Chapter 4 - STIPULATIO POENAE

4. Range of application

Stipulationes poenae were employed in Roman law in conjunction with all sorts of transactions. They were used to secure the observance of obligations arising from sale, hire or partnership agreements, the enforcement of settlements or the repayment of a loan; their field of application extended to the law of property, to family law and to succession. In three types of transactions, however, penalty stipulations found a particularly prominent expression: compromissa, stipulationes duplae and cautiones vadimonium sisti. The first two have been or will be discussed at other places, the cautio relates to the law of procedure: “Cum autem in ius vocatus fuerit adversarius, neque eo die finiri potuerit negotium, vadimonium ei faciendum est, id est, ut promittat se certo die sisti.” Where the proceedings in iure could not be concluded within one day, the praetor permitted the plaintiff to fix the time when the defendant had to reappear in court. The defendant then had to make a promise in something like the following terms: “[T]e sisti in certo loco: si non steteris, quinquaginta aureas dari spondes?” The penalty would usually be fixed at half the amount in dispute. Whether we are dealing here with an independent or accessory conventional penalty is not entirely clear. It is in keeping with the practical relevance of stipulationes poenae that the Roman lawyers went to great pains to find the most suitable and expedient form of drafting them. Thus Labeo recommends the following Versions, according to whether a duty to do or to refrain from doing something is involved:

"Si ut aliquid fiat stipulemur, et usitatus et elegantius esse Labeo ait sic subici poenam: ‘si ita factum non erit’: at cum quid ne fiat stipulemur, tunc hoc modo: ‘si adversus ea factum erit’: et cum alia fieri, alia non fieri coniuncte stipulemur, sic comprehendum: ‘si non feceris, si quid adversus ea feceris’."

Forfeiture of the penalty would then be decided accordingly: where the stipulatio poenae aimed at securing forbearance ("Si in Capitolium..."
ascenderis, centum mihi dari spondes?"), the penalty became exactable in case of contravention; where the penalty was used to exert pressure to act ("Si intra biennium Capitolium non ascenderis, centum mihi dari spondes?"), forfeiture occurred in case of failure to do the act.

5. Forfeiture of the penalty

(a) If no time has been set for performance

That sounds simple enough, but the latter situation especially gave rise to intricate problems of interpretation. What if no time had been set within which the act was to take place?\(^{53}\) One can think essentially of two solutions, and both were advocated in Roman law.

According to Sabinus, the penalty became exactable if what had been promised was not done immediately ("statim").\(^{54}\) Pegasus preferred an interpretation more favourable to the debtor: in his opinion, the debtor had to pay the penalty only if and when it had become impossible to carry out the act.\(^{55}\) Papinian, who relates this dispute,\(^{56}\) distinguishes between the two solutions. With regard to genuine conventional penalties, he follows Sabinus. The main obligation ("In Capitolium ascendere spondes?" "Pamphilum dari spondes?") is due immediately: quotiens dies non ponitur, praesenti die debetur.\(^{57}\) It would, therefore, frustrate the purpose of the penalty clause to quite a considerable extent if the penalty became due only at a much later date and not as soon as the debtor had not availed himself of the first opportunity to act. This reasoning is based on the accessory nature of the genuine penalty clause and does not apply to non-genuine conventional penalties. Here Papinian comes to share Pegasus' view and, in doing so, adopts a very literal interpretation of the conditional clause. For, strictly speaking, the condition "si in Capitolium non ascenderis" can be said to have been fulfilled with any degree of certainty only when it has become impossible for the promisor to climb the Capitol. This approach is in accordance with the general principle of interpretatio contra stipulatorem:\(^{58}\) had the stipulator wished the penalty to be due immediately, he could (and should) have said so expressly.\(^{59}\)

However, even where a time had been set within which the act had to be performed, problems could arise. Did the stipulator have to wait until the time had lapsed (that is, for two years in our example above), even if it had already become clear that the act had become impossible?

"'Insulam intra biennium illo loco aedificari spondes?' ante finem biennii stipulatio non committitur, quamvis reus promittendi non aedificaverit et tantum residui temporis sit, quo aedificium extrui non possit: neque enim stipulationis status, cuius dies certus in exordio fuit, ex post facto mutatur."\(^{60}\)

Here it had become impossible to erect the building within whatever time remained of the two years the promisor had originally been given. Nevertheless, the penalty was due only after the full period had lapsed. According to Papinian, the status of the stipulation cannot be changed by subsequent events. Paulus decided likewise, but gave a different reason: ". . . tota enim obligatio sub condicione et in diem collata est."\(^{61}\) Forfeiture of the penalty was subject not only to a condition but also to a time clause ("dies"); the fact that the condition had been satisfied did not entail that the time, too, had lapsed.

