

THE LEGAL CONTRACTUAL NATURE OF THE PENALTY CLAUSE IN ENVIRONMENTAL CONTRACTS

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Abstract

The problem of identifying the Environmental contract has a special theoretical and practical importance. It must be pointed out that such contracts are that category of documents that are meant to regulate in detail much of the daily legal relations and for the future they may replace the law in many ways.

Key words: contract, ecological contract, penalty clause

INTRODUCTION

The Environmental contract can be defined as a willing agreement concluded between two or more people during their life, on birth, modification or termination of ecological rights and obligations in own interest or the interest of the whole society.

The features of the Ecological contract are: an agreement between two or more people alive when signing the contract the agreement is reached by the free will and aims birth, modification or termination of the legal relations related to rational use, conservation, development and protection of the environmental factors and requires consideration of public order and morality.

The problem of identifying the Environmental contract has a special theoretical and practical importance. It must be pointed out that such contracts are that category of documents that are meant to regulate in detail much of the daily legal relations and for the future they may replace the law in many ways.

The major challenge is to differentiate the Environmental contract from those of other branches of law, in the event that upon the Environmental contracts applicability is manifested by the specific contractual rules generated by the nature and the importance of environmental protection objectives.

MATERIALS AND METHODS

1.1. Defining the Penalty Clause under the New Civil Code

The **New Civil Code** enshrines the legal institution of the penalty clause in Art 1538-1543, defining the penalty clause (Art 1538, par. 1) as follows:” *the penalty clause is that by which the parties stipulate that the debtor undertakes a particular benefit for non-performance of the main obligation.*”

1.2. Doctrinal Definitions of the Penalty Clause

The doctrine formulated many definitions of the penalty clause. Thus, the penalty clause is evaluated as follows:

a) The penalty clause is that ancillary agreement by which the parties to the main contract predetermine the extent of the damages to be paid by the debtor in case of failure, defective or delayed performance of the benefits to which he indebted (Costin M.M. and Costin C.M., 2007).

b) The penalty is an agreement between the parties, ancillary to the main contractual obligation, by which the debtor undertakes to submit an amount of money or another good to the creditor as compensation to repair the damage caused by his wrongful act, in case of default, inadequate or late performance of his obligations. (Angheni S., 1995).

c) The agreement by which the contracting parties assess in advance and flat the amount of damages for default, defective or late performance of the obligations, by traditional Roman terminology (*stipulatio poenae*) bears the name of penalty clause (Albu L., 1994).

d) The penalty clause is the agreement by which the parties assess in advance the incidental damages arising from non-performance of the contractual obligations *lato sensu* (Lupan E. et al., 2003).

e) The penalty clause appears to be an agreement by which the parties determine - at first - the amount the debtor will pay as damages in the event of failure, incorrect or late performance of the obligations undertaken (Anghel I.M. et al., 1970).

f) The penalty is an agreement ancillary to a contract, under which a Contracting Party undertakes to pay the other party a sum of money (or possibly another asset value) in the case when, as a result of its negligence, the obligation of the contract between them was not executed, was poorly executed in terms of quality or quantity, or was in default (Eremia M.I., 1957, cited by Anghel I.M. et al., 1970).

g) The penalty clause is that agreement by which the parties to a contract assess in advance the damages that may result from failure, incorrect or late execution of contractual obligations (Sangeorzan D.E., 2009).

h) The penalty clause is that ancillary agreement by which the parties determine in advance the equivalent of the damage suffered by the creditor as a result of non-performance, late or improper execution of the obligation to its debtor (Statescu C. and Barsan C., 2008).

i) The penalty clause is that ancillary convention by which the parties establish by assessing in advance the amount of compensatory damages (or default) that shall be owed by the defaulting party in the event of default of the contract (Muresan M. et al., 1980).

j) any contractual provision according to which the debtor is bound to pay by way of indemnity or penalty a sum of money, or to meet other benefit, if does not perform, performs late or improperly the obligation due to him (Deleanu S., 1996).

The penalty clause in environmental contracts has a contractual nature. Thus, being a convention, an agreement, it must meet the validated provisions of the law.

Art 948 of the old Civil Code stipulated: "The essential conditions for validating a convention are: the capacity to contract, the valid consent of the party who undertakes, a determined object, a lawful clause.

The new Civil Code, in **Art 1179, par. (1)**, provides the essential terms for validating the contract: 1. the capacity to contract, 2. the consent of the parties, 3. a determined and lawful object, 4. a lawful and moral clause.

The consent and the cause are the two components of the parties' will to contract (Angheni S., 1996).

The consent must be given knowingly and under absolute freedom of action (Pop L., 2006).

The consent has been defined as "externalization of the decision to enter into a civil legal act" or that prerequisite and general background of the legal act which consists of the decision to conclude a civil legal act, externally manifested (Beleiu Gh., 2005).

Art 953 of the old Civil Code by a negative wording lists the qualities necessary for consents: "The consent is not valid when given by an error, pulled off by violence or by fraud" and the legal doctrine shows that in order to be valid the consent must meet all of the following requirements: to be given by a person with discernment, to be expressed with the intention to produce legal effects, to be externalized, to not be altered by any vice of consent.

Art 1204 of the New Civil Code provides the conditions of consent: "The consent of the parties must be serious, free and knowingly expressed.

The consent required for a contract must therefore possess at least three qualities: 1. **to be serious** that is based on the will to conclude the

contract, 2. to be **expressed in complete freedom of the will** to undertake contractual agreements, 3. to be a **consent informed** on all elements of the contract (Turcu I., 2011).

