

the penalty clause in civil law between the autonomy of will and the judge's authority to modify the contract

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Abstract: The penalty clause is a tool to determine the compensation between the parties in the event of a breach of contract. The research aims to clarify the judge's authority to modify or cancel the penalty clause to strike a balance between respecting the will of the parties and protecting contractual fairness. We found that the judge's authority to increase the penalty clause should not be limited to the case of fraud or gross error, but should be extended to the case of trivial error. We also concluded that an objective criterion should be established to determine the judge's intervention in determining the penalty clause.

Keywords: penalty clause, contractual compensation, autonomy of will, judge's authority, contractual equilibrium.

1- Introduction

Contracting is an essential tool in the lives of individuals and creates legal relationships between them in various economic and social activities, such as selling, renting, etc.

Due to the large number of transactions between individuals, whether commercial or civil, it is natural that one of the parties to the contract may breach its contractual obligations or fail to fulfil them. Therefore, it was necessary to organize these relationships in a way that ensures the protection of the rights of the contracting parties and imposes fair legal sanctions in case of breach of these obligations. A penalty clause is a legal tool that helps the parties to determine in advance the penalties that can be imposed in the event of a party's breach of its contractual obligations. It is a preventive tool that helps avoid disputes and encourages the timely fulfilment of contractual obligations. It allows the parties to preserve and protect their rights and ensures the effective fulfilment of contracts. Thus, the penalty clause contributes to the stability of contractual transactions between individuals in the face of the constant change and speed of business life.

Despite the great importance of the penalty clause, it raises some legal issues related to the extent of the parties' freedom to define it and the judge's authority to intervene to modify it. Therefore, we pose the following question: To what extent is it possible to reconcile the freedom of the parties to determine the penalty clause with the judge's authority to modify it to ensure contractual equilibrium?

To answer this question, we address the autonomy of will to determine the penalty clause (2) and then the judge's authority to modify the penalty clause (3).

2. Autonomy of Will in determining the Penalty Clause

In this element, we address the concept of a penalty clause and its legal nature (2.1) and then the limits of the parties' freedom to set a penalty clause (2.2).

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2.1 Concept and Legal Nature of the Penalty Clause

We address the definition of a penalty clause and its distinction from similar regimes (2.1.1) and then its legal nature (2.1.2).

2.1.1. Definition of Penalty Clause and distinguishing it from Similar Concepts

It is necessary to define Penalty Condition (2.1.1.1) and distinguish it from similar concepts (2.1.1.2).

2.1.1.1. Definition of Penalty Clause

A penalty clause, also called a contractual compensation, is a financial compensation determined by the contracting parties in advance in the contract instead of leaving the matter to the judge, which the creditor receives if the debtor does not fulfil his obligation or delays in fulfilling it (Al-SANHOURI, 1966, p. 851) (MOSADEK & BEKA, 2021, p. 339). This clause is considered subordinate to the original obligation.

2.1.1.2. Distinguishing the Penalty Clause from Similar Concepts

There are legal concepts that are distinct from the penalty clause, which are close to it and may cause confusion with it, including judicial compensation (2.1.1.2.1), coercive fine (2.1.1.2.2), termination clause (2.1.1.2.3) and deposit (2.1.1.2.4).

2.1.1.2.1. Penalty Clause and Judicial Compensation

Judicial compensation is a sum of money determined by a judge based on his assessment of the extent of the damage actually suffered by one contractor due to the other contractor's breach of its contractual obligations.

The difference between judicial compensation and a penalty clause is that the penalty clause (contractual compensation) is predetermined by the agreement of the parties, while judicial compensation is determined by the court.

