

Liquidated Damages as a Legal Remedy for Merchants in Latvia

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Abstract: *Liquidated damages are a widely used legal remedy in several countries. Liquidated damages represent a legal institution that is praised for its practicality, certainty, and economic logic. In practice, this legal institution has also been applied in Latvia. In 2023, the Supreme Court of the Republic of Latvia adopted the most significant judgment in relation to liquidated damages. In this judgment, the court ruled on the prohibition of liquidated damages in Latvia. This judgment has raised a variety of opinions in Latvian legal science as to whether in Latvia there should be an absolute prohibition on liquidated damages. Considering the above, the authors analyse the legal concept of liquidated damages in Latvia and its compatibility with other Latvian civil law concepts. The paper evaluates the reasoning of the Supreme Court of the Republic of Latvia regarding this legal institution and offers the authors' assessment of liquidated damages in Latvia, comparing the practice of Latvia and other countries regarding this legal institution. Lastly, the paper concludes with an assessment of the possible admissibility of liquidated damages in commercial legal relations.*

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1. INTRODUCTION

The paper explains the nature of liquidated damages and their place in the Latvian Civil Law system. In this article, the authors will answer the question of whether merchants could use liquidated damages in their legal transactions. The authors will also answer the question of how the proportionality of liquidated damages in merchants' legal transactions could be assessed in the Latvian civil law system. In order to achieve the objective of answering the questions formulated, the authors will use several methods. A comparative method is used to analyse the similarities and differences between Latvia and other countries in their approach to liquidated damages. The paper also uses an analytical method to draw conclusions about the application of liquidated damages in commercial legal relations. Considering that liquidated damages are a little-discussed topic in the Latvian context, foreign sources have been used in addition to Latvian legal literature and case law.

1.1. General description of the liquidated damages

According to the theory of contracts liquidated damages are one of the civil law remedies, which contractual parties can stipulate. The essence of liquidated damages is a prior, realistic estimate of potential damages in the event of a breach of contract. Moreover, it is not necessary to prove the actual amount of damages to claim liquidated damages.¹ In the case of liquidated damages, it is irrelevant whether any damages have arisen. The rules on liquidated damages apply automatically as soon as a breach of contract has been established.² Consequently, there is only one prerequisite for applying liquidated damages – a breach of contract.

In respect of preconditions of civil liability, liquidated damages fully match the concept of contractual penalties. Therefore, both legal concepts are closely related. It is important to bear in mind that liquidated damages can only be agreed upon for a breach of a contractual provision. If the parties have agreed on the payment of a certain amount in the event of certain circumstances, this does not automatically mean that the contract specifies liquidated damages or contractual penalties.³ Liquidated damages must be agreed upon not for the occurrence of certain circumstances, but specifically for the breach of a specific contractual obligation.

The structure of the agreement on liquidated damages is closely linked to its purpose. The purpose of the liquidated damages clause is to convert uncertain

¹ EGGLESTON, Brian. *Liquidated Damages and Extensions of Time: In Construction Contracts*. Wiley & Sons, Incorporated, John, 2009, p. 76.

² *Ibid.*, p. 78.

³ READ, P. A. *Contract Law (Common Professional Examination)*. HLT Publications, 1996, p. 325.

future damages into a fixed amount and thus “liquidate” the uncertainty about the consequences of a breach of contract.⁴ In addition to the aspect of legal certainty, there are pure commercial and economic reasons why contracting parties are willing to agree on liquidated damages. Liquidated damages allow parties to avoid the expense and disputes associated with proving the amount of damages.⁵ Furthermore, the liquidated damages clause may be expressed in various ways – as a fixed amount, a percentage, or otherwise.⁶

Regardless of the way liquidated damages are expressed, the key factor is the truthfulness of this contractual clause – a realistic estimate of potential damages at the time of concluding the contract. If the parties to the contract “make a mistake” in determining the amount of liquidated damages, different countries have different approaches to this legal institution.

