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THE SURVIVAL OF ACCRUED DELAY PENALTIES AFTER CONTRACT TERMINATION UNDER SERBIAN LAW

Abstract: *This article examines whether creditors lose the right to an accrued contractual penalty for delay upon termination of the contract for breach. The Serbian Law on Obligations (LO) contains no provision extinguishing that right upon termination. Penalties survive termination based on the systematic reading of the LO, legal doctrine, judicial practice, comparative materials, and the role of contractual penalties in commercial practice. A contractual penalty is accessory at inception; once due, however, it becomes an independent right. Delay gives rise to legal consequences that termination does not erase retroactively. Just as termination does not affect accrued default interest or damages, it does not affect the accrued amount of a contractual penalty for delay, but only prevents its further increase. The contrary view would force the creditor to choose between terminating the contract to obtain restitution and retaining the right to the penalty.*

Key words: Contractual Penalty, Delay, Termination, Serbian Law on Obligations, Accrued Rights.

1. INTRODUCTION

Contractual penalties occupy an important position in the Serbian Law of Obligations as one of the most flexible and economically significant instruments for regulating the consequences of breach of nonmonetary obligations. Their legal nature is hybrid: contractual in origin, coercive in function, compensatory in effect, and, in many cases, preventive in purpose. They operate as a private sanction – *clausula in terrorem* – yet also as a simplified form of liquidated damages, relieving the creditor of the burden of proving loss up to the agreed amount. Serbian law accordingly recognizes both the penal and compensatory dimensions of the penalty clause, while subjecting it to the structural limits of the Law on

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Obligations (LO),¹ including mandatory rules on form, accessoriness, and judicial moderation. The enforceability of the contractual penalty is entirely independent of whether the creditor has suffered damage: the creditor may invoke the penalty even in the absence of loss, which is central to the clause's penal function. At the same time, the compensatory function is preserved through the rule that the penalty is imputed to damages, thereby preventing double recovery unless expressly authorized by statute.

1.1. STATUTORY FRAMEWORK AND STRUCTURAL LIMITS

Under Article 270(3) LO, a contractual penalty may secure only nonmonetary obligations; any clause stipulating a penalty for breach of a monetary obligation is null and void.² Although this rule has been criticized in recent Serbian scholarship³ – particularly by reference to comparative solutions, developments in other former Yugoslav jurisdictions,⁴ and the legitimate interest of creditors in reinforcing their position in cases of monetary default – it remains a defining feature of the statutory regime.

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- 1 Zakon o obligacionim odnosima (Law on Obligations), *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 and 57/89; *Official Gazette of the FRY*, No. 31/93; *Official Gazette of the SCG*, No. 1/2003; *Official Gazette of the RS*, No. 18/2020, Arts. 270–276; Karanikić Mirić, M., 2025, *Obligaciono pravo*, 4th ed., Belgrade, Službeni glasnik, pp. 800–811.
 - 2 Pursuant to Art. 270(3) LO, which is mandatory in character, it is not permissible to stipulate a contractual penalty for monetary obligations. Accordingly, no legal effect can be given to a clause requiring payment of double the rent in the event of late payment. Appellate Court in Belgrade, Decision Gž 210/24 of 31 January 2024. The Supreme Court of Serbia has likewise affirmed that “the stipulation of a contractual penalty for breach of a monetary obligation is excluded by law. Delay in the performance of a monetary obligation is sanctioned by statutory default interest. Contractual clauses providing for payment of an increased price due to delay are void.” Supreme Court of Serbia, Decision Prevl 40/1999 of 18 March 1999.
 - 3 Hiber, D., Živković, M., 2015, *Obezbeđenje i učvršćenje potraživanja*, Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 426–428. For a more recent critique of the statutory prohibition of penalties for monetary obligations, including the argument that the rationale of avoiding conflict with default interest is unconvincing, see Vukotić, M., Ugovorna kazna: granice kažnjavanja u ugovornom pravu, in: Karanikić Mirić, M., Živković, M., (eds.), 2024, *Građansko pravo u pokretu – transformacija pre kodifikacije*, Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 169–172.
 - 4 In some legal systems with a common foundation in the former Yugoslav Law on Obligations, it is now permitted to agree on a contractual rate of default interest (in Croatian law, for claims arising from commercial and administrative contracts, and in Montenegrin law, without that limitation). See Art. 29 of Zakon o obveznim odnosima (Croatian Law on Obligations); Art. 284(2) of Zakon o obligacionim odnosima (Montenegrin Law on Obligations).

