

PRINCIPLE OF AVAILABILITY IN THE MATTER OF THE REDUCIBILITY OF THE PENALTY CLAUSE

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Abstract:

Being receptive to doctrinaire advocacies prior to October 1st 2011 and taking into consideration the social and economical realities of the last decades, the Romanian legislator, in art. 1541 of the civil Code gives the court the power to reduce the evidently excessive penalty clause in relation to the prejudice that could have been foreseen by the parties at the date on which the contract was signed. Amid the silence of the legislator and taking into account the disposition right of the parties over the object of the civil trial, we propose to find whether the court can diminish the obviously excessive penalty clause only when invested with such request or whether this prerogative can be exercised ex officio.

Key words: reducing excessive penalty clause, principle of availability

JEL classification: K10, K19, K41

1. PRELIMINARY

In the light of private law regulations, the current civil Code generated several modifications. Among those that are distinguished by the scale of practical implications is the recognition to the body of jurisdiction of the authority to modify the contract- law of the parties, in some situations.

If the previous civil Code almost excluded such possibility, the new civil Code is generous in providing the judge with wide powers of discretion and intervention on the contract and on the will of the parties; all with the generous purpose of saving the contract. If we had to keep in mind only a few of such cases, we could mention: the adaptation of the contract in unforeseeable cases or completion of the contract by the court when the parties have not reached an agreement regarding the secondary elements during negotiations. The court's interventions are based on subjective and/or objective assessment criteria. They imply a certain dose of subjectivism, the civil Code being impregnated with "reasonable manner" and the "reasonable" according to which the court must decide.

We did not set the purpose of analyzing to what extent conferring such prerogatives to the body of jurisdiction is or is not opportune in the current social, economical and political context, nor to present all situations in which the court can modify a contract or of the cases in which the court could use the criteria of "reasonable" in a ruling. We will limit our research to what is known in specialized literature as the mutability/reducibility of the penalty clause. The possibility recognized to the body of jurisdiction to revise the penalty clause, as it was defined by the Romanian legislator in art. 1541 of the civil Code, engages several controversies that will make the subject of a larger future research.

In the present study we will analyze only one aspect. Our choice is justified through the highly important consequences it generates in practice. We will try to determine if the court can reduce the penalty clause only when demanded or if it may undertake such action *ex officio*. Our research will only focus on art. 1541 (1) b) civil Code which states the possibility of reducing the penalty clause when it is evidently excessive in relation to the prejudice that could have been foreseen by the parties when signing the contract, leaving aside the diminishing of the penalty clause in case of a partial carriage of the main obligation.

2. THE SITUATION PRIOR TO THE ENTRY INTO FORCE OF THE CURRENT CIVIL CODE

In specialized literature and in the written law, the intervention of the body of jurisdiction on the penalty clause has received different denominations: revision [1], reducibility [2], mutability [3], modification [4], adaptation [5], reevaluation [6].

Prior to the entry into force of the current civil Code there was no general legal norm that allowed the judge to intervene on or modify the penalty clause in some conditions, on request or *ex officio*. On the contrary, there were provisions of general application that seemed to expressly prohibit the possibility of a judicial reevaluation of the penalty clause, and other relatively recent laws, but prior to October 1st 2011, have given the court such power only for a series of strictly determined contractual relations.

In the absence of legal provisions to clarify this problem, an important role in shaping a point of view in the matter discussed was played by the legal nature attributed to the penalty clause. We emphasize that the majority of the given arguments in favor of the reevaluation of the penalty clause were based on the exclusive or mainly reparative legal nature of the penalty clause. The recognition of a sanctioning nature or a prevalent sanctioning nature tips the balance in favor of the immutability of the penalty clause.

Regarding the rulings of the body of jurisdiction, the quality of the one who states the right to proceed to the reevaluation of the penalty clause has been explicitly and unequivocally stated in the rulings given by the arbitral courts in commercial litigation, in the last years of the previous civil Code [7]. The Supreme Court practice and the general court practice is towards respecting the will of the parties in establishing the penalty clause, meaning that it may not be judicially reevaluated [8].

A definitive answer and beyond any criticism regarding the possibility of a judicial reevaluation of the penalty clause was impossible to be given, having substantial arguments for either one of the two theses.

In this context, the intervention of the legislator to clarify the possibility of a judicial reevaluation of the penalty clause by the bodies of jurisdiction, in the sense of acknowledging such prerogatives, has been welcomed.

