TORT LIABILITY. DAMAGES AND PENALITY CLAUSE

Assistant professor **Raluca Antoanetta TOMESCU**[1]

Abstract

Tort liability has always been a constant manifestation of social life in the community, having as its main effect the birth of a new legal obligational relationship established between the author of the deed which caused the prejudice and the injured person. Apodictically, legal liability will result in an attempt to repair the damage created mainly in kind, and when it is no longer possible to repair the damage, it will be in the form of damages established legally or judicially, or in the form of a penality claim in the case of conventional damage. From this perspective, we considered it appropriate to emphasize the effects on the penality clause of the hypothesis of intervention on the contract with another sanction of law, applicable in the case of culpable non-fulfilment of the contractual obligations, namely cessation or termination. The current Civil Code determines that, upon termination of the contract, the parties will be released from any obligation. Therefore, by termination of the contract, as a result of the declaration of termination, respectively of the cessation, the obligations stipulated in the penality clause are abolished, because the source itself was abolished, as we can no longer speak of a contractual obligational liability. Of course, in this hypothesis, the creditor will have at hand to claim non-contractual damages, where the person who considers himself prejudiced has to prove the damage and its source.

Keywords: *damages, penalty clause, compensatory damage, moratory damage.*

JEL Classification: K12, K13

1. Introduction

The special relationship established between society and the individual has apodictically imposed social responsibility as a constant fundamental condition of cohabitation in the community. This *sui generis* relationship has permanently involved both condescension, but also the sanctioning of the individual, reporting his attitude to the expectations of the community, but especially to the social norms imposed by it[2].

As a matter of principle, no one will be tolerated that by his/her behaviour to breach or ignore the rights and interests of another person. Regardless of whoever breaches this elementary rule, he/she will be obliged to answer for his/her actions, so liability and sanction will always be two aspects of the same social phenomenon, giving rise to a cause-to-effect relationship[3].

When a breach of a rule of law is found, a new form of social liability, that is to say, legal liability, which will work alongside moral or religious liability as an integral part of it, is set up.

Legal liability will therefore be one of the most important and frequent concrete manifestations of the social responsibility of the person. While preserving its position gained in the oldest times and which it has not ceased to have at present, legal liability can be said to express the very essence of the notion of law in its most concrete form and which in fact will reflect the whole stage of the evolution of social life, in its dynamics.

In terms of the substantive and form conditions, characteristic of each branch of law, a specific form will correspond to legal liability and related sanction. Thus, along with criminal or administrative liability, civil legal liability is a fundamental, very extensive and complex institution of civil law, which has in principle the idea of responsibility and accountability of the person.

Civil liability will permanently result in a sanction imposed on the guilty person, as stated in the axiom, according to which any person is obliged to repair the damage caused to another person by his/her contractual or extra-contractual action.

---

[1] Raluca Antoanetta Tomescu – „Andrei Saguna" University of Constanța; PhD. student at „Nicolae Titulescu" University of Bucharest, Romania, ratomescu@gmail.com.

[2] „Social norms are the institutionalized form by which human behaviour is appreciated, their breach always implying social responsibility" L.R. Boilă, *Răspunderea civilă delictuală obiectivă (Objective tort liability)*, C.H. Beck Publishing House, Bucharest, 2008, p.21.

[3] "Every cause has its effect, and every effect has its cause and nothing escapes from this", Armeanu Ion, *The Law of Cause and Effect*, www.oportunitati-afaceri.ro (25.09.2018).

The main effect of civil liability will give rise to a new legal obligational relationship, established between the perpetrator of the offense that caused the prejudice and the injured person and which will have as its object the full repair of the damage caused.

Romanian civil law establishes a classification of civil liability in two forms, making a clear distinction between contractual civil liability, which has as its source a contract and tort liability, which will have as its source the illicit deed causing the prejudice (the civil offense).

