THEORETICAL AND PRACTICAL ASPECTS REGARDING ABUSIVE PENALTIES CLAUSES

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Abstract

In the first part of this article we present some general notions regarding penalties clauses, as well as their history and legal characteristics.

In the second part we analyse from a theoretical and practical point of view penalties clauses in different contracts, such as: leasing agreement, loan agreement, adhesion contracts and administrative contracts.

The conclusions refer to certain principles defined in jurisprudence in relation to penalties clauses.

Key Words: *Penalties clauses / leasing agreement / adhesion contracts / administrative contracts / jurisprudence*

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1. Introduction

The general legal regime of penalties clauses in the New Civil Code is provided for in art. 1538-1543. According to the legal provisions in force (art. 1538 para.1), penalties clauses are clauses by which the parties to an agreement stipulate that the debtor undertakes a certain performance if the main obligation is not fulfilled. Thus, if there is non-fulfillment, the creditor may require either forced execution in kind of the main obligation or penalties clause (para. 2). Debtors may not free themselves by offering the damages agreed upon. If penalties clauses are to be executed, the creditor shall not have to prove any prejudice. The legal provisions regarding penalties clauses are applicable to conventions by which the creditor has the right to keep partial payments made by the debtor if the agreement is terminated or rescissioned by fault of the debtor.

We shall note that the provisions of paragraph (1) of art. 1538 reassert the provisions of art. 1066 of the previous Civil Code. We shall underline that both interests and moratory damages are different from penalties clauses provided for in art. 1538 para. 1 of the New Civil Code. It is true that in both situations the amount of moratory damages and penalties clauses is determined by the parties. However, there are two fundamental differences. Thus, the legal nature of these two institutions is different. In the case of moratory damages, if for example there

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has been a delay in fulfilling an obligation, moratory damages are aimed at protecting the creditor from the risk of late fulfillment, penalties clauses represent more forcible „sanctions" because they provide a guarantee for the creditor against non-fulfillment of the main obligation itself. If the object of moratory damages and of interests may only be an amount of money, the object of the penalties clause is larger as art. 1538 refers to a „performance".

Penalties clauses are subsidiary conventions and they may be looked at as a way to engage civil liability, as well as a *sui generis* guarantee offered to creditors by debtors themselves (Opre, 2010: 50; Dicționar de Drept Privat, 1994: 229).

From para. 2 it follows that the non-fulfillment of an obligation represents the *exit* right of creditors from *vinculum juris* which has obliged them based on art. 1164 of the New Civil Code (2) ("Obligația este o legătură de drept în virtutea căreia debitorul este ținut să procure o prestație creditorului, iar acesta are dreptul să obțină prestația datorată."), in the sense that they have the possibility to request the fulfillment of the subsidiary agreement, the penalties clause and not the fulfillment of the main obligation.

The subsidiary nature of penalties clauses is stipulated in art. 1539 of the New Civil Code, which provides that both the fulfillment in kind of the main obligation and the payment of penalties may be requested, except for the case when these penalties have been stipulated for late fulfillment or fulfillment in another place than the one agreed upon. In this later case, creditors may request both the fulfillment of the main obligation and the payment of penalties if they do not renounce to this right or if they do not accept – without reservation – the fulfillment of the obligation. We would like to underline that moratory damages may take the form of penalties clauses.

From a historical perspective, penalties clauses had already appeared in Roman law, where they were known as *stipulation poenae,* which was a subsidiary convention to the main agreement by which debtors undertook a previously determined performance in case of non-fulfillment of their obligations. The function of this clause was only comminatory, but it could be cumulated with damages owed for non-fulfillment of an obligation undertaken in the main agreement. Later, this cumulating was not allowed any more, and penalties clauses had become a substitute for damages. We may assert that the reparatory function had prevailed over the comminatory function.

As for its legal nature, the penalties clause is a subsidiary convention the nullity of which may be triggered by the nullity of the main obligation, but it will not be possible to request the payment of penalties if fulfillment has become impossible for causes not attributable to the debtor. Penalties clauses could survive rescission due to their justification, i.e. to compensate the creditor in case of non-fulfillment of an agreement. They will produce their specific effects only when rescission is attributable to the debtor. Generally, the faith of penalties

clauses depends on the nature of the agreement and on the actual provisions that have led to non-fulfillment of the agreement (Vasilescu, 2012: 540; Pop, 2012: 317-320).

Art. 1541 of the Civil Code provides that: "Courts of law may not reduce the penalties only if: a) the main obligation has been partially fulfilled and this fulfillment has profited the creditor; b) the penalties are conspicuously excessive as compared to the prejudice that could have been foreseen by the parties at the moment of concluding the agreement.

In the case provided for in art. 1 letter b), the penalties thus reduced shall remain superior to the main obligation.

Any stipulation to the contrary is considered unwritten".