In terms of their nature, judicial compensation is based on civil liability, while the penalty clause is based on the principle of the autonomy of will, i.e. the agreement of the parties

2.1.1.2.2. Penalty Clause and Coercive Fine

The coercive fine is a means of compelling the debtor to fulfil his obligation in kind and not to compensate for the damage he has caused to the other contractor. It is imposed by the judge and is not determined by the parties. This fine increases for each day of delay until the obligation is fulfilled, so it is considered a means of pressure or coercion rather than a compensatory sanction, and thus differs from a penalty clause. (JAD AL-RAB, 2007, pp. 99-100)

2.1.1.2.3. Penalty Clause and Termination Clause

A termination clause is an agreement included in the contract that if one of the contracting parties fails to fulfil one of its obligations, the contract is automatically terminated without the need for a court judgement to be issued, while a penalty clause does not lead to the termination of the contract but to financial compensation for the damage caused by the debtor to the creditor due to the breach of the obligation, while maintaining the contract.

2.1.1.2.4. Penalty Clause and Deposit

There are two connotation of the deposit: it may signify the confirmation of the contract or it may signify the right of one of the contracting parties to deviate from the contract. In the second connotation, the deposit is similar to the penalty clause because it was established to obtain compensation in the event of a breach of contract, but it differs from the penalty clause because the deposit must be paid in the event of a breach of contract even if there is no damage, whereas a penalty clause requires damage to be due. The deposit may not be reduced, while the penalty clause may be reduced until it is proportionate to the damage. In addition, the deposit can be paid by the debtor in lieu of the performance of the original obligation even if the original obligation is feasible and the creditor demands its performance, while in the penalty clause the debtor cannot pay it in lieu of the original obligation if it is feasible and demanded by the creditor. (JAD AL-RAB, 2007, p. 95)

By distinguishing the penalty clause from similar concepts, the legal limits of this clause and its effects become clear, and the contracting parties realize the nature of the obligation they incur when agreeing to it. Thus, the penalty clause is an embodiment of the principle of autonomy of will within specific legal limits and procedures.

2.1.2. Legal Nature of the Penalty Clause

There are different opinions as to the nature of the penalty clause. Some consider it a penalty (2.1.2.1), others as compensation (2.1.2.2), while others believe that contractual compensation has a dual nature (2.1.2.3). In light of these opinions, we will examine the position of the Algerian legislator (2.1.2.4).

2.1.2.1. First Opinion: The Penalty Clause is a Punishment

According to this view, the penalty clause is a special penalty imposed by the contract in advance (KACHI, 2019, p. 2255), intended to deter the party on whom the obligation falls from breaching its obligation. It is considered like a penalty because it is imposed in advance, i.e. before the breach of the obligation, and does not require proof of damage, and sometimes it is exaggerated in order to deter the obligor.

The fact that the penalty clause is considered a penalty makes it closer to a financial penalty than to compensation, which is considered compensation for the actual damage, because sometimes the penalty clause is set at an amount that exceeds the actual damage.

A penalty clause is similar to a punishment in terms of being imposed prior to the commission of a fault in order to induce the contracting parties not to breach their obligations, as is the case with the imposition of a penalty prior to the commission of a crime in criminal law.

This view has been criticized on the grounds that it is the state that imposes the penalty, not the contracting parties, and that the contract leads to compensation rather than punishment in case of breach. Moreover, the judge can modify the penalty clause but not the punishment.

2.1.2.2. Second Opinion: Penalty Clause is a Contractual Compensation

According to this view, the penalty clause is a compensation that the creditor receives if the debtor breaches his obligation by failing to fulfil it or delaying its fulfilment. This amount may not be compromised, i.e. it may not be modified by increasing or decreasing it because legally, in order to obtain compensation, the elements of fault and causation must be proven. The element of fault is not an issue because it occurs after the debtor has been notified, while the damage is difficult to prove, so the creditor is exempted from proving the damage because he receives compensation even if he does not suffer any damage.

The right to compensation is created by the will of the contracting parties and in case the debtor fails to fulfil his obligation, he receives the amount of compensation that has been agreed upon and determined freely by the contracting parties.

This view has been criticized on the grounds that the amount of the penalty clause may be exaggerated and exceed the value of the actual damage suffered by the injured party, in which case the penalty clause would be considered a punishment rather than compensation.

