The Penalty clause: From penalty to Compensation
A Comparative Study in Algerian and German Law

الشرط الجزائي: من الجزاء إلى التعويض

دراسة مقارنة في القانونين الجزائري والألماني

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Abstract :

The aim of this study is to contrast the penalty clause in Algerian and German law, to find out about the role of the penalty clause in Algerian law. This legal trick of Roman origins has been used in its repressive dimension, the most archaic, as a means of pressure on the debtor being forced to perform his obligation, not by respect to the contract but for fear of being sanctioned by a penalty. And once again arises the dilemma of the judge-control in front of the will of parties, especially in Algerian law. Hence the need of a comparative study in German law, faithful to the punitive version of the penalty clause as a 'true sanction' deserved for the simple fact of non-performance of the main contract, and regardless of the damage incurred by the creditor.

Keywords : Compensatory character, comminatory character, Roman law, conventional compensation, judge control.

ملخص:

تسعى هذه الدراسة إلى إجراء مقارنة للشرط الجزائي بين القانونين الجزائري والألماني، من أجل معرفة دور الشرط الجزائي في القانون الجزائري. هذه الحيلة القانونية ذات الأصول الرومانية، استعملت في صورتها العقابية، الأقدم على الإطلاق، كوسيلة ضغط على المدين الذي أصبح مجبرا على تنفيذ التزامه، ليس احتراما للعقد وإنما خوفًا من تعرضه للجزاء. ومرة أخرى، تطرح مسألة رقابة القاضي أمام إرادة الأطراف لا سيما في القانون الجزائري. من هنا ظهرت الحاجة إلى إجراء دراسة مقارنة في القانون الألماني، لما يتميز به من امتثال للشرط الجزائي في نسخته الردعية، معتبرا اياه 'جزاءا حقيقيا' يُستحق بمجرد الاخلال بالعقد الأصلي وبغض النظر عن الضرر الذي لحق الدائن.

الكلمات المفتاحية: الطابع التعويضي، الطابع الردعي، القانون الروماني، تعويض اتفاقي، رقابة القاضي.

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Introduction:

The penalty clause or the so-called "stipulatio poenae"[1], also known as the "conventional compensation"[2], has always been a rich field of comparative researches. Started as a psychological punishment in Roman law, the penalty clause took different trajectories on modern legal systems according to their own philosophical and economic perceptions.

Penalty clause is usually defined as an agreement by which a person undertakes to pay a fixed sum of money in case of non-performance of an obligation. But for sure, the penalty clause is not like the other agreements due to its particularity to guarantee the performance of a main obligation.

Comparative studies of the penalty clause have always been focused on Civil Law and Common Law, due to the pronounced divergence of approach to this clause in these systems. Common Law makes a distinction between penalties and liquidated damages based on the "rule against penalties"[3] according to which liquidated damages clauses are enforceable while penalty clauses are unenforceable. However, most of modern Civil Law systems regard penalty clauses as enforceable but allow courts to modify their amounts.

In a comparative view, the mixed nature of the penalty clause being now accepted in different legal systems, its purpose is sometimes to determine in advance the extent of the compensation of damages (compensatory thesis) and sometimes to force the debtor to perform his obligation (comminatory thesis). Positive law recognizes the validity of the penalty clause in its two functions[4].

This institution is essentially contractual, that is why doctrine hesitated, for a long time, to allow judges to modify it[5]. Being a simple contract, the content of the penalty clause is no longer left to the free appreciation of the parties. Public order took an increasing place in this area, and the binding force of this "dialectic clause" has been finally reduced by the admission of the power of judicial review[6] as a recent evolution in all modern jurisdictions, due to new trends aiming to limit the impact of free-will in contracts.

The importance and the main purpose of the present study is to identify the function and the nature of the penalty clause in Algerian law. The requirement of damage to benefit from the amount of the penalty and the extended control exercised by the judge on this contractual penalty, bring back into question the definition itself of the penalty clause in Algerian law.

Therefore, we can wonder whether the legal nature of the penalty clause in Algerian law has contributed to achieve its principal purpose which is to ensure the performance of the main obligation?

A comparative study in the opposite way will help us to well situate the penalty clause in Algerian law. German law is a perfect example to determine the true nature of the penalty clause in Algerian law due to the clear contrast between the two systems. Should be reminded that German law still keeps a certain level of repression for the penalty and still preserves its punitive dimension, even indirectly.

Hence the need to use the comparative analytical methodology, starting by the similarities existing in Algerian and German law in the origins and the formation of the penalty clause (Section I**)** then, we will show the contrast in the provisions related to the legal nature of this penalty in the two systems (Section II).

Section I: Origins and formation:

We can say that the first common point in Algerian and German law can be found in the historical origins of the penalty clause which contributed to its evolution (A). The second common point is related to the formation of the penalty clause (B).

A) Historical evolution:

We will study the evolution of the penalty clause from its first appearance in Roman law (1), and through different approaches in French law (2) and Common Law (3).

1- In Roman law:

In all legal systems, both in Civil law and Common Law, the penalty clause derives its origin and its name from the “stipulatio poenae” of Roman law[7]. Specific terms such as "stipulatio poenae" or "poena conventionalism" (conventional penalty) have been used since 12th century. Roman law defined the “stipulatio poenae” as an agreed sum to be paid on the breach of a certain obligation[8].

The principle function of the penalty clause in Roman law was repressive, used as a stimulation to induce the debtor to perform his obligations. Later, the clause took the function of compensation and became the most common in transactions.

The Institutes of Justinian (III, 15, 7) further recommend the inclusion of a stipulation of penalty in some contracts to avoid the difficulties according to proofs[9].

The penalty clause appeared in Roman law in two very different forms:

- In its first form, the penalty clause started as a main conditional contract. There is only one stipulation, a conditional stipulation, by which the debtor promises a penalty in the event that he fails to perform his obligation [10]. For ex: “Si PamphiIum non dederis. centum dare spondes ? “(if you don't give me Pamphile's property, do you promise to give me a hundred?)[11]

If the main obligation, placed under condition, has not been performed within the fixed period, the condition is fulfilled, which automatically entails the obligation to pay the penalty[12]. As a consequence, the main obligation would not become directly but indirectly enforceable.

The first role of the penalty clause in Roman law was not punitive, its objective was the ability to validate some conventions judged ineffective in themselves[13]. In Roman law, contracts having as object something other than money (obligation to do, not to do or to give) had, legally, no effect. Only contracts involving sums of money enjoyed legal protection and were sanctioned by law. That is why contracting parties affixed a "stipulatio poenae" on these conventions which allowed them to enjoy full legal efficiency[14]. This “trick” was a kind of precaution for the creditor[15].

The Digest texts used the same technique. They assume that the obligation to do or not to do should always be joined by a penalty clause. Such a clause was well recommended as a common and correct practice, it was even a necessity in primitive Roman law [16].

The penalty clause was also used to avoid the nullity’ effects of the main obligation. Thus, even if the main agreement was null, the penalty clause was still valid and the debtor had to perform the main agreement by fear of having to pay the stipulated sum[17].

Initially, the penalty clause had a strong repressive character in Roman law and the parties could freely set the amount of the sum due to non-performance. The purpose of the penalty clause was to put pressure on the debtor by threat of a sanction and to punish him in case of failure.

