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STIPULATIO POENAE IN THE MIDDLE EASTERN LAW- PROBLEM OF ENFORCEMENT OF CONVENTIONAL PENALTY

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Summary

Stipulatio poenae is an institute of the Roman law corresponding to penalty clauses and liquidated damages in the countries of the Middle East. Originated in the ancient roman law, it was adopted into the Egyptian Civil Code of 1948 via French Civil Code of 1804, and thean diffused to most of the countries of the Middle East. Although initially permitted unlimited conventional penalties, the Roman (or Continental-European) law slowly restricted the contractual liberty of the parties in this regard. The institute of reduction of the conventional penalty/liquidated damages by the discretional power of judge became commonly accepted. Islamic Law, at the other hand, similarly like Common (Anglo-American) law, had negative stance on the conventional penalties. But with a more flexible approach being adopted, the development went into exactly the different direction than in the Continental-European countries. Consequently, the institutes of liquidated damages in the modern Middle Eastern and Common law legislations on one side, and their Continental-European counterparts in the form of penalty clauses on the other, are becoming more and more similar.

Keywords: Conventional Penalty; Liquidated Damages; Roman Law; Egyptian Civil Code; Civil Code of the United Arab Emirates

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1. INTRODUCTION

Stipulatio poenae, an institute that originated in the ancient Rome, is today a universally accepted institute of the law of contracts in the countries depending to the legal system of Roman law (also known as Continental-European or Civil law)[2]. Virtually every contemporary Civil law legislation provides a possibility for the contractual parties to stipulate a prestation,[3] usually in the form of a sum of money, which debtor is obliged to pay in the case when he does not perform the obligation timely, or when he does not perform it at all. But this institute has had a long evolution. The rules and doctrinal positions on *stipulatio poenae* varied wildly through history, and it's no different today.

The scope of this article is to present a short survey of some of the most important legislations of the Middle East in regard to *stipulatio poenae.* We shall first shortly present the development of this institute in the ancient Roman law, and it's subsequent development in the Civil law and Common law legislations. Than we will present the general perspective of Islamic law in this regard, and at the end, the reception of this roman institute in the contemporary laws of countries of the Middle East.

2. THE ORIGINS OF THE *STIPULATIO POENE* IN THE ANCIENT ROMAN LAW

Stipulatio poenae had a wide application in the classical Roman law. It facilitated assessment of damages, served as an instrument of pressure on the debtor to perform the obligation orderly, and for indirect enforcement of unenforceable acts. Roman jurisprudence created numerous and detailed rules who regulated in detail various aspects of this institute.

[2] The system of "Civil law" indicates the countries, mostly in Continental Europe, Latin America, Northwest Africa and East Asia, whose law is based on ancient Roman law. It is synonym for the system of Roman law or Continental (European) law.

[3] For many notions and categories of the Civil law (also known as Roman law and Continental-European law) there is no equivalent in the Common law (also known as Anglo-American or Anglo-Saxon law). Having that in mind, it is impossible to translate them accurately in English language. I decided to use in such cases anglicized form of a Latin word, rather than translation which might be misleading. For example, I believe that it is better to use the term "prestation" for the latin *praestatio* than to translate it as "consideration", that it is better to say "law of obligations" than "law of contracts and thorts" and cetera.

In short, conventional penalty is a more burdensome obligation which is to be performed in the case of non-performing the main obligation. Usually it has a form of a sum of money which is to be paid. *Stricto sensu*, conventional penalty exists only when it creates a subsidiary obligation, which is to be paid only when the term is passed, or when the execution of primary obligation becomes impossible. A non-genuine conventional penalty exists when an alternative obligation has been created, in which one of the prestations is more burdensome for the debtor.

