RETHINKING THE RELATIONSHIP BETWEEN THE ENFORCEABILITY OF PENALTY CLAUSES AND THE DEBTOR'S FAULT IN BREACH OF HIS/HER OBLIGATION UNDER SWISS LAW[1,2]

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Abstract

Despite the lack of an explicit provision within the Swiss Code of Obligations (OR), the considerable majority of the Swiss doctrine as well as the Federal Court accept that contractual penalty shall be paid if and only if the debtor's breach is based on his/her fault. In this paper, we question such dogma and analyze the wording and purposes of Articles 161/2 and 163/2 of the Swiss Code of Obligations by taking their historical background into account. We argue that unless otherwise agreed by the parties, the debtor's obligation to pay the penalty shall be deemed independent of his/her fault.

Keywords

Penalty clause, Fault, Liquidated Damages, Impossibility, Accessoriness

[1] This article is a revised version of the paper on the relationship between penalty clauses and the debtor's fault in breach of his/her obligations in Turkish law, which was published in Turkish in Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Vol. 24, No. 2). Since the Swiss Code of Obligations is adopted by Turkey in 1926 and provisions concerning penalty clauses are almost identical in both codes, scholarly work and opinions concerning penalty clauses in Turkey are also worth considering in a paper elaborating on Swiss law of obligations. Therefore, scholarly work concerning the Turkish law of obligations are also cited in this paper.

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INTRODUCTION

Penalty clause is a contractual provision, where the debtor undertakes to provide the creditor with an asset of economic value[4] in case of his default or improper performance. [5] Despite the lack of an explicit provision within the Swiss Code of Obligations (OR), the considerable majority of the Swiss doctrine as well as the Federal Court accept that such contractual penalty shall be paid if and only if the debtor's breach is based on his/her fault.[6]

In fact, it is not unusual in the Continental Europe to relate the enforcement of penalty clauses to the debtor's fault. For instance, German Civil Code (BGB) explicitly requires the debtor's fault for the enforcement of penalty clauses. According to § 339, penalty can only be required if the debtor is in default and in German law, fault is a condition of the debtor's default [§ 286(4) BGB]. Consequently, enforcement of penalty clauses require the debtor's fault.[7] Similarly, Dutch Civil Code (Art. 6:92-3) also states that penalty clauses can be enforced if the breach occurs due to a cause, which is attributable to the debtor. However, there is no such explicit provision under the OR.

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[4] Although it is quite common to set the penalty as a specific amount of money, any obligation with an economic value can be stipulated as the penalty. BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* Freiburg: Diss, 1994, p. 96, fn. 454; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* İstanbul: Vedat, 2017, N. 1576; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* İstanbul, On İki Levha, 2018, p. 32.

[5] FİSCHER, T. *Vertragliche Paushalierung von Schadenersatz.* Zürich: Schulthess, 1998, p. 55; EREN, F. *Borçlar Hukuku Genel Hükümler.* Ankara: Yetkin, 2016, p. 1205; BİRİNCİ UZUN, T. *Götürü Tazminat*. Ankara: Yetkin, 2015, p. 137. Within this stance, the obligation to pay the penalty is subject to a suspensive condition, *i.e*., the debtor's breach of his/her obligations. KELLER, M., SCHÖBİ, C. D*as Schweizerische Schuldrecht, Band I, Allgemeine Lehre des Vertragsrechts.* Basel and Frankfurt am Main: Helbing & Lichtenhahn, 1982, p. 93; SCHWENZER, I. *Schweizerisches Obligationenrecht.* Bern: Stämpfli, 2016, N. 71.01; FİSCHER, T. *Vertragliche Paushalierung von Schadenersatz.* p. 56; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1565; TERCİER, P., PİCHONNAZ, P., DEVELİOĞLU, M. *Borçlar Hukuku Genel Hükümler.* İstanbul: On İki Levha, 2016, N. 1367; EREN, F. *Borçlar Hukuku Genel Hükümler.* p. 1207; NOMER, H. N. *Borçlar Hukuku Genel Hükümler.* İstanbul: Beta, 2017, N. 235.1.

[6] BGer 4A.174/2011, 4.1 (17.10.2011); BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* Zürich, Schulthess, 1988, p. 526; GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* Zürich: Schulthess, 2014, N. 3792a; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Zürich: Orell Füssli, 2016, Art. 160, N. 2; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Basel: Helbing Lichtenhahn, 2014, Art. 160 N. 8; BERGER, B. *Allgemeines Schuldrecht*. Bern: Stämpfli, 2008, N. 1792; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* Bern: Stämpfli & Cie, 1935, p. 39; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Basel: Helbing Lichtenhahn, 2015, Art. 161, N. 4; DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. Basel: Diss., 1935, p. 15. On the contrary see KELLER, M., SCHÖBİ, C. D*as Schweizerische Schuldrecht, Band I, Allgemeine Lehre des Vertragsrechts.* p. 95. Pellanda associates the fault requirement with the accessoriness of the penalty. PELLANDA, K. J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Zürich: Schulthess, 2016, Art. 160, N. 24. Schwenzer makes a distinction between non-performance and improper performance and argues that the debtor's fault is required for penalties stipulated for cases of non-performance, provided that the parties have not decided otherwise. SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.08.

[7] Although it is controversial, in cases where the debtor is obliged to refrain from doing something, breach of such obligation is *per se* sufficient to claim the penalty (§ 339 BGB).

Scholars, who claim that enforcement of penalty clauses requires the debtor's fault, base their opinion on three main grounds: (i) Art. 161/2 (concerning losses exceeding the penalty) simply reverses the burden of proof without waiving the fault requirement; (ii) Art. 163/2 is only a repetition of Art. 136, which sets forth that the debt shall extinguish in cases of subsequent impossibility for which the debtor is not responsible; and (iii) the scope of Art. 163/2 covers all kinds of breach including but not limited to subsequent impossibility for which the debtor is not responsible. In this study, we will evaluate these arguments separately and challenge the prevailing opinion in the Swiss doctrine by making a thorough analysis of the relevant provisions of the OR[8].

Article 1 of the Swiss Civil Code (ZGB) requires that the "law applies according to its wording or interpretation to all legal questions for which it contains a provision".[9] Therefore, an interpretation that is against the purpose of the law is unacceptable.[10] In addition, when seeking the purpose of the law, the preparatory work concerning the law is an important tool to consider.[11] Since the drafts, minutes of the meetings at the assembly or relevant commissions and the reasoning of the law may help us understand the purpose of the law[12] , we will also study the preparatory work concerning the OR. Therefore, we will not examine the issue solely *de lege ferenda*, but we will focus on the purposes of Articles 161 and 163