The punitive character of the penalty clause was flagrant in Roman law, the person who failed in his obligations was considered as a delinquent[18] and the penalty was due without formal notice. The debtor being not released neither by loss, nor by fortuitous event, and the sum of the penalty was payable in its entirety even in the event of a partial performance[19].

- In its second form evolved over time, the penalty clause included two successive and distinct stipulations. A first stipulation of the object of the main obligation, followed by a conditional stipulation of the penalty[20]. For ex: "Pamphilum dari spondes? si non dederis. centum dare spondes" (do you promise to give me PamphiIe? if you don't give it to me, do you promise to give me a hundred ?)"[21]. If the object of the main obligation was possible and lawful, it is still valid and it directly gives rise to the obligation to perform the main agreement. In this case, the conditional stipulation of the penalty clause only plays the role of an accessory stipulation of damages[22]. Some historians saw in this new form the birth of the accessory nature of the penalty clause[23].

The penalty clause was therefore a legal tool well known in Roman law and later in the legal systems of Romano-Germanic tradition (Civil Law). This clause could take on the two aspects that we know today. On the one hand, it could be used as a means of pressure on the debtor so that he performs his obligation and on the other hand, it could be used to cover any damage[24].

The practice of the penalty clause was generalized during the Frankish period to such an extent that it can be said that no contract was formed without a penalty clause, especially in the Wergild[25] tradition, the penalty clause was conceived as a real private sanction[26].

In Middle Ages, and as the canonists could not nullify all the penalty clauses, they found a way to separate non-fraudulent penalty clauses from the fraudulent penalty clauses. First, they tried to make a distinction based on the intention of the stipulator. If the creditor's intention was to induce his debtor to be diligent then the penalty clause would be valid, but if the creditor's intention was to circumvent the prohibition of "usury", "de facto" it would be void. This criteria was abandoned later[2728].

Then came the distinction between the "interesse and usures": interesse corresponds to damages and interests while usures correspond to simple interests. Hortensis considered that the penalty clause was legitimate if, and only if, it reflected the damages and interests that the creditor suffered as a result of the debtor's non-performance of the obligation[29].

2- In French law:

In the 16th century, Dumoulin, relying on Justinian law, considered that if the amount stipulated as damages exceeded twice the value of the thing which constituted the object of the main obligation, the penalty clause should be reduced by the judge[30].

The Napoléon code (1804) which inspired many civil codes within Civil Law, considered the penalty clause as an agreement totally submitted to the principle of will autonomy which was dominated in that era[31].

The penalty clause was regulated in Art. 1152 and from Art. 1226 to 1233 Napoléon code. But if it, apparently, adopted the compensatory aspect of the penalty clause[32], it conversely didn't allow judge to interfere except in the event of partial performance[33]. It tended to respect parties' will at the expense of justice[34].

Thus, the nature of the penalty clause becomes paradoxical: despite its compensatory nature, it remains valid, regardless of the amount of damages actually suffered by the creditor[35].

In France and since the 1960s, the penalty clause was frequently stipulated in some contracts which appeared or developed at that time (leasing, hire-service, sale on credit…) and it created major problems. Taking advantage of their position of strength, some professionals imposed on their co-parties abusive clauses. The free play of penalty clauses led to a "contractual terrorism" whose victims were most often negligent or imprudent consumers blinded by the mirage of credit conveyed by some tempting but high-risk contracts[36].

As a solution, some European jurisprudences, as in Belgium, have opted for the annulment of disproportionate clauses by referring to the notions of illicit cause and public order, or more to the notion of abuse. And here appeared the need to recognize to the judge the power of interference to moderate the sum of the excessive clauses[37].

The promulgation of the French law of July 9, 1975 which modified the articles 1152 and 1231 of French Civil Code, allowed judges to reduce the manifestly excessive penalties and to increase the manifestly derisory ones.

Art. 1 - Article 1152 Civil Code is supplemented by the following paragraph:

"Nevertheless, the judge can moderate or increase the penalty that had been agreed, if it is manifestly excessive or derisory. Any stipulation to the contrary will be deemed unwritten".

Art. 2 - Article 1231 Civil Code is amended as follows:

"When the engagement has been partially executed, the agreed penalty may be reduced by the judge in proportion to the interest that the partial execution has procured for the creditor, without prejudice to the application of article 1152. Any stipulation to the contrary will be deemed unwritten. »

This judicial review aimed to avoid the "excesses" of contractual freedom and to redefine the notion itself of the penalty clause[38]. Another reinforcement of judicial power was imposed in law n° 85-1097 of October 11, 1985 allowing judge to interfere even of his own motion (ex officio).

And as well as French law, most modern laws within Civil Law system allowed judges to interfere
and modify penalty clauses.

Actually, French law recognizes the dual function of penalty clauses and both comminatory and compensatory roles are present in actual Freanch civil code after its reform by Ordinance n°2016-131 of February 10, 2016 in Art. 1231-5[39].

Many authors have considered that, despite its name, the penalty clause cannot aim to punish, it can only aim at the compensation of a potential damage. Thus, we end up with a paradox "the penalty clause cannot be a penalty!"[40].

3- In Common Law:

In Common Law, and contrary to Civil Law, the first approach to the penalty clause was to regard all penalty clauses as unenforceable because it was not the role of private parties to punish each other[41]. More recently, the rule against penalties has been established in the 20th century to distinguish penalty clauses from liquidated damages[42], according to this rule liquidated damages clauses would be enforceable while penalty clauses would be unenforceable.

Liquidated damages clauses are the means by which parties to a contract may predetermine the liability following from the breach. It can be the payment of a sum of money or the transfer of property. The penalty clause allows the judge to interfere to strike down a purported liquidated damages clause. It will do so in cases where it is satisfied that the agreed liability is not a genuine pre-estimate of damages but a penalty to punish the co-party. In such a case, the injured party, though denied the ability to enforce the penalty clause, is forced back on the remedy of damages[43].

English case law adopted many tests to determine the legal nature of the stipulated clause, and regardless of the common intention of the parties or the terminology used, judge should take into consideration the circumstances of each particular contract. And usually, the stipulated sum is considered as a penalty if it is extravagant and unconscionable in amount in comparison with the greatest damages that could possibly follow from the breach[44].

To be valid, a liquidated damages clause must be a 'genuine pre-estimate' of the damages likely to be suffered by the breach and the valuation is done at the time the contract is made[45].

Finally, most of modern legal systems admit that penalty clause can achieve two functions[46]: the first function is compensatory, to predict in advance the amount of foreseeable damages suffered by the creditor in the event of breach, so that proceedings for the assessment of damages can be avoided, especially in cases where proof of damage is difficult. The second function is comminatory to incite and motivate the debtor to perform his obligations as set in the main contract. Although there is a common acceptance of penalty clauses in its both functions, there is still a number of fundamental differences between legal systems.

B) The formation of the penalty clause:

The second common point in Algerian and German law is the formation of the penalty clause. In both Algerian and German law, the penalty clause is a contract (1) and an accessory contract (2).

1- The penalty clause is a contract:

In both Algerian and German law, the penalty clause relates to the execution of the contract and not to its formation. But it doesn't mean that the penalty is not stipulated at the moment of the formation of the main contract[47].

1.1- In Algerian law:

Since independence in 1962 and until 1975, French articles relating to the penalty clause, previously mentioned, were applicable in Algeria. With the promulgation of Algerian civil code in 1975[48] penalty clause becomes regulated from Art. 183 to 185 of Chapter II "Execution by equivalent" of Title II "Effects of the obligation" of Book II "Obligations and contracts" of Algerian civil code.

