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LIQUIDATED DAMAGES IN LATVIAN LAW

IEPRIEKŠ NOTEIKTI ZAUDĒJUMI LATVIJAS TIESĪBĀS

Key words: damages, tort, contract, legal remedies

Atslēgvārdi: zaudējumi, delikts, līgums, tiesiskās aizsardzības līdzekļi

Summary

The present article addresses the question of whether liquidated damages are allowed under Latvian legislation. The topicality of this question was raised by a recent judgment of the Senate of the Republic of Latvia (hereinafter – the Senate), wherein it – as a surprise to many – concluded that liquidated damages are in fact prohibited within Latvian jurisdiction.

The author of the present publication challenges the foregoing conclusion. He analyses the approach of several comparable jurisdictions on the matter of liquidated damages. Most of these jurisdictions do not impose similar restrictions upon liquidated damages. Following this analysis, the author examines whether the said finding of the Senate could be supported in light of the system of Latvian civil law. The final answer, based on interpretation of relevant legal provisions in conjunction with relevant legal doctrine, is negative. Finally, the author considers the distinction between liquidated damages and contractual penalties, and, inspired by findings in other jurisdictions of Continental Europe, provides suggestions for amendments to the Latvian Civil Law, which may combat misuse of liquidated damages in the future.

Kopsavilkums

Šajā rakstā tiek aplūkots jautājums, vai Latvijas tiesībās ir atļauti iepriekš novērtēti zaudējumi. Jautājuma aktualitāti ir radījis nesenais Latvijas Republikas Senāta (turpmāk – Senāts) spriedums, kurā daudziem par pārsteigumu tika secināts, ka Latvijas tiesībās iepriekš novērtētu zaudējumu piemērošana neesot pieļaujama.

Raksta autors apšauba šī secinājuma pamatotību. Viņš analizē vairākās salīdzināmās jurisdikcijās sastopamo pieeju iepriekš novērtētu zaudējumu jautājumā. Lielākā daļa šo jurisdikciju neparedz visaptverošu ierobežojumu iepriekš noteiktu zaudējumu piemērošanā. Pēc šīs analīzes autors vērtē, vai minētais Senāta secinājums var tikt atzīts par pamatotu Latvijas civiltiesību sistēmas gaismā. Pamatojoties uz piemērojamo tiesību normu iztulkojumu

kopsakarā ar tiesību doktrīnu, atbilde uz minēto jautājumu par Senāta secinājuma pamatotību ir noraidoša. Noslēdzot šo rakstu, autors vērtē iepriekš novērtētu zaudējumu un līgumsoda nošķiršanu, kā arī, ņemot piemēru no citās kontinentālās Eiropas jurisdikcijās paustām atziņām, sniedz priekšlikumus Latvijas Civillikuma grozījumiem, kas varētu novērst iepriekš novērtētu zaudējumu neatbilstošu piemērošanu.

Introduction

In its judgment of 30 March 2023 in case SKC-3/2023, the Senate introduced a novity regarding the notion of liquidated damages. The court essentially held that the inclusion of such a pre-determined sum by the parties in a contract is contrary to the national law of Latvia and is therefore not enforceable. The judgment states that contractual damages are subject to the legal requirement to establish not only the breach of the contract itself, but also the existence of damages and their causal link to the wrongful conduct of the party – the general preconditions or grounds for any damages claim. Hence, the parties may not agree that, in the event of a breach of contract, the breaching party would be obliged to pay a specific amount of damages provided for in the contract without having to prove the named preconditions for damages derived from the Latvian Civil Law. However, should the parties wish to agree on a sum of money to be paid by a party in the event of non-performance – which is not limited to the amount of damages suffered due to non-performance – they may agree upon contractual penalties. Such penalties must be proportionate and in accordance with fair commercial practice, and Latvian courts are entitled to reduce unjust penalties at their own discretion.[1]

The Senate based these findings, *inter alia*, on its own conclusions dating back to 31 August 1937. In an almost century old one-page decision, the Senate had once concluded that a sum agreed upon by the parties in a contract, whilst given the name of "damages", was, in fact, by its nature, a contractual penalty according to the Civil Law provisions in power at the time.[2] This historic decision does not delve into the details of its reasoning outside of the particular circumstances of the case, yet the present day Senate has applied this conclusion in order to justify an overreaching principle foreseeing that the concept of liquidated damages is not recognized within the Latvian civil law system at all.