For example, in the United Kingdom (UK) (where this legal institution originates), liquidated damages are an acceptable civil law remedy. However, contractual penalties or disproportionately high liquidated damages are not permitted. Therefore, punitive contractual provisions are not permitted in the UK. The criteria for distinguishing between liquidated damages and contractual penalties in the UK are derived from two landmark judgments: 1) *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* and 2) *Cavendish Square Holding BV v Talal El Makdessi; Parking Eye Limited v Beavis*. In summarising the findings of both judgments, the following criteria may indicate the punitive character of the agreed sum: 1) the sum is excessive in comparison with the greatest damages that could be proven; 2) the sum exceeds the value of the obligation; 3) the sum is payable in equal amounts for different infringements irrespective of severity. However, the proportionality of the agreed amount is demonstrated if the clause has been carefully considered and agreed between the parties.⁷

Additional criteria for identifying a punitive clause are present where its purpose is to impose on the breaching party (i) damages disproportionate to the legitimate interests of the other party, or (ii) in less complex cases, damages that are manifestly excessive and disproportionate.⁸ Regarding this aspect of proportionality, courts in Anglo-Saxon (common law) countries have indicated that, in order for a clause to be deemed invalid, it is not sufficient that the estimate of damages is disproportionate. It is necessary that the damages included in the

⁴ HALSON, Roger. *Liquidated Damages and Penalty Clauses*. Oxford University Press, 2018, p. 116.

⁵ EGGLESTON, Brian. *Liquidated Damages and Extensions of Time: In Construction Contracts*. Wiley & Sons, Incorporated, John, 2009, p.41.

⁶ WHINCUP, Michael H. *Contract law and practice: the English system and continental comparisons*. 2nd ed. Deventer, the Netherlands: Kluwer Law & Taxation Publishers, 1992, p. 259.

⁷ BEALE, Hugh, et al. *Cases, materials and text on contract law*. 2nd ed. Oxford: Oxford: Hart, 2010, p. 1053.

⁸ HALSON, *op. cit.*, pp. 5-6.

clause are “out of all proportion”.⁹

The example of the UK is significant because the UK has the most experience with the liquidated damages. However, the UK follows the common law tradition, the foundations of which differ substantially from those of the Latvian legal system, which is part of continental European law system. Latvia is a Romano-Germanic law country, and because of historical background and traditions Latvian civil law is often compared to the related German civil law. However, unlike in Latvian civil law, in Germany the concept of liquidated damages is recognized alongside the concept of contractual penalties. The distinction is based on the different functions of the two legal concepts. Contractual penalties in Germany have two functions: they encourage the other party to the contract to fulfil their obligations and, in the event of non-fulfilment, cover any damages. Liquidated damages, by contrast, serve only the latter function.¹⁰

In German law, the purpose of liquidated damages is to simplify litigation following a breach of contract, not to impose a penalty on the contracting party. Consequently, when assessing the legality of the liquidated damages, the court must examine whether the amount determined by the parties is a reasonable assessment of the damages. In contrast, the main purpose of a contractual penalty is to encourage the debtor to fulfil their obligations by imposing an additional burden on them in the event of a breach.¹¹

The existence of liquidated damages in the German legal system is derived from the German Civil Code (*Bürgerliches Gesetzbuch*)¹² (BGB) regulations on civil liability. Liquidated damages are governed, by analogy, through the provisions on contractual penalties. For example, BGB Article 343 (1) provides: “*If the contractual penalty to be paid is disproportionately high, it may be reduced to a reasonable amount by court order upon application by the debtor. When assessing proportionality, all the debtor's legitimate interests must be taken into account, not just his financial interests. Once the contractual penalty has been paid, its reduction is excluded.*” According to German case law, this legal provision also applies in cases of liquidated damages.¹³

Thus, unlike UK law, in Germany a court may intervene in a liquidated damages clause by reducing it. In the UK, on the other hand, the court can only declare the liquidated damages clause null and void. In Germany, a claim for liquidated damages is unlawful if one of the following alternative criteria is met: 1)

⁹ Order of the High Court of Australia of 17 November 2005, No. S291/2005, S292/2005 and S293/2005. [online]. [accessed on 2025-09-21]. Available from: <https://jade.io/article/346>.

¹⁰ BEALE, *op. cit.*, p. 1058.

¹¹ RASNAČS, Lauris. Liquidated Damages in Latvian Law. In: The 9th International Scientific Conference of the Faculty of Law of the University of Latvia. [online]. University of Latvia Press, 2024, pp. 286–299 [viewed 23 September 2025]. Available from: doi:10.22364/iscflul.9.1.25

¹² Law of Germany “German Civil Code”, 01.01.1900. [viewed 21.09.2025.]. Available from: https://www.gesetze-im-internet.de/englisch_bgb/.