In Algerian law, the penalty clause is mostly known as the "conventional compensation" and it is mainly intended to be compensatory.

Even if it is named a "clause" in the majority of foreign legal systems[49], the penalty clause is a "contract"[50] but it is called so (a clause) because it is usually put within the terms of the main

contract[51]. Remains to be noted that most of Arabic legal systems expressly stipulate in their civil codes that the penalty clause is an agreement[52]. And even if it is an agreement, the penalty clause can be also concluded in the field of tort liability[53].

As a conventional compensation, the penalty clause is defined as "an agreement by which the contracting parties estimate in advance the compensation that the creditor is entitled to, if the debtor does not fulfill his obligation or if he is late to fulfill it"[54].

In contrast to German law, the conventional nature of the penalty clause is expressly stipulated in Art. 183 A.C.C which provides:

" The parties may fix the amount of reparation in advance, either in the contract or in an ulterior agreement. In this case the provisions of articles 176 to 181 are applicable".

According to this article, the penalty clause can be formed either at the moment of the conclusion of the main contract or later in an independent convention. In the second case, the convention should be concluded before the debtor's failure[55].

And either in the main contract or in the independent convention, the penalty clause must be submitted to the general rules of the formation and validity of contracts.

- The parties should give their consent as an expression of free and informed wills. And like any contract, for the clause to be valid, the contracting party's consent must be free of any vice of consent and, above all, the parties must have the legal capacity to contract.(19 years old Art. 40 A.C.C).

- The object and the cause of the clause must also comply with the law (Art. 92-98). And regardless of the main obligation, any breach of law makes the penalty void according to articles 99 to 105 Algerian C.C.

In Algerian law, the object of the penalty clause can be something other than money. It also can be the resolution of the main contract for which the clause was concluded[56].

- The objective of the contracting parties is the performance of the main obligation. And this purpose (the guarantee of the performance of the main obligation) constitutes the cause of the penalty clause. The word "cause" is taken here in the sense of the expected goal by the contracting parties[57].

- No form is required for the penalty clause in Algerian law. However, according to general rules if the main contract should be conclude in a special form, the same applies to the penalty clause being an accessory clause.

1.2- In German law:

German law regulated the penalty clause in sections 339 to 345 of Title IV "Earnest, contractual penalty" of Division III "Contractual obligations" of Book II "Law of Obligations" of German civil code Bürgerliches Gesetzbuch (BGB)[58].

In German law, Both functions of the penalty clause are recognized (compensatory and comminatory), but a legal regime only exists for "Vertragsstrafe" section 339 et seq German Civil Code[59].

The classical version of penalty clause in German law, also known as "Vertragsstrafe" or "Pönale", "Konventionalstrafe", "Strafversprechen"[60] is mainly intended to be comminatory[61].

"Vertragsstrafe" is provided in section 339 BGB on Payability of contractual penalty:

"Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default. If the performance owed consists in forbearance, the penalty is payable on breach".

Although section 339 BGB stipulates that "the obligor promises the obligee", the German penalty clause "Vertragsstrafe" is not a unilateral promise, it must take the form of a contract. We can find the term "agreement" in section 344 BGB.

The formation of the penalty clause in German law requires, as well as in Algerian law, a contractual agreement between the parties[62].

So in German law, as in Algerian law, all the elements necessary for the formation of a valid contract must be present in the penalty clause.

A consent must be given. In German law, same in Algerian law, it is the will of both parties that creates the penalty clause and not only the will of the creditor, and both parties must agree on the amount of the penalty. Even if the particularity of the penalty clause itself may generate a kind of pressure on the debtor, his consent should be given after being aware of the clause and its sum. The challenge of such a "dangerous" clause makes from the requirement of a free and informed consent something important, and after fair negotiations[63].

Usually, the amount of the penalty is determined by both parties. Nevertheless, general rules in section 315 et seq BGB provide that the performance can be specified by one of the parties or by third party. These provisions are not applied for the penalty clause, but majority of German doctrine allow courts or arbitration courts to fix the amount of the penalty. In this case the amount is no longer controlled[64].

In German law[65], as in Algerian law[66], the performance of the obligation must be in good faith. German courts and tribunals refuse to apply, both in civil and commercial matters, the penalty clauses considered to be contrary to the principle of good faith[67].

The penalty clause is void if it violates a statutory prohibition or if it is contrary to public policy according to section 134, 138 et seq BGB. Likewise, a penalty clause can be void for abuse[68].

According to section 342 BGB on Alternatives to monetary penalty:

"If, as penalty, performance other than the payment of a sum of money is promised, the provisions of section 339 to 341 apply; the claim to damages is excluded if the oblige demands the penalty".

We can see that, same in Algerian law, German law doesn't limit the penalty clause in the payment of a sum of money, and accepts the fact that the penalty clause gets, as object, a performance other than money[69]. The difference is that German civil code provided it clearly, contrary to Algerian civil code which let it to the doctrine opinions.

In this case, the creditor can not claim compensation of damages if he demands the amount of the penalty.

2. The penalty clause is an accessory clause:

The penalty clause depends on a main obligation. The accessory nature of the penalty clause is a similar point in Algerian and German law.

2.1. In Algerian law:

In Algerian law, penalty clause is an accessory clause. The accessory nature of the penalty clause means that the clause is dependent of a main obligation, it is not a main clause. And its existence requires the existence of a valid obligation[70].

Many consequences result from the accessory nature of the Algerian penalty clause:

- As long as the main obligation is possible, the creditor is not entitled to claim the penalty clause. Once the main obligation becomes not possible due to the debtor's fault, the creditor may demand the amount of the penalty.

This means that the penalty clause in Algerian law is not optional and the creditor doesn't have to choose between the main obligation and the penalty clause. The creditor, as well as the debtor, must claim first the performance of the main obligation[71]. The penalty clause is the last solution, it is a precautionary clause[72].

- According to the accessory nature, if the main obligation is void, the penalty clause is void as well[73]. Although, the nullity of the penalty clause doesn't make the main obligation void[74].

2.2. In German law:

Just like Algerian penalty clause, "Vertragsstrafe" is an accessory clause. But unlike Algerian law, the accessory character is confirmed tacitly by German law in section 344 which provides that:

"If the law declares that the promise of an act of performance is ineffective, then the agreement of a penalty made for the event of failure to fulfil the promise is likewise ineffective, even if the parties knew of the ineffectiveness of the promise".

Due to its accessory character, the validity of the penalty clause depends on the validity of the principal obligations. The accessory character of this contractual penalty is also confirmed by German case law[75].

In addition of the classical penalty clause "Vertragsstrafe", German civil code recognize another form of penalty clause stipulated in the second paragraph of section 343 which is an independent penalty promise "das selbstständige Strafversprechen"[76]. While an agreement is required for the formation of "Vertragsstrafe" only a unilateral act can give birth to "das selbstständige Strafversprechen".

Section 343 on Reduction of the penalty:

"(2) The same also applies, except in the cases of sections 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action."

"Das selbstständige Strafversprechen" is an non-accessory clause being not attached to an existing obligation. Here, a person may unilaterally undertake to pay a penalty, in case he or a third party proceeds with the execution of an act or refrains from doing so. And as well as "Vertragsstrafe", this clause can be reduced by the judge[77].