3. THE SITUATION AFTER THE ENTRY INTO FORCE OF THE CURRENT CIVIL CODE

According to art. 1541 civil Code about reducing the quantum of the penalty, the court can only reduce the penalty when: a) the main obligation was partly carried out and it was in the creditor's advantage; b) the penalty is evidently excessive in relation to the prejudice that could have been foreseen by the parties when signing the contract. In the latter case, the penalty must be reduced so it remains superior to the main obligation. Any contrary stipulation is deemed unwritten.

The tradition of inspiring by the French law is still common, the French model of modifying the penalty clause being closer to Romanian realities rather than the British one.

As seen, the current civil Code gave up the absolute intangibility of the penalty clause. However, there are some aspects of the institution that remained unclear, such as the possibility of exercising this prerogative *ex officio* or only by request.

4. THE DISPOSITION RIGHT OF THE PARTIES IN THE CIVIL TRIAL. EXERCISING THE RIGHT OF REDUCING THE EVIDENTLY EXCESSIVE PENALTY CLAUSE BY THE BODY OF JURISDICTION

Given the syntax of art. 1541 civil Code, we can mainly deduce that the court cannot modify the penalty clause. Only as an exception and only when the conditions of the law are met [9], the court

could modify the contract clause establishing the penalty. In other words, the court can reduce the quantum of the penalty only if it finds the penalty clause as evidently excessive in comparison to the prejudice that could have been foreseen by the parties when signing the contract. In this context, we ask ourselves whether the judge will be able to reduce the penalty clause only when it was invested with such a request or if it can also diminish the quantum of the penalty in the absence of an express request.

Unlike similar regulations from other European states which give various solutions, art. 1541 civil Code does not rule upon this matter. Art. 343 BGB only mentions that at the request of the debtor the penalty can be reduced to a reasonable amount. Art. 1152 of the French civil Code, following the modifications made by the law of July 11th 1985, states that the judge can modify the penalty clause, even *ex officio*.

So far, in Romania, to the extent of the information we have, there is no judicial practice following the entry into force of the current civil Code in this matter. However, due to a legislative loophole, other judiciary systems faced a non-unitary jurisprudence, which determined the enactment of one of the solutions. For example, art. 1152 French civil Code, in the initial version introduced by the law of July 9th 1975, kept quiet regarding the revision of the penalty clause *ex officio* or by request, which generated doctrinaire controversies and various case law solutions. Finally, 10 years later, the law of July 11th 1985 sorts out the problem, in the sense that the body of jurisdiction can, *ex officio*, reduce the evidently excessive penalty clause or increase the derisory one.

Our question is also legitimated by the fact that in recent specialized literature, in the context of analyzing the grounds of a court's right to reduce the penalty clause, the matter of exercising this power *ex officio* or only at request has been debated [10]. It was stated that when the grounds of reducing the penalty is considering to be unjust enrichment, the court could not, *ex officio*, invoke the existence of an oversizing of the penalty quantum and, in consequence, could not rule on reducing it, considering the principle of availability which is specific to the private law [11]. Solely at the debtor's request could the body of jurisdiction reduce the obviously excessive penalty clause quantum, if we were to admit as the ground of the reduction the fact that one of the conditions of the contractual liability is not met, respectively, the prejudice to have been foreseeable at the date of signing the contract [12]. If the abuse of rights [13] was considered as the ground of the right to reduce the penalty [14], then the court could reduce the penalty *ex officio*. An infringement of the art. 11 civil Code in conjunction to art. 14 (1) civil Code [15] could lead the court to invoke the existence of an excessive clause regarding the penalties *ex officio*, with the consequence of reducing it [16].

The attempt to know whether the court can reduce the penalty clause only when expressly requested requires, from our point of view, a dual approach: from the perspective of the substantive law, but more importantly taking into account the procedural law. If the judge can invoke *ex officio* the evidently excessive character of the penalty clause it more likely concerns the principles of the civil lawsuit, rather than the grounds of the right to reduce the penalty clause. The answer to this question is to be found in the interpretation and application of the principle of availability and the principle of immutability of the object of a trial, in relation to which we delineate the role of the judge and the role of the parties in determining the matter in dispute.

At a first glance, from the syntax of art. 1541 civil Code, it may seem that exercising the power of reevaluation of the penalty clause in the absence of an express request is prohibited. A more careful read, the solution could be subordinated to the parties' allegations brought to the body of jurisdiction.

