

# NEW ASPECTS ABOUT THE PENALTY CLAUSE IN CURRENT LEGISLATION

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## **Abstract**

*The penalty clause is that ancillary agreement in which the parties predetermines the equivalent loss suffered by the creditor as a result of the failure, delay or improper performance of the obligation by the debtor. Over time, the legal nature of penalty clause has been a controversial subject. The provisions of the new Civil Code establishes a mixed theory of the legal nature of the penalty clause aiming at fulfilling its main function, namely the private penalty function and the repair function, plus the comminatory and warranty.*

**Key words:** *agreement, obligation, penalty clause, damage*

**JEL Classification:** *K12*

The obligation relationship, regardless of its source<sup>2</sup>, entitles the creditor to the debtor claims to give, to do or not do something. In principle, this benefit positive or negative<sup>3</sup>, is voluntarily<sup>4</sup> executed by the debtor. Otherwise, the creditor may resort to coercive power of the state to ensure they meet.

As an effect of any obligation is the right of the creditor to claim the debtor and obtain from the debtor the exact fulfillment that is required – the creditor is entitled to accurate and timely fulfillment of the obligation<sup>5</sup>. Also as a result of the requirement appears the creditor's right to claim damages or to use any other means provided by law for the implementation of its right, in case of partial or total non-performance or inadequate performance if the debtor.

Where performance of the contract is as it was assumed, the parties are in the presence of direct execution of civil obligations, and if the performance can't be made in kind, we talk about indirect execution or equivalent.

Direct enforcement or execution of the nature of the obligation is to meet exactly (exactly) the benefit to which the debtor was required in the legal obligation.<sup>6</sup> The general rule is that the debtor must perform as it was assumed, willingly. The direct and voluntary execution of civil obligations by the debtor is called payment. According to Article 1469 of The Civil Code, the payment is remission of a sum of money or, as appropriate, carrying out any other benefits which are subject to the obligation itself. Therefore, payment leads to the extinction of the legal relationship between the parties by making intentional outcome.

In practice there are situations in which the debtor does not perform its obligations voluntarily, so no payment is made. Such cases are the exception to the rule against enforcement of obligations voluntarily. Thus, the creditor, in order to exploit its subjective civil law heritage may request enforcement, meaning recourse to means which the law makes available to compel the enforcement debtor does not pay.<sup>7</sup>

In case of failure, late or inadequate performance of the obligation by the debtor, the creditor may require enforcement, rescission or termination, reducing their correlative obligations

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<sup>2</sup> According to art. 1165 Civil Code springs obligations are: contract, unilaterally act, business management, unjust enrichment, undue payment, unlawful act and any other act or fact which link the birth of a law obligations.

<sup>3</sup> Positive obligations involves an action - to give, to do, while negative ones imply an abstention - not to do.

<sup>4</sup> See art. 1469, paragraph 1 of the Civil Code.

<sup>5</sup> See art. 1516 Civil Code.

<sup>6</sup> I Dogaru, P. Draghici, *Fundamentals of civil law, Vol.III, General theory of obligations*, CH Beck Publishing House, Bucharest, 2009, p 412.

<sup>7</sup> See art.1516 of the Civil Code.

or other means provided for carrying out his duty. However, if it is entitled, the creditor can claim damages.

At the same time, the lender can always ask, according Article 1527 of The Civil Code, the debtor is required to perform the obligation in kind, unless such execution is impossible. The right to perform the obligation in nature includes the right to repair or replacement and any other means to remedy a bad performance.

Indirect execution means to recognize the right of creditors to demand full compensation for the damage he has suffered as a result of the failure without justification or culpable liability. It is recognized for the creditor the right to request and obtain performance full, accurate and timely obligation. However, art. 1530 provides its right to damages to compensate the injury caused by the debtor, and that is direct and necessary consequence of the failure without justification or culpable liability.