[8] There are three types of penalty: penalty in lieu of performance; penalty in addition to performance and penalty for termination. Penalty for termination differs from the other two with respect to its function. Hence, unlike penalty in technical terms, the penalty for termination does not aim to apply pressure on the debtor to perform. Contrarily, penalty for termination allows the debtor to be freed from the obligation to perform. Therefore it serves to the debtor, not the creditor. TEKİNAY, S.S., AKMAN, S., BURCUOĞLU, H., ALTOP, A. *Tekinay Borçlar Hukuku Genel Hükümler.* İstanbul: Filiz, 1993, p. 353; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* Ankara: Yetkin, 2018, p. 145; AKINTÜRK, T., ATEŞ, D. *Borçlar Hukuku Genel Hükümler Özel Borç İlişkileri*. İstanbul: Beta, 2018, p. 166; KAYAR, İ. *Borçlar Hukuku Genel Hükümler.* İstanbul: Detay, 2013, p. 187. For types of penalty, see OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1590ff.; EREN, F. *Borçlar Hukuku Genel Hükümler.* p. 1208 ff.; GÜNAY, C. İ. *Cezai Şart (BK m. 158-161).* Ankara: Turhan, 2001, p. 78 ff.; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 133 ff.; ÇAĞLAYAN AKSOY, P. Asgari Alım Taahüdü İçeren Bayilik Sözleşmelerinde Cezai Şart - Yargıtay Hukuk Genel Kurulu'nun 16.01.2013 Tarihli Kararı Üzerine Düşünceler. *Türkiye Barolar Birliği Dergisi.* No. 131, p. 266 ff. Therefore, penalty for termination is not penalty in technical sense. GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3810; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1607; EREN, F. *Borçlar Hukuku Genel Hükümler.* p. 1210; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 144; TERCİER, P., PİCHONNAZ, P., DEVELİOĞLU, M. *Borçlar Hukuku Genel Hükümler.* N. 1376. For this reason, penalty for termination is outside the scope of our study.

[9] For the official English translation of the OR see *https://www.admin.ch/opc/en/classified-compilation/19070042/index.html*

[10] OĞUZMAN, K., BARLAS., N. *Medeni Hukuk.* İstanbul: Vedat, 2017, N. 244.

[11] OĞUZMAN, K., BARLAS., N. *Medeni Hukuk.* N. 254 ff.; DURAL, M., SARI, S. *Türk Özel Hukuku Cilt I, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri*. İstanbul: Filiz, 2017, N. 817.

[12] OĞUZMAN, K., BARLAS., N. *Medeni Hukuk.* N. 254; DURAL, M., SARI, S. *Türk Özel Hukuku Cilt I, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri*. N. 817; HATEMİ, H. *Medeni Hukuk'a Giriş.* İstanbul: On İki Levha, 2017, § 7, N. 21; BGE 116 II 525 E. 2a.

and discuss whether -*de lege lata*- these provisions provide for penalty claims from debtors who are not faulty in breaching their obligations.

I. Does Art. 161/2 solely reverse the burden of proof?

According to Art. 161/2 OR, "*Where the loss or damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault*." In Swiss law, this provision is regarded as an exception to the presumption of fault in cases of breach of obligations and it is accepted that the provision simply reverses the burden of proof.[13] However we do not agree that such provision merely aims to reverse the burden of proof.

A. Interpretation of Art. 161/2 according to the prevailing opinion

According to the prevailing opinion in Swiss law, Art. 161/2 OR has no function that exceeds reversing the burden of proof. [14] As a matter of fact, unlike torts, the debtor is presumed as faulty in cases of breach of obligation and the creditor is entitled to compensation unless the debtor can prove the lack of his/her fault. However, with respect to damages that exceed the penalty, Art. 161/2 OR deviates from such principle and shifts the burden of proof to the creditor. [15] Therefore, with respect to loses that do not exceed the penalty, the debtor shall only prove the debtor's breach and the debtor would be presumed as faulty.[16].

It is not unfamiliar in Swiss law of obligations that the burden of proof with respect to the debtor's fault is loaded to the creditor. In fact, in several articles of the former OR (fOR), certain legal results were bound to the proof of the debtor's fault by the creditor.[17] However

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[13] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3817; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 161, N. 5; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.*Art. 161 N. 3.

[14] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3817; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 161, N. 5; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.*Art. 161 N. 3.

[15] This provision is a default norm and the parties can agree otherwise. GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3817a; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 531; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.*Art. 161 N. 3.

[16] TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. İstanbul: Baha Matbaası, 1963, p. 105; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1618. However, there are some exceptional cases of objective liability -such as the debtor's liability for assistants and liability for accidents during default- where the law sets forth that the debtor shall be liable even if he/she has no fault. GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3817. It is accepted that in such cases penalty must be performed regardless of the debtor's fault. See, BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 80.

[17] See Art. 103/1 fOR, Art. 121 fOR, Art. 124 fOR and Art. 180/2 fZGB that corresponds to Art. 161/2 ZGB. For instance, similar to Art. 106 OR, Art. 121 fOR stated that if the loss suffered by the creditor exceeds the default interest, the creditor is entitled to such loss as well. Such claim requires the debtor's fault as such claim is

when the OR came into effect, such provisions were abondoned with one single exception: the exception under Art. 161/2 OR. More specifically, the current Art. 161/2 OR was preserved and it was accepted that the debtor shall be presumed faulty unless he/she can prove otherwise.

Preservation of such an exceptional provision in the current OR is criticized in Swiss doctrine. [18] It is argued that such provision contradicts with the penalty's purpose to enhance the creditor's position since it makes the creditor disadvantaged against the debtor.[19] For instance, when the loses considerably exceed the amount of the penalty, the creditor would be deprived of the security provided by the penalty if he fails to prove the debtor's fault.[20] Therefore, scholars propose several solutions to overcome the disadvantages caused by Art. 161/2 OR. For instance, some authors offer to lower the standard concerning the proof of fault and even recommend to assume the debtor's fault.[21] Some others propose to accept the existence of an implied agreement -between the debtor and the creditor- that the ordinary principle

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compensation by its nature. However, there is an important difference between the current and the former provisions of OR with respect to the burden of proof. In accordance with the general principle concerning proof, Art. 106 OR assumes that the debtor is faulty and sets forth that the debtor must prove the lack of his fault if he/she want to be freed from the obligation to compensate the exceeding losses. However, Art. 121 fOR stated that the creditor, who claims the exceeding losses must prove the debtor's fault. When enacting the current OR, the lawmakers opted to eliminate the divergent provision of Art. 121 fOR but chose to preserve Art. 180/2 fOR. Accordingly, similar to Art. 180/2 fOR, Art. 161/2 OR sets forth that the creditor must prove the debtor's fault if he/she claims the damages that exceed the penalty

[18] OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Zürich: Schulthess, Art. 161, N. 4; BERGER, B. *Allgemeines Schuldrecht*. N. 1796; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 530 fn. 41; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 161, N. 5; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* Zürich: Schulthess, 2014, N. 1267; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* Zürich: Schulthess, 1974, pp. 283-284; DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 134. In favor of the provision, see BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR*. Bern: Stämpfli, 1945, Art. 161 OR, N. 3; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* Ankara: Seçkin, 2015, p. 347.

[19] VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 284.

[20] BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 530, fn. 41; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1267. According to Becker, the *ratio legis* of the provision is as follows: since the penalty is negotiated and decided within the contract, the creditor is involved in the specification of the penalty amount. Therefore, the creditor must prove the existence of extra-ordinary circumstances as well as the existence of the conditions to claim the penalty, including the condition of fault. BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR.* Art. 161, N. 3.

[21] GUHL, T., SCHNYDER, A. K. § 56. Die Konventionalstrafe. In: T. Guhl – A. Koller – A. K. Schnyder – J. N. Druey (ed.). *Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts*. Zürich: Schulthess, 2000, § 56, N. 10; OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Art. 161, N. 4; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 58; DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 136.

concerning the burden of proof shall apply.[22] Such strained interpretations and efforts to overcome the outcomes of the principle require a crtical approach to the prevailing opinion.

