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PRIVATE LAW

CIVIL LIABILITY - ETERNAL AND FASCINATING LADY OF CIVIL LAW

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1. Lying in the centre of legal scrutiny, civil liability is a "fascinating lady" to whom the passage of time and the progressive fragmentation of contemporary law cannot diminish its power of seduction.

As beautifully, civil liability is the key to the general theory of obligations, the pillar on which the whole construction of civil law is based. In this context, it would seem that the attempt to present civil responsibility in its dynamics in the last century is doomed to failure. But appearances are deceptive - at least in this area. From the classic question: there is contractual civil liability or forced execution through the equivalent of the obligation, going through the conditions of liability and assessing damages, reaching the topical question - who is responsible for damages caused by robots - to whom the future will respond - all highlight the dynamics of contractual civil liability.

2. Our approach will be focused on presenting the changes that occurred in the last century in terms of legal, contractual, and judicial evaluation of damages to the creditor in the event of non-performance of contractual obligations. The auspices of presenting the past, present and future statutory interest and the criminal clause will be offset by the exposures of the creative effervescence of the courts in the exercise of the judicial review power of the contract in these matters. Our choice was justified by the increased frequency in the activity of the judicial bodies in the last century of the problem of damages, almost all civil actions having a component aimed at granting the damages. And the future does not seem to be different...

3. With the adoption of the new Civil Code, the Commercial Code was expressly abrogated, which may have generated the most important effect of the adoption of the new *corpus* of private law: the transition from the dualist system to the monist system. However, the economic and social realities that have justified

two separate regulations for almost 150 years - the Civil Code and the Commercial Code have not disappeared.

Seven years after this formal abolition, there are more and more acclaimed voices supporting the need to adopt a new Commercial Code that corresponds to the economic reality and business life specific to the 21st century**.**

4. Civil liability or equivalent performance? The dilemma - 150 years old - has not been clarified by the current Civil Code.

The legal nature of the lender's right to damages in the event of non-fulfilment of an obligation has generated doctrinal controversies, asking whether we are in the presence of either an enforceability of the initial obligation[1], or whether it is the execution of another obligation, that is to say, if the damage to the creditor represents a way of fulfilling the obligation or a form of liability, or in other words if the right to damages is an effect of the obligation or an effect of the non-fulfilment of the obligation (ie a form of liability).

The analysis of the nature and the subject of contractual liability reveals the clear distinction between repair and execution, between contractual liability and execution.[2] If the execution allows the creditor to obtain the object of the promised benefit, the contractual liability has as its purpose the reparation of the damage caused by non-execution, and the creditor's proxy cannot be a compensation, an equivalent.

5. The new Civil Code maintains the duality of tort liability[3] - contractual liability, although there are more and more voices that cast doubt on the need for contractual liability[4], arguing for a common law liability to be enforced with the specific responsibilities of different branches of private law or - many authors - a common law responsibility from which the liability of professionals is waived[5].

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[1] T.R. Popescu, P. Anca, *Teoria generală a obligațiilor*, Ed. Ştiinţifică, Bucureşti, 1968, p.318; E. Safta-Romano, *Drept civil. Obligații. Curs teoretic şi practic,* Ed. Neuron, Focşani, 1994, p.265, C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor,* Ed ALL, Bucureşti, 1997, p.300-301; these authors initially assert that it is an equivalent execution by showing that "by means of execution by an equivalent is intended to obtain an amount to replace in the patrimony of the creditor the value of the benefit to which the debtor was entitled", then argue that the obligation arising from the contract is replaced by another obligation resulting from the non-performance of the old contractual obligation and which has a totally different content from that of the contract: that of repairing the damage caused by non-performance, the initial claim being replaced by an amount of money representing the equivalent of the injury.

[2] See M. Dumitru, *Regimul juridic al dobânzii moratorii*, Editura Universul Juridic, Bucureşti, 2010, pp. 295-297

[3] Art. 998 of O. Civ. C. "Every act of man, which causes another injury, compels the one whose error has occurred, to repair it", and Art. 999 of O. Civ. C. had the following content: "Man is responsible not only for the damage he caused by his deed, but also for what he caused by his negligence or by his imprudence".

[4] G. Viney, *Introduction a la responsabilite*, ed a 3-a LGDJ, Paris, 2008, pp.35 and next.

[5] The notion of "*professional*" has the meaning indicated by Art. 3 of N. Civ. C., non-existent term before the adoption of the indicated normative act.

The current Civil Code explicitly establishes that there is no right of option in favour of the creditor between the two forms of liability, which cannot remove the application of the rules of contractual liability to choose for other rules which would be more favourable to them, except where the law would provide such a possibility.