This shift brings forth a number of questions both in the broader context of the principle of freedom of contract, private autonomy and legal certainty of contractual liability, as well as, in a more practical sense, the plausible consequences this lack of flexibility may cause in certain areas of law. This paper aims to review a few of these issues in the light of today's legal reality within both Latvian and foreign countries' private law. It is also argued in this paper that the Senate's

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1 Judgment of the Civil Department of the Senate of the Republic of Latvia of 30 March 2023 in case No. SKC3/2023, paragraph 14.

2 Vietējo Civillikumu kopojums. 1928. [Compilation of local civil laws. 1928.] Article 3369, p. 386. Available in Latvian: https://dom.lndb.lv/data/obj/417673.html [viewed 01.08.2023.].

ruling may not be entirely accurate in stating that liquidated damages clauses are prohibited within Latvia.

1. Nature of liquidated damages across jurisdictions

Different legal systems recognize various forms and shapes of sums that may be agreed upon by the parties concluding a contract to be paid in the event of a breach. This concept is by no means a modern-day creation. Its roots can be found already in Roman law that has largely influenced most of European private law, including the Latvian civil law system.[3]

However, notably, a distinction must be made between the different possible kinds of agreed sums due to their functions and aims. Liquidated damages in particular have been broadly defined in literature as a fixed or determined sum agreed upon by the parties to a contract to be payable on breach by one of the parties.[4] The name itself indicates that the breach has to cause a loss of some sort. Therefore, a general conclusion can be drawn that a liquidated damages clause still requires for actual loss to be suffered by the party, even if such loss has already been calculated or at least estimated beforehand, and even if there is no burden of proof thereof. This already presents a clear distinction from, for example, a contractual penalty that requires no further steps from the party other than providing a proof of breach (more on this in the next section of this paper).

However, it must be kept in mind that the understanding, application and tradition regarding liquidated damages clauses varies significantly across different legal systems and jurisdictions. For example, common law systems widely recognize liquidated damages and even favour them in comparison with contractual penalties, which they treat with certain caution.[5] By means of literal trial and error throughout history, the common law courts of the USA and the UK have come to allowing liquidated damages clauses to be enforced where they are proven to be a genuine pre-estimate of the loss suffered, whereas contractual penalties are not permitted.[6] It was established in the landmark case Banta v Stamford Motor Co. (USA, 1914) that for a liquidated damages clause to be valid:

> *(1) the damages to be anticipated as resulting from the breach must be uncertain in amount or difficult to prove; (2) there must have been an intent on the part of the parties to liquidate them in advance; and (3) the amount*

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[3] Hachem P. Agreed Sums Payable Upon Breach of an Obligation: Rethinking Penalty and Liquidated Damages Clauses. The Hague: Eleven International Publishing, 2011, pp. 30–32.

[4] Mikryukov V. A. Russian Analogue of Anglo-American "Liquidated Damages": The Prospects for Legislative Recognition. In: Vestnik Permskogo Universiteta. Juridicheskie Nauki. Perm: Perm University Herald. Juridical Sciences, 2018, Issue 41, p. 424.

[5] Zimmerman R. The Law of Obligations. Roman Foundations of Civilian Traditions. Oxford: Oxford University Press, 1995, p. 107.

[6] Hachem P. 2011, pp. 36–37.

stipulated must be a reasonable one, that is to say, not greatly disproportionate to the presumable loss or injury.[7]

Over time, this test has been refined and tweaked, leading to American courts nowadays examining only two of these criteria, namely, whether the agreed sum is reasonable and whether there truly is a considerable difficulty present regarding proving the actual losses.[8] Another aspect to consider has emerged recently, namely, the relationship between the parties or rather the balance between the power each of them possesses. Here, in addition to verifying that the clause at hand was not in fact a penalty, UK High Court also made sure that there was a commercial justification for the difference between the agreed amount of damages and the estimated loss, and that the particular clause imposed obligations on both parties.[9]

Thus, a fundamental difference exists between common and civil law systems, since civil law systems, on the contrary, tend to be much more lenient towards the implementation and employment of contractual penalties. In fact, liquidated damages clauses seem to bring a lot more confusion to courts than the sums included in contracts with the sole aim of deterring a party from committing a breach.[10] As there are no binding uniform rules within Continental Europe in this regard, each country has developed its own practice around liquidated damages – some view them the same way as penalties, others strictly distinguish between the two, while a few are still undecided on the idea as a whole and lack a consistent approach.[11] A concise review of comparable legal systems and relevant examples shall provide a clearer view of these differences.