B. A critical approach to the prevailing opinion

The *ratio legis* of Art. 161/2 OR needs to be explained to accept the opinion that this provision is only a divergence from the ordinary burden of proof. More specifically, if such provision has no other function than being a divergence from the general principle, there must be a reason that the lawmakers decided to make such an exception. However, even the authors, who defend this approach, fail to explain the *ratio legis* of the provision and event try to overcome the clear wording of the provision that shifts the burden of proof to the creditor.

We think that Art. 161/2 OR does not simply aim to shift the burden of proof to the creditor but it sets forth that the penalty claims are independent of the debtor's fault. In fact, the provision makes a distinction by considering whether the loses exceed the penalty. Accordingly, claims for loses that exceed the penalty require the debtor's fault. Moreover, the provision states that the burden of proof concerning fault is loaded to the creditor. According to the opposite meaning of the provision, when the creditor's loses do not exceed the penalty, penalty claims do not require the debtor's fault. When such interpretation is adopted, one can explain why the provision loads the burden of proof to the debtor when the loses exceed the penalty. Putting forward the reasons thereof requires to discuss the differences between penalty and compensation.

1. Penalty is not compensation by its nature[23]

According to Art. 161/1, "The penalty is payable even if the creditor has not suffered any loss or damage." Therefore, the creditor does not have to prove his/her losses to claim the penalty. [24] Moreover, Art. 163 OR not only states that the parties are free to determine the amount of

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[22] BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* P. 531, fn. 42.

[23] There are three main views with regards to the nature of penalty: (i) compensation, (ii) punishment, and (iii) insurance. However there are other opinions regarding the nature of penalty. Some authors (TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 30; TEKİNAY, S.S., AKMAN, S., BURCUOĞLU, H., ALTOP, A. *Tekinay Borçlar Hukuku Genel Hükümler.* p. 342; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 37; GÜNAY, C.İ. *Borçlar Hukuku Genel Hükümler – Özel Borç İlişkileri.* Ankara: Yetkin, 2016, p. 141; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 52) argue that penalty is liquidated damages. Some others argue that penalty is a combination of punishment and compensation. For this opinion, see TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 24; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 49; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 35. For the opinions on the nature of penalty see TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 21 ff; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 46 ff; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 30 ff.

[24] BGE 122 III 420, E. 2a; BGE 109 II 462, E. 4a; BGE 102 II 420, E. 4; BGE 95 II 532, E. 5; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 4; OSER, H., SCHÖNENBERGER, W.

the contractual penalty but also gives the judge the duty to reduce penalties that it considers excessive. Therefore, as long as it is not excessive, the contractually agreed penalty may exceed the compensation that can be claimed in the case at hand. Independence of the penalty from the loses shows that the function of the penalty is not to compensate the creditor's loses.

However, penalty and compensation claims are not entirely independent from each other. Unlike compensation, penalty can be claimed even if the debtor has not suffered any loses but penalty and compensation cannot be claimed in accummulation: penalty must be deducted from compensation. [25] Therefore, it is clear that there is a relationship between penalty and compensation, and in some cases penalty covers the debtor's loses. Nevertheless, penalty is not compensation by its nature. The penalty is deducted from compensation because in some cases, penalty and compensation aim to protect the same interest. Although such intersection is possible, it is not mandatory.[26] Since the creditor is entitled to penalty even if he/she does not suffer any losses, it is not possible to accept penalty as compensation.

Contracts very often contain provisions, which stipulate that the breaching debtor shall pay an *ex-ante* specified amount of money to the creditor. All of such clauses cannot be deemed as penalty because the contracting parties' intention might be stipulating liquidated damages.

Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183. Vorbem. zu Art 160-163, N. 12; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.*Art. 160 N. 2; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 1; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 277; BERGER, B. *Allgemeines Schuldrecht*. N. 1780; RİEMER, H.M. Konventionalstrafen in Gestalt von Verfall- oder Verwirkungsklauseln. In: H. Peter – E. W. Stark – P. Tercier (ed.). *Hundert Jahre Schweizerisches Obligationenrecht.* Freiburg: Universitätsverlag Freiburg, 1982, p. 443; PELLANDA, K.J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Art. 160, N. 5; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1251; GUHL, T., SCHNYDER, A. K. *Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts*. § 56, N. 2; GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3814. Since proving the damages arising from the breach of obligation is costly and difficult, such option given to the creditor is quite important. BERGER, B. *Allgemeines Schuldrecht*. N. 1780; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.02.

[25] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3816; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 530; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 75.

[26] Penalty in addition to performance and positive damages can be claimed in accummulation. Because in such cases, the penalty does not correspond to the creditor's interest in performance. KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 78; KAPANCI, K. B. Götürü Tazminat Anlaşması Ve Bunun Ceza Koşulundan Ayırt Edilmesi. *Prof. Dr. Mustafa Dural'a Armağan*. İstanbul: Filiz, 2013, p. 670. However, Buz rightfully argues that one should make a distinction between cases of improper performance. Although Art. 160/1 OR makes no distinction between non-performance and defective performance and setz forth that unless otherwise agreed, the creditor may only compel performance or claim the penalty, Buz states that this is caused by an editorial error. According to the author, cases of defective performance, where the penalty and compensation serve to protect the same interest, should be covered by Art. 160/2. See, BUZ, V. Konventionalstrafe wegen nicht richtiger Erfüllung. *Aktuelle Juristische Praxis*, 04/2017, p. 493 ff. According to the author, in cases of positive breach of the contract, one should examine the intents of the parties and the purpose of the penalty to decide whether penalty and compensation can be claimed in accummulation. BUZ, V. *Aktuelle Juristische Praxis*. p. 503.

Therefore, in order to classify such provisions in specific contracts, one should examine the intents of the parties.[27] Although the identification of such intent is difficult in some cases, the purpose of the provision agreed by the parties shall be distinctive. More specifically, the difference between the potential loss that could occur in breach, and the contractually agreed amount is accepted as a decisive criterion.[28] In fact, penalty exceeds the potentially anticipated loss at the time of the contract.[29] Such characteristic of the penalty applies pressure on the debtor to perform the contract.[30] On the other hand, liquidated damages is an *ex-ante* determination of the compensation to be paid to the creditor to cover the typical loses if the debtor breaches his/her contractual obligations.[31] As a result, the creditor is saved from the difficulty to prove the amount of his/her losses.[32] Unlike the penalty, which aims to deter the debtor from breaching his/her obligations, liquidated damages aims to compensate the losses of the creditor.[33] Therefore, liquidated damages claims require the occurrence of the

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[27] PARLAK BÖRÜ, Ş. Götürü Tazminat Kavramına Bir Bakış. *Türkiye Barolar Birliği Dergisi.* 2017, No. 129, p. 224; BİRİNCİ UZUN, T. *Götürü Tazminat*. p. 155; ERDEM, M. Tazminatın Götürü Olarak Belirlenmesi. *Gazi Üniversitesi Hukuk Fakültesi Sorumluluk ve Tazminat Hukuku Sempozyumu (28-29 Mayıs 2009).* Ankara: Gazi Üniversitesi, 2009, p. 122.

[28] ERDEM, M. *Gazi Üniversitesi Hukuk Fakültesi Sorumluluk ve Tazminat Hukuku Sempozyumu (28-29 Mayıs 2009).* p. 123; KAPANCI, K. B. *Prof. Dr. Mustafa Dural'a Armağan*. p. 679.

