



# The New Civil Code for Everyone



## Penalties clause

### Relevant provisions

The legal status is regulated in the text of articles 1538-1543 (book V, title V, chapter IV, 4<sup>th</sup> section of the New Civil Code), but on this institution there are mentions elsewhere in the contents of other articles: art. 1757 paragraph 2, art. 267 etc.

### Notion

The penalties clause is that *contract provision by which the parties stipulate that the debtor undertakes to a certain performance in case he/she does not perform the main obligation which he/she has undertaken.*

Thus, by the contract clause the parties establish with anticipation the equivalent of the damage the creditor would suffer as a result of the non-performance, untimely or inadequate performance of the obligation by their debtor.

### Characteristics

The penalties clause has an ancillary nature, considering that its existence is justified by the existence of a principal obligation. As a result, the nullity of the principal obligation attracts that of the penalties clause, but not the other way round.

The penalties clause also intervenes as a sanction for the non-performance of the principal obligation, for its untimely or inadequate performance.

The creditor cannot request both the performance in kind of the principal obligation and the payment of the penalty, except for the case where the penalty has been stipulated for the untimely or out of place performance of the obligations. In the latter case, the creditor may ask both for the performance of the principal obligation and of the penalty, if he/she does not waiver this right or if he/she does not accept, fără reserve, the performance of the obligation.

### Elements of Novelty

The legal status of the penalties clause did not suffer any important changes, some of the novelty elements being represented by solutions previously consecrated by way of doctrine and case law. Thus, no essential changes have occurred regarding the legal nature (means to evaluate the suffered damage) and the ancillary nature of the penalties clause, but the following aspects are now provided as novelties:

- The presumption of existence of the damage is now expressly regulated, the creditor being able to request the enforcement of the penalties clause without having to prove any damage;
- The right of the court is now provided to diminish the quantum of the penalty in case it is manifestly excessive compared to the predictable damage cause to the creditor; however, even in this case the sentencing role of the penalties clause is maintained, as imposed by the lawmaker, even when the court diminishes the quantum of the performance involved by the penalties clause, the penalty thus diminished must exceed the principal obligation.
- The penalty cannot be requested when the enforcement of the obligation has become impossible for reasons not ascribable to the debtor.

## Project „The Codes Are Coming!”

**The contents of this material does not represent an official interpretation of the New Civil Code and does not cover all the aspects concerning this subject.**