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SECURITY AND INSUFFICIENT OBLIGATION BY CONTRACTUAL PENALTY

Summary: *The author describes the structure of the contractual penalty as the most common personal means of securing claims in business practice. By examining its capabilities as a means of ensuring the fulfillment of a commitment or timely fulfillment, it also points to its elements that are not eligible to fully compensate the creditor. The aim of the paper is to enable the application of the rules of the institute and the wrong contractual punishment by revealing the true meaning of certain elements of the contractual penalty structure. In connection with the above, the linguistic method and procedure were used within the sociological method, the analysis of documents on the source of origin, the principle of accessibility and the purpose of contractual penalties in contracts. On this basis, the position is taken that the positive right also includes a wrong contractual penalty and allows the application of the general rules on the contractual penalty on it. Accordingly, the institute of a contractual penalty as a subsidiary obligation may be contracted as a means of securing a principal or auxiliary obligation under a contract. There is no impediment to the general rules of the institute of application and as a means of ensuring the fulfillment of non-enforceable claims granting him in that case the legal treatment of the main obligation.*

Key words: *contractual penalty, wrong contractual penalty, accessory*

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INTRODUCTION

A person who, under the contract of response for each failure, was appropriate for any failure to fulfill, even if the failure to fulfill it was due to circumstances that constitute a higher power (Šolaja 2017, 361). Personal legal means of securing claims (security, contractual penalty, waiver) give the creditor a guarantee that his claim will be fulfilled and as such they are determined by insecurity as property sanctions (in the absence of a full indemnity of the creditor). The contractual penalty (*stipulatio poenae*) is regulated in articles 270-276 of the ZOO head under the headings of the Act of Obligations, section on the Creditor's Rights and the Debtor's Obligations, section entitled The Right to Compensation of Damages (Law on Obligations of Serbia-ZOO, *Official Gazette of the SFRJ*, No. 29 / 78, 39/85, 45/89 and 57/89 and the *Official Gazette of Serbia*, No. 17/93, 3/96, 37/01, 39/03 and 74/04). According to the contents of the institute, it represents the most fully regulated contractual clause of a positive right and is most often represented in business practice. There are rare contracts for the sale of goods of higher value, construction contracts, engineering contracts that are not provided by some type of contractual penalty.

However, it is evident that the provisions that positively form a contractual penalty deviate from the Draft for the Code of Obligations and Contracts of Prof. Konstantinovic in the part referring to regulating unqualified penalties. It is a clause that allows a contractual

punishment to not only ensure fulfillment or timely fulfillment but emphasizes its independence in relation to the existence of the main or secondary obligation it provides. An unusual contractual penalty is the main obligation that also ensures obligations that the legal order could not claim by force as both the debtor and the obligations of third parties. Accordingly, we were interested in how much the existing provisions can be applied to a wrong contractual penalty?

Determining the usual term of the contractual penalty, the author's considerations are directed to the consideration of the functions of the contractual penalty in business transactions. By emphasizing the essential features of the contractual penalty, the author observes that an unlawful contractual punishment may be sub-contracted under the general rules on contractual penalties. In this direction, the source of the contractual penalty, the purpose and the principle of accessibility is analyzed in the text. The considerations in the text are then directed to the understanding of the type of obligations to which the contractual penalty can be applied? What conditions must be met in order to apply the contractual penalty? The manner in which courts decide on certain issues related to the structure of the contractual penalty are presented after theoretical considerations.

1. CONJECTOR PENALTY CONCEPT

Freedom of contract referred to in Art. 10 ZOO by the Contracting Parties authorizes to arrange a contractual penalty within the limits of enforceable regulations, good customs and public order in order to secure the fulfillment of the creditor's interest in fulfilling or timely fulfillment of the obligation. An agreement between the creditor and the debtor obliging the debtor to pay a creditor a certain amount of money or obtain some other material benefit if his obligation fails or is sufficient to fulfill is a contractual penalty.

Pursuant to the will of the contractor and the dispositive rule of Art. 270-276 ZOO it is possible to contract a contractual penalty due to non-fulfillment and delays in fulfillment, but also of other types. Therefore, the Contracting Parties are in principle free whether the application for the payment of the contractual penalty will be dependent on the fulfillment of the contractual obligation or the contracting party's default. Considering the form of the breach of the obligation for which the contractual penalty is given, we shall consider in the following text the type of contractual penalty.