In principle, a judge cannot reduce the penalty clause when it was not requested by the parties, since it would violate two of the civil lawsuit principles: the principle of availability and the principle of immutability of the object of a trial.

The immutability of the trial implies the fact that once a court was invested, the elements of the suit cannot be modified. However, the principle of immutability is not inflexible. In the interest of

the parties, but also in the interest of a proper administration of justice, it can and must be interpreted and applied nuanced.

The availability in a civil lawsuit means, substantively, the right of a party to order the lawsuit, and procedurally, its right to use all the procedural means established by the law [17]. From the rights included in the principle of availability, we are interested in our research only in the right of the parties to set the limits of the suit and its object.

Regarding the object of the trial, the court is bound by the plaintiff's request, being unable to extend its limits. The court is obliged to rule only regarding what has been asked and it cannot rule upon something that was not asked, give more than asked or not rule upon a certain claim. From this perspective, we could say that the court could not diminish the penalty unless it was invested by the application of summons.

But the parties can also decide on the limits of the trial, meaning the limits of the application of summons and the limits of the defense. Establishing a lawsuit's limits is not the exclusive prerogative of the plaintiff, the limits being set by both parties: plaintiff and defendant. As the plaintiff sets the "active" side of the trial through the claims it makes in the application of summons, the defendant is the one to set the "passive" side of the trial by indicating the defenses (excluding the fact that the defendant could file a counterclaim or could request adding other people to the trial). Only the defendant is entitled to establish the conditions and means in which he will respond to the plaintiff's claims. Similar to the plaintiff, solely the defendant determines the second side of the lawsuit. The defendant's role in the trial is as important as the plaintiff's, the parties being equal regarding procedural rights and obligations.

The principle of availability must not be seen as a sum of discretionary prerogatives, it must be nuanced or even differentiated, in relation to the nature of the dispute and the parties' position in the trial. But most importantly, it must be correlated with the other lawsuit principles: equality of the parties, the court's active role, exercising procedural rights in good faith.

The new civil procedure Code in art. 9 expressly states that the object and the limits of the trial are established through the requests and *defenses* of the parties. Note that the former civil procedure Code (repealed on February 15th 2013) made no such mention, it solely indicated in art. 129 that in all cases the judges rule only on the object brought upon dispute, with no other specifications regarding setting the limits of the trial.

As a consequence, in the situation in which the defendant in its defense invokes the evidently excessive character of the clause, we believe that the court should investigate the defendant's claims and in case it finds them grounded, to proceed at reducing the penalty clause. In other words, if the object of the initial claim is not the reduction of the penalty, the body of jurisdiction cannot reduce *ex officio* the penalty unless during the debates it was invoked and proved, aspects leading to this reevaluation; what is of importance is that these facts to be explicitly invoked by parties in their assertions. The evidently excessive character of the penalty clause is sufficient to be invoked by the debtor-defendant, at least as a defense in the trial. In this case, the principles previously mentioned would be respected, the judge's conduit being within the limits of art. 9 civil procedure Code, the judicial investigation and the ruling being within the limits set by the parties in their claims and defenses.

5. CONCLUSION

The Romanian legislator, receptive to some doctrinaire opinions, gave up through art. 1541 civil Code, in some exceptional situations, the intangibility of the penalty clause. Although it used as a "teaching material" the doctrinaire and jurisprudential experience of other states, it was not able to find a clear wording regarding the manner of exercising a court's prerogative to reduce the evidently excessive penalty clause.

Apparently, it seems that the court can diminish the evidently excessive penalty only if the application of summons contains such a claim. However, as we have proven, if by action or by

defense the evidently excessive character is invoked, the court is provided with the ability to diminish the penalty quantum.

Such an interpretation of art. 1541 (1) b) civil Code would result in protecting good faith, yet ignorant, imprudent or negligent debtors in defending their rights against penalty clauses that rigorously enforced would be far too onerous for them. *De lege ferenda*, we believe that the legislator's intervention would be appropriate in mentioning in art. 1541 if the court can reduce an evidently excessive penalty clause "at request" or "*ex officio*".