(b) "Si per debitorem stetit . . ."

The most intricate question, however, as far as forfeiture of the penalty was concerned, related to a more general question: did the penalty become due when the condition was (objectively) fulfilled or did forfeiture also depend upon a subjective requirement, so that it would have occurred only where the promisor was in some way responsible for the non-fulfilment?

Our sources do not provide us with a clear and distinct picture; consequently, a number of theories have been developed by modern writers as to the position in classical Roman law.\(^{62}\) But here, as in many other cases, one would be missing the casuistic nature of Roman law were one to try to extract a uniform, general rule from the available texts. Generally speaking, there seems to have been a development from a very strict and formalistic to a more subjective and equitable (that is, debtor-oriented) approach, stimulated by Sabinus (who is quoted in the following terms: ". . . et tamdiu ex stipulatione non posse agi, quamdiu per promissorem non stetit, quo minus hominem daret")\(^{63}\) and promoted by his school.\(^{64}\) The Proculians at first carried on to proceed from the principle of objective liability,\(^{65}\) but after Celsus
abandoned it in favour of the Sabinian view.\textsuperscript{66} It seems to have become the prevailing opinion that the penalty was exactable only if the debtor was responsible for the performance or non-performance of what had primarily been envisaged by the parties. This responsibility was usually expressed in the words "Si per debitorem stetit quo minus (daret, non daret, veniat etc.)": a flexible concept that varied according to the standard of liability applicable in the particular context and therefore did not necessarily entail fault in the modern sense.\textsuperscript{67} In similarly broad terms ("si per creditorem stetit, . . .") even the Proculians had already excluded liability for the penal sum, where forfeiture had its origin in the creditor's sphere.\textsuperscript{68} However, some exceptional cases of "strict" liability continued to exist, and, especially with regard to the oldest type of penal promises, the cautio vadimonium sisti, the new approach never seems to have been adopted, probably because protection of the debtor had already been assured by praetorian intervention.\textsuperscript{69} A variety of exceptions was available to him, on the basis of which he could allege, for instance, that he had been prevented from reappearing in court owing to dolus malus of the plaintiff or "valetudine vel tempestate vel vi fluminis";\textsuperscript{70} where he had failed to do so "si ab alio sit impeditus",\textsuperscript{71} the penalty was payable, but he was granted an action for damages against that third party. Today the penalty can generally be exacted only if the debtor has been at fault in not fulfilling his contractual obligations;\textsuperscript{72} the parties can, however, provide differently.

6. The problem of excessive penalty clauses

(a) The dangers of conventional penalties

Conventional penalties, as may have become apparent already, are dangerous. Where there is unequal bargaining power, the creditor tends to put the economically less potent debtor under considerable pressure by stipulating penalties that, on occasion, may well exceed every reasonable or legitimate interest. The debtor, on the other hand, often has the freedom to "take it (upon the conditions offered) or leave it" only, and therefore cannot effectively negotiate the amount of the penalty. Furthermore, as the clause does not put him under any immediate obligation but only under a conditional one, the natural confidence in his own ability to render due performance will lead the debtor to underrate its gravely detrimental nature. Thus he may find himself to be exposed, rather surprisingly, to considerable claims, going far beyond the value his performance may conceivably have had for the creditor. Such considerations raise the question whether a legal system should lend its hand to the enforcement of excessive penalty clauses.\textsuperscript{73} Roman lawyers, loath to interfere with what the Parties had agreed upon, seem to have had no qualms about such clauses. They did not object to stipulationes poenae simply because the stipulated sum was too high. Until fairly recently, the French code civil followed the same principle of giving liberal effect to penalty clauses, even where the amount in question was excessive or derisory.\textsuperscript{74} This attitude is based on individualism and freedom of contract; Johannes Voet\textsuperscript{75} summed up the underlying policy consideration in the following words: "... ac merito regeri promissori poenae conventionalis, illum imputare sibi debere, quod sponte sua sibi talis imposuerit tantaque poenae necessitatem"; the debtor has but himself to blame-had he not agreed to the clause, he would not have found himself in such a predicament. After all, we are dealing with a conventional penalty. Such an attitude, however, for the reasons mentioned above, is not acceptable under modern economic circumstances.