Actually, the independent penalty is almost abandoned because most of legal systems have for purpose to regulate penalties that aim to secure an existing obligation. Section 339 et seq BGB regulates only "Vertragsstrafe" which is an accessory clause[78].

Section II: The legal nature of the penalty clause:

While the penalty clause turned to an "ordinary" damage assessment with a dominant compensatory character in Algerian law, German penalty clause still conserves its punitive version from Antiquity with a dominate comminatory character.

The legal nature of the penalty clause in both systems can be determined by the necessity/or not of damage (A), and by the power of judicial review (B).

A) Requirement of damage:

Damage is the first indicator of the true nature of the penalty clause in Algerian and German law.

1- In Algerian law:

Seems that Algerian law firmly rejects any idea of private punishment[79]. The first compensatory character of Algerian penalty clause can be found in Art. 183 A.C.C, which stipulates that the provisions of articles 176 to 181 on "Performance by equivalent" Chapter II, are applicable. While these articles are introduced to regulate the compensation of damages (liquidated damages or contractual liability) in A.C.C. This means that Algerian legislator expressly gives a compensatory function to the penalty clause. Most of Arabic civil codes used expressly the legal term of "conventional compensation" in the provisions related to the penalty clause[80].

Art. 184/1 A.C.C. provides that:

"The reparation fixed by the agreement is not due if the debtor establishes that the creditor has no prejudice".

In this article, Algerian legislator linked the claim of the penalty clause to the actual damage suffered by the creditor, as a strong aspect of the compensatory character of Algerian penalty clause.

This means that the core of the penalty clause in Algerian law is the occurrence of the damage. If the creditor has not suffered any damage, he will not be entitled to demand the amount of the penalty even if the debtor has failed in his obligations.

As for the burden of proof, Algerian legislator exempted the creditor from proving the damage, and charged the debtor with proving that it did not occur. Thus, the damage became presumptive until the debtor proves that it did not occur[81]. In other words, damage is assumed since the creditor is not required to prove it, rather the debtor is required to prove absence of such a damage. This constitutes a simple legal presumption able to be object of a contrary prove[82].

And according to Art. 184/3 A.C.C. which provides:

"Any agreement concluded contrary to the provisions of the two paragraphs above is void".

The obligatory presence of the damage to claim the amount of the penalty is a mandatory rule and cannot be excluded by the parties by means of agreement.

Being just a simple "conventional compensation" related to the damage, Algerian penalty clause is submitted to the general rules of contractual liability.

According to A.C.C., the contractual liability triggers if the contract is not performed in conformity with the terms and conditions stipulated by the parties. To establish the contractual liability there must be a valid and enforceable contract under which the debtor does not fulfill his contractual obligation[83].

As a typical contractual civil liability, to deserve the penalty clause the three elements of civil liability mast be combined: Fault, damage and causal link, in addition to put the debtor on notice according to Art. 179, 180, 181 A.C.C.

Contractual fault is a wrongful act resulting from the debtor failing to perform his contractual obligations (non-performance, delayed performance or improper performance). Damage (or prejudice) means the harmful patrimonial or non-patrimonial[84] consequences resulting from debtor's fault. The causal link requires that the damage caused to the creditor is attributed to the debtor's fault. Contractual liability does not exist if the damage is attribute to a foreign cause like a force majeure, sudden accident, creditor's fault, or act of a third party [85].

2- In German law:

In contrast to Algerian law, German law gives full effect to the penalty clause. In Germany, the penalty clause has a hybrid nature. But, German civil code recognizes its main role as a means of constraint and then, secondarily, as a way to fix in advance the damages to be paid in case of failure[86].

The German penalty clause is principally intended to ensure the performance of the main obligation by the debtor. In case of non-performance, the debtor is sanctioned by a real penalty. And even if this penalty also covers compensation for the damage suffered by the creditor, this is still not the intended purpose of this clause in German law[87].

German penalty clause does not depend on the actual damage suffered by the creditor due to the non-performance, delayed or improper performance of the main obligation. The penalty may be claimed by the creditor, even though the creditor suffered no injury[8889].

The creditor may claim the penalty once the debtor is in default and the amount is due without any proof of actual damage being necessary[90]. The creditor should only prove the existence of the breach of contract and the fault of the debtor (failure of performance). The debtor is put on notice for delay according to provisions in section 286 BGB[91].

Section 345 BGB on Burden of proof provides:

"If the obligor contests the payability of the penalty because he has performed his obligation, he must prove performance, unless the performance owed consisted in forbearance".

According to section 345, the debtor may contest the payment of the penalty by pretending that he performed his obligation, in this case the debtor must prove the performance.

The no-requirement of damage for the clause to be claimed is the most expressive aspect of the comminatory nature of German penalty clause. Due to its comminatory character, German legislator introduced amendments to the German Civil Code in January 1, 2002[92] according to General Terms and Conditions, which expressly state that penalty clauses in standardized agreements are prohibited[93].

B) The judicial control of the penalty clause:

The second indicator of the legal nature of this clause is the extended judicial control on the penalty. The judicial control of penalty clause can take two forms: reduction or increase.

1- The reduction of the penalty clause:

Both legal systems recognize to the court the power to reduce the amount of the penalty clause, but with a certain contrast.

1.1- In Algerian law:

As in any contract and based on autonomy of will, the parties are, principally, free to fix the amount of the penalty clause, and the debtor has the obligation to pay the penalty as agreed regardless of the actual damage suffered by the creditor. Even the judge doesn't have the right to reduce or increase the penalty[94].

But being just an anticipated assessment of damages in Algerian law, the amount must correspond to the actual damage suffered by the creditor. Hence the possibility of judge to interfere and modify the sum of the penalty in accordance to the damage.

Art. 184/2 A.C.C. provides:

"The judge may reduce the amount of compensation if the debtor establishes that it is excessively exaggerated or that the principal obligation has been partially performed"

It results from this article that Algerian penalty clause can be reduced in two cases[95]:

a) If the amount of the penalty was "excessively exaggerated": Algerian legislator gives judge the power to reduce the penalty in a way that makes the sum of the penalty appropriate to the actual damage.

The exaggeration must be excessive to claim the reduction, an increased estimation of the amount without exaggeration may not give access to judicial reduction[96].

Algerian legislator didn't give the basic norms on which the court can judge the amount excessively exaggerated [97]. But we can conclude, from the compensatory nature of Algerian penalty clause, that the "excessively exaggerated" amount means the big disproportion between the amount of the penalty clause and the damage suffered by the creditor[98]. And it is estimated at the moment of the triggering of the clause, because it is the moment of damage assessment[99]. Likewise, the reduction of the amount of the penalty should be in proportion to the actual damage, but it does not have to be equal to the damage[100].

b) If the main obligation was performed partially: The partial performance is all beginning of performance that gives benefit of the creditor. The reduction in this case is based on the concept of 'justice' to avoid the accumulation of the main obligation and the penalty[101].

Algerian legislator didn't show the norms that judges should adopt to reduce the penalty in case of partial performance[102]. But doctrine tends to say that the reduction should be in proportion to the performed obligation[103].

The same is applicable in case of delayed performance, the judge may reduce the amount of the penalty according to the late performance[104].

The judicial reduction of the Algerian penalty clause is from public order and can not be excluded by means of agreement (Art. 184/3 A.C.C.).

1.2- In German law:

In contrast to Algerian law, German law allows the reduction of the penalty clause in one case, when the amount is disproportionately high.