The author has been informed that, for example, in Latvia's neighbouring country Lithuania a negative opinion exists towards liquidated damages, stating (in author's understanding) that liquidated damages do not have a compensatory function, which is required for any damages under Lithuanian law. Other sources indicate that Lithuanian law neither expressly regulates, nor prohibits liquidated damages.[12] At the same time, current Lithuanian legal doctrine stresses the need

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[7] Judgment of Supreme Court of Connecticut of 5 December 1914 in case Banta v Stamford Motor Co. 92 A. 665; Judgment of House of Lords of United Kingdom of Great Britain and Ireland 1 July 1914 in case Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd.

[8] García I. M. Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to Be Solved by the Contracting Parties. European Journal of Legal Studies, Volume 5, Issue 1 (Spring/Summer 2012), pp. 84–85.

[9] Judgment of the High Court of United Kingdom of Great Britain and Northern Ireland of 3 September 2010 in case Azimut-Benetti SpA (Benetti Division) v Darrel Marcus Healey.

[10] García I. M. 2012, pp. 85–90.

[11] Hachem P. 2011, pp. 30–34.

[12] Vitkus S. Sutarties Pažeidimo Atveju Mokètinos Sutartos Sumos: Iš Anksto Aptarti Nuostoliai Ir Netestybos. Daktaro Disertacija [Agreed Amounts Payable in the Event of a Breach of Contract: Damages and Penalties Discussed at the Outset. Doctoral thesis], Vilnius: Mikolo Romerio Universitetas, 2019, pp. 210–211.

to include explicit provisions in Lithuanian law, regulating matters of liquidated damages.[13]

In France, the Civil Code *expressis verbis* discerns contractual penalties from liquidated damages,[14] yet both are subject to judicial review and, when necessary, amendments can be imposed by the judges.[15] However, the judges may not assess the actual amount of loss and adjust the contractual agreement accordingly – this, in line with legal literature, would be contrary to the intention of the parties and therefore be against the principle of private autonomy.[16] A rather strict examination is carried out by the French courts in determining whether a liquidated damages clause is not in fact a penalty – they consider "the level of the agreed amount of damages and [whether] [...] the penalty is due in case of non-performance".[17] While the French framework clearly acknowledges both types of sums agreed upon by the parties, the practical consequences are not as clear – legal practitioners will often recommend drafting these clauses carefully, even avoiding words such as "penalty" and/or "compensation".[18]

It appears that the most constructive track of development can be observed in German law, where liquidated damages is an accepted and often employed instrument in various areas of law.[19] Penalty clauses are very clearly distinguished from liquidated damages clauses in Germany, and the view is that to treat them as interchangeable would be incorrect and dysfunctional:

> *A liquidated damages clause has to be distinguished from a penalty clause because the standard of judicial review necessarily is a different one. The purpose of a liquidated damages clause is to simplify the proceedings after a breach, not to impose a penalty on the breaching party. Consequently, the test has to be whether or not the sum fixed by the parties is a reasonable assessment of the creditor's loss in case of breach. A penalty clause, on the contrary, is intended to urge the debtor to perform by subjecting him,*

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13 Vitkus S., 2019, p. 222.

14 French Civil Code. Available in English: https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf [viewed 02.08.2023.].
Regarding liquidated damages and the competence to modify lump sums in contracts: Art. 1152: "Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum (Act No. 75-597 of 9 July 1975). Nevertheless, the judge may "even of his own motion" (Act No. 85-1097 of 11 Oct. 1985) moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten."
Completely different regulation regarding contractual penalties in Art. 1226: "A penalty is a clause by which a person, in order to ensure performance of an agreement, binds himself to something in case of non-performance".