(b) The approach of modern European legal systems

An entirely different approach has been followed by English law, where penalty clauses "stipulated as in terrorem of the offending Party"\textsuperscript{76} are rejected as wholly invalid. Only where the clause is a genuine attempt to estimate the damages likely to ensue as a consequence of the breach of promise will the claim be entertained by the courts.\textsuperscript{77} Thus, while saving the debtor from a situation where he would have had to pay what appears to be an extravagant and unconscionable amount compared with the greatest loss "that could conceivably be proved to have followed from the breach",\textsuperscript{78} the English courts have introduced a distinction between penalties in a narrow sense and liquidated damages clauses, a distinction that has proved to be cumbersome and unsatisfactory. In each case the purpose of the clause has to be determined, and certain rules and presumptions have been laid down to aid the courts in their task. But they achieve neither certainty of the law nor equitable solutions in each individual case, and therefore have been said to "manage to get the worst of both worlds".\textsuperscript{79} Continental codifications generally recognize the validity of conventional penalties, subject, however, to judicial discretion to reduce
the amount. By way of example, we may refer to the BGB: if a penalty which is due is disproportionately high, it may be reduced to a reasonable amount by a court’s decision, upon application by the debtor. As far as the determination of reasonableness is concerned, the code provides that every legitimate interest (and not only pecuniary interests) shall be taken into consideration. This judicial power to modify a contractual term was clearly recognized as highly exceptional and was accepted only after much toing and froing in the final draft of the BGB. It was also in conflict with pandectist doctrine, which faithfully supported the liberal Roman principle of literal enforcement of penalty clauses.

(c) ius commune and South African law

Nevertheless, this attitude did not always reign supreme in the course of the development of the ius commune. There was a long, drawn-out dispute as to whether the rule in C. 7, 47 limiting the amount of damages claimable to double the value of what had been promised was applicable to conventional penalties. “Haec quaestio antiquis, et neotericis multum ambagiosa est, et male discussa”, as Molinaeus bluntly remarks, answering this question himself in the affirmative. If the penalty is, with regard to its nature and function, a substitute for the recovery of whatever damages have arisen,

also be limited in the same way as damages are: this was an oft-repeated argument of those who wanted to impose the limit of duplum upon penalty clauses. Their view found legislative sanction, for instance in the Prussian Code. But in the long run the contrary view prevailed. In some places, however, and especially in the law of the Netherlands, a custom had come to be recognized that if the penalty was much larger than the actual loss suffered, it was within the competence of the court to reduce it “ad bonum et aequum” so that Voet, while rejecting the applicability of C. 7, 47, could state:

"Denique moribus hodiernis volunt, ingente poena conventioni apposita, non totam poenam adjudicandam esse, sed magis arbitrio judicis eam ita oportere mitigari, ut ad id prope reducatur ac restringatur, quanti probabiliter actoris interesse potest."

This was also, of course, what was transplanted to the Cape of the Good Hope, and the same principle, incidentally, is today recognized in South Africa, albeit on a statutory basis. The development leading to the enactment of the South African Conventional Penalties Act is colourful, interesting and not atypical of the more recent South African legal history. While at first both the Cape Supreme Court and, especially, the Transvaal Supreme Court strove to follow the Roman-Dutch principle, under the influence of Lord De Villiers and the Privy Council the English law relating to penalty clauses came to be received. Thus, instead of enforcing penalties subject to a moderating jurisdiction of the court, the courts started drawing a distinction between (unenforceable) penalties and genuine estimates of damages. A half-hearted attempt by the Appellate Division to reverse the development was rejected by the Privy Council, until 1950 the highest court for the Union of South Africa. Naturally, the Privy Council, which was not staffed with Roman-Dutch lawyers, did not find the South African development unacceptable at all. With the rise of

the purist approach to South African law, however, the decision in Pearl Assurance Co. v. Union Government was bound to receive harsh criticism; Van den Heever JA branded it as a “blemish on our legal system which militates against good faith, trust and business morality”. Yet little could be done by the courts against a precedent of that calibre, and thus only the legislature was able to remedy the situation. It acted in 1962.