German law was the first to introduce the possible interference of the judge to reduce the excessively high penalty clauses. Interference of German judge to reduce the penalty clause was not acceptable at the beginning and faced a lot of controversy. But, finally German jurists agreed to introduce such a provision in the new BGB which came into force in 1st January, 1900. This new principle of possible reduction of the penalty clause, firstly introduced in German BGB, affected also a number of legislations closely connected to German law, like Austrian C.C.179 and Italian C.C. since 1942. As indicated above, French law adopted the possibility of judge interference in penalty clause much later (in 1975)[105].

But, the compensatory function of the German penalty clause being today downgraded to the "second-class", it follows that the amount of the clause, either fixed by the parties or reduced by the judge, should not correspond to the actual damage suffered by the creditor[106].

According to section 343 BGB on The reduction of the penalty:

"(1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded.

(2) The same also applies, except in the cases of section 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action".

According to this section, both "Vertragsstrafe" (the classical clause) and "Das selbstständige Strafversprechen" (the independent clause) can be reduced by the court.

And basically, the principle of reduction applies to all forms of "Vertragsstrafe", whether it consists of a monetary or other type of penalty[107]. This principle is destined to protect the debtor, and German case law confirms that section 343 is a mandatory rule so debtor cannot waive his right to reduction by means of agreement[108]. However, once the penalty is paid, the judge is not entitled to reduce it[109].

Remains to be noted that in German law, as well as in Algerian law and contrary to French law, the review is possible only upon debtor's request, thus judge may not reduce the penalty of his own motion (ex officio)[110].

In Algerian law, the basic norm adopted to judge a penalty excessively exaggerated and submitted to reduction, is damage. German civil code sets expressly the norms of reduction. In judging the appropriateness and to assess the "reasonable amount" when reducing high clauses "unverhältnismäßig hoch"[111], the judge should take into consideration any legitimate interest of the creditor and not only of its patrimonial interest, in addition of all damages suffered by the creditor even non-material damages[112].

V. Beuthien affirms that it is necessary that the judge takes into account the fact that the penalty clause constitutes, first at all, a means of guaranteeing the performance of the main contract. It is certainly no longer necessary to recall that the systematic reduction of the clause until the level of the actual damage, or foreseeable damage during the formation of the contract, would empty the penalty clause of its threatening utility[113]. Other authors consider that a penalty does not metamorphose into compensation only because of the interference of judge and the exercise of his power of equity[114].

Another aspect of the comminatory function of the German penalty clause can be found in German commercial code HGB[115]. Contrary to German civil code, German commercial code does not recognize a judicial review to reduce excessive penalty clauses in commercial contracts[116]. According to section 348 HGB:

"A contractual penalty promised by a merchant in the operation of the merchant's commercial business may not be reduced by reason of the provisions of section 343 of the Civil Code".

Penalty clauses in German commercial law are fully enforceable and their coercive character is more pronounced[117]

2. The increase of the penalty clause:

The increase of the penalty clause is a problematic issue both in Algerian and German law.

2.1- In Algerian law:

Art. 185 of Algerian.C.C provides that:

"When the damage exceeds the amount of reparation fixed by the agreement, the creditor cannot claim a higher sum, unless he proves the fraud or the big fault of the debtor".

If the amount of the penalty clause is less than the actual damage, the provisions of mitigation or exemption from liability are to be applied. The court may not increase the amount of the penalty clause by respect to the will of parties who intended to mitigate or exempted the debtor from the liability[118].

So when the damage exceeds the amount of the penalty clause, the creditor must accept the stipulated sum. And it is only if the creditor proves that the debtor has committed fraud or big fault that the judge can increase the amount of compensation in order to match it with actual damage.

We can notice here that while Algerian legislator accepts the reduction of the penalty, he doesn't recognize its increase as a kind of protection for the debtor, who doesn't have to pay a superior amount if he didn't commit a big fault or a fraud[119]. While, may be the debtor doesn't always deserve this protection, and may be it will be necessary to increase the amount of the penalty in order to cover all the damage suffered by the creditor, especially that the penalty clause in Algerian law is above all a conventional compensation.

And unlike French law (Art. 1231-5/2), in Algerian law the debtor should claim the revision of the amount, the judge can not increase the clause ex officio.

2.2- In German law:

Another divergence between Algerian and German law, is that German law does not provide for the increase of the amount of the penalty by judges. However, German law allows the accumulation of the penalty with the performance or the damages in some cases.

Section 340/1 BGB on Promise to pay a penalty for non-performance provides:

"If the obligor has promised the penalty in the event that he fails to perform his obligation, the obligee may demand the penalty that is payable in lieu of fulfilment. If the obligee declares to the obligor that he is demanding the penalty, the claim to performance is excluded".

Principally and due to its accessory character, German civil code prohibits the accumulation of the main obligation and the penalty "Kumulationsverbot" in cases the penalty has been provided for in case of non-performance "Nichterfüllung". The debtor has to choose between the penalty clause and the performance but not both[120]. Here we distinguish two cases:

- If the creditor chooses to demand the penalty, he may not claim for performance. The election's decision in this case is final and cannot be revoked.

- If the creditor chooses the performance of the main obligation. In this case the right of the creditor to claim the penalty remain valid until the performance is fulfilled.

But, provisions of section 340 BGB are not mandatory and they can be modified through parties' agreement[121].

In the other side, German civil code accepts the accumulation of the penalty clause with an additional damage (section 340/2) or with the performance of the main obligation (section 341) in some cases:

1- Section 340/2 BGB provides that:

" (2) If the obligee is entitled to a claim to damages for non-performance, he may demand the penalty payable as the minimum amount of the damage. Assertion of additional damage is not excluded".

According to this section, if the penalty has been agreed for the case of non-performance, the creditor, if he is entitled to damages for non-performance, may demand the penalty stipulated as the minimum amount of damage, but he is not prohibited from asserting additional damage.

Unlike Algerian law and many other legal systems, German law considers "Vertragsstrafe" as a minimum amount of damages "Mindestschaden", allowing the creditor to claim compensation for supplementary damages. According to section 340/2, the creditor can get an additional damage if the damage suffered exceeds the stipulated sum of the penalty in order to recover the excess. This concept makes the penalty clause in German law as a "true" penalty for non-performance.

2- Section 341on Promise of a penalty for improper performance provides that:

"(1) If the obligor has promised the penalty in the event that he fails to perform his obligation properly, including without limitation performance at the specified time, the obligee may demand the payable penalty in addition to performance.

(2) If the obligee has a claim to damages for the improper performance, the provisions of section 340 (2) apply.

(3) If the obligee accepts performance, he may demand the penalty only if he reserved the right to do so on acceptance".

According to section 341 BGB, if the debtor performs improperly or does not perform in the right time, the creditor may demand the penalty in addition to performance "Vertragsstrafe neben Erfüllung" as well as any other incurred damages[122]. Although, the creditor may lose his rights to demand the penalty upon acceptance of the defective performance without reservations "vorbehaltloser Annahme".

If the creditor wants to demand the penalty despite the acceptance of the defective performance, he must provide for an express unilateral declaration on the moment of acceptance. However, section 341 is not a mandatory provision, the parties can waive the requirement of an express declaration, by agreement[123].

Another divergence between Algerian and German law is found in the partial performance. As an improper performance, the partial performance gives right to accumulation according to section 341 German civil code. While in case of partial performance, the penalty can be reduced in Algerian law.