ENDNOTES

- [1] Mazeaud, D. (1992) *La notion de clause penale*, Librairie Generale de Droit et de la Jurisprudence, Paris;
- [2] Angheni, S. (2000) *Clauza penală*, ed. Oscar Print, București;
- [3] Deleanu, I., Deleanu, S. (2003) *Considerații cu privire la clauza penală*, Pandectele române, no. 1, pp. 113-135;
- Man, A., Varo (Cozea), N. (2004) *Considerații cu privire la "ireductibilitatea clauzei penale"*, Pandectele române, no. 6, pp. 251-254;
- [4] The term is used by the legislator in the law 193/2000 regarding abusive clauses in contracts between traders and consumers;
- [5] Deleanu, I., Deleanu, S., *loc. cit.*, p. 127;
- [6] Dumitru, M. (2008) *Reevaluarea judiciară a clauzei penale*, Dreptul, no. 4/2008; Dumitru, M. (2010) *Regimul juridic al dobânzii moratorii*, ed. Universul Juridic, București;
- [7] The solutions given by the body of jurisdiction share a few elements: all were towards reducing or eliminating the penalty clause, none towards increasing it; they were given at the request of a party, the reevaluation not being invoked by the court *ex officio*. The grounds for the judicial intervention on the penalty clause were diverse. Some arbitration courts motivated reducing the clause by the necessity of a balance between the prejudice caused and the claimed repair - Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț a României, sent. 89/1998, *Jurisprudența comercială arbitrală*, 1953-2000, București, 2002, p. 86. Another motivation was that the rule of the irreducibility of the penalty clause in art. 1087 civil Code concerns a penalty clause set within the law and the principles of the civil Code, and not an abusive penalty clause, infringing good faith and balance between benefits – Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț a României, sent. 158/1999, *Revista de Drept Comercial*, no. 4/2000, pp. 125-127. Reducing the penalty clause was also grounded on art. 5 civil Code which prohibits setting clauses that infringe public order and morals, as well as on art. 966 civil Code, showing that prohibiting usurious terms is a constant in Romanian law. See Man, A., Varo, N. (2001) *Notă la hotărârea arbitrală nr. 83/2000 a Comisiei de Arbitraj Comercial de pe lângă Camera de Comerț, Industrie și Agricultură Cluj*, *Revista de Drept Comercial*, no. 1/2001.
- [8] Înalta Curte de Casație și Justiție, S. com., dec. nr. 671/2006, *Revista de Drept Comercial*, no. 12/2006, pp. 157-162, in which the court ruled over the illegality of reducing the penalty clause of 6% per day of delay from the flow value; Curtea Supremă de Justiție, S. com., dec. nr. 4/2000, *Revista de Drept Comercial*, no. 9/2001, p. 162
- [9] Ignătescu, C., *Sisteme de drepturi subiective*, Analele USV, nr. 12, ed. US, 2010
- [10] Regarding the grounds of the penalty clause, see Pop, L. (2011), *Reglementarea clauzei penale în textele noului Cod civil*, Dreptul, no. 8/2011, p. 23;
- [11] Angheni, S. (2012) *Câteva aspecte privind interpretarea și aplicarea dispozițiilor Noului Cod civil privind reductibilitatea clauzei penale*, Curierul judiciar, no. 3/2012;
- [12] Angheni, S. (2011) *Reductibilitatea clauzei penale. Repere legislative, doctrinare și jurisprudențiale*, edn. "Justiție, stat de drept și cultură juridică", ed. Universul Juridic, București, p. 569;
- [13] Regarding the abuse of rights, see Ignătescu, C. *Abuzul de drept*, ed. Lumen, Iași 2013; Ignătescu, C. *Abuzul de drept și fraudă la lege*, în *Studii și cercetări juridice europene*, vol. I al Conferinței internaționale a doctoranzilor în drept Timișoara 2010, Ed. Wolters Kluwer, București, 2010; Ignătescu, C., *Abuzul de drept*, *Revista română de filosofie a dreptului și filosofie socială* nr.3/2006, ed. Myrton, Timișoara, pp.79-90
- [14] Ludusan, F. (2013), *Reductibilitatea clauzei penale în accepțiunea Codului civil din 1864, a noului Cod civil, a practicii judiciare și a doctrinei*, Dreptul, no. 5/2013, p. 108;
- [15] Art. 11 civil Code states that you cannot derogate through convention or unilateral acts from the laws regarding public order or morals; art. 14 civil Code shows that any person must exercise its rights and execute its obligations in good faith, according to public order and morals.
- [16] Angheni, S. (2012) *Câteva aspecte privind interpretarea și aplicarea dispozițiilor Noului Cod civil privind reductibilitatea clauzei penale*, Curierul judiciar, no. 3/2012, p. 149;
- [17] Deleanu, I. (2000) *Tratat de procedură civilă*, vol. I, ed. Servo-Sat, Arad, pp. 38-39.

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