The rationale is not the functional distinction between interest and penalties, which in practice serve similar purposes, but rather the mandatory character of the statutory rules governing default interest. Since the amount, accrual and structure of the default interest are exhaustively regulated by law, allowing the parties to stipulate a penalty for monetary obligations would circumvent these mandatory provisions and undermine the uniformity and function of the statutory interest regime.⁵

The penalty agreement may appear as a clause within the principal contract or as a separate contract. The validity of the agreement is conditioned by the existence of a valid and enforceable secured obligation: a penalty is accessory at inception and cannot be effective when the secured obligation is void, impossible, unlawful, or indeterminate. Once the debtor falls into default, however, the penalty acquires a distinct and autonomous legal existence. This duality – accessory origin but autonomous operation – explains the doctrinal view that the penalty shares the fate of the secured obligation only until default arises; once the conditions of liability are met, the creditor's right becomes a matured autonomous claim that cannot be extinguished by subsequent performance of the secured obligation.

1.2. TYPES AND OPERATION OF PENALTY CLAUSES

A penalty may be stipulated either for nonperformance or for delay, with the statutory presumption favoring the latter. A penalty for nonperformance is alternative: the creditor must choose between insisting on performance and demanding the penalty. By contrast, the penalty for delay is cumulative: the creditor may demand both performance and the penalty. A penalty may also be stipulated for defective performance, even though the LO does not expressly regulate this scenario; doctrinal analysis and analogy with the regime of nonperformance support this view.⁶

5 Jankovec, I., 1993, *Ugovorna odgovornost*, Belgrade, Poslovna politika, p. 303.

6 The LO regulates penalties only for nonperformance and delay, without mentioning penalties for defective performance. The General Usages for the Trade in Goods (*Official Gazette FPRY*, No. 15/1954, Usage No. 245) expressly allows penalties for improper performance. This omission in the LO does not amount to a prohibition: a penalty may be stipulated for defective performance of a nonmonetary obligation, with the rules on alternative penalties for nonperformance applying *mutatis mutandis*. The creditor may insist on proper performance, including removal of the defect, or accept defective performance and additionally claim the penalty. Karanikić Mirić, M., 2025, p. 807; cf. Strezovski, S., Član 270. Opšta pravila, in: Blagojević, B., Krulj, V., (eds.), 1983, *Komentar Zakona o obligacionim odnosima*, Belgrade, Savremena administracija, pp. 947–948.

The dual functions of the penalty explain its practical operation.⁷ The penal function manifests in the creditor's ability to demand the penalty regardless of whether any damage has been incurred, and even when the agreed amount exceeds the actual loss. The compensatory function appears in the rule that the penalty is imputed to damages: the creditor may recover the difference when the actual loss exceeds the penalty but may not cumulate the two. As a result, the penalty provides a guaranteed minimum of compensation while preserving the creditor's right to full redress.

Although contractual penalties are sometimes categorized as instruments of personal security,⁸ their practical and conceptual role is not to enhance collection prospects in cases of insolvency. Rather, they function primarily as a deterrent mechanism, placing economic pressure on the debtor to perform on time and internalizing the cost of lateness. In this sense, the clause operates less as a security and more as a contractual tool of discipline.

