CONSIDERATIONS ON PENALTY CLAUSE IN ENVIRONMENTAL CONTRACTS

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Abstract
The study "Considerations on the Penalty Clauses" examines aspects of the conventional assessment of damages as penal clause in environmental contracts. Definition clause is found in the study, the usefulness of penalty clause, the concept and object of penalty clause.

Key words: penalty clause, environmental contracts, advantages, disadvantages of penalty clause.

INTRODUCTION

In Roman Law, *stipulatio poenae,* aimed at ensuring the execution of an obligation (Deleanu I. and Deleanu S., 2000).

However, *stipulatio poenae* was considered a genuine private punishment, qualification which generated the impossibility of being moderated by judge (Dumitru M., 2010).

In the primitive Roman law, *stipulatio poenae,* was an agreement ancillary to the main contract by which the debtor undertook a performance of services determined in advance in case of his default. The clause had only a penalty function, but, although distinct from the main agreement, the penalty contained in the clause could be added to any damages due to compensate failure for the main contract obligations. Afterwards, what continued to be called "penalty clause" became a substitute for damages, "the penalty" not being susceptible to aggregation with them. The remedy function prevailed against penalty function (Deleanu I. and Deleanu S., 2003).

The Penalty clause was designed long ago, being contained in **the contract for the establishment of a banking company**, a contract written on the XIIIth waxed tablet found in the area of former gold mines of Trajan Dacia and reproduced in the work of Theodor Mommsen, *Corpus Inscriptionum Latinarum*, volume III, p. 951 (Bâldea G., 2000).

In the area of former gold mines of Dacia Trajan at Alburnus Maior were discovered between 1786 - 1855, 50 waxed tablets, of which 25 have been preserved and were published in full in 1873 in Berlin (Turcu I., 2004).

The tablets contain the texts of **civilian contracts**, proving integration of this province in the legal system of the Roman Empire, being also unique in the world by their original drafting conception.

The contract for the setting up of the bank company was drafted and signed on March 28 167, at Deusara, locality located near Alburnus Maior, by Cassius Frontinus and Julius Alexandrus, document attesting the existence of the banking company having as object the cash loan with interest.

The Penalty clause in the Articles of Incorporation of the banking company sanctioned, in a severe and at the same time original manner, the swindling attempt of one of associates to another because that penalty clause stipulated was expressed in a multiplier rather than a lump sum as in the Roman law (Turcu I., 2004).

Under the influence of the **Canon Law** in France, the Penalty Clause was a substitute for damages, with purely remedy nature, the views on the possible revaluation of the court being divided (Dumitru M., 2010).

In the age of drafting The French Civil Code of 1804 the remedy aspect of the Penal Clause was considered prevailing without excluding the sanctioning dimension; the independence of the Penalty Clause in relation to the damage was stated, and, consequently, its autonomy to the remedy of common law (Dumitru M., 2010).

The same time, because some courts returned to the punitive tradition of Roman Law, the French legislator established two different texts to the Penalty Clause, Art. 1226 and Art. 1152, reproduced in their original form by our Civil Law as well (Deleanu I. and Deleanu S., 2003).

MATERIALS AND METHODS

1. CONCEPT

1.1. Definition of the Penalty Clause in the old Civil Code.

The main legislative parts relating to the penalty clause, which resulted in doctrinal and case interpretation were the provisions of the old Civil Code of 1864, Articles 1066 to 1072. The Penalty Clause had been defined by the old Civil Code, in **Art.1066**, as *"The Penalty Clause is that a person, to give assurance for the performance of an obligation, binds to give something in return in case of his failure to execute his obligations."*

1.2. Definition of the Penalty Clause in the new Civil Code.

The **new Civil Code** also enshrines the legal institution of the penal clause in art. 1538-1543, defining penalty clause (Art. 1538 para. 1) in the following terms: *"The Penalty Clause is that the parties stipulate that the debtor is obliged to a certain services provision in case of main default."*

1.3. Doctrinal definitions of the Penalty Clause.

In doctrine many definitions of Penalty Clause were formulated. Thus, the Penalty Clause is evaluated as follows: a) The Penalty Clause is that ancillary convention by which the main parties to the agreement predetermine the extent of damages to be paid by the debtor in the event of non-performance, defective performance or late payment of the services provision he had undertaken (Costin M.N. and Costin C.M., 2007).

a) (....) is a convention between the parties, accessory to the main contractual obligation by which the debtor undertakes, in case of default or inadequate execution or late execution of his main obligations, to submit a sum of money or other goods to the lender in return, as a remedy to the damage caused by his wrongful act (Angheni S., 1995).

b) The agreement by which the Contracting Parties assess in advance and inclusive the amount of damages for the event of default, defective performance or late performance of the obligation, by traditionally Roman terminology (stipulatio poenae) bears the name of Penalty Clause (Albu I., 1994).