7. Semel commissa poena non evanescit

(a) The Celsinian interpretation

Roman law, as we have seen, did not provide for the reduction of excessive conventional penalties. This did not mean, however, that the Roman lawyers were totally unsympathetic towards the debtor and did not develop ways and means to assist him against creditors claiming the penalty. Reduction clauses are not the only means of diffusing the dangers inherent in penalty clauses. The same end can, to a certain extent, be achieved by careful analysis of the requirements for forfeiture. In particular, however, a legal system can condone subsequent rendering of whatever performance had been due and thus allow the debtor unilaterally to purge forfeiture of the penalty. Such purgatio is, historically, the older device to protect the debtor, and the Roman lawyers, in fact, went out of their way to use it. It is largely forgotten today, quite wrongly so, as Rolf Knütel has demonstrated.
Semel commissa poena non evanescit: a penalty, once payable, will not subsequently fall away. This sounds like a very general statement, but it would be wrong to take it as a hard-and-fast rule of Roman law. It was restricted owing to a very bold and flexible interpretation of penalty clauses, which goes back to Celsus (who is generally regarded as one of the most original thinkers among the Roman lawyers). He drew a distinction according to whether the penalty clauses in question contained a reference to a specific date up to which performance had to have been made or not. To take a compromissum between Gaius and Seius as an example, the promise might have been something like: "Si quid adversus sententiam arbitri factum erit sive quid ita factum non erit, centum dari spondes?". "Spondeo." The arbiter might then have decided that the slave, Pamphilus, had to be given to Seius; just as well he might have requested Gaius more specifically to hand the slave over before the tenth of October. In the first case it had to be decided when the penalty was exactable. In Celsus' view, performance had to be rendered within "modicum tempus"; accordingly, forfeiture occurred after the lapse of whatever time was deemed to be "modicum" under the circumstances. However, even when Pamphilus had been given later on (that is, after the lapse of "modicum tempus" and after forfeiture of the penalty), that was still in accordance with a literal interpretation of the compromissum: Gaius had promised to act according to the award of the arbiter; this sententia had to hand over Pamphilus, and that, finally, was what Gaius had done. Hence the paradox that forfeiture, which had actually taken place, was taken not to have occurred after all. The practical result was that payment of the penalty could still be avoided, until the creditor had brought an action—that is, until litis contestatio had taken place. At the time of litis contestatio, of course, the programme of litigation was fixed conclusively and later developments could no longer be taken into consideration.

One might ask whether such an interpretation did not both unduly prejudice the interests of the creditor and disregard the "in terrorem" function of the penalty. But the creditor was allowed to reject any performance tendered after the lapse of modicum tempus, if his interest in receiving it had fallen away in the meantime. Also, it was in his hands to force the debtor either to make performance or to pay the penalty; once modicum tempus had passed, he could resort to litigation and thus preclude the debtor from unilaterally purging forfeiture. As far as the penalty itself is concerned, it seems to have fulfilled its "in terrorem" function if the debtor had rendered performance; if he had finally done what was expected of him, the enforcement of what was designed to put Pressure on him surely must be out of place.

(b) Praetorian intervention

In the second of the above-mentioned cases, however, there was no room for such a flexible approach. Where a specific date had been set and the penalty become payable at that time, subsequent performance could no longer change this situation. Thus it is only in these instances that "semel commissa poena non evanescit" becomes relevant. But even here it was not applied as a general rule of a binding character, for now and then we find the praetor coming to the rescue of the debtor, even where, according to the unequivocal wording of the stipulatio, the penalty had become payable. He was prepared to grant an exceptio doli wherever it seemed unreasonable of the creditor to enforce the Penalty, even though his position had not really been adversely affected by the delay in performance. Another very interesting instance of praetorian intervention is Ulp. D. 2, 11, 9, 1:

"Si plurium servorum nomine iudicio sistendi causa una stipulatione promittatur, poenam quidem integram committi, licet unus status non sit, Labeo ait, quia verum sit omnes status non esse: verum si pro rata unius offeratur poena, exceptione doli usurum eum, qui ex hac stipulatione convenitur."

Here obviously an actio noxalis had been brought; the defendant had promised, by way of a cautio, vadimonium sisti, (re)appearance in court of the several slaves in question. Even if only one of the slaves was missing, according to a strict reading of the cautio, the Penalty, in its entirety, became exactable. Where, however, the debtor offered a pro rata share of the penalty he was granted an exceptio doli against the claim for the whole sum. Thus, for considerations of equity, we find Labeo/Ulpianus here allowing what amounts to a reduction of the penalty in case of part performance; this idea was, later on, adopted by the French legislator and provided the historical basis for the ius moderandi, "lorsque l'engagement a été exécuté en partie", contained in art. 1231 of the code civil.
Chapter 18 - FORMATION OF CONTRACT

IV. PACTA SUNT SERVANDA

2. The right of unilateral withdrawal from a contract

unilateral withdrawal. Ultimately, however, an important exception was made in cases of what one could summarily term breach of contract. It is not based on Roman sources but was established, first of all, in canon law ("fidem frangenti fides frangitur"), was taken up again by the natural lawyers, and finally found its way into the BGB. Today, further statutory rights of withdrawal from a contract have been granted in the interest of consumer protection.