1.3. DELAY AND THE ACCRUAL OF CORRESPONDING RIGHTS

The operation of a penalty clause is limited when nonperformance or delay arises from causes for which the debtor is not responsible.⁹ Conversely, when the debtor is responsible, legal consequences attach immediately: damages, default interest, and penalties arise *ex lege* or *ex contractu* upon default and continue to exist irrespective of whether the debtor eventually performs. When the penalty has been agreed for nonperformance, the creditor must prove only its creditor status and the fact of nonperformance; when it is agreed for delay, the creditor must prove its status, the existence of delay, and – if belated performance has been accepted – that the right to the penalty was expressly reserved without undue delay.¹⁰

7 On the dual nature of the contractual penalty, encompassing both penal and compensatory elements, and on the critique of case law that confines the penalty to the amount of proven loss, see Vukotić, M., 2024, pp. 160–165.

8 Radišić, J., 2004, *Obligaciono pravo*, Belgrade, Nomos, p. 318; Đorđević, Ž., Stanković, V., 1987, *Obligaciono pravo*, Belgrade, Naučna knjiga, p. 646.

9 The debtor of the secured obligation is not liable for nonperformance or lateness if the nonperformance or delay resulted from a cause for which the debtor is not responsible, i.e., from causes that the debtor of the secured obligation could not have prevented, removed, or avoided (Art. 272(2) LO, read together with Art. 263 LO). This means that it is not sufficient for the debtor merely to show that the causes of nonperformance or delay cannot be attributed to his fault; he must demonstrate that the causes were unpreventable, irremediable, and unavoidable.

10 On the requirement that a creditor who accepts late performance must expressly reserve the right to claim the penalty, and on the underlying rationale of legal certainty and consistency of creditor conduct, see Vukotić, M., 2024, pp. 173–176.

This temporal structure – rights accruing at the moment of default and not only upon its termination – is crucial for understanding how penalties interact with termination.

1.4. TERMINATION AND THE FATE OF ACCRUED PENALTIES

Against this general backdrop, the present paper examines an issue that Serbian doctrine and case law have not addressed consistently: whether a contractual penalty for delay remains enforceable after the underlying contract has been terminated.

According to one view, when a penalty has been stipulated for delay rather than for nonperformance, and the contract from which the secured obligation arises is subsequently terminated for nonperformance, the obligation to pay the penalty is said to have lapsed. On this account, a contractual penalty for nonperformance is, among other things, a prior lump-sum agreement on the damages the creditor incurs through nonperformance, and termination does not extinguish the creditor's entitlement to those consequences. By contrast, in the case of a penalty for delay, there is – on this view – no basis for the obligation to pay the penalty to survive termination: the nonperformance that justifies termination is said to negate the very existence of delay.¹¹

The issue sits at the intersection of two fundamental considerations: the accessory character of the penalty at the moment of its formation, and the effects of termination on rights that have already matured through earlier default.

The LO contains no explicit provision governing this issue. It does, however, expressly regulate the only situation in which the creditor loses the right to claim a penalty for delay: under Article 273(5) LO, the right is extinguished if the creditor, after accepting late performance, fails to notify the debtor without delay that this right is being reserved. Termination is not mentioned in this provision. Termination cannot be inferred from acceptance of performance; it is, on the contrary, an act of refusal. Accordingly, termination does not fall within the scope of Article 273(5), and the penalty accrued before termination cannot be extinguished on that basis.

The structure of the LO supports this conclusion. Article 324 LO establishes that delay arises as soon as the debtor fails to perform when due, and the legal consequences of delay attach at that moment. These consequences do not disappear even if the delay ceases, nor can they be retroactively erased by subsequent performance or termination. Termina-

11 Hiber, D., Živković, M., 2015, p. 424. The doctrinal views on this issue are discussed later in the paper.

tion for breach, governed by Articles 124–132 and 262(2) LO, dissolves the contract only for the future; it does not annul rights that have already matured. Just as accrued default interest and general damages arising from delay survive termination, so too must the penalty for delay that has accrued prior to termination. Termination stops the further accrual of the penalty, but does not extinguish what has already crystallized into an independent right.