6. With regard to tort liability, responsibility for the deed and for the deed of another was maintained. However, receptive to the realities of business life has also been enshrined in contractual matters together with contractual liability for his own deed and contractual liability for the deed of another by the provisions of art. 1519 N. Civ. C.[6]

7. The ancient rule according to which the creditor is entitled to receive the exact fulfilment of the obligation, otherwise he is entitled to damages from the Mesopotamians, Greeks, Romans and French, is transferred from the old Civil Code - art 1073 Civ. C.[7] - in the current Civil Code - art. 1516[8] - explaining what is now understood by "*exactly fulfilling the obligation*": "*full, accurate and timely fulfilment*".

8. The conditions for the engagement of civil (contractual) liability remain the same. There must be an unlawful act consisting in the *lato sensu* non-performance of an obligation arising from a valid contract that has been concluded, that there is damage; the act is committed with guilt and there is a causal relationship between the non-performance of the contractual obligation and the damage. Obviously, new legislators also appeared, paying attention to the doctrinal opinions and jurisprudential issues accumulated in the last century. By way of example: it is currently destabilizing the loss of an opportunity to gain an advantage[9]; it is imperative for the creditor to have an active attitude and to take steps to avoid or limit the prejudice; symmetrically to the debtor and the creditor may be delayed when unjustified refusal to pay[10].

9. If the principle remained the same, nowhere else than in the institution "detentions" can be noticed with more clarity the influence that the evolution of the economic and social phenomenon exerted on the matter of obligations.

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[6] Art. 1519 of N. Civ. C. - *Liability for the Third Party's deed* - states: "*Unless the parties agree otherwise, the debtor shall be liable for damages caused by the fault of the person to whom it is used for the performance of the contractual obligations*".

[7] Art. 1073 of O. Civ. C. stipulated: "*The creditor has the right to acquire the exact fulfilment of the obligation, and otherwise he has the right to defeat*".

[8] Art. 1516 paragraph 1 of N. Civ. C. - *The creditor's rights* - reads as follows: "(1) The creditor is entitled to the full, exact and timely fulfilment of the obligation."

[9] Art. 1532, paragraph 2 of N. Civ. C. – "*Certain damage*" - provides that: "*The damage which would have been caused by the loss of an opportunity to obtain an advantage may be remedied in proportion to the probability of obtaining the advantage, taking into account the circumstances and the actual situation of the creditor*".

[10] Art. 1510 of N. Civ. C. – "*Litigation cases of the creditor*" reads as follows: "*The creditor may be late when he or she unjustifiably refuses the payment properly provided or refuses to comply with preparatory acts without which the debtor cannot execute the obligation*".

Remarkable seems to be two of the conclusions reached by the Romanian legislator after 150 years of Civil Code.

In the matter of moratorium interest, the Romanian legislator renounced the exclusivity of the flat-rate and automatic damage compensation system by adopting a modern conception similar to that existing in the other states.

But the most spectacular change in the matter of welfare, after our appreciation, was to confer on the organ of jurisdiction the power to review the criminal clause (and the punitive interest set conventionally - the power conferred by a special normative act), to modify the architecture of the contract.

10. Permanent changes in religious, social, and interest-rate optics are largely due to the variety of interest rates that exist today, but also to the confusion that exists between them on the jurisprudential and doctrinal realm. There is moratory, pay, repatriation[11], compensatory interest[12]. From the point of view of obligations, the hypotheses in which interest may be due are diverse, which generates names, natures and different legal regimes for this. In Romanian law, the absence of an interest taxonomy[13] is symptomatic. The editors of the Civil Code and of the New Civil Code have not been keen to clarify: none of the normative acts invoked includes a classification of interest.

11. Over the past 100 years, we have witnessed the transformation of the moratorium legal regime into a legal interest regime that transcends the duality of contractual liability. Art. 1088 of the O. Civ. C. on the one hand, the delay in the execution of any money claim, whatever its origin, and, on the other hand, whenever a cash claim produces interest whatever the characteristics of the claim or the reason it generates interest rate. Art. 1535 of N. Civ. C. shows us that the legislator's optics remained unchanged and that what is happening in practice on this issue - contrary to the view of a part of the doctrine - exactly conveys its wish.