2.1.2.3. Third Opinion: The Penalty Clause has a Dual Nature

According to this view, the penalty clause has a dual nature, i.e. it has a compensatory and punitive character at the same time. It is a compensation obtained by the creditor in the event of the debtor's breach of his obligation, and is thus a prior assessment of the damage that is likely to occur. It aims to obtain compensation quickly without resorting to the judiciary. It is also a punishment, as its value is set at an amount that exceeds the actual damage and is thus a deterrent to the party that breaches its obligation and puts financial pressure on it to fulfil the obligation.

This view was criticized because the dual nature of the penalty clause conflicts with the concept of a contractual obligation. If the penalty clause is given the status of a punishment, it conflicts with the provisions of civil law, which aims to compensate for damage. In addition, considering the penalty clause as a punishment leads to instability in transactions and different application by judges due to the lack of distinction between the boundaries between compensation and punishment.

2.1.2.4. Algerian Legislator's Position regarding the Definition of the Penalty Clause

Algerian legislation has not defined the penalty clause, but according to Article 183 of the Civil Code (Ordinance No. 75-58 of 26 September 1975, 1975), it is the prior agreement of the contracting parties in the contract or in a subsequent agreement on the compensation that the creditor will receive if the debtor breaches his obligation, and this clause has a compensatory rather than punitive character. It is subject to the discretion of the judge, who can modify it if it is excessive (BOURENNANE, 2019-2020, p. 31).

2.2 Limits on the Freedom of the Parties to set the Penalty Clause

Under a penalty clause, the contracting parties assess the compensation in advance in the event of failure or delay in the fulfilment of the obligation by one of the contracting parties, thus enshrining the freedom of the parties to include the penalty clause in their agreement and the freedom to assess it. This freedom derives from the principle of the authority of the will (2.2.1), and the freedom of the parties to specify the penalty clause has an impact on the original obligation (2.2.2). This freedom is not absolute, but is bound by restrictions related to public order and contractual balance, which may lead to the invalidity or nullity of the clause (2.2.3).

2.2.1. Authority of the Contracting Parties to Include and Assess the Penalty Clause

The penalty clause is governed by the principle of autonomy of will, i.e. the contracting parties are free to include this clause in the contract and are free to negotiate and agree on it as long as it is not contrary to public order or public morals. The contracting parties determine in advance the compensation payable in the event of a breach of obligation (2.2.1.1) and are free to assess its value and the conditions of its entitlement (2.2.1.2).

2.2.1.1. The Power of the Contracting Parties to include a Penalty Clause

The principle of autonomy of will entails the freedom of the contracting parties to include a penalty clause in the contract, i.e. to expressly stipulate in the contract a specific financial penalty in case of failure or delay in fulfilling the obligation. They are free to negotiate and agree on the penalty clause as long as it does not conflict with public order or public morals. Therefore, the contracting parties determine the compensation payable in the event of a breach of obligation in advance. The penalty clause must be formulated in a precise, clear and explicit manner in the contract when it is concluded or a subsequent agreement, leaving no room for interpretation. It must specify the obligation, the breach of which entails the entitlement to the compensation stipulated in the clause. The subject matter of the obligation must be legitimate; otherwise, the penalty clause is invalid.

2.2.1.2. Freedom of the Contracting Parties to Decide on the Amount of the Penalty Clause and the Conditions for its Fulfilment

The freedom of the contracting parties to assess the value of the penalty clause is an application of the principle of autonomy of will, which gives the contracting parties the right to freely organize their contracts. They can agree on a high or low value for the compensation, which may be in the form of a fixed amount or a percentage of the value of the contract or damage. The purpose of this assessment is to compensate the creditor for the damage caused by the debtor's breach of obligation.

In order for the creditor to be entitled to the compensation stipulated in the penalty clause, there must be a fault by the debtor that causes damage to the creditor and a causal relationship between the fault and the damage, and the debtor must have been notified.