This outcome accords with the fundamental idea that once the right to a penalty matures, it acquires an independent legal existence, separate from the continued subsistence of the underlying obligation. The contrary view would reward the debtor for remaining in default until the creditor is compelled to terminate, while placing the creditor in an untenable position: either remain bound to a nonperforming contractual relationship merely to preserve the right to the penalty, or terminate and forfeit the very remedy intended to sanction the delay. Such a result would undermine the principle of good faith, disrupt the coherent alignment of remedies for default, and erode the preventive and compensatory functions inherent in the penalty clause.

1.5. PURPOSE AND STRUCTURE OF THE ANALYSIS

The following analysis examines the legal nature and functions of the contractual penalty for delay, the interaction between termination and accrued contractual rights, and the doctrinal and jurisprudential foundations supporting the view that the right to penalty, once matured, survives termination for breach. Its purpose is both conceptual and practical: to clarify a doctrinally ambiguous question and to reinforce the coherence and internal logic of the system of contractual remedies established by the LO.

2. THE CONTRACTUAL PENALTY IN SERBIAN LAW: CONCEPT, NATURE AND LEGAL STRUCTURE

Resolving whether a contractual penalty for delay survives termination presupposes the proper understanding of the general regime governing penalties under the LO. The effect of termination on an accrued penalty cannot be analyzed in isolation: it depends on the legal nature of the penalty clause, the moment at which the penalty right arises, the meaning and extent of its accessoriness, the rules governing its accrual, and the relationship between penalties, damages, and other consequences of default. These elements form an integrated statutory structure. For this reason, the

analysis must begin with an examination of the concept, nature, and legal structure of the contractual penalty in Serbian law. Only once this general framework has been articulated can the specific doctrinal and practical implications of termination for an already matured penalty be assessed with accuracy and coherence.

2.1. CONCEPT AND DEFINITION

In Serbian contract law, the legal consequences of breaching an obligation may arise in three ways: directly from statute, *e.g.*, the obligation to pay default interest when a monetary debt is overdue; by judicial decision, *e.g.*, judicial penalties; or by agreement between the creditor and the debtor, *e.g.*, contractual penalties.

A contractual penalty agreement is a private arrangement that determines the consequences of nonperformance or delay in the performance of nonmonetary obligations. Under such an arrangement, the debtor undertakes to pay the creditor a specified sum of money or confer another pecuniary benefit if the obligation is not performed or is performed late. Although the secured obligation usually arises from a contract, this need not always be the case;¹² when it does arise from a contract, the penalty may be incorporated in the contract itself or set out in a separate agreement.

The obligation to pay a contractual penalty always arises from the parties' contractual will, irrespective of the legal source of the obligation it secures. The benefit due upon breach – typically a sum of money, though another pecuniary advantage may be agreed – is traditionally referred to as a contractual penalty (conventional penalty, *stipulatio poenae*). Its amount must be determined by the parties themselves; a penalty clause is void if the amount is indeterminate or incapable of determination at the moment the obligation falls due.

12 A contractual penalty is commonly stipulated for breach of a contractual obligation. Although not prohibited, agreeing a penalty for breach of an obligation not arising from a legal transaction is unusual. The prevailing explanation is that the duty to compensate damage arises only when the damage occurs, whereas the contractual penalty is an ancillary, conditional obligation that cannot arise until the secured claim has arisen; it must also be stipulated before the secured claim falls due. See Hiber, D., Živković, M., 2015, pp. 424–425. Yet, just as suretyship may secure a future obligation (Art. 1001(2) LO), a penalty may in principle be agreed for breach of a future duty to compensate damage. Also, if damages can be awarded for future loss, there is no persuasive reason why the parties should not be free to stipulate in advance a penalty for breach of the corresponding duty to compensate that damage.

