducing the contractual penalty at the debtor's demand, if the obligation has been performed to a significant extent or if the penalty is grossly excessive. Article 485 of the Polish Civil Code states that if a specific provision stipulates that in the case of non-performance or improper performance of a non-pecuniary obligation, the debtor, even without such a contractual provision, is obliged to pay the creditor a specified amount, the provisions on contractual penalty shall apply accordingly.

The Spanish Civil Code⁵ states in articles 1152–1155 that within obligations containing a penalty clause, the penalty shall replace damage compensation and payment of interest in the event of breach, unless otherwise agreed. The penalty may only be enforced when it should be enforceable in accordance with the provisions of the Spanish Civil

⁴ Act of 23 April 1964 r. – Kodeks cywilny (Civil Code) [Journal of Laws 1964, no. 16 pos. 93 with amendments].

⁵ Royal Legislative Decree dated 24 July 1889 por el que se publica el Código Civil (approving the Civil Code), [National Journal of Laws no. 206 dated 25 July 1889 with amendments].

Code. As in the Polish Civil Code, the debtor may not be released from performing the obligation by paying the penalty, unless such a right has been expressly reserved. It is stated literally that the creditor cannot request jointly the performance of the obligation and the payment of the penalty, unless this power has been clearly granted. The judge shall equitably modify the penalty where the principal obligation was performed partially or irregularly by the debtor. The nullity of the penalty clause shall not entail the nullity of the principal obligation. However, the nullity of the principal obligation shall entail the nullity of the penalty clause.

II. CONSTRUCTION OF THE PENALTY CLAUSE IN THE POLISH AND SPANISH LEGAL REGIMES

Under Spanish law, the nature of the contractual penalty is different from that in Polish law. The major difference is the lack of a regulation prohibiting the application of the provision of contractual penalties against monetary obligations. In Poland, as an accessory clause for such monetary obligations, such a penalty clause may be established solely in the event of delay in the service, modifying the default interest rate given by the Polish Civil Code.

With respect to non-monetary obligations, the nature of the contractual penalty in Spain is more similar to that in the Polish jurisdiction, although there are some exceptions. For example, there is a possibility of emphasizing the repressive function of that institution. Article 1152 of the Spanish Civil Code authorizes parties to include in their contractual relations a penalty clause that strengthens and ensures compliance with their obligations by encouraging the debtor to carry out the benefits or activities that it assumed contractually, directly generating its effects when the anticipated breach occurs. Even if it is considered as a substitute for the indemnification of damages and losses, it may produce a more onerous effect than if damages were claimed⁶.

⁶ The judgment of the Spanish Supreme Court of 7 March 1992, "Repertorio de Jurisprudencia" Issue 2007, 1992, the judgment of the Spanish Supreme Court of 12 April 1993 and of 12 December 1996, "Repertorio de Jurisprudencia", Issue 8976, 1996.

Under the Polish Civil Code, a contractual penalty might be reserved only in the form of a definite amount, which does not necessarily imply that the amount stated in the contract must be determined while reserving it. The determination of the penalty may provide only indicators or criteria that will be used to determine the final amount of the penalty which the debtor will have to pay to the creditor. However, the Supreme Court of the Republic of Poland has stated that the parties to a contract who assume the amount of contractual penalty on a basis that was unknown at the time of conclusion of the contract have not stipulated a valid contractual penalty and such a provision shall be considered as a different legal construct. While concluding a contract containing a penalty clause with an indefinite amount, parties should be able to approximate the amount of the contract, and in the event of it being necessary to apply it, there ought to be no doubts as to its amount⁷. Nevertheless, Polish case law assumes a broad definition of the character of contractual penalties. For example, it is acknowledged that a non-monetary obligation, such as the return of a leased asset, may be a consequence of withdrawal from the contract⁸.

The contractual penalty in Spanish law should, in principle, be in a monetary form⁹. However, many authors recognize that there is no objection to indicate another form of compensation if it has any economic value. This, in principle, means a very wide application of non-monetary values constituting contractual penalties¹⁰. The practical question raised in Spain in relation to such non-monetary penalties is how to moderate them in case such moderation is permitted by law and considered by the court¹¹. It is suggested in such cases that the court shall assess both the

⁷ The judgment of the Polish Supreme Court of 8 February 2007, I CSK 420/06, Lex no. 274239.