¹³ BEALE, *op. cit.*, p. 1056.

the amount specified exceeds the damages that would normally be expected under normal circumstances or the normal reduction in value; or 2) the counterparty is not expressly granted the right to prove that either no damages occurred or that the actual loss is significantly lower than the fixed sum.¹⁴ As a final difference from UK law, it should be noted that under German law, a liquidated damages clause does not preclude the enforcement of a “classic” damages claim. In other words, liquidated damages (like contractual penalties) are claimed as the minimum amount that the claimant hopes to obtain, in addition to the claim for full compensation for damages.¹⁵ Thus, to summarise, liquidated damages are a contractual civil liability remedy that is found in both Anglo-Saxon and Romano-Germanic countries. However, both examples illustrate that liquidated damages constitute a legal institution whose regulation must be aligned with the legal system of the respective country.

2. LIQUIDATED DAMAGES IN LATVIA

The first theoretical breakdown, which can be found as a legal source on liquidated damages in Latvia is the judgment of the Supreme Court of the Republic of Latvia of 30 March 2023 in case SKC-3/2023¹⁶ (the Judgment). In the Judgment, the Supreme Court answered the question of whether a claim for liquidated damages is admissible in Latvia. The judgment provides a clear answer that liquidated damages are not admissible in Latvia. In the opinion of the Senate, this legal institute is not permissible because the parties could avoid the need to prove the prerequisites for compensation for damages specified in the Civil Law of the Republic of Latvia (*Latvijas Republikas Civillikums*)¹⁷ (CL).¹⁸

In the authors' view, comparing liquidated damages to a claim for compensation for damages is not the most appropriate method of analysis. As mentioned above, liquidated damages do not have the same prerequisites as a classic claim for damages. Liquidated damages require only a breach of obligation, but a claim for damages also requires the existence of damages and causality. Similarly, the objectives of liquidated damages and claims for damages are completely different. The objective and effectiveness of liquidated damages lies in the fact

¹⁴ DANNEMANN, Gerhard, Reiner SCHULZE, and Jonathon WATSON (eds.) *German Civil Code Volume I* [online]. C.H. BECK, 2020 [viewed 23 September 2025]. ISBN 9783406765773. Available from: doi:10.17104/9783406765773.

¹⁵ BEALE, *op. cit.*, p. 1058.

¹⁶ Decision of Senāta Civillietu departaments, Latvia of 30 March 2023, No. SKC-3/2023 [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2023>.

¹⁷ Law of Republic of Latvia “the Civil Law”, 28.01.1937. [viewed 21.09.2025.]. Available from: <https://likumi.lv/ta/en/en/id/225418-civil-law>.

¹⁸ Decision of Senāta Civillietu departaments, Latvia of 30 March 2023, No. SKC-3/2023 cited above, para. 14.7.

that a specific, previously known amount is claimed. Compensation for damages, by contrast, must restore the injured party to the financial position they would have occupied had the unlawful act not occurred. A similar objective of compensation for damages is also set out in the civil law codifications of Germany and the Czech Republic.¹⁹

To determine whether the concept of liquidated damages is compatible with the Latvian civil law system, it is necessary to examine its compatibility with contractual penalties rather than compensation for damages. The CL sets out the rules for agreeing and applying contractual penalties in relatively great detail. The most significant of these is the mandatory 10% limit on contractual penalties from the amount of non-performed debt for improper performance of obligations (CL Article 1716(3)) and the mandatory order of debt deduction, starting with interest, then principal debt, and only then contractual penalties (CL Article 1843). If, in parallel with contractual penalties, liquidated damages clauses (which are not regulated by the CL²⁰) were also allowed, all restrictions regarding contractual penalties could easily be circumvented, which will lead to the result that the CL Article 1716(3), which limits the contractual penalty to max 10%, would become declarative. In the authors' opinion, this is precisely why liquidated damages are not permissible in the Latvian civil law system.

3. LIQUIDATED DAMAGES AS A LEGAL REMEDY FOR MERCHANTS

Although the Judgment prohibits liquidated damages in any form, it would be reasonable to discuss whether this legal institution could be permitted at least in certain sectors. For example, the opinion has been expressed that liquidated damages should be permissible in competition law. In light of Latvia's current experience with the recovery of damages for competition law violations, it has been concluded that in such a particularly complex sector, parties should be permitted to agree in advance on the amount of damages.²¹ Although there is no court case in Latvia which supports such approach, it should be examined from the point of view of legal theory, whether such potential admissibility of liquidated damages can be allowed – namely, its application in merchant (business) relations.