If the execution in the nature of the obligation is no longer possible, the original claim is replaced by another claim, namely compensation, which concerns the amount of money representing the creditor's damage.<sup>8</sup> But it can't be considered a transformation of the original obligation into a new one, because compensation is due to consider this obligation.<sup>9</sup>

Compensation is due both to the actual loss suffered by the creditor (*damnum emergens*) and for the benefit which lacks (*lucrum cessans*). In determining this is taken into account the reduction of expenses or losses avoided by the creditor as a result of default (Article 1531 of The Civil Code). Paragraph 3 of the same article states that patrimonial damage can be repaired. Moreover, under the provisions of The Civil Code, it can be repaired not only current damage but also a future one, when it is certain and if the damage can't be determined with certainty, it will be determined by the court. Article 1532, paragraph 3 isn't complete, there aren't clear criteria for determining the amount of damages. Next article states that the debtor is liable only for the damage he foresaw or could have foreseen the failure to enforce the contract is concluded, unless the failure is intentional or due to its gross negligence. Even in the latter case, the damages include only what is direct and necessary consequence of default.

Compensation is to be done in several ways: through court (judicial evaluation), the law (legal assessment) and by agreement between the parties (conventional assessment)<sup>10</sup>.

Conventional evaluation allows parties to understand and establish the rule differently than the law enforce, in the sense that they are entitled to change their agreement and to amend the legal status of contractual liability. An example of a change in contractual liability clauses is when by convention, the parties expressly and directly affect their liability for non-compliance of the contractual obligations.<sup>11</sup> These clauses must necessarily be agreed before execution benefits and producing the damage. Such type of clause amending the legal regime of contractual liability are those which anticipate or establishes the performance or compensation that the creditor is entitled to claim from the debtor in case of unlawful non contract.

The clause in a contract or in a contractual agreement whereby the debtor agrees to pay a sum of money or perform another determined benefit in favor of its creditor for illegal non-contractual obligations, bearing the name of penalty clause.<sup>12</sup>

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<sup>8</sup> C. Stătescu, C. Bîrsan, *Civil Law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008, p.328.

<sup>9</sup> T.R. Popescu, P. Anca, *General theory of obligations*, Scientific Publishing House, Bucharest, 1968, p.319.

<sup>10</sup> C. Stătescu, C. Bîrsan, *Civil Law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008, p.339.

<sup>11</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 14.

<sup>12</sup> L. Pop, *Overview of liability in the texts of the new Civil Code*, in the Romanian private nr.1/2010, p 222.

In another definition given in literature<sup>13</sup> the penalty clause is ancillary agreement by the parties that predetermines the equivalent of the loss suffered by the creditor as a result of the failure, delay or improper performance of the obligation by the debtor.

The older doctrine defined the penalty clause as ancillary agreement whereby the parties agree, thru expected appreciation, the amount of compensatory damages (or default) to be paid by the party at fault in the event of breach of contractual obligation.<sup>14</sup>

The Civil Code defines the penalty clause in Article 1538: "The penalty clause is the one in which the parties stipulated that the debtor undertakes a particular performance in case of default of the main obligation."

Although called "penalty" is not about the criminal right, but it is the clause by which the parties stipulate that the debtor undertakes a particular performance in case of default of the main obligation. The name comes from the Latin, from the expression "*stipulatio poenae*", in French is called "*clause penale*" and the English "*penalty*" or "*liquidated damages*".

Over time, the legal nature of penalty clause has been a subject of controversy. According to an opinion, penalty clause is restorative in nature, as it is a compensation for the damage suffered by the creditor, a simple conventional assessment to anticipate damages.<sup>15</sup>

According to another view, the clause is exclusive sanctioning: a private punishment has no connection with the repair of the common law.<sup>16</sup> This view is supported by the fact that the execution of the penalty clause is independent of the existence and extent of the damage caused to the creditor and even without any harm. In the latter case, payment of penalty punishes the mere fact of non-compliance.

In another view<sup>17</sup>, it is assigned that the penalty clause has a mixed nature: repair and sanctioning. Thus, thru penalty clause imposition is punished the guilty behavior of the debtor but it also covers the damage caused by defaults principal obligation.

The Civil Code establishes the mixed theory of penalty clause, having as its main landmarks three functions: reparative function, comminatory function and sanctioning one. Therefore, criminal clause contains in a single notion the reparative nature, establishing early repair (expressed in damages), but also the sanctioning of private contractual penalty for unlawful failure of the obligations under the contract.<sup>18</sup>

**a.** The reparative function, also called compensatory<sup>19</sup>, assumes that thru penalty clause be parties determine in advance the compensation which the borrower is obliged to pay for damage caused by failure or delay in performance of its obligations.