⁸ The judgment of the Polish Supreme Court of 17 December 2008, I CSK 240/08, Lex no. 484667.

⁹ Rey, *supra* note 3 at p. 173; judgment of the Spanish Supreme Court, of 16 April 1988, "Repetitorio de Jurisprudencia", Issue 3173, 1988.

¹⁰ I. Espín Alba, *La Cláusula Penal. Especial referencia a la moderación de la pena* [The Penalty Clause. Special Reference to the Moderation of the Penalty Clause], Madrid 1997, p. 39.

¹¹ Rey, *supra* note 3 at p. 210; C. Fuenteseca Degenefee, *Diversos matices de la regulación de la cláusula penal en el ordenamiento español y alemán*, "Foro, Nueva Época" 2011, vol. 13, p. 95-122.

damage effectively suffered, and the non-monetary benefit established as a penalty¹².

Under Polish law, the obligation to pay a contractual penalty is a secondary obligation, which means that it depends on the validity of the debtor's main liability. The contractual penalty is invalid or unenforceable if the principal obligation is null and void. The time of enforcement of the contractual penalty depends on the time of enforcement of the principal obligation. However, due to the accessory nature of this institution, the invalidity or unenforceability of a contractual clause does not invalidate the principal obligation. Similarly, according to article 1155 of the Spanish Civil Code, the nullity of a clause introducing a contractual penalty does not result in the nullity of the principal liability, whereas the nullity of the principal liability results in the nullity of the established contractual penalty. The doctrine is relatively unanimous regarding this matter. However, there are Spanish authors who distinguish some exceptions, such as the validity of contractual penalties in the case of actions for third parties, or when they are related to warranty obligations¹³.

The Polish Civil Code does not authorize courts to exercise their judicial discretion when reviewing the penalty clause. This may only happen if it has been determined by any of the parties that the sum stipulated is manifestly excessive or negligible, or in the event of partial performance of the obligation. The approach of Spanish courts is similar¹⁴, however, the question of the possibility of an *ex officio* judicial intervention is more debatable¹⁵.

Another significant difference between the Polish and the Spanish law of contractual penalties is that the former bans the cumulative penalty, i.e. the aggrieved party is not jointly entitled to the payment of penalty and the performance of the obligation, while the latter allows the cumulative penalty, as long as this right has been clearly granted by parties to the

¹² Rey, *supra* note 3 at p. 210.

¹³ J. M. Rodríguez Tapia, *Sobre la Cláusula Penal en el Código Civil* [About the penalty clause in the Civil Code], "Anuario de Derecho Civil" 1993, vol. 46, issue 2, p. 570.

¹⁴ The judgment of Spanish Supreme Court of 7 February 2002, "Repertorio de Jurisprudencia" Issue 2887, 2002.

¹⁵ See point VII of the Article.

contract¹⁶. Is it stated in the Spanish doctrine that in the case of awarding or the debtor recognizing jointly a contractual penalty and damages, the penalty clause would not be of an indemnificatory nature. Of course, the creditor will bear the burden of proving the damage accumulated to the required penalty¹⁷. Polish law does not allow for exclusion of the indemnificatory character of the penalty clause. It is clearly stated that the creditor may claim damages higher than the penalty clause only if it is so agreed between the parties in the contract. The penalty clause is of a creditable character, which means that this penalty must count towards compensation and the damage may be subject only to compensation in the amount exceeding the contractual penalty¹⁸.

III. PREMISES FOR THE CLAIM FOR PAYMENT OF CONTRACTUAL PENALTY

Compared to other elements that make up the contractual penalty, the issue of premises is not subject to extensive doctrinal analysis. In Spanish law, it is not characterized by such a large variety of possible solutions. The Polish regulation is relatively similar to the Spanish.

In the Polish legal system, the possibility of enforcing contractual penalties should be analyzed in terms of ex contractual liability. There have to exist two premises at the same time: an effective contractual provision creating an obligation to pay a contractual penalty, and non-performance or inadequate performance of a principal obligation. Satisfaction of both conditions must be demonstrated by the creditor. However, the latter is not obliged to prove the damage. The contractual penalty may be enforced only if the non-performance or improper performance of the obligation is the consequence of circumstances for which the debtor is liable under

¹⁶ Cristina Guilarte Martín-Calero, *La Moderación de la Culpa por los Tribunales (Estudio Doctrinal y Jurisprudencial)* [*Moderation of the fault by Tribunals (Doctrinal and Jurisprudential Studies)*], Valladolid 1999, p. 139.