Latvian commercial law is codified in the Latvian Commercial Law

¹⁹ BRANDEJSKÝ, Tomáš. Selected aspects of Compensation in the Dieselgate case in Germany. in GRMELOVÁ, Nicole (ed.), *Perspectives of Law in Business and Finance*, Bucharest: ADJURIS, 2023, pp. 105-117.

²⁰ See more on institutions of Contractual Law that are not regulated in the CL: KERIKMÄE, Tanel, *et al.*, (eds.) *The Law of the Baltic States* [online]. Cham: Springer International Publishing, 2017 [viewed 25 September 2025], pp. 297-298. Available from: doi:10.1007/978-3-319-54478-6.

²¹ RASNAČS, Lauris, and Beāte PETRONE. Iepriekš novērtēti zaudējumi konkurences tiesību pārkāpuma gadījumā. *Jurista Vārds*. 2023, (43) 1309, pp. 36–42.

(*Komerclikums*)²² (KCL). Since the KCL does not contain specific provisions regarding contractual penalties, the CL also applies to contractual penalties in commercial legal relationships. As mentioned above, according to the CL, liquidated damages are not permitted. Therefore, at least for the time being, liquidated damages are not admissible in commercial legal relations under Latvian law.

However, merchant relations (as in the case of competition law) cannot be regarded in the same manner as ordinary legal relations. The KCL regulations themselves provide for a different approach to merchants. Merchants are one of the few entities whose purpose of existence and functioning is defined by law. KCL Article 1(2) provides that the purpose of a merchant's activity is the pursuit of profit. Therefore, all aspects that promote profit-making – speed, efficiency, predictability, etc. – are essential in merchant relations. This distinction is illustrated by the limitation period: while the general limitation period under Latvian civil law is 10 years (CL Article 1895), in commercial relations it is reduced to 3 years (KCL Article 406). This is one example of how Latvian legislation has been adapted to the economic needs of merchants.

Different legal treatment of merchants is common practice in many countries. When assessing the possibility of introducing liquidated damages in Latvia, we must once again return to the example of Germany. Under German law, a court has the right to reduce the amount of liquidated damages only if the relevant clause is intended to put pressure on a party to fulfil a legal obligation (rather than to agree in advance on the amount of damages), and if that party is not a merchant.²³ Thus, German regulation allow for greater flexibility in the application of liquidated damages between merchants.

In addition to the argument for more liberal regulation for merchants, economic considerations in favour of liquidated damages should also be noted. Legal doctrine indicates that economic principles can be used to analyse the effectiveness of legal regulation. The economic approach offers a rather uniform and objective view of what legal norms are and what they should be to promote economic activity.²⁴ Thus, if there were no Judgment (prohibiting liquidated damages), economic logic would indicate that the legal framework should allow for liquidated damages between merchants.

At the same time, Latvia's experience with the regulation of contractual penalties demonstrates that civil liability remedies cannot be applied without limitation. Even in the absence of specific legal provisions, guidelines for establishing sound practice are necessary at the very least. This is particularly important in the case of contractual remedies,²⁵ as there is information asymmetry in many

²² Law of Republic of Latvia “the Commercial Law”, 13.04.2000. [viewed 21.09.2025.]. Available from: <https://likumi.lv/ta/en/en/id/5490-commercial-law>.

²³ HALSON, *op. cit.*, p. 175.

²⁴ HILLMAN, Robert A. Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages. *Cornell Law Review*. 2000, 85(3), 717–738.

²⁵ More on remedies in CL: TORĢĀNS, Kalvis, et al. *Contract Law in Latvia*. Alphen aan den

contracts, which allows one party to impose its will on the other. Such commercial contracts include, for example, insurance contracts, agency contracts, sub-contractor contracts, etc.²⁶ Therefore, if liquidated damages were permitted in commercial legal relations, a mechanism should be provided for the court to control their proportionality.

Given that Latvia has no specific regulations governing liquidated damages, the court should be guided by the principle of proportionality, which is derived from Article 1 of CL.²⁷ Article 1 of CL requires that rights are exercised, and obligations are performed in good faith. Article 1 of CL demands that parties of civil law relationships respect each other and take into account the legitimate interests of the other party.²⁸ However, the obligation to respect the interests of others should not be interpreted as authorising the court to adapt the outcome of each legal situation to general considerations of fairness, freely modifying the legal consequences arising from the law or a legal transaction.²⁹ Article 1 of CL applies as a rule for interpreting written law, which imposes an obligation on the person applying the law to assess the interests involved in each individual case and, on that basis, to determine the scope and limits of subjective rights.³⁰

This is where the first problem arises – in the absence of any regulation on liquidated damages, the Latvian courts will not be able to use Article 1 of CL as a norm for interpreting written law, as there will be no norm to interpret. However, taking into account legal theory and the findings of the Constitutional Court on the application of the principle of proportionality in the context of contractual penalties³¹ courts could use the principle of proportionality as an independent legal norm for the control of liquidated damages.