In The Civil Code the penalty clause is regarded as a restorative punishment, the legislator giving the main role to its private contractual penalty, in order to punish that illegal non obligations of the debtor, as provided in the alternative remedy component of the new regulation. Therefore, we can say, that it is primarily a civil penalty and without exception, and only then, only when the creditor has suffered harm, is also a repair.<sup>20</sup> This is explained by the fact that the

<sup>13</sup> C. Stătescu, C. Bîrsan, *Civil Law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008, p.344.

<sup>14</sup> M. Muresan, *The penalty clause*, in Dictionary of Civil Law by M. Costin, M. Muresan, V. Bear, Scientific and Encyclopedic Publishing House, Bucharest, 1980, p.90.

<sup>15</sup> C. Stătescu, C. Bîrsan, *Civil Law. General theory of obligations*, Hamangiu Publishing House, Bucharest, 2008, p.345.

<sup>16</sup> D. Mazeud, *The notion of penalty clause*, Librairie Generale de Droit et de Jurisprudence, E.J.A., Paris, 1992, p. 289.

<sup>17</sup> I.M. Anghel, Fr. Deak, M.F. Popa, *Liability*, Scientific Publishing House, Bucharest, 1970, p.371.

<sup>18</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 16.

<sup>19</sup> Angheni S., *The mechanisms and functions of penalty clause in the provisions of Law no.469/2002 on measures for strengthening contractual discipline*, Romanian Magazine of Private Law, no.2/2007, p. 17-19.

<sup>20</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 17.

existence and extent of the damage is not a prerequisite for enforcement of penalty clause.<sup>21</sup> It can also be invoked art.1538, paragraph 1, according to which the penalty clause is the one by which the parties stipulate that the debtor undertakes a particular case of default main benefit. From this legal text, results that the establishment and enforcement of penal clause is subject only to the main debtor defaults, whether it was caused or not an injury to the creditor.

The repair component of the penal clause is that it is designed to repair damage to the creditor, caused by unlawful failure of the debtor's obligations if the injury exists. Article 1539 provides that it can't be talked about both execution in nature of the main obligation and pay the penalty, their accumulation is possible only when the penalty was stipulated for defaults in time or spot.

**b.** The sanctioning character of private punishment is meant to punish the debtor for wrongful failure in fulfilling its obligations, whether or not the creditor was caused an injury. The character of private penalty results from the fact that it's set thru a specific clause or agreement with the value of private legal norm.<sup>22</sup>

The penalty clause sanctions that culpable performance and only secondarily covers the damage. This makes essentially its punishment part and not a repair, a compensation. The penalty clause is not intended to return property to the creditor as if he would have had if the obligation were performed. Designed to punish the debtor guilty, the criminal clause is a loss to his estate.<sup>23</sup>

**c.** The comminatory lies in the fact that penalty clause is a legal means of economic pressure on the debtor to determine him to execute its contractual obligations. In this way, it plays an indirect coercive, stimulating and mobilizing role in that penalizes breach of contractual obligations, even if it does not cause any harm to the creditor. Criminal clause appears as a process of constraint on execution and technique to prevent breach of contract.<sup>24</sup>

In French doctrine<sup>25</sup> it was stated that the agreed compensation is generally higher than the damage suffered by the creditor. It is seen as a private contractual penalty, which enriches and impoverishes the debtor creditor.

In another opinion<sup>26</sup>, the penalty clause functions are:

- a)** the security function, the term "security" is understood in the broadest sense, including all legal means they have at hand the lender for the performance of obligations by the debtor;
- b)** the insurance function combined with the mobilization of the debtor, this function is subject to the ratio of the amount of the penalty and the damages; the insurance function is based on the idea that, by stipulating it in the contract, creditor seeks, in fact, the main duty performance, obtaining only object remaining in the alternative penalty clause;
- c)** the sanctioning function - as a mean of establishing the anticipated contractual liability, it is likely that penalties have a value greater than the amount of damages, as damage may be missing completely, in the latter case, the penalties are designed to punish the mere fact of non obligation and appears as a true civil fine "a means of prevention, it becomes a means of repression, a penalty".<sup>27</sup>

<sup>21</sup> According to Article 1538, paragraph 4, the creditor may require performance penalty clause without being bound to prove any damage.

<sup>22</sup> I.M. Anghel, Fr. Deak, M.F. Popa, *Liability*, Scientific Publishing House, Bucharest, 1970, p.383-384.