3. Clausula rebus sic stantibus

(a) Origin and development of the clausula

One of the most interesting, and potentially most dangerous, inroads into pacta sunt servanda has, however, been the so-called clausula rebus sic stantibus: a contract is binding only as long and as far as (literally:) matters remain the same as they were at the time of conclusion of the contract. It is obvious that such a proviso, if broadly interpreted, can be used to erode the binding nature of contractual promises very substantially; not surprisingly, therefore, the clausula doctrine fell into oblivion in the late 18th and the 19th centuries: the heyday of "classical" contractual doctrine when freedom of contract, economic liberalism and certainty of law reigned supreme. The Roman lawyers had not known anything like it either. Moral philosophers were the first to draw attention to the change of circumstances and thus to sow the seed for the clausula rebus sic stantibus. "Omnia esse debent eadem, quae fuerant, cum promitterem, ut promittentis fidem teneas . . .": this general proposition, which was to be quoted time and again, had originally been formulated by Seneca. Equally influential was the example of the sword which does not have to be returned to a depositor who has become insane. It goes back to Cicero, De officiis ("Si gladium quis apud te sana mente deposuerit, repetat insanens, reddere peccatum sit, officium non reddere"), and was taken up by St. Augustine.
the bottom of both the principle that all pacts are actionable and of its limitation there lies the specific significance attributed by canon lawyers and moral theologians alike to the human will.250

(b) The clausula from the 17th century to today

The 17th century was a flowering time for the clausula doctrine (partly, perhaps, in response to the devastating wars of the time)251 and it became part and parcel of the usus modernus as well as of the systematic endeavours of the natural lawyers.252 It attained great prominence in the field of public international law,253 but in the area of private law its star ultimately began to wane. Nineteenth-century legal science was predominantly hostile to it, and the clausula thus disappeared.254 But the underlying idea had only temporarily lost its attraction. Thrown out by the door, as Windscheid put it,255 it will always re-enter through the window. The will of a person usually relates to a certain given set of facts only; it has been formed on the basis of certain suppositions. If these turn out to be wrong, it is not always fair to hold that person by his word. On the other hand, however, the promisor's interest in having the contract set aside must be balanced against the interest of the community at large in certainty of the law. Some kind of criterion is therefore needed to attempt to achieve the balance. Windscheid's own "Voraussetzungslehre" (doctrine of tacit presupposition) was one such attempt,256 but it did not commend itself to the drafters of the BGB.257 The BGB does not, in fact, contain a general rule dealing with the problem of changed circumstances. The modern version of the clausula rebus sic stantibus therefore had to be developed

extra legem by courts and legal writers; it is the doctrine of "Wegfall der Geschäftsgrundlage" (collapse of the underlying basis of the transaction), which was formulated, initially, in response to the problems posed by the consequences of the First World War on the performance of long-term contracts,258 and which has become part and parcel of the modern German law of contract.259 Its functional equivalent in English law is the doctrine of frustration of contract.260

42 Cf., for example, Adolf Berger, Die Strafklauseln in den Papyrusurkunden (1911), pp. 102 sqq.
43 See e.g. Alf./Paul. D. 17, 2, 71 pr. On this fragment, see Daube, (1961) 12 Jura 88 sqq.
44 Cf the "stipulatio ex bonis moribus concepta" in Pap. D. 45, 1, 121, 1, which had been promised by a husband in case he would fall back into "consuetudo concubinae". Otherwise penalty stipulations in the field of family law were often disapproved of for moral reasons; cf., for example, supra, pp. 96 sq.
45 Restrictions of the freedom of testament by means of stipulations poenae ("si heredem me non feceris, tantum dare spondes?") were regarded as invalid: Iul. D. 45, 1, 61. The question was disputed in the later ius commune (cf. Windscheid/Kipp, § 529, n. 4); the BGB (§§ 2302, 344) has returned to the Roman solution.
46 Vide supra, pp. 98 sq., and infra, pp. 295 sq. and 526 sqq.
47 Gai. IV, 184.
50 Cf Gai. IV, 186.
51 Cf. the discussion by Knütel, Stipulatio poenae, pp. 71 sqq.
52 Lab./Ven. D. 45, 1, 137, 7; cf. also Ulp. D. 45, 1, 71.
53 Otherwise, expiry of the time set for performance would mark the forfeiture of the penalty: Pomp. D. 45, 1, 27, 1.
54 Sab./Pap. D. 45, 1, 115, 2: "Item si quis ita stipuletur: 'si Pamphilum non dederis, centum dari spondes?' . . . Sabinus . . . existimabat ex sententia contrahentium, postquam homo potuit dari, confestim agendum . . . ."
55 Peg. /Pap. D. 45, 1, 115, 2: "Pegasus respondit non ante committi stipulationem, quam desisset posse Pamphilus dari."
57 For this principle, see Ulp. D. 45, 1, 41, 1; Pomp. D. 50, 17, 14; cf. also Inst. III, 15, 2.
58 Vide infra, pp. 639 sq.
59 See, too, Knütel, Stipulatio poenae, pp. 131 sq.
60 Pap. D. 45, 1, 124.
61 Pap. D. 45, 1, 8.
63 Pap. D. 45, 1, 115, 2, relating to "si Pamphilum non dederis, centum dari spondes?".
64 Cf., for example, Iul./Afr. D. 44, 7, 23 (for poena traiectiae pecuniae); on which cf. infra, p. 185.
66 Cels./Ulp. D. 4, 8, 23, 3.
Cf. infra, pp. 385, 730, 785 sqq., 820, 822.