2.2. ACCESSORINESS, AUTONOMY AND FORMAL REQUIREMENTS

A defining feature of the contractual penalty is its accessory character.¹³ Its existence and validity depend on the existence of a valid and enforceable secured obligation. This follows from Article 272 LO, which provides that the penalty shares the fate of the obligation it secures. The penalty agreement is therefore void if, at the time it is concluded, the secured obligation is void, impossible, unlawful, nonexistent, or indeterminate, or if it later ceases through performance, set-off, release of debt, confusion, or death. In the case of novation, however, the parties may expressly agree that the penalty is to be carried over to the new obligation. Likewise, the penalty becomes ineffective when nonperformance or delay occurs for reasons for which the debtor is not responsible and which he could not prevent, remove, or avoid within the meaning of Articles 263 and 272(2) LO. These rules preserve the internal coherence of the contractual system by preventing the indirect enforcement of obligations that cannot lawfully be performed.¹⁴

Where the secured obligation arises from a voidable contract, the penalty agreement remains valid until annulment; indeed, in some circumstances, the subsequent agreeing to a penalty may amount to confirmation of the voidable contract by the party entitled to annul it.¹⁵ Conversely, where the secured obligation continues to subsist despite a change of debtor or creditor – such as in cases of assignment of contracts, assumption of debt, accession to debt, or assignment of right (*cessio*) – the penalty agreement likewise continues to operate, as the underlying secured obligation itself persists.¹⁶

Despite its accessory character at inception, a penalty acquires autonomy once the conditions for its enforcement have been met. When the debtor fails to perform or performs late, the creditor's right to the penalty

13 For a detailed discussion, see Radovanović, S., 2018, *Akcesornost ugovorne kazne u srpskom pravu*, Novi Sad, Pravni fakultet. See also Danilović, T., 2011, *Ugovorna kazna u pravu, praksi i teoriji*, Belgrade, Svet knjige; Attias, A., 2006, *Ugovorna kazna, Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, No. 4, pp. 297–345; Savić, S., 2013, *Pravna dejstva sporazuma o ugovornoj kazni, Pravo i privreda*, Nos. 7–9, pp. 267–276.

14 The accessory character of the penalty clause also applies in the context of prescription and restitution. A debtor who voluntarily pays a time-barred penalty cannot seek restitution. Conversely, if the debtor invokes limitation in respect of the secured obligation, he may also refuse to pay the penalty.

15 Stanković, V., Član 270. Opšta pravila, in: Perović, S., (ed.), 1995, *Komentar Zakona o obligacionim odnosima*, Belgrade, Savremena administracija, p. 629.

16 See Karanikić Mirić, M., 2025, pp. 802–805.

becomes a matured and independent claim that survives even if the underlying contract is later terminated for breach. This duality – dependence at inception and independence upon maturity – defines the contemporary structure of the penalty clause.

As to form, an agreement on a contractual penalty may generally be concluded in any form. However, when a secured obligation arises from a contract subject to a constitutive form, the penalty agreement must observe that same form. This reflects the rule of parallelism of forms: formal requirements extend from one connected legal act to another only when mandated by law or expressly agreed by the parties.¹⁷

A further substantive limit concerns the nature of the secured obligation. Under Serbian law, only nonmonetary obligations may be secured by a contractual penalty, and any clause stipulating a penalty for breach of a monetary obligation is null and void. Although both the contractual penalty and default interest ultimately serve to internalize the cost of late performance, the rationale for this prohibition lies in the mandatory character of the statutory rules on default interest. Because the amount, accrual, and structure of default interest are exhaustively regulated by law, allowing the parties to impose a contractual penalty for monetary obligations would circumvent these mandatory provisions and duplicate the statutory sanction for delay.