Fault: In order for the creditor to be entitled to the contractual compensation or penalty clause, the debtor must be at fault, and in the absence of fault, the creditor is not entitled to this compensation. There must be a breach by the debtor of his obligation, whether total or partial, and the deadline for fulfilling the obligation must have arrived but the debtor failed to fulfil it. (JAD AL-RAB, 2007, p. 163)

Damage: In order for the penalty clause to be enforceable, there must be damage to the creditor. Article 184 of the Civil Code stipulates that the creditor is not entitled to this compensation if there is no damage. The penalty clause exempts the creditor from proving the damage because it is presumed that the debtor will not fulfil his obligation, so the burden of proof falls on the debtor.

Causality: In order for the penalty clause to be enforced, there must be a causal relationship between the fault and the damage, i.e. the fault must be the direct cause of the damage, but if the debtor proves that the damage is due to an external cause, the causal relationship is negated and the creditor is not entitled to the agreed compensation (penalty clause), unless it is agreed that the creditor is entitled to the penalty clause despite the impossibility of execution due to an external cause, in accordance with Article 178 of the Civil Code. (FERGANI, 2020, p. 1660)

Notice to the debtor: In order for the creditor to be entitled to the contractual compensation (penalty clause), he must give notice to the debtor, unless there is an agreement or stipulation to the contrary (HISHAM, 2011, p. 193) (Al-SANHOURI, 1966, p. 794). It can be agreed between the contracting parties that the debtor is deemed to have been notified as soon as the obligation is due for fulfilment without the need to give notice.

There are also cases in which the law does not require notice, as stipulated in Article 181 of the Civil Code, i.e. if the performance of the obligation is impossible or unfeasible due

to an act of the debtor, or if the obligation consists of compensation resulting from a harmful act or the restitution of something stolen and the debtor knows it, or something that the debtor has received unlawfully and knows it, or if the debtor declares in writing that he does not intend to perform his obligation.

2.2.2. Effect of the Agreement on the Penalty Clause on the Original Obligation

The penalty clause follows the original obligation and does not diminish it (1.2.2.2), the agreement reduces the burden of proof (2.2.2.2), and the penalty clause has legal effects on the performance of the obligation (3.2.2.2).

2.2.2.1. The Penalty Clause is Subordinate to the Original Obligation and does not Diminish it

A penalty clause, i.e., a contractual indemnity, is not an original obligation, but is subordinate to the original obligation stipulated in the contract, and this clause has a direct effect on the original obligation. The penalty clause protects the contracting party from the contractor who does not fulfil his obligation, which makes the contractor fulfil his obligation seriously, and the penalty clause is not an independent obligation, but a subsidiary obligation to the original obligation, thus the penalty clause is a mechanism that guarantees the protection of the rights of the contracting parties and the regulation of the relationship between them. (KACHI, 2019, p. 2258) (AL-TABAKH, 2005, p. 336)

The agreement on the penalty clause strengthens the original obligation, because the contracting party knows in advance the consequences of its breach of its obligations. However, the fulfilment of the penalty clause does not lose the creditor's right to demand the performance of the original obligation, unless performance has become impossible.

The existence of the penalty clause doubles the importance of the original obligation, as it serves as a guarantee to the injured party in case the other contractor breaches his obligation and gives the injured party a legal right to claim compensation immediately without requiring proof of actual damage.

2.2.2.2. Agreement on the Penalty Clause Eases the Burden of Proof

A penalty clause or an indemnity clause is a pre-estimate of the damage caused by the breach of the original obligation. Thus, the creditor does not have to prove the occurrence or the extent of the damage, but it is sufficient to prove the breach in order to have the right to claim the value of the clause. We believe that this clause or this agreement is an implicit modification of the recognized rules of evidence and reduces the burden of proof on the injured contracting party. (AL-TABAKH, 2005, p. 337)

2.2.2.3. Legal and Practical Effects of the Penalty Clause on the Execution of the Obligation

The penalty clause has a deterrent effect on the performance of the original obligation (2.2.2.3.1) and, in practice, is characterized by the speed of obtaining the contractual compensation out of court (2.2.2.3.2).

Penalty clause in terms of the speed of obtaining it out of court.