1.1. Types of contractual penalty

Under the fulfillment of the obligation we mean the fulfillment of its contents in accordance with Art. 307, para. 1 ZOO. "The penalty imposed for failure to comply with contractual obligations has the character of a penalty contracted for failure to comply" (Supreme Court of the Republic of Slovenia judgment No. 125/54). A contractual penalty for failure to fulfill the obligation is credited to the creditor if the debtor fails to fulfill the contractual obligation to demand either the fulfillment or the contractual penalty (*faculty alternative*), that is, the contract terminates and claims compensation for damages due to failure to fulfill.

Therefore, a positive right allows the fulfillment of an obligation for which the contract is concluded for the substitution for the receipt of a contractual penalty. In order to enable the creditor to act in accordance with legal authority, the contractual penalty must be explicitly agreed. "Therefore, there is no possibility of exercising the right to a contractual penalty if the contract is terminated, since the termination of the contract has ceased the purpose for which the contractual penalty was contracted" (Judgment of the Supreme Court of the Federation of BiH No. 17 0 Ps 002693 12 Rev. dated September 3, 2013).

Alternative contractual penalties exist when the right to choose a debtor is related to the termination of the principal contract by the debtor, i.e., the case where the debtor gives up the contract.

A contractual penalty due to default is authorized by the creditor to claim the cumulative and fulfillment of the main obligation and contractual penalty, provided that the debtor informs the debtor without delay of the right to a contractual penalty. A contractual penalty due to a delay in fulfillment entitles the creditor to unilaterally terminate the contract and claim damages. In the light of the foregoing, we emphasize that in the literature there is an opinion that in case of termination of the contract, the creditor could claim a contractual penalty in the period from the fall of the debtor in the delay to the termination (Jankovec 1975, 57).

We believe that by terminating the contract, the creditor declares the claim that he does not want to be bound by the contract (in accordance with the principle of accessibility and contractual punishment) and to modify the existing legal situation, so that there is no delay, but a failure to fulfill the contractual punishment.

"A statement on the retention of the right to a contractual punishment may also be given orally if the parties have not agreed that this statement can be given only in a particular form. Namely, legal security is achieved by an informal announcement of retaining the right to contractual punishment, and to achieve certainty, it is sufficient that the announcement is expressly and determined. Since the announcement does not create a subjective right that already exists, it is already a statement of the precondition for its realization, and this assumption is a necessary condition for the debtor to be aware that it will be affected by this sanction, there is no need for the announcement to specify the same form as for the contractual punishment. Accordingly, the ZOO does not prescribe a form for a statement on the retention of the right to a contractual penalty, so this announcement can be given either verbally, unless the contracting parties agree that a special form is a condition for the validity of the announcement of Art. 69, para. 1 ZOO" (Paragraph XL of the joint session of the former supreme courts in Ohrid on 23 and 24 May 1989).

The contractual penalty for delays in fulfillment does not have to be explicitly contracted because the legal presumption in its favor under Art. 270, para. 2 ZOO. It exists in the case where the contract specifies the moment from which a contractual penalty may be required, which is different from the moment of default.

The general advances for the traffic of goods contained a contractual penalty in the case of improper fulfillment which does not only include delay in fulfillment, but also surrenders with material defects, poor performance of construction works,

There is no disadvantage in contracting both contractual penalties and then owed only for non-fulfillment, since the delay means fulfillment. They are not only contracted as a means of ensuring fulfillment or default in fulfilling the main contractual obligation, but also as a means of ensuring fulfillment or failure to fulfill the secondary contractual obligations (for example, in contracts on the delivery of investment equipment, not only is the delay in the delivery of equipment, but also the delay in the delivery of technical documentation, etc.).

According to prof. Konstantinović from Art. 220 "when the contractual punishment is promised not as a secondary obligation but as a main obligation, provided the promise is made by a promulgator or not, the court may, at the request of the plaintiff, reduce it if it finds it to be excessively high" (Miladin 2006, 1765). It is a unilateral promise of a contractual penalty for itself or a third party. "A non-reciprocal contractual penalty the debtor takes the punishment for the actions or omissions that he otherwise does not legally bind" (Miladin 2006, 1764).