Serv. /Ulp. D. 22, 2, 8; Pomp. D. 4, 8, 40.

Knütel, Stipulatio poenae, pp. 198 sqq.

Ulp. D. 2, 11, 2, 3-8.

Ulp. D. 2, 10, 1, 3.

Cf. § 339 BGB ("... the penalty is forfeit if he is in default"); mora debitoris (default) entails fault: § 285 BGB; implicitly also De Wet en Yeats, pp. 217 sqq. (breach of contract); cf. also Treitel, op. cit., note 14, p. 94 ("Thus if 'fault' on the part of a debtor is an essential ingredient of contractual liability, it must exist before the penalty can be exacted").


Cf. artt. 1152 and 1231 code civil, amended, however, and brought into line with the other Continental systems in 1975. Cf. e.g. Fischer, op. cit., note 1, pp. 132 sqq.; Nicholas, FLC, pp. 229 sqq.

Commentarius ad Pandectas, Lib. XLV, Tit. I, XII.

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1915] AC 79 (HL) at 86.

Cf., for example, Treitel, Contract, pp. 769 sqq.

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1915] AC 79 (HL) at 87.

Treitel, op. cit., note 14, p. 103. Strangely enough, the German courts have more recently cumbered themselves with very much the same problem. They have started distinguishing between penalty clauses (which, however, contrary to English law, are not invalid, but subject to the rules laid down in § 339 sqq.) and liquidated damages (which are not subject to these provisions of the code). In the literature, too, attempts have not been wanting to confine application of the § 339 sqq. to "in terrorem" clauses. Cf. the critical discussion by Fischer, op. cit., note 1, pp. 42 sqq.

§ 343 BGB: cf. also § 1336 ABGB, art. 163 III OR, art. 1384 codice civile.


A notorious constitution, the wording of which (according to J.C. de Wet, Opuscula Miscellanea (1979), p. 205) is "so confused and obscure that it defies interpretation and even translation". Yet it became part and parcel of the ius commune. On C. 7, 47 in Roman law, see Medicus, Id quod interest, pp. 288 sqq.; H.J. Erasmus, "'n Regshistoriese Beskouing van Codex 7, 47", (1968) 31 THRHR 213 sqq.; on the ius commune, see Coing, pp. 438 sqq. and H.J. Erasmus, "Aspects of the History of the South African Law of Damages", (1975) 38 THRHR 115 sqq.; for modern South African law, see Erasmus, (1968) 31 THRHR 237 sqq. For further details cf. also infra pp. 828 sqq.

Carolus Molinaeus, Tractatus de eo quod interest (Venetiis, 1574), n. 159.

As can be seen from this argument, the focus was very much on the purely compensatory function of penalty clauses. This attitude dates back to canon law (emphasizing, for moral reasons, the protection of the debtor and arguing that whatever was beyond a reasonable pre-estimate of damages constituted an unjustified gain for the creditor) and prevailed down to the time of the natural-law codifications. Only the 19th century saw a renascence of the "in terrorem" function of penalty clauses; their character, as private sanctions for the wrong of breach of contract, was (re-)accentuated-

§ 301 I 5 PrALR.

Cf., for example, Fachinaeus, Controversiae iuris, vol. I, p. 50; Glück, vol. IV, p. 532, n. 3.

Van Leeuwen, Censura Forensis, Pars I, Lib. IV, Cap. XV, 2.

Commentarius ad Pandectas, Lib. XLV, Tit. I, XII.

Commentarius ad Pandectas, Lib. XLV, Tit. I, XIII; cf. also Groenewegen, De legibus abrogatis, Cod. Lib. VII, Tit. XLVII, n. 10.