2.2.2.3.1. Deterrent Effect of a Penalty Clause on the Enforcement of the Original Obligation.

The penalty clause may affect the debtor's behavior as it is stipulated in the contract and thus has a deterrent effect, making the contractor keen to perform his obligation on time and in the required form and not to slacken or neglect to perform his obligation, especially if the value of this clause is high. This deterrent effect can be considered at the same time as an

encouragement to fulfil the obligation in kind. (KASSAR LAIL, 2021, p. 939)

2.2.2.3.2. The Penalty Clause in terms of the speed of obtaining it outside of the judiciary

The penalty clause is an immediate contractual remedy that can be claimed directly by the contractor without the need to resort to the judiciary to assess the damage, which makes the party affected by the other contractor's failure or delay in fulfilling the obligation avoid the slowness of the compensation compared to claiming it before the judiciary and obtain the compensation quickly by agreeing on the penalty clause.

2.2.3. Voidability or Nullity of the Penalty Clause

Even though the penalty clause is an embodiment of the principle of the autonomy of will in contracts, it may be subject to voidability or nullity in certain cases stipulated by the law. There are cases where this clause is voidable (2.2.3.1) and others where it is void (2.2.3.2).

2.2.3.1. Voidability of the Penalty Clause

As the penalty clause is a clause inserted in the contract, it may be voidable if it is tainted by a defect of consent, such as mistake, duress or fraud, and thus the injured contracting party has the right to file a lawsuit to demand its annulment.

2.2.3.2. Nullity of the Penalty Clause

A penalty clause may be void if it is contrary to public order or public morals, such as if the clause stipulates a large sum that is in no way commensurate with the original obligation, thus constituting a type of special punishment that is considered impermissible in civil law. The judge may rule that the clause is void at the request of the injured party who argues that the clause is unlawful or requests that it be amended, and the burden of proof is on the injured party to prove it.

Finally, the voidability or nullity of the penalty clause is an essential legal guarantee to protect the contractual equilibrium, achieve contractual fairness and prevent arbitrariness. Thus, it preserves the principle of autonomy of will without becoming a tool to harm one of the parties. However, the judge may intervene to modify the penalty clause, and this is what we will address in the second part.

3. Judge's Authority to Modify the Penalty Clause

The penalty clause embodies the will of the contracting parties to regulate the penalty for breach of the contractual obligation, but this will is restricted by the judge's authority to intervene to achieve fairness (JAD AL-RAB, 2007, p. 206) if the legal conditions for this intervention are met (3.1). However, it is necessary to know the limits of this intervention between protecting the contractual equilibrium and respecting the will of the contracting parties (3.2).

3.1 Legal Requirements for the Judge's Intervention in Modifying the Penalty Clause

Even though the penalty clause is a prior agreement on the assessment of compensation in case of breach of contractual obligation, as stipulated in Article 183 of the Civil Code, the judge can intervene either to reduce it (3.1.1) or to increase it (3.1.2).

3.1.1. Legal Requirements for the Judge's Intervention in Reducing the Penalty Clause

The legislator limits the judge's reduction of the penalty clause to the following conditions: If the debtor proves that the estimate is excessive (3.1.1.1.) or proves that he has

fulfilled part of the obligation (3.1.1.2.). (BITAR, 2014, p. 5)

3.1.1.1. Debtor's Proof that the Penalty Clause is overstated

The penalty clause, i.e. the contractual compensation, is a prior agreement on the assessment of compensation before the breach of the contractual obligation, i.e. before the occurrence of the damage. Therefore, it is very possible that this compensation may not correspond to the amount of damage that occurred when the obligation was breached, so it may be greatly exaggerated. In accordance with Article 184/2 of the Civil Code, the judge can intervene to reduce the compensation until it is commensurate with the damage caused (SI YOUSSEF, 2015, p. 11) (HISHAM, 2011, pp. 121-122). However, the article does not specify the standard upon which the judge should rely to assess whether the compensation is excessive or the method by which it should be reduced. Therefore, reliance is placed on the objective standard, which requires that the compensation is commensurate with the damage (SI YOUSSEF, 2015, p. 12) (TOUATI & OTHMANI, 2022, p. 166).