<sup>23</sup> See M. Dumitru, *Judicial reassessment of the penalty clause*, Law Magazine no. 4/2008, p 132.

<sup>24</sup> D. Mazeaud, *The notion of penal clause*, LGDJ, Paris, 1992.

<sup>25</sup> P. Malaurie, L. Aynes, P. Stoffel-Munck, *Civil Law. Obligations*, Wolters Kluwer Publishing, Bucharest, 2009, translated by D. Dănișor, coordinating lawyer M. Șcheaua, p.569.

<sup>26</sup> Angheni S., *The mechanisms and functions of penalty clause in the provisions of Law no.469/2002 on measures for strengthening contractual discipline*, Romanian Magazine of Private Law, no.2/2007, p.17.

<sup>27</sup> I.M. Anghel, Fr. Deak, M.F. Popa, *Liability*, Scientific Publishing House, Bucharest, 1970, p.383.

d) the compensatory function, evaluation and coverage damage caused by the debtor to the creditor.

From the new regulations these are the legal characters of the penalty clause are: consensual, sanctioned, repair and enhancement.<sup>28</sup>

The consensual character<sup>29</sup> is underlined in the legal definition of penalty clause<sup>30</sup>. The following two characters are highlighted on the legal nature of both its components - civil penalty and repair.<sup>31</sup>

Article 1538 paragraph 2 and 3 and Article 1540 emphasizes the dependency relationship between the criminal and primary obligation clause. It can't exist outside a contractual context, can't take effect only if the primary obligation, unenforced or enforced delay, has its source in a contract whose validity is questioned<sup>32</sup>. The accessory character of the penalty clause makes this clause legal obligation to follow the fate of the main obligation (*accessorium serquitur principale*). Thus, it may be granted only if the principal obligation is not performed by the debtor.

Article 1540 provides that penalty clause is null in any invalid contract or settlement<sup>33</sup>. Thus, if the primary obligation is sanctioned by nullity shall be without effect also the obligation which includes penalty clause. However, if the only the penalty clause is void, the main obligation stays intact.<sup>34</sup> Also, if the principal obligation has become impossible through no fault of the debtor, the penalty may not be required because there is no justifying provided. The contractual nature of the penalty clause is mentioned in French doctrine and practice is considering the same thing, namely that, like the other clauses of a contract it has no effect in case of nullity of the contract.<sup>35</sup>

Penalty may be required when the performance obligation has become impossible to reasons not attributable to the debtor.

A valid penalty clause entitles the creditor to choose between the debtor sought an order requiring the execution of the nature of the principal obligation when this is possible and if he desires, and to seek an order that the execution penalty clause.<sup>36</sup>

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<sup>28</sup> L. Pop, *Treaty of Civil Law. Obligations. Contract, Vol III*, Legal Universe Publishing House, Bucharest, 2009, p 682;

<sup>29</sup> Unilateral inclusion of penalty clauses in the contract is not valid. See SCJ, sec. Commercial, dec.nr.2961 of May 18, 2001, in Review of Commercial Law no. 6/2004, p.237.

<sup>30</sup> See Article 1538 paragraph 1 Civil Code.

<sup>31</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 17.

<sup>32</sup> *Idem*, p.17. See Supreme Court, Commercial Division, Decision no. 809 of 12 February 2003, the jurisprudence Bulletin 1990-2003, p 285.

<sup>33</sup> The primary obligation can be extinguished by compensation (Article 438 Civil Code), confusion (Article 1439 Civil Code), debt relief (Article 1440 Civil Code).

<sup>34</sup> In accordance with art. 35 of Decree 31/1954, legal persons exercising their rights and obligations through their governing bodies, and according to Law no.31/1990 governing body empowered to enter into contracts on behalf of the company is the administrator. As the person who signed the receipt invoice accompanying the goods supplied do not have the authority to conclude contracts, criminal clause inserted in this bill is not valid without the consent of the debtor. Must distinguish between the main agreement, which was proven by performing *părestăției* one party, the other benefit accepted by paying the price and penal clause that can not be proven by the signature of a person competent to bind the company. See C.A. Brasov, Decision no. 97/Ap of 8 April 2004, Reports ... 2003-2004, p.4. The court remains valid solution because legislation has not been amended, art. 35 of Decree 31/1954 was taken over by art. 209 Civil Code, which provides that legal entity exercising rights and fulfilling its obligations through its administration.