Other authors, although do not enunciate a proper definition of the penalty clause, appreciated that *de lege lata* to define the penalty clause should be taken into account the following articles of the old Civil Code: Art. 1066, Art. 1069, Art. 1087 (Deleanu I. and Deleanu S., 2003; Dumitru M., 2008).

To **define** the penalty clause it is important to specify the time of the will agreement on damage assessment and determination of the amount of damages. Usually, the parties agree on the amount of damages after the default, as a result of the failure, improper or late execution of the contractual obligations (Angheni S., 1996).

The contracting Parties, however, can determine the amount of damages before the default takes place. This early assessment of damages shall be done as penalty clause, inserted in the content of the contract or established by a separate convention after signing the contract, but still before the default occurs (Angheni S., 1996).

By analysis of doctrinal **definitions**, along with those given by the legislation, we shall distinguish the legal characteristics of the penalty clause, as well as the purpose and functions of this clause.

2. THE ADVANTAGES AND DISADVANTAGES OF PENALTY CLAUSE

2.1. The practical advantages of inserting the Penalty Clause in agreements

Within the contractual relationship, throughout the contract or by a separate agreement, after the conclusion of a contract, but before the default, the parties have the opportunity to determine the amount of damages due by the debtor as failure to perform his contractual obligations.

The Penalty clause provides the advantage of allowing the parties and not the court to choose the amount of compensation in case of a damage suffered, thus the parties shall be from the beginning aware of what and how much it shall cost if they do not meet their obligations, in this point of view it not being only a mechanism of defence against harmful consequences of a default, but also coercion, both legal and moral, without leaving the parties in hope that they will not pay or will pay much less for "breaching" the contract.

Also, in the assumption of inserting a penalty clause in contracts, the injured party is exempt from a long, costly and uncertain legal procedure. It can thus be avoided a trial between the contracting parties to establish the due compensation for the damage caused to the creditor by non-performance of the contractual obligations.

The creditor receiving penalty clause is exempt from the requirement to prove the injury suffered by wilful misconduct of the main obligation. This clause gives the creditor the option between forced execution in nature of the main obligation and forced execution of the penalty clause. The choice shall be made by the creditor and is not within the debtor's freedom of choice (Turcu I., 2009).

Therefore, the parties are free of any evidence to the existence and extent of the injury and thus of the amount of damages owed by the debtor. The creditor must prove only the non-performance, the defective performance or late performance of the contractual commitments undertaken by the debtor.

In the event that the indemnity established is less than the actual injury, the liability of the debtor is reduced by effect of the penalty clause (Weill A., quoted by Bârsan C., in *The Penalty Clause in International Trade Agreements* by Babiuc V. et al, 1985).

We may conclude that the usefulness of the penalty clause, expression of the principle of contractual freedom, results from exempting the parties of any evidence on the existence and extent of the damage and the amount of damages owed by the debtor, and in avoidance of a possible legal dispute between the parties covering the settlement of the damages owed by the debtor to the creditor as a result of the damage caused.

2.2. Disadvantages of inserting the Penalty Clause in agreements.

Nevertheless the Penalty Clause has drawbacks. Thus, the debtor of the obligation performed improperly can be determined either for economic reasons or because the creditor's bad faith to set very high amounts in the penalty clause which can lead to unfair situations with injurious effects on him if the clause is enforced. (Sangeorzan D.E., 2009).

Likewise, if the amount determined by penalty clause is too small, it gives the debtor a means or reason to deliberately evade the execution of duties. This finding is particularly applicable when the penalty clause is less than the benefit that the debtor gets from non-performance of the contract.

3. THE FUNCTIONS OF THE PENALTY CLAUSE

The functions of the Penalty Clause resulted from the economy of Old and New Romanian Civil Code.

The specialty literature and in practice the penalty clause functions were discussed. There is no single point of view regarding their number. We rally to the opinion according to which the main functions of the penalty clause are: *the guarantee function, the function of mobilizing the debtor in the execution of contractual obligations, the sanctioning function, the compensatory function* (Angheni S. et al, 2008).