Under this imperative delimitation, research literature promotes the view that "*civil liability is the common law of civil liability, and consequently its rules will apply in all situations wherever we are in the presence of contractual obligations"*[4].

If in principle, as a basic rule, the repair of the damage in kind is attempted, the daily reality has proved that this is not feasible in all situations, which required the establishment of an alternative, subsidiary and compensatory way, namely the repair of the damage by equivalent.

Thus, when the repair of the damage is no longer possible in kind, it will be accomplished by equivalent, in the form of the payment of damages, usually monetary, bearing the name of damages. Although the legislator did not provide a precise definition of damages, it may be deduced from the text of Article 1530 of the Civil Code which makes reference to the creditor's right "*to damages for the repair of the prejudice caused by the debtor and which is the direct and necessary consequence of non-performance without justification or, as the case may be, of the obligation "*. On that basis, in the doctrine, damages were defined as "*the monetary indemnities that the debtor is obliged to pay for the purpose of repairing the damage suffered by the creditor as a result of the culpable non-performance of the obligations"*[5].

2. Damages and penality clause

De lege lata, the determination and assessment of damages can be made by court, where, through a judicial assessment, they are given to the creditor by a court, when the person deemed to be injured is going to prove the nature of the damage; by law as a consequence of a legal evaluation or by the parties' convention as we refer to a conventional assessment - in this case the parties providing for a contractual clause, in particular in order to predict the extent of the prejudice in the event of non-performance of the main obligation.

Thus, through the distinction, established by the legislator, between "*the two types of relations, a liability is generated on the one hand on the basis of an unlawful legal fact and, on the other hand, a liability for the breach of a pre-established civil obligation"*[6]. If the tort liability is based on an unlawful legal act, instead, in the case of contractual liability, it is caused by the prejudice created by the breach (non-observance) of an obligation assumed by a contract or by a contractual obligation.

Therefore, when by the breach of a rule of conduct ("*alterum non laedere*") the subjective right or legitimate interest of a person is harmed, causing damage to the person, the consequence of this action will entail the engagement of the tort liability of the perpetrator.

Our current Civil Code establishes with reference to the forms of repair that in the case of tort liability, the repair of damage to be done mainly in kind until the restoration of the previous situation (Article 1386), but alternatively, when the repair of the damage "*is not possible or if the victim is not interested in the repair in kind, by payment of an indemnity, determined by agreement of the parties or, failing that, by a court order.*"

Indeed, breach of any obligation arising out of a contract will result in the incurring of contractual liability, which in principle will be governed by the parties' convention and, in subsidiarity, by the right of the injured party to damage compensation. In general, when speaking of

---

[4] Turianu C., Duțu A., *Drept Civil. Compediu (Civil Law. Compendium),* Universul Juridic Publishing House, Bucharest, 2016, p. 414.

[5] L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile (Elementary Treaty of Civil Law. Obligations),* Universul Juridic Publishing House, Bucharest, 2012, p. 303.

[6] A. Stoica, *Drept Civil, Obligațiile (Civil Law. Obligations),* Pro Universitaria Publishing House, Bucharest, 2015, p.142.

contractual liability, and the extent of the compensation is determined by the parties' agreement, this conventional assessment of damages is recognized as a penality clause.

When we talk about contractual liability, the repair of damage occurs within the broader framework of engaging the contractual liability of the debtor. The Civil Code states in the art. 1350 on contractual liability that, in principle, any person must fulfil his/her obligations, but "*where, without justification, he/she does not fulfil this duty, he/she is liable for the damage to the other party and is obliged to repair this damage, under the law ".*

The doctrine classifies damages in compensatory damage, which is the remedy if the damage suffered by the creditor consists in the non-performance, incomplete or defective performance of the debtor's obligations, respectively in moratory damages by which the damage caused by the debtor is repaired by performance with delay of its obligation[7].