15 Cannarsa M. Contractual Penalties in French Law. In: European Review of Private Law, 23, Issue 3, 2015, p. 299.

16 Ibid., p. 302.

17 Ibid.

18 Cannarsa M. 2015, p. 305.

19 Faust F. Contractual Penalties in German Law. In: European Review of Private Law, 23, Issue 3, 2015, p. 288.

in case of breach, to a burden more onerous than the mere compensation of the creditor's loss. For that reason, the amount of the creditor's loss can be but one factor in reviewing the penalty. Even penalties that considerably exceed that loss may be upheld.[20]

The possibility to agree on liquidated damages in German law stems from paragraph 276 (1) of the German Civil Code (*Bürgerliches Gesetzbuch – de.*),[21] providing that certain extent of liability may be stipulated in the infringed obligation (i.e. – the contract – in given situation). Legal literature often observes this provision in the context of freedom of contract, concluding that the parties are entitled to agree on how to calculate the amount of damages to be compensated and collected, unless it is obvious that no actual damages have occurred or their amount is smaller than the amount calculated according to the contract.[22] In German law, the purpose of liquidated damages is to ease the usually cumbersome duty to prove the exact amount of losses incurred.[23] In order to achieve this goal, a contractual clause on liquidated damages releases the claimant from the duty to prove the amount of damages.[24]

Liquidated damages are typical in certain situations in Germany. For example, it is rather common feature in contracts concluded as a result of public procurement. These provisions usually foresee that in case the service provider or the seller of goods is involved in a competition law infringement (for example, a cartel agreement), it will be required to compensate the damages of the customer, suffered due to excessive pricing of the services or goods in question – the amount of these damages will be calculated in a predetermined manner, usually as a set percentage of the price of respective services or goods. German courts enforce these contractual provisions.[25]

Last but not least, a common frame of reference may perhaps be sought in the Draft Common Frame of Reference (DCFR). In 3:710, the document stipulates:

(1) Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.

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[20] Faust F. 2015, p. 296.

[21] German Civil Code. Available in German: https://www.gesetze-im-internet.de/bgb/ [viewed 16.08.2023.].

[22] Heinrichs H. (Author des Kommentares). Kommentar zum § 276 BGB. Palandt Bürgerliches Gesetzbuch, Kommentar. 66., neubearbeitete Auflage. München:Verlag C. H. Beck, 2007, S. 347, Rn. 26.

[23] Schulte-Nölke H. (Author des Kommentares). Kommentar zum § 276 BGB. Handkommentar. 10. Auflage. Baden – Baden: Nomos, 2019, S. 453, Rn. 20.

[24] Faust F. 2015, p. 288.

[25] Judgment of Mannheim Land Court (*Landgericht Mannheim – de.*) of 4 May 2012 in case No. 7 O 436/11 (Kart.); Judgment of Karlsruhe Supreme Land Court (*Oberlandgericht Karlsruhe – de.*) of 31 July 2013 in case No. 6 U 51/12 (Kart.).

> *(2) However, despite 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 the other circumstances.*

The commentary here confirms the reflections in the examples given thus far – that the treatment of "agreed damages" clauses varies from one legal system to another. Further, it clarifies that

> *the laws of most European countries will enforce a stipulation in a contract under which the debtor undertakes to pay a fixed sum of money in the event of nonperformance. The stipulated payment clause will be enforced whether its purpose was to coerce the debtor to perform the principal obligation (penalty clause) or to serve as a pre-estimate of the loss suffered by the creditor in case of non-performance (liquidated damages clause).*[26]

Although the DCFR is by no means a binding document to the states, the generalized summary provided by it serves as evidence that liquidated damages are, in fact, recognized in many jurisdictions and differentiates the notion from penalties via its purpose. Therefore, it stands that liquidated damages, in their essence, are neither "regular" damages nor contractual penalties.

As already noted, some civil law states expressly regulate this instrument, while others make-do with case-law and methods of private nature. Nevertheless, the fact that the Latvian civil law system historically belongs to the group of jurisdictions, which, unlike Latvia currently, all recognize liquidated damages, raises doubts as to whether the conclusion made by the Senate is correct. In the next sections, the author shall examine the approach of Latvian law regarding liquidated damages followed by a discussion on what could be learned from the experience of other countries as analysed above.

2. The Latvian Civil Law and liquidated damages

Similar to Lithuanian law, Latvian law neither explicitly permits, nor prohibits the application of liquidated damages. However, several provisions contribute some insights of possible relevance in the context of liquidated damages.