3.1. The guarantee functions of the Penalty Clause.

Under the provisions of the old Civil Code (Art. 1066-1072), the guarantee function realized by penalty clause is based on the idea that, by stipulating it in the agreement, the creditor in fact seeks the performance of the main obligation. Obtaining the object of the penalty clause remains just subsidiary.

The term "guarantee" should be understood in the broadest sense, including all legal means the creditor has on hand for the proper execution of the debtor's obligations. Thus the creditor, by stipulating the penalty clause, shall have the guarantee of getting what is due from his debtor.

The penalty clause is part of the so called "real performance guarantees" which are aimed to induce one party to perform in kind, properly and on time a certain obligation for which that guarantee had been stipulated, in our case the penalty clause. At the same time it should be noted that this is not an actual guarantee in the category of those who are likely to defeat the rule of equality of creditors.

The provision of the penalty clause ensures the compliance with contract obligations, causing the debtor to execute them properly and in good faith. This "admonish" wields a material and moral pressure on the debtor to avoid enforcement of the penalty clause. The guarantee function is effective only if the amount of penalty is properly established to an amount at least equal to the damages that the debtor would be required to pay in the absence of the penalty clause.

By comparing the provision contained in art. 1066 of the old Civil Code where the legislator uses the term *insurance* with the provision in art. 1539 of the New Civil Code, you can see that currently the legislator dropped the term of *insurance*, defining the penalty clause as *"that by which the parties stipulate that the debtor undertakes to a certain benefit in case of default."*

The new definition of the penalty clause is more appropriate to the real functions penalty clause meets given that it does not give the creditor a special guarantee on the debtor's assets (Angheni S., 2011).

3.2. The function of mobilizing the debtor in the execution of contractual obligations.

By its drastic nature the penalty clause is a means of mobilizing the debtor to a correct contractual conduct to not expose to the negative consequences arising from the enforcement of this clause. This function of the penalty clause is especially evident when the amount of penalty is greater than the damage caused to the creditor by failure, improper or delayed performance of the benefit to which the debtor had indebted.

The mobilizing function, stimulating on enforcement, of the penalty clause may result in establishing progressive penalties for late performance (Angheni S. et al, 2008).

The mobilizing function of the debtor in performance of his obligations is also drawn from the **provisions of the New Civil Code**, especially for the penalties progressively set for each day of delay. The penalty clause is mobilizing for the debtor also if the creditor requests both enforcement of the main obligation and the penalties for non-performance on the established time or place (Art. 1539 New Civil Code)

3.3. The sanctioning function

The penalty clause has a *sanctioning function* especially if the penalties amount more than the amount of the damages, as it is possible that the damage is absent, in which case the payment of the penalties is to sanction the mere fact of default and occurs as a real civil penalty - *of a means of prevention it becomes a punitive means, a sanction*.

The debtor is obliged to pay the amount of money or the pecuniary value provided in the clause even when they are higher than the actual damages sought by the creditor.

Art. 1541 para. 2 of the New Civil Code provide that the sanctioning function of the penalty clause is hardened by the legislator. Thus, if the court decides to reduce the amount of the obvious excessive penalty, *the penalty thus reduced shall be superior to the main obligation.*

3.4. The compensatory function of assessment and remedy of the damage.

The main function of the penalty clause is the compensatory function, of assessment and remedy of the damage of the debtor to creditor by *lato sensu* performance of the contractual obligations. This compensatory function, of damage remedy, is as efficient as the conventional penalty corresponds to the extent of the damage.

The compensatory function consists in the fact that by penalty clause the contracting parties conventionally establish in advance the penalties or other compensatory benefits binding the debtor to remedy the damage caused to the creditor by wilful misconduct of his obligations undertaken by contract.

To this extent, Art.1531 para. 1 and para. 2 of the New Civil Code provide: (1) *"The creditor is entitled to full remedy of the damage he suffered due to non-performance"* and (2) *"The damage is the actual loss suffered by the creditor and the benefit he is deprived of. Upon establishing the amount of the damages shall also be taken into consideration within reasonable limits the expenses of the creditor to avoid or limit the damage".*

CONCLUSIONS

In conclusion, the insertion of penalty clauses in contracts continues to remain a challenge both for theorists but especially for practitioners. As far as we are concerned, we consider that the parts of a contract can determine in advance the extent of damages to be paid by the debtor in case of failure, defective performance or delay in benefits he was indebted, and the creditor is not obliged to likelihood the injury.

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