[29] COOTER, R, ULEN, T. *Law and Economics*. Boston: Addison-Wesley, 2012, p. 321; BİRİNCİ UZUN, T. *Götürü Tazminat*. p. 159.

[30] OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Vorbem. zu Art 160-163, N. 12; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 4; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 277; BERGER, B. *Allgemeines Schuldrecht*. N. 1780; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 56; BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 12; DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 12; ERDEM, M. *Gazi Üniversitesi Hukuk Fakültesi Sorumluluk ve Tazminat Hukuku Sempozyumu (28-29 Mayıs 2009)*. p. 123; BİRİNCİ UZUN, T. *Götürü Tazminat*. p. 160. In most cases, the debtor would prefer to perform in accordance with the contract in order to avoid the penalty that exceeds the losses of the creditor. Since the creditor is entitled to the penalty regardless of the existence of the debtor's fault, the debtor shows a high level of care that he/she would not show otherwise. JHERİNG, R. v., BÄHR, O. *Zwei Rechtsgutachten in Sachen der Gotthardbahn-Gesellschaft gegen die Unternehmung des grossen Tunnels (Favre).* Luzern: Meyer'sche Buchdruckerei, 1884, p. 9. On the opinion that such level of care is above the optimal level, see SANLI, K. C. *Hukuk ve Ekonomi Perspektifinden Sözleşme Hukuku ve Sözleşme Yaptırımlarının Ekonomik Analizi.* İstanbul: XII Levha, 2017, p. 353. However, as its primary aim, liquidated damages is not directed at applying pressure on the debtor but it only has such an indirect effect due to its results. See ERDEM, M. *Gazi Üniversitesi Hukuk Fakültesi Sorumluluk ve Tazminat Hukuku Sempozyumu (28-29 Mayıs 2009).* p. 116; KAPANCI, K. B. *Prof. Dr. Mustafa Dural'a Armağan*. p. 666, 677.

[31] PARLAK BÖRÜ, Ş. *Türkiye Barolar Birliği Dergisi.* p. 197; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 40; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 176.

[32] PARLAK BÖRÜ, Ş. *Türkiye Barolar Birliği Dergisi.* p. 207; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 40.

[33] VİTKUS, S. Penalty Clauses within Different Legal Systems. *Social Transformation in Contemporary Society.* 2013, No. 1, p. 154. In anglo-saxon legal system, contractual agreements concerning liquidated damages are deemed valid; however -except for some exceptions- the general tendency is to regard penalty clauses invalid. DE GEEST G., WUYTS, F. Penalty Clauses and Liquidated Damages. In: B. Bouckaert – G. De Geest (ed.). *Encyclopedia of Law and Economics.* Cheltenham: Edward Elgar, 2000, p. 141. Available at:

creditor's loss. [34] However, the burden of proof is shifted and the creditor is saved from the burden to prove the occurrence of his loss as well as its amount. [35] Despite their similarities, penalty is a different institution from liquidated damages and it has no purpose to compensate the losses of the creditor. [36]

The preparatory work concerning the OR also shows that penalty is not compensation by its nature. Before its enactment, the draft of the OR was reviewed by an expert commission in three sessions held in 1908 and 1909.[37] The preparatory work of the OR demonstrates that the lawmakers intentionally refrained from defining the penalty clauses at this stage. More specifically, in the former drafts (Art. 1185), there was a definition that specifically emphasized the dual (punitive and compensatory) character of the penalty. When Bruestlein, one of the members of the expert commission, proposed to revise the definition of penalty as "merely a compesatory claim with a reversed burden of proof" and to omit the punitive function of penalty from the definition, [38] several members (Planta, Hoffmann, Isler) objected to such proposal. Following the discussions, it was decided to completely omit the definition of the penalty from the draft.[39] Rejection of Bruestlein's proposal shows that the function of penalty is not –at least only- compensation.

2. Exploring the *ratio legis* of shifting the burden of proof to the creditor

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<http://reference.findlaw.com/lawandeconomics/4610-penalty-clauses-and-liquidated-damages.pdf>; GOETZ, C. J., SCOTT, R. E. Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on the Enforcement Model of Efficient Breach. *Columbia Law Review.* 1977, Vol. 77, No. 4, p. 554 ff; HARWOOD, W. S. Liquidated Damages: A Comparison of the Common Law and the Uniform Commercial Code. *Fordham Law Review.* 1977, Vol. 45, No. 7, p. 1350; VİTKUS, S. *Social Transformation in Contemporary Society.* p. 154; HATZİS, A. N. Having the cake and eating it too: efficient penalty clauses in Common and Civil contract law. *International Review of Law and Economics*. 2003, Vol. 22, p. 383; COOTER, R, ULEN, T. *Law and Economics.* p. 321. Anglo-saxon courts generally compare the agreed sum with the amount of the actual loss to classify the contractually agreed amount as penalty or liquidated damages. HATZİS, A. N. *International Review of Law and Economics*. p. 385; VİTKUS, S. *Social Transformation in Contemporary Society.* p. 155.

[34] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3851; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 525; BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 19; ERDEM, M. *Gazi Üniversitesi Hukuk Fakültesi Sorumluluk ve Tazminat Hukuku Sempozyumu (28-29 Mayıs 2009).* p. 108; KAPANCI, K. B. *Prof. Dr. Mustafa Dural'a Armağan*. p. 660; BİRİNCİ UZUN, T. *Götürü Tazminat*. p. 148; KAHRAMAN, Z. *Saf Garanti Taahhütleri*. İstanbul: Vedat, 2017, p. 82; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 180.

[35] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3851; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1566a.

[36] For differences beyween penalty and liquidated damages, see VOLKER, B. Pauschalierter Schadensersatz und Vertragsstrafe. *Festschrift für Karl Larenz zum 70. Geburtstag.* München 1973, p. 495 ff.

[37] BÜHLER, T. Haft- und Reugeld sowie Konventionalstrafe im alten und im geltenden Obligationenrecht. In: H. Peter – E. W. Stark – P. Tercier (ed.). *Hundert Jahre Schweizerisches Obligationenrecht.* Freiburg: Universitätsverlag Freiburg, 1982, p. 156.

[38] Protokoll der Expertenkommission, Bd. II, 7. Sitzung, Montag, den 12 Oktober 1908, p. 5.

[39] Protokoll der Expertenkommission, Bd. II, 7. Sitzung, Montag, den 12 Oktober 1908, p. 7.

We find it reasonable to require the debtor's fault for compenating the creditor's losses that exceed the penalty. In fact, penalty and compensation are two different legal institutions and the claims concering the losses that exceed the penalty are compensatory by nature. In principle, fault is a requirement of compensation claims under Swiss law. However Art. 161/2 not only requires the debtor's fault but also diverges from the general principle concerning the burden of proof and shifts the burden to the creditor. In order to accept that the penalty does not require fault, one should also interprete such exception.

By shifting the burden of proof to the creditor, Art. 161/2 OR fairly balances the interests of the debtor and the creditor. Considering that the penalty is freely agreed by the parties at the time of contract negotiations, it is for the benefit of the creditor that he is entitled to penalty regardless from his losses and the creditor's fault. In other words, -notwithstanding the exception in Art. 163/2 OR- the creditor may claim the penalty even if he has no losses and the debtor breaches his/her contractual obligations without fault. Therefore, if the creditor claims an amount that exceeds the *ex-ante* negotiated penalty, such claim is no longer penalty but compensation in nature. Therefore it requires the debtor's fault and the burden of proof should be on the creditor. Such rule concerning the burden of proof now balances the interest between the parties in favor of the debtor.