In legal systems that permit parties to agree on the amount of default interest, the prohibition on contractual penalties for monetary obligations becomes largely redundant. When default interest itself is subject to contractual determination, its coercive and compensatory functions effectively overlap with those of the penalty clause, leaving little substantive justification for maintaining a separate prohibition. In such systems, parties may already calibrate the financial consequences of late payment through an agreed interest rate, and any additional penalty would merely replicate mechanisms that the law has entrusted to party autonomy.

Comparative law shows that the traditional model has started to shift in recent years. Several jurisdictions have introduced reforms that relax or abandon the prohibition on penalties for monetary obligations. Notably, Croatian law now allows the parties to agree on default inter-

17 “Parallelism of forms” denotes that two connected legal acts must be concluded in the same form only when this is expressly prescribed by statute or agreed by the parties. Otherwise, the form required for one act applies only to the act for which it is prescribed. Examples include: the contractual penalty agreement (Art. 271(2) LO), consent to contract assignment (Art. 145(3) LO), the preliminary contract (Art. 45(2) LO), and agreements modifying or terminating a contract requiring a notarial deed (Art. 82(3) Notaries Act). These examples are not exhaustive.

est in commercial and administrative contracts, while Montenegrin law has eliminated the prohibition altogether.¹⁸ These developments illustrate a broader trend towards greater contractual autonomy in regulating the consequences of monetary default.

In light of these changes, it is questionable whether the existing restriction remains justified, especially given that Serbian law already tolerates contractual interest rates exceeding the statutory default interest, which continues to accrue after the delay.¹⁹

Moreover, in situations where the creditor has a legitimate interest in terminating immediately for nonpayment – or where the contract is fixed and terminates *ipso lege* upon failure to pay – the prohibition may deprive him of the default interest altogether, thereby neutralizing the punitive and deterrent function normally fulfilled by monetary late-payment remedies. In such cases, the creditor is left only with a claim for damages, which offers neither the certainty nor the simplicity of a predetermined contractual mechanism. Allowing the parties to stipulate a contractual penalty for nonperformance of a monetary obligation could, in these circumstances, enhance creditor protection and promote legal certainty.

2.3. VALIDITY AND EXTINCTION OF PENALTY AGREEMENTS

A contractual penalty may be stipulated only for an existing and unperformed obligation. The penalty agreement is void if, at the time of its conclusion, the secured obligation was impossible, unlawful, or indeterminate. This reflects the prohibition on indirectly validating obligations that the law refuses to enforce: if the secured obligation is void or nonexistent, it cannot be breached, and the obligation to pay the penalty cannot arise.

The penalty ceases when the secured obligation ceases through performance, set-off, release of debt, merger of creditor and debtor (*confusio*), death, or novation (unless the parties expressly carry the penalty over to the new obligation). It remains effective when the secured obligation continues, for example in cases of assignment of right, assumption of debt, accession to debt, or assignment of a contract. The agreement likewise loses effect when nonperformance or delay arises from causes for which the debtor is not responsible.

Taken together, these rules illustrate the strict accessory nature of the penalty clause at the stage of its creation and continued existence as a contractual mechanism. The clause itself cannot survive independently of a valid and enforceable underlying obligation: if the secured obligation

18 See fn. 4 above.

19 Art. 277(2) LO.

is void or later ceases for reasons unrelated to breach, the penalty clause necessarily falls with it. However, once the debtor has fallen into delay or nonperformance and the right to the penalty has matured, that right acquires an autonomous legal character. Accrued penalties – unlike the penalty clause as such – may therefore survive subsequent developments in the contractual relationship, including termination, because their legal foundation lies in the debtor's past breach and not in the continued existence of the secured obligation.