<sup>35</sup> Cass. com (La chambre commerciale et FINANCIERE from the Cour de cassation), July 20, 1983, Bull.civ. IV, no.230; Revue trimestrielle of droit civil, 1984.710, obs. J. Mestre: nullity of an agreement issued by judges involve the nullity of the penal clause is inserted in it.

<sup>36</sup> See Article 1538, paragraph 2 of the Civil Code.

However Article 1539 provides that the execution in nature of the principal obligation can't be combined with any performance of the penalty clause, unless it has been stipulated for delay in execution or enforcement elsewhere than agreed.

Assuming that the penal clause is invalid or otherwise becomes ineffective<sup>37</sup>, this does not affect the main obligation or creditor's right to obtain redress. So, the only consequence of missing the penalty clause on main obligation is to return to the contractual powers under common law applicable to non-performance consequences.<sup>38</sup>

The accessory character of the penalty clause does not confer any right of option for the debtor. Obligations are contractual, the main one - to execute in nature and even the set obligations and the other subsidiary - to execute the penalty, execution that can consist of another benefit or payment of money.

Article 1538 paragraph 3 provides: "the debtor can't offer compensation". Thus, the debtors with penalty clause have no option between execution primary obligation and payment penalty clause. He can't refuse to perform, providing penal clause instead.

It should be noted that the penalty clause must not be confused with alternative obligation<sup>39</sup> or an obligation optional<sup>40</sup>.

Article 1538 paragraph 5 concludes that the main contract termination or cancellation will not affect the existence and enforcement of the penalty clause stipulated in the contract or in a separate agreement for default by the borrower. Instead, the criminal clause stipulated for delay in execution of main obligation will necessarily terminate as an incidental consequence to the principal contract termination or cancellation. Thus, the actual non-performance of the principal obligation can produce two effects simultaneously, without one to exclude the other: terminating the contract and is payable penal clause.<sup>41</sup>

Article 1539 of The Civil Code provides: creditor may request the execution in nature of the principal obligation and pay the penalty, unless the penalty was stipulated for the defaults set time or place. In the latter case, the creditor may require the execution of the main obligation and the penalty, unless he waive that right or do not accept, without reservation, the execution of the obligation. The legal text stipulates unable aggregation of the two powers of the creditor - request enforcement in nature and performance of the main obligation penalty clause. The penalty clause is therefore an alternative<sup>42</sup>. In exceptional situations, the purpose of penalty is not to punish main defaults, but delay in performing or, where appropriate, enforcement in a location other than the main set of that obligation.<sup>43</sup>

Compared to the previous regulation, The Civil Code deals with the problem of judicial reassessment of the penalty clause in Article 1541.

The judicial reassessment of the penalty clause means the judge can intervene upon request or ex officio, and change the amount of penalty clause, its downward when excessive or augmentation it when it is ridiculous.<sup>44</sup>

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<sup>37</sup> Article 276 of the Civil Code provides: penalty clause stipulated for breaking the engagement is deemed unwritten.

<sup>38</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 18. See also Article 1516 of the Civil Code.

<sup>39</sup> See Article 1461-1462 Civil Code.

<sup>40</sup> See Article 1468 Civil Code.

<sup>41</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 20.

<sup>42</sup> S. Angheni, *The penalty clause in civil and commercial law*, Oscar Print Publishing House, Bucharest, 1996, p 110.

<sup>43</sup> L. Pop, *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p 20.

<sup>44</sup> Pop L., *Treaty of Civil Law. Obligations. Contract, Vol III*, Ed Legal Universe, Bucharest 2009, p.687;

In literature and court intervention on legislative acts penalty clause appeared in various forms: revision<sup>45</sup>, reducibility<sup>46</sup>, reducers<sup>47</sup>, mutability<sup>48</sup>, modify<sup>49</sup>, adapt<sup>50</sup>. In case law<sup>51</sup> and in legal doctrine<sup>52</sup> was often discussed the admissibility of reviewing the penalty clause.