¹⁷ Tapia, *supra* note 13 at p. 528.

¹⁸ Judgment of the Court of Appellate in Łódź, of 18 June 2015, I ACa 1868/14, published in LEX no. 1771278; Judgment of the Court of Appellate in Kraków of 21 December 2012, I ACa 1173/12, published in LEX no. 1293086.

article 471 of the Polish Civil Code. Unless otherwise provided by law or an agreement between the parties, the condition for requesting the payment of a contractual penalty arises upon failure of the debtor to exercise due care, that is, the fault is of at least negligence¹⁹.

By providing flexible contractual terms in Spanish law, the Spanish legislator allowed the parties to apply contractual penalties with a wide extent of arbitrariness, significantly narrowing down or extending the liability of the debtor depending on particular needs²⁰. For this reason, Spanish jurists do not seem to be preoccupied with a comprehensive analysis of the grounds for claiming a contractual penalty. Much broader is the interpretation of the punitive character of contractual penalties, which partly overlaps the grounds for payment of contractual penalties²¹.

Article 1152 point 1 of the Spanish Civil Code provides that contractual penalties may be enforced only in the event of breach, if parties have not decided otherwise. There are no doubts as to the possibility of applying a contractual penalty in the event of improper performance of an obligation or partial fulfillment of an obligation, as article 484 of the Polish Civil Code states.

In addition to the complete non-performance of the contract, Spanish authors distinguish three prerequisites that allow enforcement of the contractual penalty: delay, partial execution of the obligation, and improper performance of the obligation. Often partial fulfillment of an obligation and improper performance of an obligation are recognized as one premise²². There is no doubt as to the possibility of establishing several contractual clauses in relation to one principal obligation. It is also possible to establish a single clause which is effective in relation to both default and delinquency.

¹⁹ W. Borysiak, *Comment on article 484 of the Civil Code* [in:] K. Osajda [ed.], *Komentarz do Kodeksu Cywilnego* [Comment on the Civil Code], Warszawa 2017.

²⁰ Alba, *supra* note 10 at p. 86.

²¹ According to article 1154 of the Spanish Civil Code, the enforcement of a contractual penalty is conditional on partial default or wrong performance of the obligation by the debtor.

²² M. D. Mas Badía, *La Revisión Judicial de las Clausulas Penales. Apéndices cronológico y sistemático de jurisprudencia* [The Judicial Review of the Penalty Clauses. Chronological and systematic appendices of jurisprudence], Valencia 1995, p. 108.

The failure to perform an obligation properly reflects the situation when the debtor has performed actions leading to the fulfillment of the obligation, however, his actions are not sufficient to state that the purpose of the contract has been fulfilled. Such conclusions are based on systemic interpretation, e.g. article 1169 of the Spanish Civil Code states that performance of an obligation which is not sufficiently similar to the main obligation would be deemed as a defective performance of an obligation.

An interesting issue not covered by Spanish legislation, but noted by jurists, is that of so-called positive contractual infringements which consist in additional actions of the debtor that are not covered by the contract and cause damage to the creditor²³. There is no clear doctrine view on that issue, however, since a positive contractual breach can be the subject of *ex-delicto* liability, there are no obstacles preventing the parties from forming contractual penalties in such a shape.

IV. THE RELATIONSHIP BETWEEN THE CLAIM FOR PAYMENT OF A CONTRACTUAL PENALTY AND THE OCCURRENCE OF DAMAGE

In Polish law, the dispute as to the relationship between the damage and the claim for payment of contractual penalty has existed since the moment of entry into force of the Civil Code²⁴. Both the doctrine and the case law have outlined two contradictory views.

According to the so-called traditional view²⁵, the proof of non-occurrence of damage does not release the debtor from the obligation to pay a contractual penalty. Within such an understanding, attention is paid to the objective and functional interpretation, refusing the existence of a link between the necessity of payment of contractual penalties and

²³ L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial* [Fundamentals of the civil law heritage], Madrid 1993, p. 666.