Our view is also supported by the fact that in most cases penalty and compensation cannot be claimed in accummulation. For instance, when the parties freely negotiate and agree on the penalty in lieu of performance, they assume that the agreed amount covers the creditor's losses as well. Therefore, the debtor considers such risk as a cost item when deciding on the price. However, the losses that exceed the penalty are outside the scope of the risk that the debtor takes and reflects to the price. Therefore, the debtor, who accepts to pay the penalty under the terms that are in favor of the creditor, rightfully expects to be protected with regards to compensatory claims that exceed the penalty and such expectation is met by the law through a shift of burden of proof concerning the fault.

II. Does Art. 163/2 OR simply repeat Art. 119 OR?

Article 163/2 OR sets forth that *unless agreed otherwise*, penalty cannot be claimed if performance becomes "impossible" due to circumstances beyond the debtor's control. [40] It could be argued that this provision is merely a repetition of Art. 119 OR, which states that

[40] Although the official English translation of OR refers to the "prevention" of circumstances, the original German text refers to performance becoming "impossible" ("unmöglich").

debt shall extinguish in case of impossibility for which the debtor is not responsible.[41] According to such opinion, the opposite meaning of Art. 163/2 OR shall not mean to construe that penalty can be claimed in "other contractual breaches" where the debtor is not responsible. Otherwise, this provision would contradict with Art. 97 OR that covers all types of contractual breaches.[42] We think that this opinion cannot be accepted because extinguishment of the debt under Art. 119 OR is not caused from the principle of accessoriness that applies for penalty clauses.

Penalty is accesory by its nature.[43] Therefore, emergence, existence and enforcement of penalty is bound to the primary claim that the penalty warrants.[44] In other words, validity of the penalty requires the existence of a valid primary claim. [45] If the primary claim is invalid, extinct or legally unenforceable, this affects the penalty as well. [46] For instance, if a contract is

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[41] In this opinion, see KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 58; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 232; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 278; BİLGE, N. *Cezai Şart*. Ankara: Güzel İstanbul Matbaası, 1957, p 108; TEKİNAY, S.S., AKMAN, S., BURCUOĞLU, H., ALTOP, A. *Tekinay Borçlar Hukuku Genel Hükümler.* p. 359; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 119.

[42] It is argued that the interpretation construed from the opposite meaning must be inconformity with the general principle; however it would be against the general principle (under Art. 97 OR) to deduct an opposite meaning that penalty can be claimed even if the debtor has no fault. See TEKİNAY, S.S., AKMAN, S., BURCUOĞLU, H., ALTOP, A. *Tekinay Borçlar Hukuku Genel Hükümler.* p. 360. We disagree with this opinion because the general principle under Art. 97 is that compensation claims are bound to debtor's fault; but the provision does not set a principle that penalty claims require the debtor's fault.

[43] KELLER, M., SCHÖBİ, C. D*as Schweizerische Schuldrecht, Band I, Allgemeine Lehre des Vertragsrechts.* p. 92; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.03; FİSCHER, T. *Vertragliche Paushalierung von Schadenersatz.* p. 60; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 523; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 278; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 7; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 23; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 66; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 13; KILIÇOĞLU, A. M. *Borçlar Hukuku Genel Hükümler.* Ankara: Turhan, 2016, p. 803; KAYIHAN, Ş. *Borçlar Hukuku Genel Hükümler.* Ankara: Seçkin, 2016, p. 333; KAYAR, İ. *Borçlar Hukuku Genel Hükümler.* p. 186; UYGUR, T. *6098 Sayılı Türk Borçlar Kanunu Şerhi, Cilt – I. Ankara*: Seçkin, 2013, p. 1075.

[44] SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.03; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 7; BÜHLER, T. *Hundert Jahre Schweizerisches Obligationenrecht.* p. 168; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 3; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.*Art. 160 N. 5; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 17.

[45] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3835; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 278; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1254; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160 N. 5; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 163, N. 4; PELLANDA, K.J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Art. 160, N. 8; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 523; BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR.* Art. 160, N. 9; OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Art. 163, N. 2; BERGER, B. *Allgemeines Schuldrecht*. N. 1784; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 13; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 65.

[46] PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160, N. 5.

against the formalities, morality or the law or if it is rescinded due to failure of intent, the penalty would also become invalid. [47] Similarly, initial impossibility to perform the primary obligation invalidates the penalty.[48] Moreover, if the primary obligation extinguishes due to discharge, novation or set-off, penalty ends *ipso facto*. [49] If the primary obligation is time-barred at the end of the limitation period, penalty becomes time-barred as well.[50] Similarly, the assignment of the primary claim, in principle, includes the assignment of the penalty.[51]

Since penalty is accessory in nature, it cannot be claimed if the debtor's primary obligation extinguishes due to impossibility for which the debtor is not responsible. Once we establish the causal link between the accessoriness of the penalty and the principle that penalty cannot be claimed in cases of impossibility for which the debtor is not responsible, one could apprehend the reason why the law allows the parties to "agree otherwise". Could one argue that such provision allows the parties to bring an exception to the principle that penalty requires the debtor's fault? We disagree with such assertion and argue that the provision

[47] BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 523; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 7; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 4; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 157.

[48] BERGER, B. *Allgemeines Schuldrecht*. N. 1785; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1582; AKKAYAN YILDIRIM, A. Cezai Şartın İşlevi - Türk ve Amerikan Hukukları Açısından Karşılaştırmalı Bir Değerlendirme. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası.* 2003, Vol. LXI, No. 1-2, p. 368, fn. 41; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 77; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 59.

[49] PELLANDA, K.J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Art. 160, N. 10; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 279; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 7; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 4; BERGER, B. *Allgemeines Schuldrecht*. N. 1786; AKKAYAN YILDIRIM, A. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası.* p. 367.

[50] EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 4; BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR.* Art. 160, N. 11; GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3841; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.06; BERGER, B. *Allgemeines Schuldrecht*. N. 1786.

[51] See Art. 170/1 OR; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 523; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 71.07; BERGER, B. *Allgemeines Schuldrecht*. N. 1787; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 160, N. 5; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160, N. 5; PELLANDA, K.J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Art. 160, N. 10; WUFFLİ, D. *OR Kommentar Schweizerisches Obligationenrecht.* Art. 160, N. 7; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1254; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 158. However, once it is due, the penalty ceases to be acessory. PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160, N. 6; PELLANDA, K.J. *CHK – Handkommentar zum Schweizer Privatrecht, Obligationenrecht – Allgemeine Bestimmungen Art. 1-183 OR.* Art. 160, N. 11; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 17; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 160; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 29.

allows the debtor to make an independent promise of guarantee.[52] More specifically, the debtor may undertake to perform the penalty even in cases where he/she has no fault in occurrence of subsequent impossibility. Therefore, penalty can still be claimed even if the obligation extinguishes in cases of subsequent impossibility for which the debtor has no responsibility (Art. 119 OR). As a result, this is not an exception to the principle that penalty requires the debtor's fault (in fact there is no such principle at all) but this is an exception to the principle that penalty is accessory in nature. Therefore, Art. 163/2 OR is not a repetition of Art. 119 OR because extinguishment of the obligation under Art. 119 OR is not a result of the accessoriness principle.