As for the second exception from the rule, different solutions have appeared in judicial practice as the legislator has not defined the term „excessive", which means that it is up to the courts to make such an appreciation. Before the adoption of the New Civil Code, judicial practice has appreciated that a penalties clause of 6% per day of default in commercial law is not an excessive penalties clause and it has been affirmed that exceeding the prejudice does not have to be 25-30% higher in civil contracts and 30-40% higher in commercial contracts. (High Court of Cassation and Justice, 2006). We would like to underline that the New Civil Code provides that penalties must be considered highly disproportionate as compared to the prejudice the parties could have foreseen when concluding the agreement and not by taking into consideration the actual prejudice suffered. From a comparative legal perspective, we shall point out that in French legal doctrine it is exactly the prejudice suffered that has been chosen as a criterion, which takes us towards judicial evaluation and it underlines a veritable reparatory character (Angheni, 2000: 72).

We consider that the rationale of the Roman legislator was to underline the punitive character of penalties, without the obligation of the creditor to prove something that both parties wanted to avoid, i.e. the proof of prejudice.

From a *per a contrario* interpretation of the provisions stating that "the court may diminish the penalties" (art. 1541 para. 1 New Civil Code), we could understand that they could be raised and the court could grant higher damages than those provided for. In reality, however, as opposed to the French legislator who expressly provides for the possibility of raising penalties clauses when they are ridiculous, the Romanian legislator has chosen as an exception from art. 1538 of the Civil Code only its diminishing (Ludușan, 2014: 155). At the same time, French legislation has an express provision that judges may intervene even *ex officio* in order to diminish excessive penalties clauses. We appreciate that this is possible under the system of our civil code, which results from a systematic interpretation of art. 1538-1541 of the Civil Code.

As for the conspicuously excessive character of penalties clauses (High Court of Cassation and Justice, 2003; Craiova Court of Appeal, 1999; Cluj Court of Appeal, 2014), judges primarily have in view the limits of the main obligation which they cannot disregard (diminish) in any circumstances. However, from this point of view, judges – taking into consideration the circumstances – might apply the reduction of penalties when they are indeed conspicuously higher. In this situation, judges will not be obliged to apply reduction proportionately to the non-fulfilled part of an obligation, but they will make an appreciation based on the criterion of equity (Ungureanu, 2012: 1634-1635).

Belgian jurisprudence constantly sanctions by absolute nullity excessive penalties clauses, motivated by illicit cause or public order (Turcu, 2011: 630).

We would like to add that when the parties have disguised a liability limiting clause under the form of a penalties clause, setting a ridiculous limit for damages, the penalties clause may be annulled if it illegally limits contract liability, as for example in the case of non/fulfillment due to intention or serious fault. Otherwise, the New Civil Code expressly provides to this end that liability for material prejudices caused to someone else by a deed committed with intent or by serious fault may not be excluded or limited through conventions or unilateral deeds (art. 1355 para. 1). As the disguised penalties clause is void, the creditor will be able to cover the prejudice suffered by appealing to judicial evaluation (Angheni, 2014: 799).

It is also possible that the penalties clause itself provides its reduction in case of partial non-fulfillment only, in which case the judge shall diminish the penalties clause.

Generally, abusive clauses are defined in art. 4 of Law no. 193/2000 on abusive clauses in agreements concluded between traders and consumers. A clause is abusive when it has not been directly negotiated with the customer, if by itself or together with other provisions of the agreement it creates a significant disequilibrium between the rights and obligations of the parties, to the detriment of the consumer and contrary to the requirements of good-faith.

The European Court of Justice has decided that if such clauses are identified, national courts shall entirely exclude their application and not only limit their effects.

In the following, we shall analyse the issue of excessive penalties clauses in leasing, loan, exclusive distribution and administrative contracts.

Leasing agreements are regulated in Government Ordinance no. 51/1997, and at international level they are regulated by the UNIDROIT Convention on international financial leasing, signed in Ottawa on May 28, 1988.

In judicial practice, many abusive clauses comprised in leasing agreements take the form of penalties clauses consisting of the obligation of users – upon termination of the agreement – to return the good that has been the object of the

agreement and to pay the remainder of the lease until the end of the agreement, with damages, or by obliging the user to pay damages that are equal to the sum of the reminder and the residual value (Ludușan, 2014: 155).

The following clauses have also been considered abusive in leasing agreements: a) the contract provision stating that if an insurance company refuses to pay the entire sum of the damages, users undertake to cover the difference. This type of clause produces without any doubt a lack of contractual equilibrium between the lessor and the user and the good-faith of the insurance company is excluded as long as it does not have any benefit. If it is inserted in the standard from currently used by the user and this user is also a consumer, the clause providing that if the insurance company refuses to pay the entire sum of the damages the user undertakes to cover the difference qualifies as an abusive clause. b) the clause stipulating that the parties derogate from the rules on the imputation of payments, in the sense that any amount paid by the user shall first extinguish default interests, then other expenses and only finally leasing rates. This clause is not abusive in itself, but the way in which lessors understand to fulfil it, creates an unfavourable situation for users who most of the time do not have the possibility to know the extent of the penalties the insurance company claims from them taking into consideration that most of the time these expenses are invoiced separately in practice.