Therefore, the debtor will, of course, be held liable to repair the damage to the creditor. The injured party may claim, depending on the nature of the prejudice, compensatory, respectively moratory damages, established by legal or judicial assessment, which constitute the common law in the matter.

However, the parties have the freedom, that by means of a clause inserted in the contract or by a separate convention, to determine in advance the amount of damages that the debtor owes to the creditor in the event of non-performance of the obligations assumed by the contract. Therefore, when the parties consider it useful that by the contract to establish, in anticipation of the occurrence of the damage (future and uncertain event), a conventional assessment of the damages (compensatory or moratory), this conventional contractual assessment of the damages will be the penality clause.

Contractual liability in the form of a penality clause cannot be said to be a creation of the modern legal system. The origins of the penality clause are considered to be contradicted by the principles of Roman law, which by offering valuable constants for the posterity, by its logic and pragmatism strongly influenced the legislations that followed and where *stipulatio poenae* presented itself as an accessory convention to the main contract, distinct from the main agreement and which anticipated the benefit to be borne by the debtor in the event of failure to comply with the main obligation "*Stipulatio poenae namely the promise of a patrimonial benefit in the event that a fact agreed between the parties happens or not (...) It is an ancillary and conditional convention. It is based on a main convention, which must give rise either to a bond, either civilis or naturalis, either simple or with a term or with condicio.*[8]*"*

In the old Romanian Civil Code, we find this notion assumed in the art.1066, which defines the penality clause as "*the one by which a person, in order to provide assurance for the fulfilment of an obligation, is bound to give a thing in case of its non-performance".*

Our current Civil Code regulates, in Article 1538, the penality clause as being that convention "*whereby the parties stipulate that the debtor is bound to perform a particular benefit in the event of non-performance of the main l obligation."*

We note that by this definition the legislator has clearly emphasized, using the phrase "*non-performance of the main obligation*", the ancillary character of the penality clause, but also the source of the penality clause, namely the "*convention*" of the parties, the source of the main obligation.

As an ancillary convention (obligation), "*the penality clause is obviously of a contractual nature"*[9], the legal regime of the penality clause being similar to the main one, so that the penality clause will have to be subject to the validity conditions of the main one, which will imply "*firstly, the fulfilment of the general conditions for the validity of any convention, and secondly, the validity*

[7] See Turianu C., Duțu A., *op. cit.*, p. 414.
[8] Longinescu S.G., *Drept privat roman (Roman Private Law)*, University of Iasi Yearbook 1901-1902, p. 69 and seq.
[9] Angheni S., *Clauza penală în Dreptul Civil și Comercial (Penality Clause in Civil and Commercial Law)*, OscarPrint Publishing House, Bucharest, 1996, p.18.

of the main obligation is an essential condition for the validity of the penality clause, and if the main obligation is extinguished, then the penality clause will also be extinguished[10]".

However, it is important to emphasize that, regardless of whether the damages are moratory or compensatory, legally or judicially established, or established conventionally as in the case of the penality clause, they are consequently a result of the culpable non-fulfilment of the contractual obligations, but only in the case the penality clause, according to art.1538, paragraph 4, Civil Code, "*The creditor may request the performance of the penality clause without having to prove any damage*".

I therefore agree to the view that the great advantage of the penality clause lies primarily in the fact that "*the stipulation of the penality clause is of great practical utility, because it anticipatedly sets the amount of the prejudice caused to the creditor through non-performance, late or inadequate performance. In this way, the parties are exempt from addressing justice for the assessment of the damage and the difficulties involved by its proof are removed*"[11].

It should be noted that when damages are granted by the court or come as a consequence of the provisions of the law, the creditor will be required to prove the nature of the damage as well as its extent as opposed to the case of conventional assessment by the stipulation of the penality clause, where, as these are already established by contract, become applicable by the mere fact of culpable non-performance of contractual obligations.