Cf. Steytler v. Smuts (1833) 1 Menz 40; Mann and Harris v. Cohen 1902 TH 261.


Pearl Assurance Co. Ltd. v. Union Government 1933 AD 277.

Pearl Assurance Co. v. Union Government 1934 AD 560 (PC).

Tobacco Manufacturers Committee v. Jacob Green and Sons 1953 (3) SA 480 (A) at 493F.

Conventional Penalties Act 15/1962. Sec. 3 of this Act provides: "If upon the hearing of a claim for a penalty, it appears

Cf. supra, pp. 104 sqq.

It was specifically excluded by § 306 I 5 PrALR. As to modern German law, cf. Söllner, op. cit., note 1, § 339, nn. 17 sqq.
101 Rolf Knütel, "Verfallsbereinigung, nachträglicher Verfall und Unmöglichkeit bei der Vertragsstrafe", (1975) 175 Archiv für die civilistische Praxis 44 sqq.


103 Cels./Ulp. D. 4, 8, 21, 12, Paul. D. 4, 8, 22, Cels./Ulp. D. 4, 8, 23 pr.: "Intra quantum autem temporis, nisi detur quod arbiter iussisset, committatur stipulatio, videndum est. et si quidem dies adiectus non sit, Celsus scribit libro secundo digestorum inesse quoddam modicum tempus: quod ubi praetererit, poena statuta peti potest: et tamen, inquit, et si dederit ante aceptum iudicium, agi ex stipulato non poterit: utique nisi eius interfuerit tunc solvi. Celsus ait, si arbiter intra kalendas Septembres dari iussisset nec datum erit, licet postea offeratur, attamen semel commissam poenam compromissi non evanescere, quoniam semper verum est intra kalendas datum non esse: sin autem oblatum accepit, poenam petere non potest doli exceptione removendus." Cf. also Marci. D. 4, 8, 52; Scaev. D. 45, 1, 122, z. For a full discussion, see Knütel, Stipulatio poenae, pp. 147 sqq.

104 Kaser, RZ, pp. 225 sqq.

105 Because, as a consequence of this interpretation, he had to accept the belated performance. If he did not do so (that is, if the fulfilment of the condition was brought about by the party to whose advantage it operated), the condition was deemed not to have been fulfilled. Vide infra, p. 729.

106 Paul. D. 4, 8, 22.

107 In a similar vein, see Knütel, (1975) 175 Archiv für die civilistische Praxis 56 sq.

108 Paul. D. 21, 2, 35: "Evictus autem a creditor tunc videtur, cum fere spes habendi abscissa est: itaque si Serviana actione evictus sit, committitur quidem stipulatio: sed quoniam soluta a debitore pecunia potest servum habere, si soluto pignone venditor conveniat, poterit uti doli exceptione." For a very interesting parallel in the old English common law (to which Professor R. Knütel, Bonn, has drawn my attention), see the decision by Bereford CJ in Umfraville v. Lonstede YB 2 and 3 Edw II (Selden Society) 58 and the comment by F. W. Maitland in his Introduction (p. xiii) to this volume: "A man has bound himself to pay a certain sum if he does not tender the document over a certain document on a certain day. Being sued upon his bond, he is unable to deny that he did not tender the document on the day fixed for the transfer; but he tenders it now, excuses himself by saying that he was beyond the sea, having left the document with his wife for delivery, and urges that the plaintiff has suffered no damage . . . . To our surprise, Bereford CJ . . . exclaims: 'What equity would it be to award you the debt when the document is tendered and you cannot show that you have been damaged by the detention?' (Quel équité serra de agarder à vous le dette de pus que l'escrit est prest, si vous ne porriez monstrer que vous fustes endamaged par la deteune?) In the end the plaintiff is told that he will have to wait seven years for his judgement. Here certainly we seem to see 'relief against penalties' and relief that is granted in the name of 'equity', though it takes the clumsy form of an indefinite postponement of that judgement, which is dictated by the rigours of the law."

109 On which see infra pp. 916 sqq., 1099 sqq., 1118 sq.

110 Already in its original form, i.e. before the alteration in 1975. Cf. also art. 1384 codice civile.

232 For details, cf. Scherner, Rücktrittsrecht, passim. A unilateral right of withdrawal from the contract was still rejected by the pandectists: for details, see Leser, Rücktritt vom Vertrag, pp. 2 sqq


234 Scherner, Rücktrittsrecht, pp. 92 sqq.; Coing, p. 444.


236 Cf. § 1 b AbzG (dealing with instalment sales) and § 1 HaustürWG (dealing with door-to-door sales).

237 Cf. e.g. A.D. Weber, Systematische Entwicklung der Lehre von der natürlichen Verbindlichkeit (1784), § 90; for further details, see Leopold Pfaff, "Die Clausel: Rebus sic stantibus in der Doktrin und der österreichischen Gesetzgebung", in: Festschrift für Joseph Unger (1898), pp. 272 sqq.

