

COUNCIL OF EUROPE COMMITTEE OF MINISTERS

RESOLUTION (78) 3

RELATING TO PENAL CLAUSES IN CIVIL LAW

*(Adopted by the Committee of Ministers on 20 January 1978,
at the 281st meeting of the Ministers' Deputies)*

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, in particular by the adoption of common rules in the field of law ;

Considering that it is necessary to provide for judicial control over penal clauses in civil law in appropriate cases where the penalty is manifestly excessive ;

Considering that penal clauses applicable on breach of contract constitute the most typical and frequent form of penal clauses and that it is therefore desirable to provide common rules for such clauses,

Recommends governments of the member states :

1. to take the principles concerning penal clauses in civil law contained in the appendix to this resolution into consideration when preparing new legislation on this subject ;
2. to consider the extent to which the principles set out in the appendix can be applied, subject to any necessary modifications, to other clauses which have the same aim or effect as penal clauses ;
3. to make this resolution and its appendix and the explanatory memorandum available to the appropriate authorities and other interested bodies in their countries.

Appendix to Resolution (78) 3

Article 1

A penal clause is, for the purposes of this resolution, any clause in a contract which provides that if the promisor fails to perform the principal obligation he shall be bound to pay a sum of money by way of penalty or compensation.

Article 2

The promisee may not obtain concurrently performance of the principal obligation, as specified in the contract, and payment of the sum stipulated in the penal clause unless that sum was stipulated for delayed performance. Any stipulation to the contrary shall be void.

Article 3

A penal clause shall not of itself prevent the promisee from obtaining specific performance of the principal obligation instead of the sum due under that clause.

Article 4

The sum stipulated shall not be due unless the promisor is liable for the failure to perform the principal obligation.

Article 5

The promisee cannot obtain damages in respect of the failure to perform the principal obligation instead of, or in addition to, the sum stipulated.

Article 6

Despite any stipulation to the contrary, the promisee cannot obtain a sum in excess of either the sum stipulated under the penal clause or the damages payable for the failure to perform the principal obligation whichever is the larger.

Article 7

The sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation. Any stipulation contrary to the provisions of this article shall be void.

Article 8

The provisions of the preceding articles shall be without prejudice to rules relating to any particular type of contract owing to its special nature.