III. Does Art. 163/2 OR cover all types of contractual breaches?

Although Art. 163/2 OR sets forth that penalty cannot be claimed when performance becomes *impossible* due to reasons for which the debtor is not responsible, there is a tendency in the literature to expand the scope of the provision to cover all types of contractual breaches.[53] In other words, in addition to impossibility, penalty cannot be claimed in cases of default or improper performance caused by circumstances outside the debtor's control.[54]

We do not think that the scope of Art. 163/2 OR can be expanded to cover all types of contractual breaches. First of all, despite many criticisms, Swiss law still adopts the Roman law distinction of impossibility-default-improper performance. Since the lawmakers used the

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[52] GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3822; BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR.* Art. 163, N. 4; OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Art. 163, N. 9; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 527; GUHL, T., SCHNYDER, A. K. *Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts*. § 56, N. 3; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 163 N. 4. The provisions concerning penalty (including Art. 163/3 OR) shall apply by analogy to the debtor's guarantee. GAUCH, P., SCHLUEP, W. R., SCHMİD, J., EMMENEGGER, S. *Schweizerisches Obligationenrecht Allgemeiner Teil.* N. 3848; PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 163 N. 4; EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 163, N. 9. For a comparison of penalty to similar institutions including guarantee, see BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 524 ff.

[53] BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 78 ff.; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 526; KILIÇOĞLU, A. M. *Borçlar Hukuku Genel Hükümler.* p. 813; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 233; EKİNCİ, H. *Terazi Hukuk Dergisi*. p. 23. For instance, by reference to Art. 163/2 OR, Berger and Bucher state that the penalty would not be performed if the debtor has no fault in breach of the obligation that the penalty guarantees. BERGER, B. *Allgemeines Schuldrecht*. N. 1792; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 526. Bentele argues that the scope of Art. 163/2 OR should be widened by analogical application of Art. 97 OR concerning all types of contractual breaches. BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 78 ff.

[54] For instance, Huguenin states that if the scope of the provision is restricted to impossibility, a debtor who is faced with impossibility of performance due to an accident would be in a more advantaged position than another debtor who is in default or conducts improper performance without his fault. HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1262.

phrase “impossibility” while drafting the OR, this term cannot be interpreted as “contractual breach” in general.

Historical development process and the preparatory work of Art. 163/2 OR also support the opinion that the provision aims to cover specifically “impossibility”. The term “impossibility” in the provision is a remainder of the former OR dated 1881. OR dated 1881 was accepted following 4 drafts and various amendments.[55] In the third draft, it was decided to add a new paragraph to the provision concerning penalty (Art. 76) and bring an exception to the debtor’s obligation to perform the penalty. [56] Under this new paragraph, it was set forth that the creditor would not be entitled to the penalty, in cases where force majeure *prevents* (“verhindert worden”) performance.[57] In fact, “prevention” was broad enough to cover all types of contractual breaches including impossibility. However, in the fourth draft, the scope of the provision was revised and it was accepted that the creditor would not be entitled to penalty, in cases of *impossibility* caused (“unmöglich geworden”) by force majeure, the creditor or accident occurring in the person of the creditor (Art. 202).[58] This provision was also preserved in Art. 181 of the OR dated 1881.[59]

When OR of 1881 was replaced with the current OR dated 1908, the reference to “impossibility” was preserved but the list of causes of impossibility was not carried over to Art. 163/2 OR. As a result, Art. 163/2 OR sets forth that the penalty may not be claimed when performance becomes impossible under circumstances for which the debtor is not responsible.[60] Moreover, it is accepted in the provision that the parties may agree otherwise.

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[55] See BÜHLER, T. *Hundert Jahre Schweizerisches Obligationenrecht.* p. 146 ff.

[56] BÜHLER, T. *Hundert Jahre Schweizerisches Obligationenrecht.* p. 149.

[57] See Schweizerisches Obligationenrecht mit Einschluss des Handels- und Wechselsrechtes, (Art. 64 der Bundesverfassung.), Entwurf bearbeitet nach den Beschlüssen einer Kommission vom 16. Bis 21. Mai 1876 und vom 18. September bis 7. Oktober 1876; Buchdruckerei Jent & Reinert, Bern 1877.

[58] See Schweizerisches Obligationenrecht, Allgemeiner Theil, Entwurf bearbeitet nach den Beschlüssen der Kommission im September 1877 und September/Oktober 1878, R.F. Haller-Goldschach, Bern 1878.

[59] BBI 1881 III 109: Art. 181.

[60] There is consensus that with this wording, the provision covers subsequent impossibility caused by force majeure, the creditor or accident occurring in the person of the creditor. However, the results of an accident occuring in the person of the debtor are controversial. According to the opinion that we also agree (see EHRAT, F. R., WİDMER, M. *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR.* Art. 163, N. 6; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 281, fn. 30; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 527; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 121), accident occuring in the person of the debtor (for instance, the debtor’s illness that prevents performance) does not prevent penalty claims. According to the contrary opinion (see BECKER, H. *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Band VI, 1. Abteilung, Obligationenrecht, Allgemeine Bestimmungen, Art. 1-183 OR.* Art. 163, N. 4-5; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 4; DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 87) the provision also covers accident occuring in the person of the debtor. Certainly, it must be accepted that penalty cannot be claimed when the creditor causes the contractual breach. KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 236; EKİNCİ, H. *Özel Hukuk*

In other words, it is expressed that the parties may agree that the penalty shall be performed even if performance becomes impossible under circumstances for which the debtor is not responsible. As the historical development process of the provision reveals, Art. 163/2 OR was not designed at any stage in a way to cover all types of contractual breaches.

IV. Contractual breaches for which the debtor is not responsible and assessment of their effects on the penalty clause

A. Effect of the contractual breaches for which the debtor is not responsible

As explained above, when it is accepted that penalty claim is not dependent on the debtor's fault, the enforcement of the penalty clause cannot be associated with the existence of fault. Within this stance, the enforcability of penalty has to be separately evaluated for each type of contractual breach by considering its accessory nature.

1. Initial impossibility

Art. 20 OR accepts initial impossibility as a reason of voidness. Accordingly, if performance of an obligation is objectively impossible at the time of contract formation, such contract shall be void regardless of the debtor's fault in occurrence of impossibility.[61] Therefore, initial impossibility also causes voidness of the accessory penalty. Such result, which occurs even when the debtor has no fault, emerges from the accessoriness of the penalty.

At the time of the contract formation, if the debtor is aware of impossibility of performance, he/she would be liable for *culpa in contrahendo*.[62] However, compensation claims due to *culpa in contrahendo* do not cover positive interest of the creditor. Such compensation is not paid due to breach of the primary obligation but it is paid because the debtor concludes the

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Sözleşmelerinde Ceza Koşulu. p. 280; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 61; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 104; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 123.

[61] SEROZAN, R. *Borçlar Hukuku Genel Bölüm, Üçüncü Cilt, İfa, İfa Engelleri, Haksız Zenginleşme.* İstanbul: Filiz, 2016, § 14, Nr. 21; ALTUNKAYA, M. *Edimin Başlangıçtaki İmkansızlığı.* Ankara: Yetkin, 2005, p. 238; AKSOY, H. C. *Impossibility in Modern Private Law.* Cham-Heidelberg-New York-Dordrecht-London: Springer, 2014, p. 71.