Unlike The French Civil Code, which was amended to provide in an explicit and imperative way the possibility for the judge to modify the extent of the penalty clause<sup>53</sup>, the text of the old Romanian Civil Code remained as at 1865. The theoretical and practical solution found in our law, was that of immutability<sup>54</sup> of the irreconcilability<sup>55</sup> of the penalty clause<sup>56</sup>. The mutability of penalty clause proposed is motivated by the Article 1270 paragraph 1 – a valid contract has the force of law between the contracting parties. In another opinion, the explanation of the mutability is justified by the principle of good faith, to the contract throughout its duration<sup>57</sup>, and the principle of fairness, proportionality of the contractual arrangement<sup>58</sup>.

In fact, any valid contract has the force of law only if and as long as good faith of the parties and utility are still presumed to them. When based on evidence, the presumption is rebutted the principle of compulsory labor contract must be understood and applied according to the specific situation. Consequently, when the penalty clause is excessively onerous, it becomes detrimental to the debtor and the judge justifies his intervention to link it with the principle of good faith and fairness.<sup>59</sup>

Thus, given the dual nature of the penalty clause, when it's derisory, its repair function will prevail upwards its by non-compliance and, conversely if it is too high, priority should be

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<sup>45</sup> D. Mazeaud, *The notion of the penalty clause*; C.E. Zamsa, *The theory of unpredictability. Study of doctrine and jurisprudence*, Hamangiu Publishing House, Bucharest, 2006, quoted by M. Davies in *Judicial reassessment of the penalty clause*, Law Magazine no. 4/2008, p 125.

<sup>46</sup> S. Angheni, *Penalty clause*, Oscar Print Publishing House, Bucharest, 1996, p.58.

<sup>47</sup> C. Ciubotea, *Abusive clauses in commercial contracts* in Romanian Journal of Business Law no. 2/2004, quoted by M. Davies in *Judicial reassessment of the penalty clause*, Law Magazine no. 4/2008, p 125.

<sup>48</sup> I Deleanu, S. Deleanu, *Considerations on penalty clause* in Romanian Pandectele no. 1/2003 - Supplement, p.126.

<sup>49</sup> The term is used by the legislator in Article 13 paragraph 1 of Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers, republished in the Official Gazette no. 305 of 18 April 2008.

<sup>50</sup> I Deleanu, S. Deleanu, *Considerations on penalty clause* in Romanian Pandectele no. 1/2003 - Supplement, p.127.

<sup>51</sup> See sent. 89/1998 of the Court of Arbitration of the Chamber of Commerce and Industry of Romania in commercial arbitration jurisprudence 1953-2000, p 86; sent. No. 158/1999 of the Court of Arbitration of the Chamber of Commerce and Industry of Romania, Commercial Law Review no. 4/2000, p 125-127. C.S.J., sect. Com., Dec. No. 642 of May 9, 1996, in Law no. 3/1997, p 122.

<sup>52</sup> I Deleanu, S. Deleanu, *Considerations on penalty clause* in Romanian Pandectele no. 1/2003 - Supplement, p.122.

<sup>53</sup> In French law, a long time the penalty clause was intangibil. It was affirmed that the judge can not intervene in any way to change the penal clause. Law of 9 July 1975 gives the judges the moderating power, so that whenever there is an excess, one way or another, to the damage assessed the day he states (Cass.civ. [ La chambre of the Cour de Cassation Civil] March 10, 1998, Bull.civ. I, no.98, Revue trimestrielle of droit civil, 1999.97, obs. J. Mestre: To assess whether an excessive penalty clauses, judges must be placed on their decision.). The judge can increase or decrease the penalty agreed. Judge's power should not be exercised only in exceptional: only if "sentence is manifestly excessive or ridiculous". The judge may then control one of the penalties of non contravention of a contractual obligation. - P. Malaurie, L. Aynes, P. Stoffel-Munck, Civil Law. Obligations Wolters Kluwer Publishing, Bucharest, 2009, translated by D. Dănișor, coordinating lawyer M. Scheaua, p.569.

<sup>54</sup> According to the Explanatory Dictionary of the Romanian Language "immutable" means that remains eternally the same, that does not change, permanent, constant, immutable.

<sup>55</sup> According to the Explanatory Dictionary of Romanian language "irreducible" means that can not be reduced to a simpler form, which can not be simplified.

<sup>56</sup> S. Angheni, *Penalty clause*, Oscar Print Publishing House, Bucharest, 1996, p.59.