3.1.1.2. Debtor's Proof of Partial Performance of the Original Obligation

The judge has the discretion to modify the penalty clause if the debtor proves that he has fulfilled part of his obligation and thus the amount of the penalty clause can be reduced. Since the creditor has benefited from the partial fulfilment of the debtor's obligation, it is fair not to oblige the debtor to pay the full amount of the penalty clause and thus the penalty clause is reduced so that the damage is commensurate with the compensation. (SI YOUSSEF, 2015, pp. 13-14).

3.1.2 Cases of the Judge's intervention in Increasing the Penalty Clause

According to Article 185 of the Civil Code, if the damage exceeds the value of the compensation agreed upon in the contract, the creditor may not claim a value greater than this value according to the principle of *pacta sunt servanda*. In other words, the penalty clause or the agreed compensation may be less than the damage suffered by the creditor due to the debtor's breach of his obligation. The creditor cannot claim an increase in the agreed compensation according to the amount of damage, but there is an exception in which the judge has the right to increase the penalty clause, namely the case of gross error or fraud by the debtor (3.1.2.1) and if the penalty clause is intended to relieve the debtor from his tort liability (3.1.2.2).

3.1.2.1. Increasing Penalty Clause due to the Debtor's Gross Fault or Fraud

If the penalty clause, i.e. the contractual compensation, is less than the damage suffered by the creditor due to the debtor's breach of his obligation, the creditor cannot claim an increase in the contractual compensation according to the amount of the damage. Some consider the penalty clause as a mitigation of liability and may agree to mitigate liability except in the case of fraud or gross error by the debtor.

However, some foreign legislations provide for the possibility of increasing the amount of the contractual compensation, i.e. the penalty clause, so that it is commensurate with the actual damage. Nevertheless, this is considered a disregard for the will of the contracting parties, who tended to set a maximum amount of compensation that should neither be waived nor exceeded. (HISHAM, 2011, p. 122).

Therefore, some other legislations stipulate that the judge has the power to increase the amount of the contractual compensation - i.e. the penalty clause - so that it is commensurate with the actual damage in one case, namely when the creditor proves that the debtor has committed a serious error or fraud. The Algerian legislature has done so in order to prevent the

debtor from benefiting from his fraud or gross error (SI YOUSSEF, 2015, p. 15). However, the issue that arises here is if the debtor commits a minor error that causes serious damage to the creditor, in which case it is understood from Article 185 of the Civil Code that the judge may not increase the contractual compensation unless the error is serious, unlike the French legislator who allowed the increase of the contractual compensation in the case of a minor error. (BOURENNANE, 2019-2020, p. 101)

3.1.2.2. Increasing the Penalty Clause to Exempt the Debtor from Tort Liability

A prior agreement on the amount of compensation to be paid by the debtor in the event that he fails to fulfil his obligation may be excessive to the extent that it is understood that its real objective is to exempt the debtor from any additional liability. Even if the breach is due to gross error or fraud, the law stipulates that it is not permissible to agree on exemption from liability resulting from fraud and gross error because it is considered a breach of public order. Excessive assessment of the penalty clause leads to emptying the contractual obligation of its content and deprives the creditor of his right to demand full compensation, which is closer in terms of effects to the exemption from tort liability, and thus the clause is void because it violates public order, as Article 178/3 nullifies any clause that exempts the debtor from liability resulting from a criminal act. (SI YOUSSEF, 2015, p. 18)

3.2 Limits of the judge's Intervention between Achieving Contractual Equilibrium and Respecting the Will of the Contracting Parties

The judge's intervention in the issue of a penalty clause aims to balance two opposing principles: The need to achieve a contractual balance between the parties to the contract on the one hand (3.2.1) and respect for the contractual will as a fundamental rule of civil law (3.2.2). The difficulty arises when attempting to reconcile these two principles, especially in the case of an exaggerated or arbitrary assessment of the penalty clause, i.e. the contractual compensation.