In the case of the penality clause, it is not necessary to prove the damage or the extent thereof, since, having as its source the contract, the effects of the penality clause are in fact an obligation assumed by the parties by contract, a contract on which the parties have expressed their free consent, from the moment of its conclusion.

In contrast, however, with the evidence regime in the case of conventional evaluation where it is sufficient to prove the source of that obligation, namely the contract or the agreement of the parties, in the case of judicial assessment of damages, whether compensatory or moratory, these will always have to be proved, which implies that the injured person should indicate their source, the damage suffered and the causal link between the damage and the allegedly guilty person.

Although, with the drafting of the current Civil Code, we retain the intention of our legislator to provide a clearer and more predictable legislative framework, we cannot say that all the constantly controversial and widely debated issues of doctrine would have been resolved, one of these being incidental to the present study, namely the survival of the penality clause in case of cessation or termination of the contract. Although we cannot fully criticize the ambiguity of the law text, this very complex issue remains subject to the analysis of theoreticians and practitioners in terms of the practical consequences they generate.

Both in the research literature and in the judicial practice, there are countless contradictory opinions on the effects on the penality clause of the hypothesis of intervention on the contract with another sanction of law, applicable in the case of culpable non-fulfilment of the contractual obligations, respectively the cessation or termination thereof.

We observe, on the one hand, the opinion of the doctrine, according to which, without challenging the ancillary character of the penality clause "*explained by the link of dependence that exists between it and the obligation arising from the main contract*", it is stated that only in principle the penality clause will pursue the fate of the main one, since this rule allows only one exception, namely the dissolution of the main contract through a cessation, which will not affect the existence and performance of the penality clause. It is therefore argued that when the main contract ceases as a result of the declaration of cessation or termination, the penality provision may continue to have effect if it has been stipulated for the case of non-performance of the debtor's obligations in kind, but the same author further asserts that when the penality clause was specifically stipulated for delay in the performance of the main obligation, it would be compulsorily dissolved as an ancillary

[10] Boroi G., Stănciulescu L., *Instituții de drept civil în reglementarea noului Cod civil (Institutions of Civil Law in the Regulation of the New Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p. 195.

[11] Stătescu C. and Bârsan C., *Drept civil. Teoria generala a obligatiilor (Civil Law. General Theory of Obligations)*, All Beck Publishing House, Bucharest, 2000, p. 325.

consequence of the cessation or termination of the main contract. It is stated that in conclusion an "*actual non-fulfilment of the main contractual obligation can simultaneously produce two effects, without one excluding the other: it implies the termination of the contract and renders the penality clause enforceable; the two contractual prerogatives for non-performance of the contract are fully compatible and can therefore be cumulated*[12]".

Personally, I consider that accepting a derogation from one of the fundamental principles of law, such as the *accessorium sequitur principale*, would assume a more solid argumentation of interpretation or even counter-arguments based on principles or rules of law that are confirmed.

3. Conclusions

Under these circumstances, I am in favour of the opinion, which I personally fully appreciate, of other authors, who regard the penality clause as an obligation affected by modalities, and consequently without any doubt, it follows the fate of the main one. The immediate consequence of the dissolution of the contract will be the dissolution of the penality clause, because "*with an ancillary character, the penality clause pursues the legal regime of the main obligation, according to the principle accessorium sequitur principale. As such, the extinction of the principal obligation also affects the benefit provided by the penality clause*"[13].

By way of a logical interpretation of the text of Article 1549 of the current Civil Code, which refers to the right to cessation or termination of the creditor, we can draw the same conclusion, namely the extinction of the effects of the penality clause along with the dissolution of the contract, the legislator stipulating that "*If it does not request the forced enforcement of the contractual obligations, the creditor has the right to cessation or, as the case may be, to the termination of the contract, as well as damages, if any are due.*"

The law clearly underlines that only on condition that it does not require the forced enforcement of the contractual obligations, the creditor will be accepted the statement of cessation, respectively of termination of the contract. Since the penality clause also falls within the scope of these contractual obligations and there is no provision derogating from the established rule, the debtor's obligation arising from the penality clause will no longer survive and consequently it cannot be enforced when the creditor opts for termination, respectively the cessation of the contract. By using the phrase "*if any are due"* with reference to the right of the creditor to claim damages, it is clearly demonstrated that when the creditor wants to enjoy its right to cessation or termination, it is also entitled to damages, but only if they are due to it, which will impose on him a probative regime to prove the occurrence and extent of the damage, a task which would no longer have been necessary in the case of the penality clause.