²⁴ K. Falkiewicz, M. Wawryniewicz, *Kara umowna w obrocie gospodarczym* [The penalty clause in business trading], Warszawa 2001, p. 46.

²⁵ P. Drapała [in:] A. Olejniczak [ed.], *Prawo zobowiązań – część ogólna* [Law of obligations – the general part], Warszawa 2014, p. 1150.

the occurrence of the damage²⁶. Proponents of recognition of damage as a prerequisite for the obligation to pay contractual penalties appeal primarily to the systematic and linguistic interpretation of article 483 § 1 of the Polish Civil Code, which states that “damages are paid” by the payment of contractual penalties, and article 484 § 1 of the Civil Code mentioning the “suffered damage”²⁷.

The issue was eventually settled by the adoption of a Supreme Court Resolution which pointed out that contractual penalties are a substitute for compensation in the sense that the parties specify in advance in the contract the value of the indemnity for default or non-performance of the obligation, which is intended to compensate not only for the damage, but also for the broadly understood negative consequences of the infringement of contractual liabilities, such as a lost sales margin or lost trust of contractors. This kind of effect would be very difficult to prove, and hence the rationale for accepting that the occurrence of damage is not necessary for the claim for payment of the contractual penalty²⁸. Although the cited resolution of the Supreme Court is unequivocal, it still happens that the courts adjudicate differently²⁹.

Comparing Spanish to Polish obstacles in terms of establishing a common approach to the relation between the penalty clause enforcement and the damage suffered, the Spanish view is more clear and unequivocal. Even though there is no clear provision on this matter in the Spanish Civil Code³⁰, Spanish jurisprudence recognizes that there is no need for the existence of damage in the event of a claim for payment of contractual

²⁶ J. W. Katner [in:] S. Włodyka [ed.] *Prawo umów w obrocie gospodarczym* [Law of contracts in economic turnover], Warszawa 2006, p. 279.

²⁷ P. Drapała [in:] A. Olejniczak [ed.], *Prawo zobowiązań – część ogólna* [Law of obligations – the general part], Warszawa 2014, p. 1151, also the judgment of the Polish Supreme Court dated 14 July 1974, I CR 221/76, OSN 1977, no. 4, pos. 76; the judgment of the Polish Supreme Court dated 20 February 2003, II CKN, 1158/00, not published, the judgment of the Polish Supreme Court dated 20 June 2003, III CKN, 122/01, not published.

²⁸ The Judgment of the Polish Supreme Court dated 14 April 2005, II CK 626/2004, LexisNexis no. 2339854.

²⁹ The Judgment of the Polish Appeal Court in Katowice, dated 20 March 2013, I ACa 132/2013, LexisNexis no. 5795335.

³⁰ The Spanish Civil Code provides in article 1152 only that in obligations with a penalty clause, the penalty shall replace the damage compensation and payment of interest in the event of breach, unless otherwise agreed.

penalties³¹. Also, the case law concerning the ratio of contractual penalties to the damage proves that it is not necessary to prove the damage³².

V. THE CONTRACTUAL PENALTY FOR WITHDRAWAL FROM THE CONTRACT

A penalty clause for withdrawal from the contract provides that the debtor is allowed to be released from the performance of a contractual obligation by paying the contractual penalty to the creditor. While such a contractual penalty is acceptable in the Spanish legal system, in Polish law such a clause has to be carefully examined on a case by case basis as it may be contrary to the basic premises of that institution.

The imperative form of article 483 of the Polish Civil Code limits the freedom of parties to impose the character of penalty clause on any contractual provisions if they do not fulfill the premises and functions provided for by the Civil Code³³. The penalty for withdrawal from the contract, agreed upon by the parties, would be classified as the penalty clause regulated by the Polish Civil Code only if such a premise is expressly provided for in the contract. If a creditor decides to enforce its rights under such a clause, other privileges provided for by the Polish Civil Code related to the debtor's withdrawal from article 492 of the Polish Civil Code cannot be enforced. Enforcement of such a penalty clause would also be limited only to the non-monetary character of the obligation. For example, if the withdrawal from the contract occurred owing to the non-performance of a monetary obligation by one party, the

³¹ The judgment of the Spanish Supreme Court dated 20 May 1986, "Repertorio de Jurisprudencia" Issue 2734, 1986; the judgment of the Spanish Supreme Court dated 10 November 1983, "Repertorio de Jurisprudencia" Issue 6071, 1983.