Conclusion :

Being devoid of any punitive character, seems that the penalty clause in Algerian law lost all its repressive role and moved to the compensatory mode, when it is supposed to ensure the main obligation. The claim of the penalty clause in Algerian law depends strictly on the actual damage. In addition, the pronounced judicial control on this clause in Algerian law, comparing to German law, refers the will of Algerian legislator to protect the debtor at the expense of the creditor, by allowing judge to reduce the excessive penalty but not to increase the small one.

Ironically, German law was the first to introduce the possible interference of judge into penalty clauses in 1900, exceeding all the other systems (even French law in 1975). However, it seems that German law today, is more adherent to the very first comminatory function of the penalty clause, which aims to push the debtor to perform the main obligation. Through a repressive legal regime of "non-damage is needed to claim the penalty" and "accumulation of the penalty to cover all damage". But if German legislator adopts the punitive function, he does not radically deny the compensatory aspect of this clause.

It remains to be noted that:

- While German legislator imposed a regime of 7 sections for the penalty clause (from §339 to §345 BGB), Algerian legislator regulated this clause through only 3 articles (183,184 and 185 A.C.C.) with a reference from Art. 176 to 181. Thus, many aspects of the penalty clause have been clearly regulated in German law in contrast to Algerian law which left the largest work to the doctrine.

- The penalty clause, both in Algerian and German law, is an accessory contract from Roman law. Unlike German law, the contractual nature is expressly confirmed by Algerian civil code (Art. 183). Unlike Algerian law, the accessory character is tacitly confirmed by German civil code (section 344).

- When the amount of the penalty is "excessively exaggerated", Algerian law gives judge the possibility to reduce the penalty in accordance with the actual damage. In German law, the amount of the clause, either fixed by the parties or reduced by the judge, doesn't have to correspond to damage.

- If the main obligation has been partially performed, the solution in Algerian law is to reduce the amount of the penalty. In German law, a partial performance is an improper performance which can give right to the creditor to claim the penalty in addition to performance, as well as any other damage.

- If, unlike Algerian law, German law doesn't provide the increase of the penalty, German law allows the accumulation of the penalty with the performance or the damages in some cases, so the creditor will be able to cover all the damages.

- Both in Algerian and German law, judge can not interfere to modify the amount of the penalty clause of his own motion (ex officio).

As suggestions:

- Algerian legislator may more clarify the basic norms that judge can use to determine the reduction in case of impartial performance (damage, interests of the partial performance on the creditor…).

- If we can say that Algerian legislator favoured "justice" over "free-will" when regulating the penalty clause, this same justice should be taken into consideration to increase the penalty. Article 185 A.C.C. allows judge to increase the amount only in the event of fraud or big fault by the debtor, as a protection for the debtor. But Algerian legislator forgets that the debtor is not always "the weak party" in the contract and not always worthy of this protection. In addition, before being a party in the penalty convention, the debtor is a party in the main contract and the party who has failed in his obligations.

May be by "justice", judge should be allowed to increase the amount of the penalty to cover all the damage suffered by the creditor, even without big fault or fraud. This will perfectly match with the compensatory format that Algerian legislator gives to the penalty.

Noting that, the aim of the revision of the penalty clause is to find a balance in order to ensure a correct performance of the main obligation for the creditor, and to guarantee a legal protection against unreasonable penalty clauses for the debtor.

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[2] Art. 224/1 Egyptian Civil Code.

[3]Paula D Baron, The Doctrine of Penalties and the Test of Commercial Justifi cation, 34 UWA LAW REVIEW, 2008, p.46.

[4] Marième Lacroix, Pour une reconnaissance encadrée des dommages-intérêts punitifs en droit privé français contemporain, à l'instar du modèle juridique québécois, LA REVUE DU BARREAU CANADIEN, Vol.85, 2007, p.579.

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[6] D. Mazeaud, La notion de clause pénale. In: Revue internationale de droit comparé. Vol. 45 N°3, Juillet-septembre 1993, p. 722.

[7] Segrè Tullio, Clause pénale et dommages ultérieurs en droit comparé. In: Revue internationale de droit comparé. Vol. 22 N°2, Avril-juin 1970, p. 307.

[8] Silva Pleqi, Fakultät für Rechtswissenschaft Penalty clause and earnest money in german and albanian law a comparative approach, Thesis Submitted in partial fulfilment of the requirement for the degree Magister Legum (LL.M), University of Hamburg, June 2020, p. 4.

[9] Marc Pichon De Bury, La clause pénale en droit français et en droit allemand, Available online: https://www.juripole.fr/memoires/compare/Marc_Pichon/partie1.html Accessed on : January 29, 2023 at 1:51 p.m.

[10] Marc Pichon De Bury, *Idem.*

[11] Alexandre Demeyere, *Op. cit.*, p. 6.

[12] Marc Pichon De Bury, *Idem.*

[13] According to Justinian, instead of simply stipulating the fact or abstention, it was preferable to strengthen this stipulation by adding a penalty clause. It is very advantageous for the stipulator to require a promise of penalty, there is a great interest to make his debt certain and to fix in advance and at a fixed price the amount of the pecuniary reparation which will be due to him in the event of non-performance. Joseph Delon De Mézerac, Droit Romain de la stipulation, Un fait ou une abstention, Droit français du retrait d'indivision, Thèse pour le Doctorat, Faculté de Droit de Paris, 1886, p.11.

[14] Alexandre Demeyere, *Op.cit.*, p. 7.

[15] Joseph Delon De Mézerac, *Op.cit*., p. 13.

[16] Joseph Delon De Mézerac, *Op.cit*., p. 12.

[17] Alexandre Demeyere, *Op.cit*., p. 7.

[18] حملاوي دغيش ، الشرط الجزائي وأثره في العقود بين الشريعة الإسلامية والقانون المدني الجزائري، أطروحة مقدمة لنيل شهادة دكتوراه علوم في الحقوق تخصص القانون الخاص، كلية الحقوق والعلوم السياسية، جامعة محمد خيضر بسكرة، الموسم الجامعي 2018/2017، ص 185.

[19] Julie Paquin, Droit des obligations, Le contrôle des clauses pénales abusives en droit québécois : la clause pénale peut-elle être punitive ? 47 RJTUM 387, 2013, p. 389.

[20] Marc Pichon De Bury, *Idem.*

[21] Alexandre Demeyere, *Op.cit.*, p. 7.

[22] Marc Pichon De Bury, *Idem.*

[23] Alexandre Demeyere, *Op.cit.*, p. 6.

[24] Marc Pichon De Bury, *Idem.*

[25] The Wergild, also spelled Wergeld, or Weregild (in old English means "man payment"), is in ancient Germanic law the amount of compensation paid by a person committing an offense to the injured party or, in case of death, to his family. Available online: https://www.britannica.com/topic/wergild Accessed on: January 31, 2023 at 6:18 p.m

[26] Alexandre Demeyere, *Op.cit.*, p. 8.

[27] Alexandre Demeyere, *Op.cit.*, p. 8.

[28] لمزيد من التفاصيل يراجع مؤلف: حملاوي دغيش، مرجع سابق، ص 96 وما بعدها.

[29] Alexandre Demeyere, *Op.cit*., p. 9.