<sup>57</sup> I Deleanu, S. Deleanu, *Considerations on penalty clause* in "Pandectele romane" no. 1/2003 - Supplement, p.125-128.

<sup>58</sup> Article 1272, paragraph 1 states: a valid contract requires not only what is expressly stipulated but also to all the consequences that practices established between the parties, custom, law or equity give contract after its nature.

<sup>59</sup> Dumitru M., *Judicial reassessment of the penalty clause*, Law Review no. 4/2008, p.136.

given to its sanctioning function taking steps to reduce it, so sensitive yet overcome the injury, because otherwise his character of private punishment would disappear.<sup>60</sup>

Thus, Article 1541 provides: "The court may reduce the penalty only when: a) primary obligation was partially enforced and the enforcement was in creditor's advantage, b) is manifestly excessive penalty to the damage that could be provided by the parties to the contract." From this text appears that criminal courts can't change the terms, but there are two exceptions, however, the first of which is set out in previous legislation.<sup>61</sup> The second exceptional situation is a genuine case of judicial reassessment of the penalty clause<sup>62</sup>. If the penalty is clearly excessive in relation to the damage that could be provided in the contract, it can be reduced only if a condition is met, that the main obligation<sup>63</sup> to remain high, which emphasizes the nature of the penalty.

The reference for court intervention must not be the damage or only the injury, but overall failure.<sup>64</sup>

Revising the penal clause allows the court to establish a relationship of proportionality between the seriousness of default main and criminal clause stated value.

This relationship is not proportional, but opposite assured if the above penalty clause if the value is too low in relation to the damage caused to the creditor. If it is accepted that the court may reduce penalty clause, it can to increase it. There is a possibility that the borrower take advantage of his ignorance or contracting party where he is at the conclusion of the contract and to determine the lender to accept a ridiculous penalty clause<sup>65</sup>. Although increasing the amount of penalty would support the compensatory function of penalty, to cover the loss suffered by the creditor as a result of non-performance of contractual obligations by the debtor, the latest legal texts on the penalty clause deals only with the admissibility review regarding reducible to: amount of money stated in the contract may be reduced to a reasonable level if it is "manifestly excessive in relation to the resulting damage and other circumstances"<sup>66</sup>, the sum stipulated for non-compliance "can be reduced to a reasonable amount where it is grossly excessive, damage resulting from of non-compliance and given other circumstances"<sup>67</sup>.

### Conclusions

Therefore the penalty clause is one of the most important contractual prerogatives that creditor has.

The provisions of the new Civil Code establishes a mixed theory of the legal nature of the penalty clause aiming at fulfilling its main functions, namely private penalty function and repair function, plus the comminatory and warranty.

Nowadays, the emphasis is increasingly often the patrimonial aspect of the contract and its proper execution becomes an overriding interest. By the threat they represent, penalty clauses plays an essential role in ensuring a guaranteed execution of the contract. And if the contract is

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<sup>60</sup> Pop L., *Treaty of Civil Law. Obligations. Contract, Vol III*, Ed Legal Universe, Bucharest 2009, p.690.

<sup>61</sup> Article 1070 of the old Civil Code provides: penalty may be diminished by the judge, when the principal obligation has been partly executed.

<sup>62</sup> Pop L., *The regulation of penalty clause in the text of the New Civil Code*, Law Magazine, no. 8/2011, p.24.

<sup>63</sup> See Article 1541, paragraph 2.

<sup>64</sup> Dumitru M., *Judicial reassessment of the penalty clause*, Law Review no. 4/2008, p.145.

<sup>65</sup> For example, if a trader has goods they wish to sell it as quickly as possible for the seller to be "forced" to accept only penalty of 0.01% per day delay paying the price, making the clause to be a criminal ridiculous.

<sup>66</sup> See Article 9509 paragraph 2 of the Principles of European Contract Law.

<sup>67</sup> See Article 7.4.13 UNIDROIT Principles paragraph 2 of the applicable international commercial contracts.

not executed, the penalty clause suppresses criminal behavior of the debtor and offers more interesting financial prospects to the lender than a judicial assessment of damages.

The provisions of the new Civil Code, the remedy of non-criminal illegal contract called penalty clause, has a higher regulatory undoubtedly from the old law, regulation corresponds to the needs and requirements of the current contracts, which is fully consistent with solutions enshrined in international trade and in major European projects of codifying contract law.

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