

Some Basic Issues of the Power of the Court to Reduce the Penalties and Liquidated Damages

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Abstract

This paper analyzes some basic issues on the application of Article 252 of the Civil Code which provides that where the “penalty” agreed is excessively high, the court may reduce it to an appropriate amount. My focus is mainly on the objects, legal foundation, nature and the types of applications, and the factors that should be taken into consideration when a court applies this Article to reduce the agreed penalties or liquidated damages. Most Supreme Court decisions hold that Article 252 of the Civil Code is applicable to both the agreed penalties and liquidated damages. To be more precisely, I suggest that it is an analogue application of Article 252 when it applies to cases where an obligee forfeiture money paid by an obligor before he/she breaches the contract. Further, most Supreme Court decisions take the view that so long as there is a litigation between the obligee and the obligor, the court may ex officio reduce the agreed penalties or liquidated damages and there is no need for the defendant/obligor to request so and it does not matter whether the claimant or the defendant has provided the facts to the court that the agreed penalties or liquidated damages is excessively high. But if there is no fact for the court to take the view that the agreed penalties or liquidated damages are excessively high, the defendant has to present such facts, and if necessary, he must prove them.

I take the view that the legal foundation of Article 252 of the Civil Code is the principle of good faith. My point is that even if Article 252 does not in existence, the obligee’s right of claim to the agreed penalties or liquidated damages is still subject to the principle of good faith when the agreed penalties

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or liquidated damages is excessively high in comparison with all possible reasonable interests of the obligee. It is also worth noting that a few Supreme Court decisions also indicate that the agreed penalties or liquidated damages must be excessively high or remarkable unfair in comparison with all possible reasonable interests received by the obligee in case where the obligor had performed his/her obligation. Finally, the court's power to reduce the agreed penalties or liquidated damages should base on all the facts presented by the parties to the litigation before the second instance of the court concludes the proceedings where the parties make their final debate with arguments.

Keywords: penalties liquidated damages, excessively high, power of reduction, the principle of good faith, principle of the party presentation, ex officio to exercise the power to reduce the sum of penalties or liquidated damages