[30] Jean Thilmany. Fonctions et révisibilité des clauses pénales en droit comparé. In: Revue internationale de droit comparé. Vol. 32 N°1, Janvier-mars 1980, p. 19.

[31] Art. 1152 Napoléon code : *« Lorsque la convention porte que celui qui manquera de l'exécuter paiera une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte ni moindre* ».

[32] Art. 1229 Napoléon code : « *La clause pénale est la compensation des dommages et intérêts que le créancier souffre de l'inexécution de l'obligation principale.*
Il ne peut demander en même temps le principal et la peine, moins qu'elle n'ait été stipulée pour le simple retard ».

[33] Art.1231 Napoléon code: « *La peine peut être modifiée par le juge lorsque l'obligation principale a été exécutée en partie* ».

[34] Jean Thilmany. *Op.cit.*, p. 21.

[35] Julie Paquin, *Op.cit.*, p. 391.

[36] François Terré and Yves Lequette, CLAUSE PÉNALE. CARACTERE FORFAITAIRE, Les grands arrêts de la jurisprudence civile, 12e édition 2008, p.207.

[37] François Terré and Yves Lequette, *Op.cit.*, p. 207

[38] D. Mazeaud, *Op.cit.*, p. 721 ; See also : M. Jacques Thyraud, *Op.cit.*, p. 7-8.

[39] Art. 1231-5 : *" Lorsque le contrat stipule que celui qui manquera de l'exécuter paiera une certaine somme à titre de dommages et intérêts, il ne peut être alloué à l'autre partie une somme plus forte ni moindre.*

Néanmoins, le juge peut, même d'office, modérer ou augmenter la pénalité ainsi convenue si elle est manifestement excessive ou dérisoire.
Lorsque l'engagement a été exécuté en partie, la pénalité convenue peut être diminuée par le juge, même d'office, à proportion de l'intérêt que l'exécution partielle a procuré au créancier, sans préjudice de l'application de l'alinéa précédent.
Toute stipulation contraire aux deux alinéas précédents est réputée non écrite.
Sauf inexécution définitive, la pénalité n'est encourue que lorsque le débiteur est mis en demeure ».

[40] Christine BIQUET-MATHIEU, Les clauses pénales, Rapport belge Texte provisoire, Journées trilatérales Espagne – Québec – Belgique «Questions choisies de droit privé», Barcelone 28 et 29 octobre 2010, p. 3.

[41]Scottish Law commission, Discussion Paper on Penalty Clauses , Discussion Paper No 103, Decembre 1997, p.4.

[42] Yusuf Mohammed Gassim Obeidat, The 'Penalty' Clause in English Law: A Critical Analysis and Comparison with Jordanian Law , A thesis submitted in accordance with the requirements for the degree of Doctor of Philosophy, University of Leeds School of Law Centre for the Study of Business Law and Practice, UK July 2004, p.21.

[43] Paula D Baron, *Op.cit.*, p. 43.

[44] Andrew Ham, The rule against penalties in contract: an economic perspective, Melbourne University Law Review [Vol. 17, December 1990, p. 651.

[45] Paula D Baron, *Op.cit.*, p. 43.

[46] Some authors deny the double function of the penalty clause: «The penalty clause is one, and one is its function, the function to establish the threat of a conventional sanction which replaces the sanction of damages provided for by law. The penalty clause is a precious instrument for the clarity of its effects, offered by the legal system to the autonomy of the contracting parties to regulate contractual relations ». Segrè Tullio, *Op.cit*., p. 310.

[47] Hugo Barbier, Clause pénale et période de formation du contrat, RTD Civ. 2014 p.111.

[48] Ordinance n° 75-58 of September 26, 1975, on Civil law, JORA n° 78, of September 30, 1975.

[49] For ex: Art. 1231-5 French C.C.; Art. 1226 Belgian C.C.; Art. 1622 Quebec C.C…

[50] D. Mazeaud, *Op.cit.*, p. 722.

[51] أنور سلطان، النظرية العامة للالتزام، أحكام الالتزام، دار الجامعة الجديدة للنشر، الإسكندرية، 2005، ص 173.

[52] For ex. Art. 183 Algerian C.C.; Art. 224 Egyptian C.C.; Art. 224 Syrian C.C.; Art. 364 Jordanian C.C.; Art. 264 Moroccan Code of Obligations and Contracts ….

[53] العيد بورنان، دور القاضي في التعويض الاتفاقي، بحث من أجل نيل شهادة الماجستير في العقود والمسؤولية، جامعة الجزائر، 2015/2014، ص 49 وما بعدها.

[54] أنور سلطان، مرجع سابق، ص 173.

[55] أنور سلطان، مرجع سابق، ص 173.

[56] حملاوي دغيش، مرجع سابق، ص 174.

[57] Marc Pichon De Bury, *Idem.*

[58] German civil code Bürgerliches Gesetzbuch (BGB), promulgated on August 18, 1896, entered into force on January 1, 1900. Available online: https://www.gesetze-im-internet.de/englisch_bgb/ Accessed on: January 07, 2023 at 10:05 p.m.

[59] Schelhaas, H. N., Het Boetebeding In Het Europese Contractenrecht, The Penalty Clause in European Contract Law, Utrecht 2004, p. 507.

[60] See: Silva Pleqi, *Op.cit.*, p. 31; The Mystery of Penalties & Liquidated Damages, A comparison between German and English Law: The 7th August 2015. Available online: https://www.walkermorris.co.uk/in-brief/the-mystery-of-penalties-liquidated-damages/ Accessed on: February 11, 2023 at 6:00 p.m.

[61] Jean Thilmany. *Op.cit.*, p. 49.