12. Compensation for damages caused by late payment of capital, in the form of default interest, has always been allowed from the earliest transactions involving the money. What was different was the conditions for granting and probation as well as the amount of the interest rate.[14]

13. The provisions of art. 1088 of O. Civ. C.[15] developed an original solution for repairing the damage caused by the delay in executing the monetary obligations

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[11] The New Civil Code seeks to establish a unitary legal regime for the return of benefits including the interest generated by claims subject to repayment. With regard to the issue of repayment interest see, M. Dumitru, *Dobânda restitutorie- dobânda moratorie*, in the magazine "Dreptul", no.12/2010, pp. 86-112

[12] See M. Dumitru, *Delimitarea dobânzii moratorii de instituții adiacente : dobânda compensatorie*, in *Revista română de drept privat,* no. 4/ 2010, pp. 40-64

[13] See M. Dumitru, *Regimul juridic al dobânzii moratorii*, Editura Universul Juridic, Bucureşti, 2010 pp.62 and next.

[14] See M. Dumitru, *Regimul juridic al dobânzii legale*, Editura Hamangiu, Bucureşti, 2008

[15] Art. 1088 of O. Civ. C. provides that: "*(1) In the case of obligations with a subject-matter amount, damages for non-execution may include only the statutory interest, except for the special rules in the field of*

having as main feature the lump-sum and automatic character of the damages. It deals only with the monetary contractual obligations of origin, being mistakenly extended by doctrine and practice, for reasons of convenience and pragmatism, to all pecuniary obligations.

Interest damages to the creditor are invariable, uniform, irrespective of the amount of actual damage suffered by the creditor, quantified by the legislator, in the absence of the parties' stipulation, always at the level of the legal interest rate.

Outdated, obsolete and criticized in respect of limited reparation for damage caused by delay, art. 1088 of O. Civ. C. it should be appreciated, however, in terms of automatically allocating an indemnity, in the form of interest, to the creditor - the victim of the delay.

The main reproach for the lump sum scheme is that, without taking into account the actual damage suffered by the parties, it was possible to repair more or less than the actual damage suffered by the parties, which is inconsistent with the principles of civil liability.

14. The right of accountability has gained in coherence and effectiveness by reconsidering the principle of purely flat-rate repairs. Limiting the rights of the contractual creditor means on the one hand a form of intervention by the legislator over the natural contractual relations and, on the other, affecting a large number of contractual relationships.

The New Romanian Civil Code by the provisions of art. 1535 of N. Civ. C.[16] adopts a solution in line with the UNIDROIT Principles and European Contract Law: keeps the lump-sum regulation system but provides for the possibility for parties to set the interest rate conventionally.

Moreover, the creditor is expressly given the prerogative to obtain, in addition, under certain conditions, additional damages for the full coverage of the damage, through the court which has the task of determining the value of the damages corresponding to the actual extent of the damage injury.

The New Civil Code allows for the correction of the concrete and variable moratorium damages, proved by the creditor who claims it under the conditions of the common law of contractual liability.

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trade, fairness and society. (2) These damages are indisputable without the creditor being held to justify any damage; are debited only on the day of the court's sued, except in cases where the interest flows by law."

[16] Art.1535 of N. Civ. C. – "*Late damages in the case of monetary obligations*"- reads as follows: "*(1) If a sum of money is not paid at maturity, the creditor is entitled to moratory damages, from maturity until the payment, in the amount agreed by the parties or, failing that, in the amount stipulated by the law, without having to prove any damage. In this case, the debtor is not entitled to prove that the loss suffered by the creditor as a result of late payment is lower. (2) If, before maturity, the debtor owes interest above the statutory interest, the moratorium is due at the level applicable before maturity. (3) If no overdue interest is due at a rate higher than the statutory interest, the creditor has the right, apart from the legal interest, to damages for the full reparation of the damage suffered.*"

Instead, the debtor cannot prove that the damage suffered by the lender is less than the amount of the legal interest. In this respect he is disadvantaged by the creditor who has the opportunity to prove the real extent of the damage and to obtain additional damages. If, under the Old Civil Code, the creditor is disadvantaged by the flat-rate repair system, because he could not obtain the full reparation of the damage, the situation under the New Civil Code was reversed.

15. In order to avoid this movement from one extreme to the other, the European doctrine supports the idea of giving the judge the possibility of modifying conventional or judicial damages based on certain criteria. Although it enjoys support in many systems of law, due to the particularities of the Romanian law system and of the Romanian society, it seemed and it seems to us that it is currently unsuitable to confer, *de jure*, a moderating power to the general court judgment.

16. However, the New Civil Code is crossed by the idea of recognizing the court's power of intervention over the "excessive" contract in relation to the old regulation when it was possible to revise the contract only in the matter of the criminal clause when the obligation was partially executed. There are currently many situations in which the judge may enter into the contract both in relation to the conclusion and in relation to its execution.