In loan agreements, judicial practice has constantly stated that a penalties clause agreed upon by the parties in the sense of transmitting the property right of the immovable by the debtor (borrower) if the amount is not paid on due date is sanctioned with absolute nullity (High Court of Cassation and Justice, 2003; Craiova Court of Appeal, 1999; Cluj Court of Appeal, 2014). This is because even if the parties, more exactly the debtor has undertaken to transmit the property right in case of non-payment, we are in the presence of an *in rem* guarantee from a formal point of view, but this does not present any of the special characteristics of this type of guarantee. The argument that art. 1088 of the Civil Code from 1864 provided: ”for obligations having any amount as their object, damages for non-performance may only comprise the legal interest, except for the special rules in commercial, surety/guarantee and company law” had also been invoked.

As for exclusive distribution agreements, first we would like to point out that this type of agreement is a very often used framework agreement. Most of the time, in practice they are concluded between a manufacturer and a retailer who set the main rules governing their future relationships. The framework agreement gives birth to an obligation that constrains the parties to conclude new agreements in the future, but it gives them the liberty to decide the conclusion, and especially the content of application/ implementation agreements or performance agreements as they are also called.

As for this type of agreement, we may discuss certain clauses that might qualify as abusive penalties clauses. For example, non-compliance of the provider with the obligation of exclusivity granted to a distributor, in the sense of granting the right of selling the same merchandise to other persons, may create a prejudice to the distributor by diminishing its patrimony with the value that would result from selling the goods that the provider has had the obligation to provide according to the obligation of exclusivity.

Thus, if the provider does not comply with the obligation of exclusivity, which may give birth to a prejudice for the distributor, the parties may insert in the exclusive distribution agreement a penalties clause to determine the amount of damages that may result from non-compliance with this obligation by one of the parties, damages that have to be proportionate to the prejudice suffered by the other party (Ludușan, 2014:162).

The issue of abusive penalties clauses in administrative contracts shall be analysed starting from the special character of administrative contracts, i.e. that they comprise both elements that are typical to unilateral administrative acts and elements specific to private law contracts. Due to this uncontested fact, the opinion that administrative contracts may not be qualified as adhesion contracts has been expressed.

Abusive clauses may not be the object of administrative or public utilities contracts, but the possibility of abusively exercising the standard clauses of these adhesion or administrative contracts by one of the parties might exist. In this case we have to distinguish between abusive clauses and the abusive exercise of a contract clause by one of the parties. This would be the case of abusively exercising the contract clauses in contracts for the delegation of the administration of public utilities and in public utility provision contracts which entitle the creditor of a performance to request damages from the debtor of that performance, although the former one has not suffered any prejudice. Such a situation represents a case of abusive exercise of the respective contract clause.

In turn, a contract clause that establishes default interests that exceed a reasonable value, by which one of the contracting parties undertakes the obligation to pay predetermined default interest – of an excessive value – to the other party, shall be considered abusive, disguised in the form of a penalties clause.

As for the issue analysed, the jurisprudence has set a series of principles, of which we would like to mention the ones that we consider more relevant:

1. General conditions from the overleaf (verso) of invoices accepted for payment may not be mandatory for customers as they have not been accepted by them through signature or another explicit way, by way of common agreement of the parties.

2. A simple mentioning of penalties on invoices, in the absence of an agreement which provides this sanction, does not replace the agreement of the

parties in relation to this clause. As a result, it may not be asserted that invoices accepted for payment produce legal effects as for penalties mentioned thereby.

3. If the contract provides for default interests, they shall be granted, because in commercial matters the level of damages for non-fulfilment is not limited by the threshold of the legal interest as in the case of civil loans.

4. If a commercial agreement is terminated, claims for obligation to pay default interests shall be denied if the parties have not stipulated a penalties clause.

In conclusion, damages set by means of penalties clauses shall be proportionate to the amount of the prejudice suffered by the other party, otherwise such a clause will be considered abusive.

The abusive character of a clause included in leasing agreements or administrative contracts may take the form of a penalties clause if default interest exceeds a reasonable value or if there is an obligation to pay predetermined default interests of an excessive value as compared to the prejudice caused to the other party.

As for loan agreements, the High Court of Cassation and Justice has stated that a penalties clause agreed upon by the parties in the loan agreement, in the sense of transmitting the right of property by the debtor (borrower) if the loan is not paid on due date, is sanctioned with absolute nullity.

Abusive clauses may not be the object of administrative contracts or public utilities provision contracts, but there is the possibility of abusive exercise of clauses predetermined in these contracts by one of the contracting parties.

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