First of all, one shall mention Article 1779 of the Civil Law, granting the general grounds for compensation of damages: "Everyone has a duty to compensate for losses they have caused through their acts or failure to act".[27]

Although the Senate has not stated it explicitly, the judgment of 30 March 2023 in case No. SKC-3/2023 leaves an impression that the Senate considers

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[26] Bar C., Clive E., Schulte-Nölke H., et al. Principles Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full ed. München: Sellier. European Law, 2009, pp. 438–440.

[27] Latvian Civil Law. Available: https://likumi.lv/ta/en/en/id/225418-civil-law [viewed 02.08.2023.].

Article 1779 of the Civil Law a mandatory provision of law.[28] As it flows from the wording of this article, the duty to compensate damages shall be attributed according to causation. However, this article does not offer any clues, at least explicitly, regarding the quantification of damages.

One may argue: it suffices that Article 1779 of the Civil Law mentions causation – since causation includes assessment of whether any particular amount of damages were caused by the particular infringement, as demonstrated by the concept known in German law as "causation regarding the amount of liability" or "*haftungsausfüllende Kausalität*".[29]

However, quantification of damages cannot be seen as a mere extension of causation for multiple reasons. Firstly, legal doctrine explicitly stipulates the existence of damages in a certain amount as a separate precondition of the duty to compensate damages, and existence of damages as a separate precondition includes the amount of damages.[30] Secondly, Article 1779[1] of the Civil Law stipulates that the amount of damages to be compensated in case of a contractual breach depends not only on causation, but also on whether the amount of damages could be reasonably foreseen at the time the contract was concluded or the party entered the other transaction.[31] In this context, an agreement of the parties on the amount of liquidated damages could be viewed as a specification of the amount of the damages which could have been reasonably foreseen at the time the parties concluded the contract or entered into the transaction. Nothing in the wording of Article 1779[1] of the Civil Law suggests that such agreement on liquidated damages is not allowed.

Furthermore, the Article 1779[1] was introduced to the Civil Law with amendments dated 4 June 2009, and has to be viewed in light of Article 1785 (which was the basis of the Senate's interpretation as laid out in the beginning of this paper): "If the duty to compensate for losses arises from a breach of contractual obligations, then the amount of compensation shall be determined in accordance with the contract."

In the commentary to Article 1785 of the Civil Law, renowned professor Kalvis Torgāns has noted that parties may include various contractual provisions regarding the amount of damages to be compensated. Moreover, professor Torgāns also mentioned liquidated damages as one of the practices which Latvian lawyers have learned from other jurisdictions as a means to contractually regulate the amount of damages to be compensated. Professor Torgāns argued that, unlike

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[28] Judgment of the Civil Department of the Senate of the Republic of Latvia of 30 March 2023 in case No. SKC 3/2023, paragraphs 14.6 and 14.7.

[29] van Dam C. European Tort Law. Second edition. Oxford: Oxford University Press, 2013, p. 312.

[30] Torgāns K. Saistību tiesības. Otrais papildinātais izdevums [Law of Obligations. Second, amended edition]. Rīga: Tiesu namu aģentūra, 2018, 210. lpp.

[31] Article 1779[1] of the Civil Law provides: "A person who causes the losses shall compensate the losses in such amount which could have been reasonably foreseen upon entering into a transaction as expected consequences of non-performance, unless such non-performance has occurred through malicious intention or gross negligence."

the USA, Latvian law does not have explicit provisions regulating liquidated damages, however, attention shall be paid to whether certain specific limitations, for instance, prohibition to waste the property of the state or the municipality, are not applicable.[32] From this commentary it may be concluded that professor Torgāns did not consider liquidated damages as something in its essence incompatible with Latvian law.

Summing up, Article 1779 of the Civil Law, interpreted in conjunction with Articles 1779[1] and 1785 of the Civil Law, as well as relevant legal doctrine, does not support the conclusion offered by the Senate, namely – that liquidated damages are not allowed under Latvian law.