[62] WEBER, R. H. *Berner Kommentar, Band/Nr. VI/1/5, Die Folgen der Nichterfüllung, Art. 97-109 OR Schweizerisches Zivilgesetzbuch, Das Obligationenrecht, Allgemeine Bestimmungen.* Bern: Stämpfli, 2000, Art. 97 OR, N. 109; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 64.06; KRAMER, E. A. *Obligationenrecht Allgemeiner Teil.* Basel: Helbing & Lichtenhahn, 2009, N. 218; BUCHER, T. *Schweizerisches Obligationenrecht, Allgemeiner Teil.* p. 249; SEROZAN, R. *Borçlar Hukuku Genel Bölüm, Üçüncü Cilt, İfa, İfa Engelleri, Haksız Zenginleşme.* § 14, Nr. 21; ALTUNKAYA, M. *Edimin Başlangıçtaki İmkansızlığı.* p. 239; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 1.* İstanbul: Vedat, 2017, N. 295.

contract despite knowing about the impossibility of performance.[63] Therefore, the contract is void and the primary obligation and the penalty that guarantees such obligation are both *ex tunc* invalid.[64]

2. Impossibility for which the debtor is not responsible

According to Art. 119 OR, the obligation extinguishes when performance of the obligation becomes impossible due to circumstances for which the debtor is not responsible. Such extinguishment of the primary obligation covers all accessory rights including the penalty (Art. 114/1 OR). In other words, in such cases creditor is not entitled to the penalty. However, this is not due to the lack of debtor's fault but extinguishment of the penalty together with the primary obligation.[65]

3. Impossibility for which the debtor is responsible

When the debtor is responsible for subsequent impossibility, the primary obligation would not extinguish but it would convert into compensation.[66] In other words, the primary obligation would not end despite impossibility to perform. Therefore, the penalty preserves its existence as well. As a result, the creditor may claim the penalty despite impossibility.

4. Default and improper performance

When the debtor is in default, Art. 160/2 OR allows the debtor to claim the performance and the penalty in accumulation. We think that in such cases, the creditor should be entitled to penalty, regardless of the existence of the debtor's fault. In fact, in such cases, the penalty remains to be valid as the primary obligation is still intact. Therefore, the lack of the debtor's fault only prevents compensatory claims of the creditor but it has no such effect on penalty. As a matter of fact, penalty is not compensation by its nature.

A similar approach is attainable for cases of improper performance as well. In such cases, the primary obligation remains valid. Therefore, the accessory penalty remains intact as well. As

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[63] SEROZAN, R. *Borçlar Hukuku Genel Bölüm, Üçüncü Cilt, İfa, İfa Engelleri, Haksız Zenginleşme.* § 14, N. 21; ALTUNKAYA, M. *Edimin Başlangıçtaki İmkansızlığı.* p. 242.

[64] According to the Swiss Federal Court, penalty can also be agreed to guarantee a claim arising from *culpa in contrahendo*. In such cases, penalty can be claimed despite the lack of a valid contract. BGE 140 III 200. For detailed information see ALTINOK ORMANCI, P. İsviçre Federal Mahkemesi'nin ATF 140 III 200 Kararı Işığında Şekle Aykırı Sözleşmelerde Yer Alan Ceza Koşulunun Geçerliliği. *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi.* 2016, Vol. 11, No. 139-140, p. 121 ff.

[65] In this opinion, see KELLER, M., SCHÖBİ, C. D*as Schweizerische Schuldrecht, Band I, Allgemeine Lehre des Vertragsrechts.* p. 95; EREN, F. *Borçlar Hukuku Genel Hükümler.* p. 1211.

[66] WİEGAND, W. *Basler Kommentar Obligationenrecht I, Art. 1-529 OR.* Basel: Helbing Lichtenhahn, 2015, Art. 97 OR, N. 47; SCHWENZER, I. *Schweizerisches Obligationenrecht.* N. 64.20; AKSOY, H. C. *Impossibility in Modern Private Law.* p. 83.

a result, there is no valid reason to save the debtor from the creditor's penalty claims, even if the debtor's breach occurs without his/her fault.

B. Assessment of the effects of contractual breaches for which the debtor is not responsible

When it is accepted that enforcement of the penalty claim is independent of the debtor's fault, the breaching debtor must perform the penalty – except for the cases of initial impossibility and subsequent impossibility for which the debtor is not responsible where the penalty cannot be claimed due to the accessoriness of the penalty. In other types of contractual breaches, the debtor would have to perform the penalty, even if he/she has no fault. Certainly, it must be accepted that penalty cannot be claimed when the breach is caused by the creditor.[67]

In different cases, circumstances that are not caused by the debtor might render performance impossible or such circumstances may cause the debtor's default. In the first case, the creditor is freed from his/her obligation to perform, whereas in the latter, the debtor must still perform the penalty. Perhaps one could argue that this is an unfair distinction. Assesment of the fairness of such distinction requires to elaborate on the legal nature of the penalty.

As explained above, penalty cannot be deemed as compensation by its nature. Although the punitive and/or compensatory character of the penalty was explored during the preparatory work of the OR, we do not think that penalty is purely compensation or punishment.[68] The

[67] KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 236; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 280; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 61; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 104; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 123.

[68] The independence between the penalty and the debtor's losses are assocaited with the punitive nature and function of the penalty. PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160 N. 2; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 277; BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 11; OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Art 161, N. 1; BERGER, B. *Allgemeines Schuldrecht*. N. 1793. Accordingly, the debtor who is in breach of his/her obligatins is punished as he/she must perform the penalty even if the debtor has not suffered any losses. Although such "punishment" is different from punishment in criminal law (OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Vorbem. zu Art 160-163, N. 2; VON TUHR, A., ESCHER, A. *Allgemeiner Teil des Schweizerischen Obligationenrechts, Zweiter Band.* p. 277, fn. 4; SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 31), some scholars argue that the debtor's faulty breach should be sought due to the punitive nature of the penalty. In this opinion see SCHOCH, W. *Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht.* p. 39; HUGUENİN, C. *Obligationenrecht – Allgemeiner und Besonderer Teil.* N. 1262; TUNÇOMAĞ, K. Cezai Şartın Hukuki Mahiyeti. *Banka ve Ticaret Hukuku Dergisi.* 1962, Vol. 1, No. 4, p. 558. Some other scholars think that the debtor's fault is not an absolute condition for penalty. See OSER, H., SCHÖNENBERGER, W. *Kommentar zum Schweizerischen Zivilgesetzbuch V. Band: Das Obligationenrecht, Erster Halbband: Art. 1 – 183*. Vorbem. zu Art 160-163, N. 20; BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 78 ff. For instance, according to Bentele, the debtor and the creditor may agree that penalty is payable even when the debtor has no fault. However, as long as there is no

punishment view approaches the issue from the debtor's perspective. However, the parties, who agree on the penalty have no aim to punish the debtor in case of breach of his/her contractual obligations. As rational parties, both the debtor and the creditor act for their own economic benefits and decide on the penalty.

Penalty, which is independent from the creditor's losses and the debtor's fault serves to the benefit of both parties. By agreeing on penalty, the creditor guarantees to easily access an amount of money that generally exceeds his/her losses arising from the contractual breach. Similarly, the debtor benefits from the penalty to persuade the creditor to conclude a contract and reflect the undertaken risk and its cost to the contractual price. Therefore, the debtor would accept to perform the penalty regardless of the creditor's losses and his own fault.