The institute of reduction of an excessive penalty was not known in the classical Roman law. Roman lawyers would not have objections on the basis that the stipulated penalty is simply too high. This was in accordance with the accepted penal function of this institute. Still, many exceptions of this rule existed which gave some protection to the debtor. Instead of reducing, roman jurists of the classical period would rather forfeit penalty clauses entirely if the creditor would accept payment after the delay took place,[4] or partially in the case of partial performance of the obligation by the debtor.[5] But, there seems that emperor Justinian extended in the 6th century a rule introduced earlier by Diocletian, posing a limit to the estimation of damages to the double worth of actual damage.[6]

The opinions of the roman jurists were divided in regard of questions, whether the fault of the debtor is a necessary instrument for requiring payment or not? Beside, different solutions were proposed in regard of the situation when a term was not fixed: to exact penalty at once, or only when performance becomes impossible? But when a term was fixed, roman jurist agreed (although for different reasons) that in the case when performance becomes impossible before the time has lapsed, creditor could not ask the payment of the penalty before time lapsed. Also, roman jurisprudents did not offer a unique solution on the question, does creditor, in the situation when the main obligation is still performable, has the right of option between exacting the penalty and asking fulfillment of the obligation, or is entitled to ask only the penalty?[7]

[4] D.4.8.21.12; D.4.8.22; D.4.8.23.pr; D.45.1.122.2. See: Zimmermann, 1990, pp. 110-111.
[5] D.2.11.9.1.
[6] D.7.4.13. See also Visky, 1968.
[7] For more information about *stipulatio poenae* in the ancient Roman law see: Zimmermann, 1990, pp. 95-113; Frezza, 1960; Bonini, 1961; Voci, 1967; Visky, 1968; Visky, 1971; Voci, 1971; Knütel, 1976;

3. *STIPULATIO POENAE* IN THE CONTEMPORARY CIVIL LAW/ROMAN LAW LEGISLATIONS

The roman institute of *stipulatio poenae* had a wide range of application in the Middle ages and in the Early modern periode, and was carefully elaborated in the legal doctrine. The justification of very existence of contractual clauses whose purpose is not only estimation of damages but also a psychological presure on debtor to perform obligation orderly (*in terrorem debitoris*) was never put in question. All the contemporary Roman law legislations accept the penalty clauses as a normal element in contracts.

The rules that regulate this institute are adopted from ancient roman law. In some aspects, when choosing among different solutions proposed by the roman jurists, modern legislators would choose one that favours creditor. For example, when the principal obligation is still performable, both the French and the German Civil Code offer an opportunity for the creditor to choose between the penalty and damages, while in the French Civil Code (*Code civile*; CC)[8] and in the the Swiss Code of Obligations (*Obligationenrecht*; *Code des Obligations*; *Diritto delle obbligazioni*; CO)[9] can even ask both penalty and damages when penalty is stipulated for delay, while according to the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) can ask the penalty as a minimum, and addition up to the full ammount of damages.[10] This solutions were accepted because theory that the intention of a creditor who stipulates the penalty is to improve, rather than to deteriorate propper legal position.

But what to do in the situation when the parties stipulated an unreasonably high amount of contractual penalty? Or, on the contrary, when the penalty is so low that it does not fulfill the intimidating function? In the Middle ages the classical roman rule that once payable penalty will not subsequently fall away (*semel commissa poena non*

Biscardi, 1978; Sturm, 1978; Biscardi, 1980; Talamanca,1982; Giliberti, 1983; Sacconi, 1984; Lombardo, 2020.

[8] §1229

[9] §160 section 2

[10] §340 section2: *Steht dem Gläubiger ein Anspruch auf Schadensersatz wegen Nichterfüllung zu, so kann er die verwirkte Strafe als Mindestbetrag des Schadens verlangen. Die Geltendmachung eines weiteren Schadens ist nicht ausgeschlossen.*

evanescit) was unanimously accepted and to the judge was not allowed to make any correction of the stipulated sum. Since 16th century the legal theory started to doubt to the rightfulness of this solution, specially regarding the position of debtor, and to reevaluate the solution from Justinian's law.[11]

Consequently, different approaches were followed by modern legislators. In the CC, the more rigid solution from the roman classical Roman law was adopted and only in the case of partial fulfillment of the obligation a proportional reduction is permitted, while BGB[12] and CO[13] accepted the possibility of reduction of the penalty at discretion of the judge.