17. In the matter of contractual liability, the prerogative of the judge is assigned to amend the parties' convention, but not in general terms, but punctual on certain matters. It is the case of the penalty interest, the rate of which was established by conventional means, the interest rate which is excessively onerous (by the provisions of Article 10 of G.O. no. 13/2011[17]) and the manifestly excessive criminal clause - by the provisions of art. 1541 of N. Civ. C[18]., further analysing this latter situation.

18. The Romanian legislature renounced, by the provisions of art. 1541 of Civ. C.[19], in certain exceptional situations, to the intangibility of the criminal clause, as

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[17] Article 10 of the Government Ordinance no. 13/2011 on the legal interest payable and penalizing for monetary obligations, as well as for the regulation of some financial-fiscal measures in the banking field stipulates that "The provisions of Art. 1535 and Art. 1538-11543 of Law no. 287/2009, republished, are applicable to the penalty interest".

[18] Art. 1541 of N. Civ. C.: "*The reduction of the amount of the penalty*" is as follows: "*(1) The court cannot reduce the penalty only when: a) the main obligation has been partially executed and this execution has taken advantage of the creditor, b) the penalty is manifestly excessive in relation to the damage that may have been foreseen by the parties at the conclusion of the contract. (2) In the case provided by par. (1), point (b), however, such a reduced penalty must remain superior to the principal obligation. (3) Any contrary provision shall be deemed not to be written.*"

[19] According to Art. 1541 of Civ. C., Which has the marginal title "*Reducing the amount of the penalty*", "*(1) The court may reduce the penalty only if: a) the main obligation was partially executed and this execution took advantage of the creditor; (b) the penalty is manifestly excessive in relation to the damage that could have been foreseen by the parties at the conclusion of the contract. (2) In the case provided for in paragraph (1), point (b), however, such a reduced penalty must remain above the principal obligation. (3) Any contrary provision shall be deemed not to be written.*"

claimed by part of the doctrine. However, the mutability of the criminal clause further raises the interest of all participants in legal life. We have been among those who have advocated conferring jurisdiction on the right to reassess the criminal clause, but the manner in which this prerogative has been regulated leaves much to be desired.[20] It is a Pandora's box that will generate vast, unanimous and often disappointing jurisprudence for several reasons.

19. Referring to this power conferred on the jurisdictional body, it is first necessary to analyse a procedural issue, namely whether, in the light of the legislature's silence, the court can reduce the criminal clause only upon request or if the judge can, of its own motion, take such a step.

Apparently, it would appear that the court may reduce the excessively large penalty for the damage that could be foreseen by the parties to the conclusion of the contract only if there is such a claim in the petition. However, as we have shown in a previously published study[21], whether in action or in defence, it is alleged that the criminal clause is manifestly excessive, the court has provided the legal process to reduce the amount of the penalty.

In order to avoid the emergence of a non-unitary practice in the matter, we have complained, *de lege ferenda*, the intervention of the Romanian legislator to clarify this problem by introducing into the body of art. 1541 alin.1 of Civ. C.[22] the expression "*on demand*" or "*ex officio*". "On request", it would mean any form of discussion of the manifestly excessive nature of the penalty[23]. It is important to note that even if the phrase "ex officio" existed in the text, the court would not have allowed it to refer automatically, but merely to invoke the excessive nature of the criminal clause in *pending* proceedings, when on this theme no dialogue has been held.

Considerable arguments may be put forward in favour of any of the variants, but for our part, we think that the legislator should allow the judge to be able to diminish the excessively damaging penal clause on demand only. Recognition of the power to state ex officio would damage the craftsmanship with which the parties did civil architecture. In this manner, the law would allow the court, in the process, to disregard the edification of the facts built by the parties, and in the context of the substance of the law, to decide on a reduction in the criminal clause which the contracting parties did not want, and which, surely the debtor did not

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[20]See M. Dumitru, *Reevaluarea judiciară a clauzei penale*, in "Dreptul", no.12/2008

[21] See M. Dumitru - Nica, *Reducerea clauzei penale vădit excesive - "la cerere" sau şi "din oficiu"?,* in "Dreptul", no. 8/2014, pp. 43-53.

[22] The proposal refers only to letter b of paragraph 1 of Art. 1541 of Civ. C. because our approach only touched upon this paragraph. We consider that the discussion could be held in the same terms and with respect to Art. 1541 alin.1 let. a of Civ. C. The legislative amendment should aim at the entire paragraph 1 of Art. 1541 of Civ. C.