Its application in the territory of the European Union has been recorded as a means of implementing interventional measures in agriculture (e.g. shortage in the production of certain wheat varieties) in terms of considering the benefits that have changed the environment within Europe (Cash 2015, 6). Regarding the world market where dominated by non-binding acts of Art. 7.4.13. Principles of UNIDROID and Art. 9: 509 Principles of the International Commercial Contract do not imply an inferior contractual penalty (Beebe and Fromer 2018, 947). There is a different situation in German law. German Civil Code in § 343, paras. 2 regulates when somebody promises to pay a fine in case it undertakes an action or that

omissions are taken (Fikentscher and Heinemann 2006, 302).

2. CONCLUSION PENALTY FUNCTIONS

The practical application of a contractual penalty allows you to see its functions in business practice. Under the function (legal nature) of the contractual penalty, we investigate the overall relationship of the creditor and debtor from the angle of obligation to pay the contractual penalty. Theoreticians do not have a single point of view on the legal nature of the contractual penalty (Patti 2015, 321), but on this occasion we will not enter a deeper analysis of the function of the contractual penalty. For the purposes of this paper, we will briefly summarize the essential characteristics of the two main functions to argue the relationship between the general rules on contractual liability for damage and (ineffectiveness) of the contractual penalty in the context of the full indemnity of the creditor and thus the fulfillment of the fulfillment for which the contract was concluded. Observing the functions of a contractual penalty is also important when filling in legal gaps, interpreting the provisions, etc.

Starting from the system of the lawyer, the Department of the Right to Compensation for Damage Caused establishes that its first and primary function is to compensate for the damage caused. Both types of contractual penalties are negotiated in advance when it is not known whether the damage will be caused and how much will be its amount. The contractual penalty allows the "(...) creditor to be freed from burdens proving the amount of damage" (Orlić 1985, 542), but also to be completely compensated because the rare situations in which the contractual penalty is lower than the damage suffered. In addition, the creditor has the right to demand a contractual penalty and when its amount exceeds the amount of damage it suffered, as well as when it did not suffer any damage pursuant to Art. 275, para. 1 ZOO. Additionally, if the damage suffered by the creditor exceeds the amount of the contractual penalty, it is authorized to require a difference up to the full compensation referred to in Art. 275, para. 2 ZOO. Therefore, the contractual penalty does not exclude the general rules on the contractual liability of the debtor.

The penalty function (secondary function) is realized in a manner that is characteristic of the personal means of ensuring the proper fulfillment of the obligation. Starting from the presumed amount of damage that could result from a breach of a contractual obligation, adding a portion so that its amount is higher than the compensation for the damage caused and influenced the debtor to fulfill the contractual obligation. If the debtor fails to fulfill his contractual obligation, the secondary function of the contractual penalty is transformed into a primary function, i.e. the contractual penalty becomes a means of compensation for the caused damage. Thus, from the point of view of the debtor, the contractual punishment is always a pressure on him not only in connection with securing the fulfillment of the contractual obligation, but also when fulfilling the contractual penalty.

3.STRUCTURE OF THE CONTRACTUAL PENALTY

Actuality is prescribed by the law direct dependence on one's right to another right. The principle of accessibility means that the contractual penalty agreement divides the legal fate of the principal or secondary mandatory obligation that the fulfillment ensures. A contractual penalty like any private sanction is always offensive. Accordance does not have the same meaning in each case and therefore the deeper legal meaning of two parallel rights should be explored. In relation to this, do we investigate when the wrong contract penalty is admissible? Starting from the expectation of the creditor, he also expects a certain behavior from the debtor in the case of an unlawful and unlawful contractual penalty, and in both cases, it is the consequence of the agreement reached upon the taking of the contractual penalty. Thus, contractual punishment is a single institute whose opposing poles are an adjacent contractual

penalty and a non-contractual penalty. All other infinity is open to the respondent (Schechter 1926, 813).