This brings us to the next problem – how to apply the principle of proportionality in the context of liquidated damages? In this regard, Australian legal doctrine states that the application of the principle of good faith to liquidated

Rijn: Kluwer Law International, 2020, pp. 151-166.

²⁶ BAG, Sugata. *Economic Analysis of Contract Law: Incomplete Contracts and Asymmetric Information*. Palgrave Macmillan, 2018, p. 60.

²⁷ BALODIS, Kaspars. *Ievads civiltiesībās*. Rīga: Zvaigzne ABC, 2007, p. 146.

²⁸ Decision of Senāta Civillietu departaments, Latvia of 27 March 2024, No. SKC-25/2024, para 16.1. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/528455.pdf>.

²⁹ Decision of Senāta Civillietu departaments, Latvia of 12 March 2020, No. SKC-189/2020, para 6.3. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/407611.pdf>.

³⁰ Decision of Senāta Civillietu departaments, Latvia of 16 December 2020, No. SKC-231/2020, para 6.1. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/433401.pdf>.

³¹ Decision of Constitutional Court (Satversmes tiesa) of 28 September 2020, No. 2019-37-0103, para 29.2. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: https://www.satv.tiesas.gov.lv/wp-content/uploads/2019/12/2019-37-0103_Spriedums.pdf.

damages cannot be equated with their “reasonableness”.³² For example, the applicability of the principle of good faith to liquidated damages clauses may be indicated not only by prior discussion of the agreed amount, but also by discussion of the methodology used for its calculation. In Latvia, incorporating discussion of the methodology for calculating liquidated damages could serve as a useful means of assessing their compliance with the principle of good faith. However, this assessment criterion is not universal, as there may be cases where the calculation methodology contains commercial secrets or state secrets, which at the time of concluding the contract cannot be revealed to others for legal reasons.³³ Latvian courts will potentially have to come to their own conclusions and criteria for assessing liquidated damages clauses between merchants. Foreign court practice and doctrine could be a possible source for these criteria.

To summarise, it must be concluded that allowing the liquidated damages, even only in commercial legal relations, would pose a serious challenge to the Latvian civil law system. The application of such a legally complex legal institution could cause difficulties for both the courts and the parties to the agreement. To be able to accurately determine the amount of potential damages at the time of concluding a contract, the parties to the transaction must have in-depth knowledge in the specific field, as well as sufficient financial and time resources to draft the contract. Therefore, in the authors' opinion, merchants are the subjects who could theoretically be allowed to use liquidated damages. Although, according to the practice of the Latvian Supreme Court, liquidated damages are currently not allowed, it is likely that the development of economic relations will force Latvia to allow the existence of such a legal institution. Therefore, it can be expected that in the coming years, liquidated damages or a serious reform of contractual penalties could become topical issues in Latvian civil law.

4. CONCLUSION

Liquidated damages are a civil law remedy commonly used in Anglo-Saxon countries., they are also applied in several countries with a Romano-Germanic legal system. Liquidated damages are a civil remedy that allows the parties to agree in advance on the amount to be paid in the event of a breach of contract. This avoids lengthy and costly litigation to prove the existence and exact amount of the damages. Since only one criterion (breach of contract) needs to be established to recover liquidated damages, this legal institution is similar to a contractual penalty.

The Supreme Court of the Republic of Latvia has adopted a judgment

³² CARTER, JW and Elisabeth PEDENA. A Good Faith Perspective on Liquidated Damages. In: RICKETT, Charles E.F. (ed.) *Justifying Private Law Remedies* [online]. Hart Publishing, 2008, pp. 149-174.

³³ *Ibid.*

prohibiting liquidated damages in Latvia. This judgment has sparked a debate on whether a complete prohibition of liquidated damages is appropriate in today's economic relations. The authors point to commercial legal relations as the most appropriate area in which liquidated damages could theoretically be allowed. However, the use of liquidated damages can pose considerable challenges even among the most economically knowledgeable and capable entities. These challenges are related both to the ability of the parties to the contract to apply this legal institution correctly and to the ability of the courts (currently without specific regulations) to control it.

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