³² The judgment of the Spanish Supreme Court dated 30 March 1995, "Repertorio de Jurisprudencia", Issue 2789, 1995; the judgment of the Spanish Supreme Court dated 20 May 1986, "Repertorio de Jurisprudencia", Issue 2734, 1986; the judgment of the Polish Supreme Court dated 10 November 1983 r., "Repertorio de Jurisprudencia", Issue 6071, 1983.

³³ P. Drapała, *Glosa do uchwały SN z dnia 18 lipca 2012, III CZP 39/12* [Case note on the decision of the Supreme Court of 18 July 2012, III CZP 39/12], „Państwo i Prawo” 2013, vol. 10, p. 133–138.

contractual penalty reserved in the event of withdrawal from the contract would be indirectly a penalty for delay in fulfilling the cash payment and would not be enforceable³⁴.

Spanish authors distinguish, among other types, the penalty clause for withdrawal from the contract (*cláusula penal penitencial o de desistimiento*)³⁵. The use of such a contractual penalty model in Spain is primarily aimed at compensating the creditor's damage in connection with the failure to perform the contract³⁶. It allows the debtor to be released from the performance of a contractual obligation by paying the amount agreed upon in the contract. The use of the penalty clause in a such contractual model might be compared to the Polish institution of compensation for renunciation (*odstępne*), regulated in article 396 of the Polish Civil Code, which states that one or both parties may agree on the possibility to renounce the contract when paying a determined sum. However, unlike in Spain, the Polish institution requires that a declaration on renunciation shall be effective only where it has been made along with the payment of the compensation for renunciation.

VI. THE POSSIBILITY OF MODIFICATION OF CONTRACTUAL PENALTY

A measure to mitigate significantly excessive contractual penalties is the possibility of reducing such penalties. Mitigation is justified if the fine exceeds the value of the damage, and therefore also if the injury did not occur at all. The judicial review in terms of modification of the contractual penalty is very common in both the Polish and the Spanish legal systems. However, it is much more restricted under Spanish law. In both Polish and Spanish law, the judicial intervention as to the amount of the contractual penalty may consist only in the reduction of the sum

³⁴ The judgment of the Polish Supreme Court dated 7 February 2007, III CSK 288/06, OSP 2009, no. 4, pos. 39; judgment of the Polish Supreme Court dated 28 May 2014, I CSK 345/13, Legalis, judgment of the Court of Appeal in Warsaw of 30 March 2017, I ACa 1880/15, LEX no. 2402448.

³⁵ S. Díaz Alabart, *La Cláusula Penal [The penalty clause]*, Madrid 2011, p. 171-172.

³⁶ The judgment of the Spanish Supreme Court dated 12 December 2009, "Repetitorio de Jurisprudencia", Issue 1179, 2008.

stipulated. In Poland – at the request of the debtor – in Spain – on the initiative of the Judge, literally interpreting it is the Judge's sole decision if the penalty is to be reduced.

Under the Polish law regime, the possibility of modifying the contractual penalty is regulated in article 484 of the Civil Code. The creditor may demand an amount exceeding the contractual penalty if the parties decide (i.e. in the contract) that it would be admissible. On the other hand, if the obligation has been performed to a significant degree, or if the contractual penalty is grossly excessive, the debtor may demand a reduction of the penalty.

The purpose of such mitigation is to eliminate the extreme disproportions between the amount of the penalty set by the parties and the creditor's corresponding interest³⁷. It does not seem reasonable to recognize protection of the debtor against excessive enrichment of the creditor as the only purpose of moderating the contractual penalty³⁸. On the one hand, it is an expression of the limitation of the autonomy of the parties' will, but on the other hand it serves the implementation of a postulate of contractual justice³⁹.

In contrast to Polish law, the Spanish Civil Code allows courts to reduce the penalty only if a part of the main contract obligation has been performed or the performance of the obligation was irregular. There is no provision regarding mitigation of the penalty because of excessiveness, therefore a judicial review on the grounds of equity is excluded⁴⁰. Such regulation makes Spain one of the few countries that has not amended its Civil Code in order to allow a reduction of a penalty amount in this scope. However, Spanish jurists have called in recent years for the amendment of the provisions related to the penalty clause in such a way that there would be other prerequisites to reducing the amount of the contractual penalty on the grounds of equity⁴¹.