According to professor Boroï Gabriel, **the notion of consent is used in two different meanings**: first, by consent we understand the unilateral manifestation of will, meaning the externalized will of the author of the unilateral legal act or one of the parties to a bilateral or multilateral legal act; then in a second meaning by consent it is designated the agreement of the parties in bilateral or multilateral legal acts" (Boroï G., 2008).

Therefore, consent is the manifestation of the will of the parties with the effect that in the event the debtor fails to perform the undertaking to perform his obligation under the penalty clause.

Cause or purpose means the objective pursued when the contract is signed. Along with consent, the cause forms the legal will. **The immediate cause (purpose) of the penalty clause** is for the creditor to obtain the object of obligation of the penalty clause, and the mediated cause (purpose) expresses the subjective motive of the creditor, namely: remedy of the damage produced by the debtor as a result of default of the main contract (Angheni S., 1996).

The object of the penalty obligation has to be determined and licit.

The contracting parties may therefore alter and even abolish penalty clause given the contractual nature of this clause.

The delay penalties shall not be granted in the absence of the penalty clause. Without the existence of a contract expressly providing the penalty clause, the mere mention of the penalty clause on invoices does not prove the agreement of the parties in this regard.

RESULTS AND DISSCUTIONS

THE JURIDICAL CHARACTER OF THE PENAL CLAUSE INSERTED IN THE ECOLOGICAL CONTRACT. A SPECIAL LOOK ON THE ACCESORY CHARACTER

The penal clause has the following juridical characters: **consensual, sanctioning, repairer and accessory** (Pop L., 2011).

1. THE CONSENSUAL CHARACTER

According to art. 1538 from (1) the New Civil Code, "the penal clause is the one by means of which the parties stipulate the fact that the debtor binds to a specific benefit in the case of the non-execution of the main obligation".

From the legal definition of the penal clause provided by art. 1538 from (1) the New Civil Code, results the consensual character of this clause. As a result, the mere externalized agreement of the parties is sufficient, and the manifestation of the agreement does not have to be accompanied by any

form with the occasion of its externalization.

2. THE ACCESSORY CHARACTER

The accessory character of the penal clause results from the provisions of art. 1538 paragraph 2 and 3 and art. 1538 from the New Civil Code.

As a result, according to art. 1538 paragraph (2) and (3), “in the case of non-execution, the creditor may ask the enforcement in nature of the main obligation, or the penal clause”, “the debtor cannot free himself by offering the agreed compensation.”

Also, according to art. 1540 paragraph (1) and (2) from the New Civil Code, “the nullity of the main obligation attracts the nullity of the penal clause. The nullity of the penal clause does not attract the nullity of the main obligation; “(2) the penalty cannot be asked when the execution of the obligation has become impossible because of reasons which are not attributable to the debtor.”

Practically, art. 1540 paragraph (1) from the New Civil Code takes over entirely the provisions of art. 1067 from the Civil Code from 1864 according to which: “the nullity of the main obligation attracts the nullity of the penal clause. The nullity of the penal clause does not attract the nullity of the main obligation.”

The explanation of the accessory character of the penal clause is in the dependency connection which exists between it and the main obligation, for the warranty of the execution to which it was stipulated.

The accessory character of the penal clause derives from its finality, by means of the stipulation of the penal clause the creditor pursuing the execution of the contractual obligations and not the collection of the penalties.

So, the penal clause does not have an independent existence, neither an own juridical value, if it is separated from a contract.

An isolated penal clause must be regarded as nonexistent; it cannot be imagined outside a contractual context, of a pre-existing report of obligation.

The juridical fate of the penal clause depends of the juridical fate of the main obligation. As a result, the nullity of the main obligation will also attract the nullity of the penal clause. Also, the settlement of the main obligation will also result in the settlement of the penal clause. In exchange, the nullity or inefficiency of the penal clause does not also attract the nullity or inefficiency of the main obligation. (art. 1540 the New Civil Code).

Having an accessory character, the penal clause therefore follows the juridical regime of the main obligation, according to the rule, *accessorium sequitur principale* – the juridical condition of a good, of a right, of an act, of a deed, of a sanction or of an activity, considered as being principal, is

extended on another one, considered as being accessories.“

The influence of the accessory character of the penal clause on the juridical situation of the creditor and the debtor.

According to art. 1538 from the New Civil Code – “the **creditor** may ask the enforcement in nature of the main obligation, or the penal clause. As a result, from the creditor’s perspective, the valid penal clause gives him the right to choose between asking the conviction of the debtor to the execution in nature of the main obligation, when it is possible and when he wants it, and his obligation to the execution of the penal clause (Pop L., 2010).

In exchange, the **debtor** does not have any right of option.

The debtor has two obligations of a contractual nature: a main obligation which consists in the proper execution, in nature, of the benefit to which he committed to by means of a contract and an accessory obligation which consists in the execution of the benefit established by means of the penal clause.

According to art. 1538, paragraph 3 from the New Civil Code, “the debtor cannot free himself by offering the agreed compensation.” As a result, the debtor will execute the main obligation, not being able to free himself by means of the offer of the execution of the penal clause.

3. THE SANCTIONING CHARACTER AND THE REPAIRER CHARACTER results from the analysis of the functions of the penal clause.

CONCLUSIONS

The issue of inserting the penalty clause in contracts remains a challenge both for theorists but especially for practitioners. As far as we are concerned, we consider that the parties to a contract may determine in advance the extent of the damages to be paid by the debtor in case of non-performance, defective or delayed performance of the obligations undertaken, the creditor not being obliged to prove the existence of the injury.

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