[62] According to section 328 BGB, the performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly. As a contract, "Vertragsstrafe" can be made for the benefit of a third party. Marc Pichon De Bury, *Idem.*
[63] Marc Pichon De Bury, *Idem.*
[64] Marc Pichon De Bury, *Idem.*
[65] Section 242 BGB on Performance in good faith: "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration".
[66] Art. 107/1 A.C.C.: « The contract must be performed in accordance with its content, and in good faith".
[67] Such is the case when the creditor invokes a non-performance which he could prevent or had to prevent, due to the duty of loyalty. Or when the clause is absolutely out of proportion with the object of the main contract. Or when the creditor who claims the application of the penalty is not ready to perform his own performance. Jean Thilmany. *Op.cit.,* p. 50.
[68] Like when the actual damage is insignificant and that it can be deduced from the creditor's attitude that he attached no importance to the non-performance, or when it is because of the creditor's behavior that the debtor was forced to breach the contract. Jean Thilmany. *Op.cit.,* p. 50.
[69] Pieck, Manfred, A Study of the Significant Aspects of German Contract Law, Annual Survey of International & Comparative Law: Vol. 3: Iss. 1, Article 7, 1996, p. 128.
[70] حملاوي دغيش، مرجع سابق، ص 105.
[71] حملاوي دغيش، مرجع سابق، ص 106.
[72] العيد بورنان، مرجع سابق، ص 33.
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[74] حملاوي دغيش، مرجع سابق، ص 106.
[75] Silva Pleqi, *Op.cit.,* p. 15.
[76] Marc Pichon De Bury, *Idem.*
[77] Marc Pichon De Bury, *Idem.*
[78] Silva Pleqi, *Op.cit.,* p. 32.
[79] Abdelkrim MEFLAH and Khaldia YEKRO, La Clause Pénale Comme Moyen d'Indemnisation en Droit Algérien à la Lumière du Droit Français, Revue de Droit Public Algérien et Comparé, Vol. 07, N 02, Novembre 2021, p. 11.
[80] مثال ذلك: المادة 1/224 قانون مدني مصري: "لا يكون التعويض الاتفاقي مستحقا إذا أثبت المدين أن الدائن لم يلحقه أي ضرر"، المادة 226 قانون مدني سوري: " إذا جاوز الضرر قيمة التعويض الاتفاقي، فلا يجوز للدائن أن يطالب بأكثر من هذه القيمة، إلا إذا أثبت أن المدين قد ارتكب غشا أو خطأ جسيما".
[81] إبراهيم سيد أحمد، الشرط الجزائي في العقود المدنية بين القانونين المصري والفرنسي، دراسة مقارنة فقها وقضاء، المكتب الجامعي الحديث، الإسكندرية، 2003، ص 61.
[82] بسام سعيد جبر جبر، مرجع سابق، ص 115.
[83] Nadia Quzmar, , Mohammed Elbayat, Legal Nature Of Contractual Liability: A Comparative Study, INTERNATIONAL JOURNAL OF SCIENTIFIC & TECHNOLOGY RESEARCH VOLUME 9, ISSUE 03, MARCH 2020, p. 7019.
[84] Art. 182 bis (Law n° 05-10 of June 20, 2005 modifying and supplementing Ordinance n° 75-58 of September 26, 1975, modified and supplemented, on the Civil Code): "moral damage includes any violation on the freedom, honor or notoriety".
[85] Nadia Quzmar, , Mohammed Elbayat, *Op.cit.,* p. 7022.
[86] Jean Thilmany. *Op.cit.,* p. 49.
[87] Joé Zeimetz, Paul Eilenbecker, Charlotte Junck ,Les clauses relatives à la responsabilité contractuelle en droit allemand, Travail de groupe pour le CDPF, Master 2 Droit privé fondamental

2010/2011, Université de Strasbourg. Available online: http://cdpf.unistra.fr/travaux/obligations-biens/les-clauses-contractuelles/allemagne/ Accessed on : February 10, 2023 at 10:17 a.m.

[88] Pieck, Manfred, *Op.cit.,* p. 128.

[89] Remains to be noted that German law makes a distinction between penalty clauses and liquidated damages "Schadensersatzpauschalirung" or "pauschalierter Schadenersatz".
Since 2002 it is included in section 309/5 BGB. The distinction between "Schadensersatzpauschalirung" and "Vertragsstrafe" is considered as unclear and was subject to doctrinal debate. The main purpose of liquidated damages is the compensation of the damages suffered by the customer. If the customer did not suffer damage the other party may be entitled to have the liquidated damages reduced or set aside. For more details, see: Silva Pleqi, *Op.cit.,*p. 38 ; The Mystery of Penalties & Liquidated Damages, A comparison between German and English Law, *Idem.*

[90] Joé Zeimetz, Paul Eilenbecker, Charlotte Junck, *Idem.*

[91] Silva Pleqi, *Op.cit.,* p. 33.

[92] German Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738). Available online: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html Accessed on: February 11, 2023 at 2:39 p.m.

[93] Section 309 BGB on Prohibited clauses without the possibility of evaluation provides that:
"Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms: 6- (Contractual penalty) a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract".

[94] قويدر نور الإسلام فرقاني، استحقاق الشرط الجزائي وحدود سلطة القاضي في تعديله، مجلة الباحث للدراسات الأكاديمية، المجلد 07، العدد 02، جوان 2020، ص 1662.

[95] Some Algerian authors add a third case of reduction stated in Art. 187 A.C.C. which provides that: "If, when claiming his right, the creditor has, in bad faith, extended the duration of the litigation, the judge may reduce the amount of the compensation fixed by the agreement or not grant it, for the entire duration of the unjustified extension of the litigation". Based on the abuse and good faith principle, the judge may reduce the amount of the penalty clause or not grant it if the creditor deliberately prolonged the litigation. See:
زاهية حورية سي يوسف، سلطة القاضي في تعديل الشرط الجزائي، المجلة النقدية، مجلد 10، رقم 01، 2015، ص11 وص 15، قويدر نور الإسلام فرقاني، مرجع سابق، ص 1665.

[96] أنور سلطان، مرجع سابق، ص 179.

[97] Section 343 German C.C.: "In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account".

[98] العيد بورنان، مرجع سابق، ص 58.

[99] زاهية حورية سي يوسف، مرجع سابق، ص 12.

[100] قويدر نور الإسلام فرقاني، مرجع سابق، 1664.

[101] حملاوي دغيش، مرجع سابق، ص 278.

[102] French C.C. provides that in case of partial performance, the reduction is done in proportion to the interest that the partial performance has procured for the creditor. (Art. 1231-5/3 French C.C.).

[103] أنور سلطان، مرجع سابق، ص 179.

[104] علال قاشي، الشرط الجزائي بين القانون الجزائري والشريعة الإسلامية (دراسة مقارنة)، مجلة الأستاذ الباحث للدراسات القانونية والسياسية، المجلد 4، العدد 2، 2019، ص 2263.

[105] Silva Pleqi, *Op.cit.,* p. 36.

[106] Jean Thilmany. *Op.cit.,* p. 49.

[107] Pieck, Manfred, *Op.cit.,* p. 128.

[108] Silva Pleqi, *Op.cit.,* p. 37.
[109] Pieck, Manfred, *Op.cit.,* p. 128.
[110] Silva Pleqi, *Op.cit.,* p. 37.
[111] Schelhaas, H. N., Het Boetebeding, *Op.cit*., p. 507.
[112] Silva Pleqi, *Op.cit.,* p. 37.
[113] Jean Thilmany. *Op.cit.,* p. 49.
[114] Such a power to revise the amount of the penalty clause when it is disproportionately high, is exercised sparingly. The requirement of the manifestly excessive character that the comminatory penalties must present in order to be reduced is strictly applied by the judges. Moreover, no obligation is imposed on them to align the penalties with the amount of the damage suffered. The revision of a penalty clause may therefore allow to remain a "reasonable penalty". This is then fixed by the judges according to the seriousness of the fault of the debtor. The evaluation refers to "a real penalty sanctioning unlawful non-performance" and therefore, "the amount of the revised penalty must necessarily and significantly exceed the actual damage. Marième Lacroix, *Op.cit*.,p.580.
[115] German commercial code Handelsgesetzbuch (HGB), legislated on 10 May 1897, entered into force on 1 January 1900. Available online: https://www.gesetze-im-internet.de/englisch_hgb/ Accessed on: January 08, 2023 at 7:45 a.m.
[116] Pieck, Manfred, *Op.cit.,* p. 128.
[117] "Since merchants are presumed to be more knowledgeable than private individuals, they are assumed to be less inclined to be trapped by abusive clauses. In addition, litigation in commercial matters hamper business". See: Jean Thilmany. *Op.cit.,* p. 49.
[118] أنور سلطان، مرجع سابق، ص 180.
[119] Unlike French law which allowed the increase of the penalty clause if it is obviously derisory (Art. 1231-5/2 French C.C.).
[120] Pieck, Manfred, *Op.cit.,* p. 128.
[121] Silva Pleqi, *Op.cit.,* p.34.
[122] Pieck, Manfred, *Op.cit.,* p. 128.
[123] Silva Pleqi, *Op.cit.,* p.36.

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