As a consequence of the accuracy of the contractual penalty, we also point out the following: the form of contractual penalty is a form of obligation for which the fulfillment of the contract is a contractual penalty determined by its form (*form ad solemnitatem*); the ineffectiveness of the non-cash obligation also entails the ineligibility of the contractual penalty; a contractual penalty loses legal effect if the failure or failure to fulfill the consequences of the causes for which the borrower does not respond; in accordance with the circumstances of contracting for the provision of non-monetary obligations, the contractual penalty and when contracted in cash is subsumed under the rules on non-cash obligations; in the case of a cession, transfers to the receiver and the contractual penalty: termination of the obligation for which it is contracted leads to termination and contractual punishment.

An exceptionally contractual penalty will not cease if the main obligation has ceased. By fulfilling the main contractual obligation, the obligation to pay the contractual penalty is terminated when it is agreed upon in case of failure. Disputing the creditor's fulfillment (eg eviction or material defect) leads to termination of the contract and renewal of the right to a contractual penalty.

The second exception is the unilateral termination of the main contract for which a contractual penalty for failure to complete has been agreed. Starting from its function as a compensation for damages that does not terminate by termination of the contract (The judgment of the Commercial Court of Appeals, No. 2413/1 dated 17 May 2013), despite the termination of the contract, the creditor has the right to demand a contractual penalty (Hiber and Pavić 2013, 74). When the said statement would not apply, it would have been brought in two alternative solutions by itself: to waive contractual penalties (the fact that it does not have to prove the existence and amount of the damage) or to demand a contractual penalty and waive the right to terminate the contract, which prevents it from ask for a refund.

4. APPOINTMENT OF THE CONTRACTUAL PENALTY INSTITUTE

A contractual penalty contract obliges the debtor to pay a contractual penalty to the creditor if he fulfills his contractual obligation. "The existence of a contract is a necessary feature of the institution of a contractual penalty" (Wéry 2013, 96). In doing so, we mean the existence of a contractual contract, a one-sided obligatory contract of a debtor. Like any contract, it must meet the general conditions for a valid conclusion, which relate to the existence of legally authorized Contracting Parties, the consent of the will, the case, the basis and the form which is dependent on the contract to which the contractual contract is related. In addition, it is necessary to meet the general conditions for applying the institute observed from the creditor's point of view.

4.1. General conditions for the establishment and application of the institute of a contractual penalty

The general conditions for concluding a contract also apply to contractual penalties. Consequently, it would be necessary to have a free statement of the will to conclude it. It is more precisely to exclude the existence of a lack of will (threats, delusions, frauds).

A contractual penalty must have an object, admissible, determined or determinable. The object of the contract is the obligation from the contract on the contractual penalty. The obligation that constitutes the contractual penalty and obligation provided for by a contractual penalty are not the same in nature, although they are dependent on one another. A contractual penalty may be contracted in cash but may also be non-cash (eg execution of some works). A fine is a contract in one total amount of the principal obligation or for each day of default as a percentage, or in some other way. Although it is possible to arrange a non-pecuniary penalty,

it could impose difficulties in the judicial control of its level referred to in Art. 271, para. 1 ZOO.

The penalty must be determined or at least determinable as any object of the contract at the time of the conclusion before the maturity of the obligation. Earlier jurisprudence allowed the contractual punishment to be determinative, more precisely in the contract, it was only stated without specifying the amount that the court could determine, depending on the circumstances of the particular case. Thus, "(...) if the parties envisaged a contractual penalty and failed to anticipate its monetary amount or other material gain, the court can not reject the request for the calculation and collection of the contractual penalty, but is obliged to determine its amount based on all the circumstances that the parties had and should have in mind when concluding a contract (Judgment of the Supreme Commercial Court, No. 720/64 of 18 September 1964). If there is a reference to the exact amount of the contractual penalty from an earlier contract or certain typical business conditions, it would mean that the contractual penalty is precisely determined.