The later development of the European law, mostly thanks to the influence of the idea of consumer protection, went in this direction. So, today practically all the Roman law based legislations accept the possibility of the reduction of conventional penalty. Even the French law adapted to the new circumstances, with changes of 1975 and 2016, allowing to the judge not only to reduce the excessively high, but also to increase ridiculously small amount of penalty fixed by the contractual parties.[14] In that way, still, the penalty clause did not become purely an instrument of assessment of damages. It never lost the penal function. There is no doubt in the legal praxis of the Civil law countries that the reasonable amount of conventional penalty is the one which, though not excessive, is higher than the damage actually sustained, high enough to make a pressure on the debtor to perform an obligation orderly.[15]

[11] Zimmermann, 1990, pp. 106-110.
[12] §343
[13] §163 section 1
[14] §1231-5, Création Ordonnance n°2016-131 du 10 février 2016 - art. 2. *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.*
[15] See more in: Thilmany, 1980; Downe, 2016,; Calleros, 2006.

4. COMMON LAW

While in the countries of the Continental law penal clauses remain, though with some limitations, commonly accepted and important legal institute, the second larges legal system in the world, Common or Anglo-American law, went into direction of it's total abolishment. Still, it was not always the case. Introduced in the 14th century in the system of Equity law, the Common law equivalent of the *stipulation poenae*, so called penal bounds, were readily enforced by the Common law courts until at least the end of the 17th century. They were not put down by the general rule of the prohibition of usury, because they were paid not as a part of the obligation, but for non-performance of a contract.[16]

Still, they started eroding already at the end of 16th century. Until the end of the 18th century a doctrine started to develop, that will definitively prevail in the 19th century, that the penalty clauses *in terrorem debitoris* shall be rejected as wholly invalid, but that they shall be distinguished from the so called liquidated damage clauses. The latter are understood as agreements of the contractual parties on assessment of damages for non performance. Such clauses are considered perfectly valid. This doctrine is most famously expressed in the famous decision *Dunlop pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* of 1915, the milestone of the contemporary law of penalties.[17]

The current situation has been highly criticized. In Treitel's words, the distinction between penalty and liquidated damages clause "manage to get the worst of both worlds". Not only that many useful effects of the penalty function are lost, but the unclear distinction between them and liquidated damages clauses, and the mechanical application of current rules, lead to the invalidation of many proper liquidated damages clauses.[18]

Both exasperation and criticism of numerous judges and commentators and the need to operate in conformity with European and international development called for reform. The basic rules of the new approach were set in 1989 in the Jobson v. Johnson case. In the said case the court marked a clause as a penalty, but instead of declaring it void,

[16] Obeidat 2004, pp. 9-17.
[17] Obeidat 2004, pp. 17-22; Zimmermann, 1990, pp. 107-108.
[18] Obeidat 2004, pp. 23-26; Zimmermann, 1990, ibid.

allowed it to be executed up to the amount of the damage. The difference is important, because in that way the creditor was not forced to demand his damages in another claim. Effectively, the penalty clauses became enforceable in that way, although subjected to adjustment by judge. Beside, according to the new approach the sum does not even have to be equal to the damages to enter in the category of liquidated damages, i.e. it can be higher than actual damages. Only a sum labeled as obviously disproportionate (extravagant and unconscionable) is considered a penalty, and so can be subject to adjustment. But such a sum still can *de facto* have a function of pressure on debtor to perform an obligation.[19]

5. MIDDLE EASTERN LAW

In the third biggest world legal system, Islamic or Sharia law (also known as Mohammedan law, especially in the older literature), penalty clauses were not developed independently into a general legal theory.

First reason is, that they might be in contradiction with the prohibition of risk and speculation (*gharar*) in the Islamic law of contracts.[20] Even when fault of the debtor is required for enforcement of penalty, from the point of view of the creditor, payment of a sum much higher than damage sustained still could be considered a fortunate enrichment.[21] So, Islamic lawyers did not use very much the opportunity to develop common theory of penalty clauses on the basis of intruments like partial earlier payment in the form of earnest (spelled variously as *'urboon*, *'arboun*, *'arabun*, *'urban*, *'urboun* and ctr.)[22] or earnest deposit (*hamish jiddiyyah*), or even some forms of genuine penalty clauses that existed in the Islamic law.[23]