238 De beneficis, Lib. IV, XXXV, 3.

239 3, XXV-95.

240 Enarrationes in Psalmos, V, 7.


242 Johannes Teutonicus, gl. Furens, ad C. 22, q. 2, c. 14. Cf. further Robert Feenstra, "Impossibilitas und Clausula rebus sic stantibus", in: Daube Noster (1974), pp. 81 sqq. The wording of the condition is taken from a text by Africanus (D. 46, 3, 38 pr: "... si in eodem statu maneant"), which does, however, not deal with the problem in question. The legal construction of the clausula remained that of an implied condition. A very similar construction, incidentally, appears in Taylor v. Caldwell (1863) 3 B & S 826, the decision which broke with the principle established in Paradise v. Jane (1647) Aleyne 26 and became one of the roots of the modern doctrine of frustration of contract (cf. infra, pp. 582, 817).

243 Johannes Teutonicus, loc. cit.

244 Summa theologiae, Secunda Secundae, q. 110, art. 3, ad quinimum; the general rule is expressed in the following terms: "Si vero non faciat quod promisit, tunc videtur infideliter agere per hoc quod animum mutat. "

Page 9/10
245 Commentaria, D. 12, 4, 8, § Quod Servius, 3.
246 Commentaria (Venetiis, 1586), ad D. 12, 4, 8.
247 Yason de Mayno, Commentaria, ad D. 12, 4, 8.
248 Andreas Tiraquellus, as quoted by Pfaff, Festschrift Unger, p. 229.
250 Feenstra/Ahsmann, op. cit., note 214, p. 21.
253 Cf. e.g. Pfaff, Festschrift Unger, pp. 282 sqq.; Erich Kaufmann, Das Wesen des Völkerrechts und die clausula rebus sic stantibus (1911).
254 Cf. supra, note 237.
255 "Die Voraussetzung", (1892) 78 Archiv für die civilistische Praxis 197.
256 Windscheid defined the term "presupposition" in terms of an "undevolved condition": one party wishes the effects of a transaction to be dependent on a certain state of affairs without, however, elevating such presupposition, by way of an express declaration, to the status of a term of the transaction. Such party may refuse to render performance, if his contractual opponent was in a position to gauge, from the circumstances of the transaction, that the presupposition in fact formed an element of his intention. Cf. esp. Bernhard Windscheid, Die Lehre des römischen Rechts von der Voraussetzung (1850); idem, in: Windscheid/Kipp, §§ 97 sqq. Contra e.g. Otto Lenel, "Nochmals die Lehre von der Voraussetzung", (1892) 79 Archiv für die civilistische Praxis 49 sqq.; cf. also Gehard Kegel, "Empfiehlt es sich, den Einfluss grundlegender Veränderungen des Wirtschaftslebens auf Verträge gesetzlich zu regeln und in welchem Sinn?", in: Verhandlungen des 40. Deutschen Juristentages (1953), vol. I, pp. 143 sqq; for a recent analysis, cf. Ulrich Falk, Ein Gelehrter wie Windscheid (1989), pp. 193 sqq. The notion of "economic" impossibility (cf. e.g. RGZ 100, 129 (130)) may be mentioned as another attempt to cope with the problem of changed circumstances.
258 Paul Oertmann, Die Geschäftsgrundlage, ein neuer Rechtsbegriff (1921). On the judicial reception of this doctrine since the famous decision of RGZ 103, 328 sqq., see Bernd Rüthers, Die unbegrenzte Auslegung (1973), pp. 40 sqq.
260 Treitel, The Law of Contract, pp. 663 sqq.; on its history, see Kegel, op. cit., note 256, pp. 172 sqq.; for a comparison, cf. Stefan Schmiedlin, Frustration of Contract und clausula rebus sic stantibus (1985). The Louisiana Civil Code, interestingly, deals with the problem as being one of an error in motive, which can under certain circumstances constitute a ground for the voidability of contracts: "No error in motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it" (art. 1826). For details, see Timothy Hoff, "Error in the Formation of Contracts in Louisiana: A Comparative Analysis", (1978-79) 53 Tulane LR 358 sqq.

Referring Principles:

VI.4 - Promise to pay in case of non-performance

VIII.1 - Definition