3.2.1. Judge's Intervention to Achieve Contractual Equilibrium

In order to achieve contractual equilibrium, the judge intervenes to correct arbitrary penalty clauses (3.2.1.1) and to ensure the balance between the penalty clause and the actual compensation (3.2.1.2).

3.2.1.1. Judge's Intervention to Correct Arbitrary Penalty Clauses

The judge may intervene to assess the extent of the creditor's arbitrariness in determining the amount of penalty clause. If the debtor proves that the creditor has overvalued the penalty clause, the judge may modify it so that it does not become a tool of exploitation or cause harm to the weaker party. The judge has the authority to reduce it if it is deemed excessive.

There are some conditions that are essential to the contract, but they are arbitrary and if the judge cancels them, they will affect the existence of the contract, so the judge modifies the condition and does not invalidate the contract (BAHMAOUI, 2014, pp. 107-108).

3.2.1.2. Judge's intervention to Strike Balance between the Penalty Clause and the Actual Compensation

Contractual fairness requires that the penalty clause be commensurate with the actual damage caused to the creditor. Therefore, the judge intervenes in modifying the penalty clause when there is a clear imbalance between the obligations of the contracting parties. This intervention aims to achieve contractual fairness by reducing the penalty clause to commensurate with the actual damage caused to the creditor in order to prevent unnecessary enrichment at the expense of the debtor. The judge may intervene by increasing the penalty

clause in order to preserve the contractual equilibrium without compromising the essence of the contractual will, but the Algerian legislature has restricted this in the case of fraud or gross error.

3.2.2. Respecting the Contractual Will as a Limitation on the Judge's Authority

The principle of autonomy of will is the basis of contracting and a limitation on the judge's authority (3.2.2.1), so the judge's role is limited to preventing one party to the contract from taking advantage of the other party's situation (3.2.2.2).

3.2.2.1. The Principle of Autonomy of Will is the Basis of Contracting and a Limitation on the Judge's Authority

The agreement on the penalty clause embodies the principle of autonomy of will, as the parties assess in advance the damage that is likely to occur upon breach of the contractual obligation and determine the appropriate compensation for it. This compensation should be fair and respected by the judge in order not to violate the principle of *pacta sunt servanda* and the principle of autonomy of will.

3.2.2.2. The judge's role is limited to ensuring that one party to the contract does not take advantage of the other party's situation

The judge's authority to intervene to modify the penalty clause is not absolute, but is limited to ensuring that one of the contracting parties does not take advantage of the other party's situation and thereby violate the principle of the contractual relationship. The judge does not change the content of the contract, but only addresses cases of arbitrariness and breach of the principle of good faith in the performance of the contract. Therefore, the judge intervenes only in cases specified by law, such as when the clause is excessive or contrary to public order. (JAD AL-RAB, 2007, p. 223)

4- Conclusion

In conclusion, the penalty clause is of great importance in practice because it is a tool to determine the compensation between the parties in the event of a breach of contract by one of the parties. The judge has the power to modify or cancel this clause in order to strike a balance between respecting the will of the parties and protecting contractual fairness.

We have seen that the judge's intervention in modifying the penalty clause does not aim to limit contractual freedom, but rather to protect the weaker party from the arbitrariness of the stronger party, and to ensure that the compensation determined in the contract is appropriate to the actual damage caused by the breach. Nevertheless, the principle of autonomy of will remains the cornerstone of any contract. The judge will only intervene in cases where the penalty clause is unfair or excessive, within the framework of what is stipulated by law and without prejudice to the principle of contractual stability. However, with regard to increasing the penalty clause, the legislature has limited it to the case of fraud or gross error.

Accordingly, we offer the following suggestions:

- The judge's authority to increase the penalty clause should not be limited to the case of fraud or gross error, thus extending it to the case of minor error.
- The need to establish an objective criterion to determine the limits of the judge's intervention in modifying the penalty clause, in a way that guarantees contractual fairness and contributes to the stability of transactions.
- Urge the contracting parties to adhere to clear legal wording when defining the penalty clause to ensure that it is a condition that respects the contractual equilibrium and can be enforced without the need for judicial intervention.

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