[23] The statement does not address the case of unfair criminal terms in contracts between professionals and consumers.

dream to invoke it. By such a change the role of the judge would be substantially increased to the detriment of the parties' will and the principle of binding force of the contract.

20. The analysis of the limits of the court's power of intervention would also cover the assessment of the reunion of the conditions laid down by the hypothesis of the legal norm, in the case before the court, in order to have the framework required for its interference.

The condition of substantive law for the court to intervene in the criminal clause is to find that "*the penalty is manifestly excessive in relation to the damage that might have been foreseen by the parties at the conclusion of the contract*".

Interpreting this requirement generates many questions that we have been trying to outline. The explanation of the notions of "foreseeable damage", "obvious overstatement of the penalty", outlining the objective and subjective criteria that the courts will use for their appreciation, the choice of the moment in the report to determine the above mentioned elements are only a few of our study. It is a first step with such a topic in the Romanian legal literature, given the novelty of the regulation.

We are convinced that in the years to come, doctrine and jurisprudence will give their point of view on the interpretations and solutions that we have proposed in a work[24], since, in the meantime, the Romanian legislator will not change art. 1541 of Civil Code.

21. Another problematic issue concerns the possibility for the court to assess the opportunity of its interference with the contract when it ascertains that the requirements imposed by the law for its intervention have been fulfilled. In other words, if the judge, establishing the manifestly excessive nature of the criminal clause, has the obligation or only the faculty to diminish it, which has been the subject of another article[25].

Article 1541 paragraph 1 of Civ. C. is not clear about the optional or mandatory nature of the court's intervention, in favour of any of the variants having arguments.

As we have already shown, it seems that in the current legislative framework the court is entitled to appreciate the opportunity of reducing the excessively high penalty. In other words, the judge may chose for the full maintenance of the criminal clause which he held to be "manifestly excessive", not being obliged to reduce it.

The Romanian legislator by the provisions of art. 1541 of Civ. C., gave up, in exceptional circumstances, the intangibility of the criminal clause. Although he did

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[24] M. Dumitru- Nica, *Reducerea clauzei penale vădit excesive - o cutie a Pandorei în dreptul civil român*, in *Liber amicorum* Liviu Pop, Editura Universul Juridic, Bucureşti, 2015, p.238-261.

[25] M. Dumitru - Nica, *Reducerea clauzei penale - reținută a fi "vădit excesivă" in temeiul art .1541 alin.(1) lit.b din noul Cod civil - constituie o facultatea sau o obligație pentru instanța de judecată?,* in "Dreptul", no. 4/2015, p. 23-36.

not have the doctrinal and jurisprudential experience of other states as "didactic material," he failed to find a clear formulation as to how to exercise the court's prerogative to reduce the excessive criminal clause. Obligation or, on the contrary, the ability of the court to reduce the penalty when it finds that it is manifestly excessive in relation to the damage that could be foreseen by the parties at the conclusion of the contract is an example in this respect.

Each of the variants may be supported by relevant arguments, but it seems that in the current legislative framework the balance tends to keep the freedom of the court unrestricted. In other words, the judge can chose for the full maintenance of the excessive criminal clause, and is not obliged to reduce it.

The recognition of the optional nature of court intervention allows the safeguarding of the cominatorial aspect of the criminal clause, which gives the specificity and utility that is inherent in it. The freedom left to the judge is an intimidating uncertainty for the debtor, which preserves the constraint character of the criminal clause.

Our proposal of *lege ferenda*, from the previous study, suggested that the Romanian legislator should stipulate that the reduction of the manifestly excessive penalty can only be achieved "upon request", is, in line with the optional exercise of such power by the court, when it finds that the conditions for his intervention are met.

Embodying this view leads to an increase in the degree of subjectivity of the court's solutions but, alongside the ones outlined above, it militates to maintain the exceptional and minimal character of judicial intervention on the contract.

Conclusions. The much-discussed legislative reform in the field of civil law has taken place. In 2011, a New Civil Code was adopted, which has the merit that besides the adaptation of the old institutions to the socio-economic reality of the beginning of the 21st century, it also establishes new institutions claimed by law theorists and practitioners. But some of the changes prove to be uninspired at least in the concrete manner in which they were consecrated. Of the examples that may be given, we have limited ourselves to the new system of compensation for the damage caused by the delay in executing a monetary obligation and to the power given to the courts to modify the contract, namely the value of the damages to the creditor quantified in the form of the interest penalties or penalties. With regard to these changes, we have already put forward proposals to improve the new regulation.