The provisions on the reduction of excessively high contractual penalties are in the function of the protection of debtors. A borrower's request for a contractual reduction (expressed in its broadest sense) is required by the court to be decided by the court with regard to the value and importance of the subject of the obligation. "The opposition of the debtor to the obligation to pay the contractual penalty contains in him and opposition to the amount in which the payment of the contractual penalty is requested. In the sense of Art. 274. The ZOO will, at the request of the debtor, reduce the amount of the contractual penalty if it finds that the sum is too high in relation to the value and meaning of the performance, i.e. obligations that the borrower has not fulfilled "(Supreme Court of the Republic of Croatia No. Rev. 800/97 of 21 April 1998). The application of this provision can not be excluded or limited. We observed that court and arbitration practice, when decreasing the contractual penalty, starts from the extent of the actual damages assessed at the time of the decision. After the reduction, the penalty will be slightly higher than the damage suffered by the creditor to keep the pressure on the debtor.

The restriction of the amount of the contractual penalty is done by special regulations, by-laws (Hiber and Pavić 2013, 69), and in the territory of the European Union there is also a Directive on the prevention of unfair clauses in consumer contracts in the European Union (Sternlight 2002, 833). Special knowledge of construction limits the total amount of the contractual penalty so it can not exceed 5% of the value of the contracted works. All legal regulations are aimed at preventing the borrower from "curiosity, inexperience, and necessity" (Miladin 2006, 1763).

What is the basis for calculating the contractual penalty? The division of the obligation provided by the contractual penalty also entails the delimitation of the contractual penalty. In the case of a contractual penalty for failure, the creditor, if he has an interest, may also receive a partial contractual penalty (proportionally reduced by the amount of fulfillment). While the contractual penalty is due to a delay in fulfillment, the method of determining its height does not mean that it is also designated as a periodic rent. The notice of the creditor without delay to request and the contractual penalty determines its amount owed (from the determinable station is determined) in the total amount.

It is a general view that obligations that can't be practically or lawfully enforced can be ensured. We are of the opinion that it is justifiably the same to treat the actions of acts or omissions that are not legally binding, but for which contractual punishment is contracted. Obligations that are natural obligations and restrictions that can not be the subject of execution can be provided by a contractual penalty since they are legally valid. Their legal fate is exhausted in the fact that they are natural and can not be the subject of execution. Thus, if the debtor commits a contractual penalty for an out-of-date obligation, such an agreement should be treated legally as a waiver of a contractual penalty, as well as an interruption of the limitation period, unless otherwise provided by the contract itself. In order for the creditor to

exercise his right to a contractual penalty, it is sufficient to prove that the debtor has not complied with his natural obligations or non-claimed terminations.

4.2. The nature of the obligations to which it applies and to which it applies

A contractual penalty is a means of ensuring fulfillment or failure to fulfill all valid non-monetary obligations under the positive law of Art. 270, para. 3 ZOO and can't be contracted for monetary liabilities because their fulfillment is provided by a penalty interest. "Regulation Art. 270, para. 3 of the Law on Obligations, which excludes the possibility of contracting for monetary obligations, is a contractual penalty, it is a regulation of a cogent nature whose application can't be excluded by the party by its will. The delay in fulfilling the monetary obligation is sanctioned by the penalty interest (Article 277 ZOO). Contractual clauses on the payment of the increased amount of the price due to delay have been null and void and do not produce legal effect in the case of payment of monetary obligations" (Supreme Court of Serbia, No. 40/98 of 18 March 1998).

Contraction of a contractual penalty for monetary obligations would result in the enforcement of default interest rate rules, the rate of which is prescribed by the law as the maximum. According to prof. Loze "(...) in that case the contractual penalty could be treated as an agreed interest" (Hiber and Živković 2015, 201). We take the view that "starting from this item, we come to the conclusion that the default interest is a stronger asset on the part of the creditor to secure monetary claims than a contractual penalty" (Jankovec 1975, 52). In doing so, the debtor owes the default interest regardless of guilt.

It is not allowed to contract a penalty for non-repayment of letters of credit. Opening of letters of credit is the execution of a monetary obligation. Namely, the debtor's duty to open a letter of credit in favor of the creditor practically is the same as the debtor gave the order to the bank to transfer a certain amount of money in favor of the creditor. The difference is only in the circumstance that when submitting a creditor's request for documentary credentials, which is the most common in business practice, the creditor, together with the request for payment, must prove that he has fulfilled his contractual obligation (unlike the transfer of assets in which he is not obligated).

