Swiss Supreme Court clarifies the burden of proof in the context of liquidated damages clauses

In a recent decision (4A_526/2024, dated 28 April 2025), the Swiss Supreme Court (the "SSC" or "Court") addressed the aspect of the burden of proof in the case of a liquidated damages clause. More specifically, the Court specified that the parties are free to allocate the burden of proof and allegation under the contractual freedom.

In the case at hand, A German GmbH (the "**Seller**") and a U.S.-based corporation (the "**Buyer**") entered into a supply agreement (the "**Agreement**"), where the Seller was designated as the Buyer's exclusive supplier.

After having ruled that the Buyer had breached the exclusivity clause of the Agreement, the SSC addressed the question of whether the Seller had suffered damages in connection with the liquidated damages clause (providing for a lump-sum compensation). In this context, the Court first recalled that even if the Swiss Code of Obligations does not explicitly provide for liquidated damages, it is recognised in practice that the parties may agree in advance to such lump-sum compensation in the event of damage. The main purpose of liquidated damages clauses is to simplify the process of proving the **extent of the damage** for the injured party.

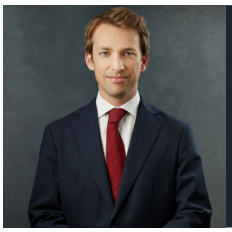
However, the Court pointed out that it is controversial whether a liquidated damages clause also relieves the injured party of the burden of proving that **damage occurred** (namely its existence). To address this point, the Court referred to three different legal positions and stated in a nutshell the following:

- The fact that the parties have provided for liquidated damages does not necessarily mean that the injured party (in this case, the Seller) must prove whether a damage has occurred.
- By virtue of contractual freedom, the parties are free to allocate the burden of proof. In other words, they can decide which party must prove the existence or non-existence of a damage.
- In case it is agreed that the injured party shall not prove the damage, the other party shall be given the opportunity to demonstrate that no damage has been suffered. In absence of such possibility, the liquidated damages clause would be deemed a penalty clause.

For this particular instance, in light of the Agreement and the terms used, the Court held that the liquidated damages clause relieved the injured party (the Seller) from proving **the existence** of the damage and **its extent**. However, the Buyer could still attempt to prove that no damage occurred. Accordingly, considering the breach of the exclusivity clause and that the injured party (the Seller) had followed the process to claim the liquidated damages (intended as compensation and not as a penalty according to explicit terms of the Agreement), such lump-sum compensation was due and payable by the Buyer, who failed to prove in this case the non-existence of the damage.

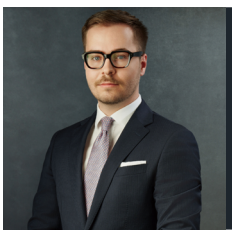
In light of this court decision, we would like to stress the importance to give particular attention to the drafting of liquidated damages clauses, respectively penalty clauses, in order to allocate, or even eliminate, the burden of proving the occurrence of the damage or its extent, in accordance with the will of the parties.

Should you require any further information on this subject, please do not hesitate to contact the authors or your usual contact person at Borel & Barbey. Our specialists will be pleased to assist you.



Pierre Turrettini
Partner
pierre.turrettini@borel-barbey.ch

Viviana Cibelli
Associate
viviana.cibelli@borel-barbey.ch



Julien Dayer
Associate
julien.dayer@borel-barbey.ch