3. Distinguishing, application and limiting of liquidated damages

One may ask, where lies the significance of proving that liquidated damages are not prohibited under the Latvian law. Indeed, there is no dispute about the possibility for the parties of a contract to agree on contractual penalties in the form of a lump sum, which shall be paid for a breach of the contract and hence at least at a first glance may provide similar effects for the creditor. Such possible line of argumentation, however, cannot be supported, since liquidated damages and contractual penalties each have different purposes.

The purposes of a contractual penalty are (i) to prevent a breach of the contract, (ii) to compensate the loss and (iii) to an extent, to punish the party for the breach of the contract.[33] However, it is stressed that primacy is to be given to disciplining the other party (prevention of breach).[34] Also, it shall be kept in mind that pursuant to the Article 1716 (2) of the Latvian Civil Law, in case when the contractual penalty is provided for improper performance of the contract or failure to perform in due time, the amount of contractual penalty is limited to 10% of the amount of the remaining principal debt. On the other hand, the amount of damages caused by improper performance or failure to perform in a due time may constitute more than 10% from the remaining principal debt. Thus, a contractual penalty may not always be a suitable option for compensation of actual damages and on this ground the author does not agree with the opinion at times voiced in

[32] Torgāns K. Civillikuma 1785. panta komentārs. Latvijas Republikas Civillikuma komentāri. Saistību tiesības. Otrais izdevums [Commentary of Article 1785 of the Civil Law. Commentaries to the Civil Law of the Republic of Latvia. Law of Obligations. Second Edition]. Rīga: Mans īpašums, 2000, 275.–276. lpp.

[33] Torgāns K., Kārkliņš J., Bitāns A. Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Contract and Tort Issues in the EU and Latvia]. Rīga: Tiesu namu aģentūra, 2017, 148. lpp.

[34] Kārkliņš J., Buls L. Līgumsoda reforma [Reforming of Contractual Penalty]. Jurista Vārds, Nr. 49(800), 03.12.2013.

legal literature, that the speedy recovery of creditor's loss should also be considered among the primary roles of a contractual penalty.[35]

The primary role of compensation of damages, however, is to provide the injured party with the possibility to receive full compensation of its loss and as such it is sometimes emphasized in the law.[36] However, as a matter of fact, a concrete amount of damages has to be proved by the party claiming the compensation of these damages, and this task is not always an easy one. There are several categories of cases where the duty to prove the existence and amount of damages is burdened with substantial difficulties, which are objective due to the particularities of the respective cases or categories of cases. To this note, looking at liquidated damages from the purpose attributed to them by German law – to relieve the claimant from the duty to prove an exact amount of damages, as described in section 1 of this article – liquidated damages appear rather useful and can serve as a crucial tool in several categories of cases. Hence, it may be concluded that the main purpose of liquidated damages is to provide the infringed party with adequate compensation in a situation where exact calculation of damages could be difficult or even impossible. As for the specific categories of cases, in which the possibility to agree on liquidated damages could be considered as particularly important, the following considerations ought to be mentioned.

For example, in case of a competition law infringement, there is a phenomenon called "information asymmetry", meaning that the infringer is substantially better informed about the details of the infringement than the victim who probably suffered damages because of the respective competition law infringement.[37] The law does provide particular rules on the possibility to request the disclosure of necessary evidence by the defendant or a third party.[38] However, as the author of present paper has experienced in his own legal practice, such request for disclosure of evidence usually requires considerable effort and lengthy debates, therefore only partially improves the prospects of the claimant to receive compensation. Hence, the possibility to agree on liquidated damages could be an appropriate instrument to help the claimant and to spare potential efforts, thus ensuring the possibility to receive compensation in a more efficient way and facilitating damage claims for competition law infringements.[39]

Another area, where proving the existence and amount of damages may be difficult, because claimant may not objectively have access to the necessary

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[35] Kārkliņš J., Buls L. 2013.

[36] See, for instance, Article 3 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union. OJ L 349, 5.12.2014, pp. 1–19.

[37] See the recital 15 of the said Directive 2014/104/EU and subsequently Article 250[66] of the Latvian Civil Procedure Law.

[38] Article 5 of the said Directive 2014/104/EU.