There is a different situation with the untimely provision of a bank guarantee that is a formal legal transaction related to a particular contract. The obligation of the debtor to obtain a bank guarantee is not the obligation to pay to the creditor. Its purpose is to convince the creditor that the debtor will fulfill the obligation assumed because it only produces a legal effect in this case. Bank guarantees are also given for monetary and non-monetary liabilities (eg, the borrower will deliver the goods on a certain timeframe, a guarantee that the goods will have a certain quality, etc.). Considering the legal nature of the obligation for which a bank guarantee is obtained, it would not be disputable to allow contracting a contractual punishment from the borrower's point of view, although from a bank's point of view, the bank guarantee is always a monetary obligation.

The securing of contractual obligations outside commercial and contractual law is not mandatory. Thus personal relationships (marital, extra-marital, etc.) can't be secured by a contractual penalty. In accordance with the declaration of will, the spouses decide whether they will marry and when they will break it. However, it is wrong to draw a general conclusion that all personal relationships can't be secured by a contractual penalty.

A contractual penalty is legally permitted to provide lump sums for the maintenance of a spouse who has left the job because of her extramarital husband, provided that such intent is expressly and clearly expressed when contracting a particular contractual clause. We also find the justification for such an attitude in the provisions of Art. 192. ZOO of the Criminal Code of Republika Srpska, *Official Gazette*, no. 64/17 regulating avoidance of support. Accordingly, if the law-makers provided punitive provisions why contractors could not be provided with the provisions on contractual penalties.

It is permitted under Art. 31. Constitution of Republika Srpska freedom of political organization, argumentum a contrario and expulsion for justified reasons provided for by the regulations. Analogous interpretation extends the possibility of extending to religious communities as well as contractual arrangements. Necessity is the provision of the contract on the contract, according to which the contracting partner must pay the contractual penalty. We highlight several judgments from previous case-law. "There is no legal significance of the provisions of an agreement between a worker and an organization of associated labor with which the worker assumes the obligation to pay a certain amount to the organization if he does not enter into work at a certain time" (Judgment of the Supreme Court of the Autonomous Province of Vojvodina, GJ 14/62 of 16 February 1962 years).
We also emphasize that "the provision of the scholarship agreement for the specialization does not have legal significance, which establishes that the recipient of the scholarship is obliged to pay a certain amount of the contractual penalty if after the completion of the specialization he does not spend the contracted working hours at the scholarship" (Judgment of the Supreme Court of Serbia, Ms. 4821 63 of January 11, 1964).

4.3. Cause of the Contract on Contractual Punishment

The causality of contractual penalties is the reason why the debtor has committed itself. The causality of contractual penalties is different from that of the creditor's main contract, although they are substantially close and coincidental. The reasons for its existence are in the tendency that all the main and secondary benefits of the contract for which it is made is legally founded (to justify them legally). In addition, it is a means of securing any permissible interest, even though it is the most commonly allowed property interest.

4.4. Form Contract Form Contract

When it comes to parallelism, the form of a contractual punishment then we notice that it is a rule that has been accepted in the General Trade Seals for the Sale of Goods. We emphasize that all major codifications do not mention the form within the general rules in the contractual penalty. "In any case, the parallelism of the form (main and accessory contract) does not contradict the view that the contract of contractual penalties is autonomous, although an accessory contract, such as it can't, without the rest, without the corresponding legal provision, draw up a rule on the obligation of the form of the main contract for a penal agreement (...)" (Hiber and Živković 2015, 417).

4.5. Requirements for application

In order to apply the rules of the institute of a contractual penalty, it is not necessary that the creditor has suffered damage. The contractual penalty shall be paid even if the creditor has not suffered any damage, and if it has suffered more than the amount of the contractual penalty it is necessary to prove that he has the right to compensation until full compensation under Art. 275, para. 2 ZOO.
Then, the debtor must be guilty. In the domain of contractual liability, guilt is presumed to require the absence of a reason which excludes his liability. According to Art. 272, para. 2 The ZOO Agreement loses its legal effect if the failure to meet or fulfillment of the fulfillment resulted from the cause for which the borrower does not respond. According to Art. 263 ZOO, these are the circumstances that arose after the conclusion of the contract, which the debtor could not prevent, eliminate or avoid. We emphasize that the rules of contractual liability are of a dispositive nature and, as such, allow for the extension of responsibilities and situations in which the borrower would otherwise not be able to respond.
There must be a explicit contractual penalty for failure to complete. While a contractual