[19] Obeidat 2004, pp. 26-48.
[20] Bremer pp. 200. For more details about *ribā* and *gharar* see for example: Bhala, 2016, pp. 587-599; Dau-Schmidt, 2012, pp. 533-553; Schacht, 1982, pp. 151-154; Muhammad, 2003, pp. 19-44; Milenković & Milenković, 2016, pp. 54-69.
[21] Bremer, 2015, 200'203.
[22] There are many systems of transcription of Arabic script to Latin letters, none of which is universally accepted. The Arabic words in this article are given in the form(s) contained in the literature cited.
[23] See for example: Abdullah, 2013, p. 16ss; Obeidat 2004, 163ss.

Second reason, they did not have to. It was much easier to accept already developed institute from the Roman law jurisprudence. Most of modern Middle eastern countries decided in the 20th century to restrict the application of the Islamic law to family and inheritance law, while in the areas like real rights and the law of obligations were open for the reception of the solutions from the roman law, insomuch as they were not contrary to the basic Islamic principles like prohibition of risk (*gharar*) and interest (*ribā*).

In some of the countries of the Middle East the law of the obligations is completely secularized, without any regard to the Islamic tradition. So, not only excessive liquidated damages, but the penalty clauses too are perfectly enforceable. For example, Turkish Code of Obligations, a product of the reception of swiss law, doesn't even require the creditor to have suffered any damage, so the penalty clauses are perfectly applicable.[24] Same is the case with the Lebanese Civil Code, where the norms non liquidated damages and penalty clauses were received directly from the French civil code.[25]

But most of the modern Middle eastern laws of obligations are a product of fusion of technicalities from Roman law on one side, and the general principles from Sharia law on the other, forming a specific branch of the Civil law system.

Forbearer of this approach was the Egyptian Civil Code of 1948. It was drafted by the famous jurist Abd El-Razzak El-Sanhuri who studied in France under the guidance of Édouard Lambert, who also participated actively in the drafting of Egyptian civil code (ECC), which was consequently modeled upon the French Civil Code of 1804. In turn, the Egyptian Code had an enormous influence in the region,[26] influencing the laws of practically all the Middle Eastern countries, with exception of Lebanon, Saudi Arabia, Oman and Israel. The norm of the Egyptian Civil Code on the conventional penalty was inspired by French model, but with a small change:

§224

(1) Damages fixed by agreement are not due if the debtor proves that the creditor has suffered no harm.

[24] §§ 181-182.
[25] §§ 266-267
[26] Bremer, pp. 200.

(2) The Judge may reduce the amount of damages if the debtor proves that the amount fixed was greatly exaggerated or that the original obligation has been partially performed.

(3) Any agreement contrary to the provisions of the two preceding paragraphs is void.[27]

Although the generally based on CC, the ECC permits penalty clause not to be paid if the creditor did not suffer any harm, and permits to the judge to reduce the amount if the sum is grossly exaggerated. This amendment was expectable, because it is in line both with both international development and the principles of Islamic law.

Similar is the solution of the Civil Code of Bahrain (BCC):

§226

Damages fixed by agreement are not due, if the debtor establishes that the creditor has not suffered any loss.

The court may reduce the amount of these damages, if the debtor establishes that the amount fixed was grossly exaggerated or that the principal obligation has been partially performed.

An agreement contrary to the provisions of the two preceding paragraphs is void.[28]

Same could be said for Qatari Civil Code (QCC):

§265 *Where the obligation is the payment of money, the contracting parties may calculate the amount of indemnity in advance in the contract or in any subsequent agreement.*

§265 *No agreed indemnity shall be payable if the obligor proves that the obligee has suffered no damages. The court may decrease the agreed amount of indemnity if the obligor proves that the calculation is exaggerated or if the obligation has been performed in part. Any agreement to the contrary shall be invalid.* [29]

[27] Translation: Chedrave 2017, p. 104.
[28] Translation: Chedrave 2017, pp. 107-108.
[29] Translation: https://www.almeezan.qa/LawView.aspx?opt&LawID=2559&language=en

Formulated in such way, the clause still can serve a penalty function, as is the case in most modern legislations. Although most of translators use the term "liquidated damages" when translating Arab legal terminology, the Common law dichotomy between liquidated damages and penalty clauses does not exist in the said Middle Eastern laws.[30] Both are fused in a unique institute.