[39] Held M. Facilitating Private Enforcement in Germany Through Contractual Liquidated Damages Clauses? Global Competition Litigation Review, 9 (3), 2016, p. 5.

evidence,[40] are the cases of trade secret infringements and compensation of damages caused by such infringements. In some jurisdictions, there are special rules on disclosure of evidence in these cases, too. For example, in Germany the socalled "Düsseldorf proceedings" (*Düsseldorf Verfahren – de.*) are available, rooted in patent litigation, and more broadly – in enabling the plaintiff to request the court to collect the evidence from the defendant,[41] *inter alia*, by means of a search order providing the plaintiff with a possibility to inspect premises, devices or processes of the defendant that allegedly has infringed his rights, and examine any corresponding documentation.[42] However, not all European Union Member States have similar rules on disclosure of evidence, and therefore the possibility to agree on liquidated damages may come in handy to improve the prospects of trade secret holders to receive compensation of damages in case of trade secret infringement.

Finally, an area in which the possibility to agree on liquidated damages could be seen as a useful tool for protection of interests of both parties – not only a claimant – is long-term contracts with changing variables. From the defendant's perspective, the amount of damages, when left only to the general criteria of foreseeability provided by Article 1779[1] of the Latvian Civil Law, may prove to be rather unpredictable. If in such a contract the parties agree on liquidated damages, this provision would grant both parties a greater level of certainty and improve their possibilities to insure the respective risk.

Of course, this list of categories of cases is by no means exhaustive. However, the examples contained therein prove that liquidated damages play an important role in balancing the interests of the parties of contract in cases where proving an exact amount of damages could be difficult. In such situations, liquidated damages may be the most reasonable and sometimes also the only legal remedy available to the injured party.

One could say that, although liquidated damages may have positive properties, this notion also carries substantial risks of misuse. On the one hand, this could be true. However, such a risk may be associated with several other legal instruments, too – for example, various presumptions and reversed burden of proof, which, nevertheless, are not subject to debate, whether they should be allowed or not. On the other hand, it shall be mentioned that Paragraph 309(5) of the German Civil Code already provides certain rules on tackling a potential misuse of liquidated damages. These rules stipulate that the agreement on liquidated damages is void if

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[40] Azanda I., Bukaldere I. Negodīgas konkurences aizlieguma piemērošanas aspekti [Aspects of Application of the Prohibition of Unfair Competition]. Jurista Vārds, Nr. 25/26 (672/673), 21.06.2011.

[41] Ohly A. Das neue Geschäftsgeheimnisgesetz im Überblick. Im: Gewerblicher Rechtsschutz und Urheberrecht. Zeitschrift der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, Heft 5/2019, S. 450.

[42] Deichfuß H. Rechtsdurchsetzung unter Wahrung der Vertraulichkeit von Geschäftsgeheimnissen. Das praktizierte Beispiel: der Schutz des verdächtigen Patentverletzers im Düsseldorfer Verfahren. Im: Gewerblicher Rechtsschutz und Urheberrecht. Zeitschrift der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, Heft 5/2015, S. 438.

a) the sum of the liquidated damages exceeds the damage expected under normal circumstances, or b) the other party to the contract is not expressly permitted to show that damage has either not occurred, or is substantially less than the agreed amount. In the author's opinion, if such provision were to be included in Latvian law, for example, as Article 1779^2 of the Civil Law, it would provide a sufficient possibility to avoid the misuse of liquidated damages.

Conclusions

1. Although the Senate has recently ruled that liquidated damages are prohibited under Latvian law, Article 1779 of the Civil Law, interpreted in conjunction with Articles 1779^1 and 1785 of the Civil Law and relevant legal doctrine, does not support such finding.
2. Liquidated damages must be distinguished from contractual penalties, mainly because each of these two remedies carries different purposes. The main purpose of liquidated damages is to provide the infringed party with adequate compensation in a situation where exact calculation of damages could be difficult or impossible.
3. Liquidated damages play an important role in balancing the interests of the parties of contract in cases where proving of exact amount of damages could be difficult or impossible. In such situations, liquidated damages may be the most reasonable and sometimes also the only legal remedy available to the injured party.
4. In order to prevent potential misuse of liquidated damages, the author suggests to amend the Latvian Civil Law with a provision similar to Paragraph 309 (5) of the German Civil Code, stating that the agreement on liquidated damages is void, if a) the sum of the liquidated damages exceeds the damage expected under normal circumstances, or b) the other party to the contract is not expressly permitted to show that damage has either not occurred, or is substantially less than the agreed amount.

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