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Title: Skutki naruszenia wymogów formalnychw prawie prywatnym – proporcjonalność i sposoby jej zapewnienia / The consequences of non-compliance with formal requirements in private law – proportionality and the means of assuring it

Source: Kwartalnik Prawa Prywatnego („Quarterly of Private Law”)

Year: 2015, vol: XXIV, number 4, pages: 785-816

Keywords: formal requirements, contractual formalities, remedies, sanctions, proportionality

Discipline: Law (Private Law, International Private Law, European Law, Commercial Law, Labor Law, Civil Procedure)

Language: Polish

Document type: Article

Publication order reference: Institute of Legal Studies, Polish Academy of Sciences, Nowy Świat 72, 00-330 Warsaw, Poland

Abstract:

The question of proportionality is undoubtedly an overriding concern of formal requirements in the modern private law – approaching form as a functionally motivated regulatory tool (designed to reach particular economic and social goals). As the goals in question and particular goals for their fulfilment (both formalities itself, as well as the consequences prescribed for their non-observance) are set forth generally, regardless of any particular legal dealing already made, the interdependence between these two spheres (“goals” and “means”) is being predetermined in equally abstract terms. This peculiarity – proper both (yet in different shape) for the requirements enacted through statute and stipulated by the parties – entails the need of assessment, whether formalities and effects of their breach remain actually proportional against the particular circumstances arising in their application. In some instances the balance in question can be distorted due to the occurrences and conditions existing both at the time of decision making or prior to it, as well as arising later on. In these cases emerges the need for restoring proportionality – and, if recognized, incentivizes to seek for remedial tools. The text summarizes the most common ways of maintaining and restoring proportionality, developed by the judiciary (in discourse with the doctrine) and statutory law, supplemented by the parties’ dealings. Upon these observations it attempts to identify the more common structures and concepts underlying the issue of proportionality in the field of formal requirements.