But, some legislators adapted the rule of the ECC so that this function seems to be excluded. For example, in the Civil Code of the United Arab Emirates (UAECC) we read:

§390

1. The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.

2. The judge may, in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the harm, and any agreement to the contrary shall be void.[31]

Similar we see in the Civil Code of Jordan (JCC):

§364.

1. Contracting parties may stipulate, in their contract, the amount of damages in advance. This contractual term is called "liquidated damages or penalty clause".

2. The court may, upon the request of either party, increase or decrease such damages to make it equal to the actual damage sustained by the injured party. Any agreement to the contrary shall be null and void.[32]

[30] Obeidat 2004, p. 23; Eisenman, 1978, p.110 note 16.
[31] Translation: Chedrave 2017, p. 109.
[32] Translation: Obeidat 2004, ibid.

In both codes the amount established by the parties mustn't even be exaggerated to be declared null. It is enough simply to be higher, or even lower, than the actual loss sustained by the creditor. If taken literally, this would mean that even the slightest discrepancy between the agreed amount of compensation and the actual loss would entitle the offended party to ask adjustment by the court.[33] In this way, almost every potential function of pressure on the debtor would be abolished. But, things did not always go that way. In practice, there are ambiguity and imbalance in the interpretation of this rule in practice.[34] For example, in United Arab Emirates, Dubai Court of Cassation holds that compensation may be adjusted whenever a discrepancy exists, while Abu Dhabi Court of Cassation holds that only substantial discrepancy matters.[35]

To the same group seems to depend the Iranian civil code, that seems to put to the discretion of the judge to decide, if the amount of liquidated damages should be diminished or increased.[36]

6. CONCLUSION

One might expect that a roman transplant like *stipulatio poenae* planted in arid Middle eastern soil, constrained by the bonds of prohibition of *gharar*, would live a pitiful life of a bonsai-like dwarf. Actually, it is better to be compared with a wildly overgrown garden shrub that urgently needs pruning. It entered legal praxis and it has huge importance in the law of Middle East. It became a normal part of many important commercial contracts, especially in construction and wholesaling, just as anywhere in the world.

But, at the other hand, many questions regarding regulation of this institute are open, and the legal praxis does not offer always a satisfactory answer. There is feeling of uncertainty, and seems that more detailed regulation is needed. But at the other hand, maybe is too early for that. Letting a still relatively new legal institute to be developed spontaneously in the legal praxis and doctrine has advantages.

[33] See: Chedrave 2017, p. 110-111.
[34] For the situation of Jordan see: Obeidat 2004, pp. 157 ss; Ismail 2019 pp. 11-13.
[35] Bremer,pp. 208-209.
[36] §230

Maybe for beginning more important for the Middle eastern lawyers would be to know more about roman roots of the institute. Understanding Civil law institutes without knowledge of the ancient Roman law is as difficult as understanding institutes of Islamic law without knowledge of the Quran. Introduction of studies of the Roman law on the law faculties would not only facilitated understanding of the institutes of contemporary law like *stipulatio poenae*, but it would also provide solution for questions that may appear in practice, and for which not even contemporary European civil codes, although more detailed in this regard than Middle eastern, doesn't have solution. For example, when a term was not fixed, could a creditor exact penalty at once, or only when performance becomes impossible? Moreover, some alternative solutions of the ancient Roman law which did not enter the modern European civil codes could be interesting for Islamic lawyers, generally known as favorable toward debtor. Consider for example denying to the creditor (and attributing to the debtor) the right of option between exacting the penalty and asking fulfillment of the obligation, when it's not specifically agreed to whom the right of option belongs?

At the end, we could add that both Islamic and Common law jurisprudence, albeit for different reasons, had negative position on the penalty clauses, while Continental-European (Civil law) jurisprudence had positive. And they are eventually coming slowly all to the same conclusion: conventional clauses on damages are ok, even if they exceed somewhat the actual damage, under condition that the difference is not too big.

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