penalty due to a delay in fulfillment, it is necessary for the debtor to fall due. The debtor is in arrears when he fails to fulfill his obligation within the deadline set for fulfillment under Art. 324, para. 1 ZOO. If the debtor has not fulfilled his obligation of maturity, the creditor must, with a warning (in cases when the deadline has not been determined), invite him to fulfill the obligation and demand payment of the contractual penalty (a statement is also required in case it should not be warned). It is a legally irrelevant measure in which the debtor is obliged to make a commitment. We emphasize that in the case of an exceptional contractual punishment, the guilt also includes the liability of the debtor that he has towards himself.
Arbitrage practice shows that a contractual penalty is awarded even when the creditor has requested the fulfillment of the main obligation and left an appropriate postponement period. If the debtor fails to fulfill his obligation even within this period, the creditor is authorized to terminate the contract with a single-handed termination or declaratory statement that the termination occurred and requires payment of the contractual penalty (Decision of the Foreign Trade Arbitration at the Chamber of Commerce of Serbia No. T-9/10 of 10.10.2011. years).

5.LIQUIDATED DAMAGES

English law as one of the rights that common law belongs to the legal system contains an institution of liquidated damages that is similar to the institution of a contractual penalty in our legal system. The agreement of the contracting party on the clause with the amount of damage that will occur if the contractual discipline is violated is liquidated damages. "When a contract contains such a clause, the contracted amount is paid regardless of the amount of damage caused by the breach of the contractual obligation" (Goetz and Scott 1997, 595).
Both institutes can't be applied to monetary obligations, but only to non-monetary liabilities. A contractual penalty can't be contracted if it is provided that in the event of a breach of contract, the debtor will pay to the creditor a certain amount of money, penalties, fees, contractual penalties or under any other name when the creditor can't claim and compensation determined by law and contractual punishment, this is permitted by law according to Art. 276 ZOO.
In English law, the contracted amount is considered pennaly if it is greater than the greatest damage that could be assumed at the time of the contract conclusion that it could arise if the contract is injured "(Goetz and Scott 1997, 596). Negotiating liquidated damages is not permitted for penalties. Whether in the specific case there are pennaly or liquidated damages should be assessed with regard to the circumstances at the time of the conclusion of the contract.
Liquidated damages owe the debtor irrespective of its amount, without the possibility of a reduction. But if the contracted amount is greater than the damage that could have been foreseen as a possible consequence of a breach of contract at the time of the conclusion of the contract, such a contractual provision would be ineffective and the creditor would be entitled to compensation for damage "(Goetz and Scott 1997, 597).

CONCLUSION

The structure of the contractual punishment awarded by a positive right makes it a specific property sanction. The benefits that the creditor can derive from the avoidance of the costs of litigation (proving damage, expert judgment, etc.) until the harmful consequences due to their long duration.
Elements of the structure of the contractual penalty also respect the position of the creditor and the debtor, allowing the debtor to demand the reduction of excessively high contractual penalties under the law-stipulated conditions. As well as allowing the creditor to claim a difference in remuneration when the amount of damage exceeds the amount of the contractual penalty. In line with the strengths of her contracting, we were trying to justify applying a

wrong contractual penalty. Considerations in the work have shown that the omission of undue contractual punishment in positive law does not, however, have the ultimate consequence of circumvention of legal provisions on contractual penalties. The assertion of this assertion was made based on the principle of freedom of contracting on the basis of which it was agreed and aims to secure the creditor's expectations to fulfill the obligation. We also stressed the necessity of its legal treatment in the applicable law because of its independence, which does not presuppose the existence of a major or minor liability from a contract. It is already going further and increasing the security that the irrevocable obligation of the debtor or of a third party will be met. We emphasized that in her case the creditor should prove that the borrower did not behave in accordance with the natural or natural obligation.
The positive legal framework of the contractual penalty, which we subsequently analyzed, also considered the application of a wrong contractual penalty. The provisions governing the contractual penalty are of a dispositive nature so that the contracting parties may agree to apply the wrong contractual penalty.

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