Penalty has an insurance function that should not be overlooked unless the parties to a concrete contract narrow down its function to punishment. [69] According to Jhering, someone who accepts to perform penalty in case of his/her contractual breach takes over the concerning risk. In other words, penalty must be performed even if the debtor is not faulty in his breach.[70]

The opinion that penalty has an insurance function is criticized in the doctrine. Some scholars especially argue that it cannot be "assumed" that penalty has an insurance function.[71] Accordingly, unless the parties agree otherwise, it cannot be accepted that the debtor aims to guarantee to the creditor that the obligation will be fulfilled. [72] Contrarily, we think that unless the parties agree otherwise, it must be accepted that penalty has an insurance function.

At first glance, the debtor might look disadvantaged since the penalty has to be performed regardless of his/her fault. However, it is the other way around. Jhering rightfully argues that the independence of the penalty from the debtor's fault paradoxically protects the party who undertakes to perform the penalty (*i.e.*, the debtor). For instance, the insurance function of the

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such agreement, debtor's fault is required for penalty claims. BENTELE, R. *Die Konventionalstrafe nach Art. 160-163 OR.* p. 78 ff.

[69] JHERİNG, R. v., BÄHR, O. *Zwei Rechtsgutachten in Sachen der Gotthardbahn-Gesellschaft gegen die Unternehmung des grossen Tunnels (Favre).* p. 7. This paper does not aim to establish the function of penalty. In fact, penalty cannot only be labeled as compensation, punishment or even insurance. However it should be accepted that insurance lies within the functions of penalty.

[70] JHERİNG, R. v., BÄHR, O. *Zwei Rechtsgutachten in Sachen der Gotthardbahn-Gesellschaft gegen die Unternehmung des grossen Tunnels (Favre).* p. 6.

[71] DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 17-18; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 27; GÜNAY, C.İ. *Cezai Şart (BK m. 158-161).* p. 34; EKİNCİ, H. *Özel Hukuk Sözleşmelerinde Ceza Koşulu.* p. 49.

[72] DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 17-18; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 27.

penalty allows smaller enterprises to compete with larger enterprises.[73] In fact, the debtor might use the penalty to signal his/her reliability to potential creditors.[74] Similarly, when the creditor highly values the performance and does not prefer to take risks, he/she might wish to receive the penalty without facing an objection that the debtor has no fault in breaching his/her obligation.[75] Especially, in cases where the creditor attributes subjective value to performance by the debtor, parties may agree on a penalty that exceeds the potentially anticipated loss that might arise from the breach. [76] In such case, the debtor might be willing to take over the risk of non-performance (for any reason), which shall be reflected on the price.[77]

In comparision to the creditor, the debtor has more information about the circumstances that hinder performance. In fact, such incidents occur at the enterprise, activities and immediate circle of the debtor.[78] Moreover, the debtor undertakes to refrain from all kinds of faulty acts that would prevent performance to the creditor. Therefore, the debtor is obliged to make all arrangements that are necessary for performance as undertaken in the contract. As a result, it is necessary to protect the creditor, who assumes that he/she secured himself/herself through the contract and the penalty.[79]

A comparison between penalty and default interest also supports the view that penalty is independent of the debtor's fault. Both penalty and default interest are accessory by nature and both can be claimed regardless from the debtor's fault. Moreover, default interest is also independent of the debtor's fault.[80] However there is an important difference between these two institutions. Default interest can be claimed by operation of law, even if it is not

[73] JHERİNG, R. v., BÄHR, O. *Zwei Rechtsgutachten in Sachen der Gotthardbahn-Gesellschaft gegen die Unternehmung des grossen Tunnels (Favre).* p. 8.
[74] MACKAAY, E. *Law and Economics for Civil Law Systems*. Cheltenham: Edward Elgar, 2013, p. 477; COOTER, R, ULEN, T. *Law and Economics*. p. 322.
[75] Sanlı, p. 353.
[76] Penalty can be agreed for all kinds of obligations. PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160 N. 4; OĞUZMAN, K., ÖZ, T. *Borçlar Hukuku Genel Hükümler, Cilt 2.* N. 1567; AKKAYAN YILDIRIM, A. *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası.* p. 366; KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 73; KABAKLIOĞLU ARSLANYÜREK, Y. *Ceza Koşulu – Özellikle Zarar ve Tazminatla İlişkisi.* p. 23. Even the emotional value attributed by the creditor to the performance can be included within the scope of the penalty. PİETRUSZAK, T. *Kurzkommentar Obligationenrecht.* Art. 160 N. 4; BGE 73 II 158, 161.
[77] See GOETZ, C. J., SCOTT, R. E. *Columbia Law Review.* p. 562; HATZİS, A. N. *International Review of Law and Economics*. p. 390; COOTER, R, ULEN, T. *Law and Economics*. p. 322.
[78] DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht*. p. 131.
[79] DİETZİ, W. *Die Konventionalstrafe und ihr Verhältnis zum Schadenersatz nach schweizerischem Recht.* p. 132.
[80] KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 189; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 126.

specifically agreed by the parties.[81] However penalty can only be claimed if it is agreed in the contract.[82] Therefore, a penalty clause shows the importance the creditor attaches to his security and the debtor's assumption of the risk. As a result, a creditor, who persuades the debtor to agree on penalty should not be more disadvantaged than another creditor who fails to negotiate on a provision concerning default interest. In other words, if fault is not a requirement for the default interest, it should not be reuqired for penalty *a fortiori*.

If we return to the assesment of the fairness of making a distinction between impossibility and default resulting from circumstances that are not caused by the debtor, we come to the conclusion that there is no unfairness at all. In fact, if the parties find it unfair that the creditor will only be freed from his obligation to perform in case of impossibility but he/she must still perform in case of default, such parties may freely refrain from agreeing on penalty. Hence, the debtor would not take over any risks other than the risk of compensation payment due to his/her faulty breach. Contrarily, the parties may prefer the exact opposite direction and choose to surpass the legal regulation by agreeing that the debtor shall perform the penalty even in cases of impossibility for which the debtor is not responsible (Art. 163/2 OR). In law of obligations, which is constructed over freedom of will, none of these cases may be deemed unfair.

CONCLUSION

The relationship between penalty and the debtor's fault in breaching his/her contractual obligations is controversial. Based on Art. 161/2 OR and Art. 163/2 OR, the prevailing opinion argues that enforcement of a penalty claim requires the debtor's faulty breach of his/her contractual obligation. However the result deducted from these provisions is exactly the opposite.

The opinion that the penalty can only be claimed in case of the debtor's faulty breach results from the association of the penalty with compensation. Since compensation is bound to the fault of the debtor, it is assumed that the same requirement should be sought for penalty claims as well. However, penalty is different from compensation by its nature and functions.

Penalty clause is a provision that is agreed by the parties to a contract and applies pressure on the debtor to perform as undertaken under the contract. By this definition, it is clear that

[81] KOCAAĞA, K. *Ceza Koşulu (Sözleşme Cezası).* p. 190; TUNÇOMAĞ, K. *Türk Hukukunda Cezai Şart*. p. 126.
[82] Art. 160/1 OR: "Where a penalty is promised for non-performance or defective performance of a contract…"

penalty protects the creditor in the first place. Therefore, unless the parties agree otherwise, the insurance function of penalty should not be overlooked and it should be accepted that the penalty is payable if the debtor breaches his/her contractual obligation with or without his/her fault.