³⁷ J. Jastrzębski, *Kara umowna [The penalty clause]*, Warszawa 2006, p. 304.

³⁸ K. Falkiewicz, M. Wawrynkiewicz, *Kara umowna w obrocie gospodarczym [The penalty clause in business trading]*, Warszawa 2001, p. 37.

³⁹ Drapała, *supra* note 27 at p. 1158.

⁴⁰ The judgment of the Spanish Supreme Court of 15 October 2008, "Repertorio de Jurisprudencia", Issue 5692, 2008.

⁴¹ Comisión General de Codificación, *Propuesta de Anteproyecto de Ley de Modernización del Derecho de Obligaciones y Contratos [Draft project on modernization of the Obligation Law and*

In order to moderate the contractual penalty in Spain, the judge must assess the proportion between the actual performance and the performance that would have barred the claim of the penalty⁴². Such a statement has led to courts stating that there would be no moderation of the penalty agreed upon if partial performance actually occurred⁴³.

Regarding the latest changes in Spanish jurisprudence related to modification of the penalty clause, the ruling issued on 26 October 2016 by the Spanish Supreme Court⁴⁴ should be mentioned. The case was based on a non-competition, post-contractual clause included in an employee's contract, which stated that the minimum compensation for the breach of the post-contractual non-competition obligation amounted to a minimum of 18,000 euros, which would be paid at the rate of 6,000 euros gross per year under the title of "post-contractual non-competition compensation". The contract also stated that in the event that the employee failed to comply with the agreement, it had to compensate the employer with an amount equivalent to an annuity of his gross salary. When a former employee breached the non-competition clause, the employee demanded the payment of 59.900 euros in contractual compensation, stating that the post-contractual non-competition agreement was null, inadmissible, and abusive. The Spanish Supreme Court reduced the amount claimed as a penalty. The ruling was based on the fact that the amount claimed by the employer tripled the amount agreed in the employment contract, in which the employee had accepted the non-competition clause in exchange for a monetary benefit, without further explanation of the details related to this obligation. The Court, having regard to the general rule that the penalty clause cannot be modified if excessive, took into consideration

Contracts] (2009), Article 1150; M. Dolores Mas Badía, *La Revisión Judicial de las Cláusulas Penales [Judicial revision of penalty clauses]*, Tirant Lo Blanch 1995, p. 216; Alba, sura note 10 at p. 86.

⁴² M. Albaladejo García, *Comentarios al Código Civil y a las Compilaciones Forales [Comments to the Civil Code and on the compilation of local laws]* Madrid 2008, vol. 15, issue 2, p. 486.

⁴³ The judgment of the Spanish Supreme Court of 14 September 2007, "Repertorio de Jurisprudencia", Issue 5307, 2007.

⁴⁴ The judgment of the Spanish Supreme Court of 26 October 2016, "Repertorio de Jurisprudencia", Issue 893 2016.

article 21.2 of the Law on the status of employees⁴⁵, which refers to the agreement after the termination of the employment contract, and which states that adequate financial compensation shall be paid to the employee. The Supreme Court took into consideration also the fact that the clause presented in this case may be abusive and contrary to the principle of good faith (article 7.2 of the Spanish Civil Code)

SUMMARY

In spite of the abovementioned differences concerning the grounds for judicial review, the Polish and Spanish civil law systems share the same idea of the penalty clause. The institution is formed so as to always seek to deter breach by requiring the payment of extra-compensatory damages.

Nevertheless, the concept of the penalty clause in Spain is wider and gives parties more contractual freedom in its use than in Polish law. The Spanish approach to the use of penalty clauses is wider and remains more flexible. It has more types and enables emphasizing all or some features, e.g. the punitive character of the penalty. The Polish concept, shaped by jurisprudence and doctrine, does not give such freedom. However, parties to a contract may form their relationship by means of other legal constructions, as long as they are compliant to the law.

The most interesting difference is the approach to the moderation of the contractual penalty. While in Poland there are more prerequisites to moderating the penalty, Spanish judges are empowered to do so without a party's motion. Postulated changes to the Spanish model will bring the concept of the penalty clause closer to the Polish one.

⁴⁵ Royal Legislative Decree of 24 March 1995 no. 1/1995 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores [Labour Code].

