

The penalty clause is a topic widely discussed within the scope of Contract Law, mainly with regard to its application and its limitations at the time of imposition in contracts.

Discussions for the imposition of penalty clauses are currently focused on achieving a balance between good faith, business activity continuity, and the human person's dignity.

## WHAT IS A PENALTY CLAUSE?



The penalty clause, also called the penal clause, refers to an obligation contractually established between the parties to that commercial relationship that provides for the economic effects of a breach of contract.

In this sense, its objective is to guarantee legal certainty for contractors.

This contractual legal security stems from the potential that the penalty must prevent any breach of contract from occurring, as it will have economic consequences for the non-

complying party, in addition to encouraging the continuation of any provision of service established by the contract.

It is important to emphasize that the application of the penal clause occurs only in cases previously stipulated in the contract, with the amount previously agreed, no penalty can be applied without contractual provision.

In addition, the mere termination of the contract does not give rise to the application of the clause, it is necessary to meet some criteria for the penalty to be applied.

In this way, the situation must be adapted to one of the previously foreseen hypotheses, which, in general, dictate about:

- Lack of punctuality in fulfilling obligations
- Mandatory default
- Prior termination of the contract

## **LIMITS OF APPLICATION OF THE PENALTY**

Before presenting the arguments about the limits of the application of the penal clause, it should be noted that there are limits to its application.

These limitations are based, in the foreground, on the limits of the autonomy of the will established by the Brazilian legal system, legislation, and jurisprudence.

In other words: although the execution of a contract occurs, in most cases, between two private entities in an agreement of wills, the law establishes rules and principles that limit contractual freedom.

The main objective of these rules and principles is to protect the hypo-sufficiency party of that contractual relationship so that there is no abusive use of the authority of one party in relation to another.

## **WHAT ARE THE LIMITS?**

In the foreground, recognizing the various normative sources of law, the limits of the penalty may result from regulations of the judiciary, legislation, or the autonomy of the parties, that is, what was agreed between the contracting parties.

The Civil Code establishes, for example, that the penalty cannot exceed the value of the principal obligation, an example of an existing legal limit.

Contractual clauses that provide for a penalty clause must be prepared with caution, with a lawyer's participation, to ensure the contract's validity.

According to some court decisions, the value indicated for applying the penalty is between 10% and 20% (maximum) of the value of the contract, which guides the lawyer when drafting the contract to be in line with the jurisprudence, avoiding conviction in any proceedings.

To learn more about penalty clauses and other aspects of contracts, keep following our blog and Instagram.