On the basis of the provisions of article 132 of the Civil Code regarding the effects of the termination of the contract[14], which state that "*upon the termination of the contract the parties are free from the assumed obligations"*,[15] it is obvious that the parties will also be released from the effects of the penality clause, because this is also an obligation that has the contract as the source, and once the very source of the obligation itself has been dissolved it will implicitly assume the dissolution of the obligation.

It is also worth noting the ruling nature of the rule, as the parties *"may, however, be held liable for the repair of the damage caused and, where appropriate, for the return in kind or by equivalent of the benefits received after the conclusion of the contract",* but not necessarily.

---

[12] Pop L., *The regulation of the penality clause in the texts of the new Civil Code*, „Dreptul" no. 8/2011, p. 19-20.
[13] Angheni S., *op. cit.*, p. 19.
[14] Causes of termination of the contract. Article 1321 Civil Code. "The contract shall cease, according to the law, by fulfilment, the will of the parties, the unilateral termination, the expiry of the term, the fulfilment or, as the case may be, the non-fulfilment of the condition, the fortuitous impossibility of performance, and any other causes provided by the law.
[15] Article 1321 Civil Code. Causes of termination of the contract: "*The contract ceases, under the law, by fulfilment, the will of the parties, unilateral termination, the expiry of the term, the fulfilment or, as the case may be, the non-fulfilment of the condition, the fortuitous impossibility of performance, and any other causes provided by the law".*

Remaining faithful to the established principles of Roman law, I consider that "*ubi lex non distinguit, nec nos distinguim debemus"*, I believe that indubitably *the obligations stipulated in the penality clause will be implicitly dissolved as a result of the declaration of cessation or termination of the contract, because their very source has been dissolved, and we can no longer speak of a contractual obligation liability. Thus, in this hypothesis, the creditor will have the right to claim only non-contractual,* compensatory or moratory damages, established by legal or judicial assessment, in the form of common law in the matter, *where the person deemed to be injured will have to prove the damage and the source of that.*

Bibliography

1. Armeanu Ion, *Legea cauzei și a efectului*, www.oportunitati-afaceri.ro (25.09.2018).
2. Angheni S., *Clauza penală în Dreptul Civil și Comercial*, Ed.OscarPrint, Bucharest, 1996.
3. Boroi G., Stănciulescu L., *Instituții de drept civil în reglementarea noului Cod civil*, Ed. Hamangiu, Bucharest, 2012.
4. Boilă L.R., *Răspunderea civilă delictuală obiectivă*, Ed. C.H. Beck, Bucharest, 2008.
5. Longinescu S.G., *Drept privat roman*, Anuarul Universității din Iași 1901-1902.
6. Pop L., Popa I.F., Vidu S.I., *Tratat elementar de drept civil. Obligațiile*, Ed. Universul Juridic, Bucharest, 2012.
7. Pop L., *Reglementarea clauzei penale în textele noului Cod Civil*, „Dreptul" no. 8/2011.
8. Stoica A., *Drept Civil, Obligațiile, Curs universitar*, Ed. Pro Universitaria, Bucharest, 2015.
9. Stătescu C., Bârsan C., *Drept civil. Teoria generala a obligațiilor*, Ed. All Beck, Bucharest, 2000.
10. Turianu C., Duțu A., *Drept Civil. Compediu*, Ed. Universul Juridic, Bucharest, 2016.