2.4. TYPES AND FUNCTIONS OF CONTRACTUAL PENALTIES

Under Serbian law, a contractual penalty may be stipulated for non-performance, for delay, or – although not expressly regulated – for defective performance.²⁰ Unless the parties provide otherwise, the law presumes that the penalty is agreed for delay – a presumption that favors the debtor because a penalty for delay is cumulative: the creditor may demand both performance of the secured obligation and the penalty. A penalty for non-performance, by contrast, is alternative. The creditor must choose either to insist on performance or to demand the penalty; he cannot claim both. The choice, once made, is irrevocable. The logic is straightforward: when performance ultimately occurs, the suspensive condition for the penalty for nonperformance never materializes. When the creditor accepts late performance, the penalty for delay remains available only if the creditor notifies the debtor without undue delay that he reserves the right to claim it.²¹ If such notice is omitted, the right lapses. This rule, contained in Article 273(5) LO, ensures that the debtor is not unexpectedly exposed to a penalty after the creditor has manifested acceptance of belated performance.

Alongside these modern forms, drawing on Roman law, doctrine also recognizes the existence of an improper or non-accessory contractual penalty.²² The earliest Roman *stipulatio poenae* was a conditional mone-

20 See fn. 6 above.

21 A reservation of the right to claim the contractual penalty may also be made orally, unless the parties have agreed that the declaration must take a particular form. Joint Session of the Federal Court and the Republic and Provincial Supreme Courts, General Legal Opinion No. 13/1989, 23 May 1989. Where the creditor has brought an action for performance and for payment of the contractual penalty for delay, and subsequently accepts late performance, the filing of the action is deemed to preserve the right to the penalty. After accepting late performance, the creditor need not give any further notice to the debtor to that effect. Higher Commercial Court, Decision Pž 8266/2003 of 5 August 2004.

22 Miladin, P., 2006, Odnos ugovorne kazne i srodnih klauzula, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 56, No. 6, p. 1763 ff.; Karanikić Mirić, M., 2025, pp. 805–806. See contra Hiber, D., Živković, M., 2015, p. 431.

tary obligation that was not tied to any primary obligation: the debtor did not owe the act whose nonperformance triggered the penalty, but only the amount payable upon failure to act.²³ From a contemporary perspective, this was not an accessory security instrument at all, as there was no principal obligation whose legal fate the penalty could follow. Some modern codifications retain this form of improper penalty, although its practical significance has diminished sharply.²⁴

Serbian law does not regulate it expressly, but under the principle of freedom of contract the parties remain free to agree such a clause. They may stipulate that the debtor will pay a specified amount or confer another pecuniary benefit if he performs, refrains from performing, or otherwise engages in a particular act. The debtor does not undertake that act itself; he undertakes only the obligation to pay if the agreed condition – whether the doing or the not doing of the act – does not occur. The only limits are those generally applicable to conditional obligations: the act on which payment depends must not be impossible, unlawful, or contrary to public order or morals.

The principal functions of the contractual penalty in Serbian law are penal and compensatory.²⁵ The penal function is evident from the fact that the right to penalty does not depend on the creditor suffering any

23 See Milošević, M., 2005, *Rimsko pravo*, Belgrade, Nomos, p. 294; Zimmermann, R., 1992, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, Juta, pp. 98–99.

24 See § 343(2) BGB (*selbständiges Strafversprechen*). The rules on judicial control of the amount of the contractual penalty apply equally to an independent penalty promise. A commonly cited example is a debtor's undertaking to pay €1,000 if he does not stop drinking alcohol: the debtor is not obliged to stop drinking; he is merely obliged to pay the agreed sum if he continues to do so. Dannemann, G., Schulze, R., 2020, *German Civil Code Volume I – Bürgerliches Gesetzbuch (BGB). Books 1–3: §§ 1–1296*, Munich–Baden-Baden, C. H. Beck/Nomos, pp. 556, 561–563.

25 Two essential functions of the contractual penalty in Serbian law are compensatory and penal. See Hiber, D., Pavić, V., 2013, Contractual Penalty Clauses in Recent Serbian Arbitration Practice, *Anali Pravnog fakulteta u Beogradu*, No. 3, p. 67. In the same direction, see Pavić, D., 2000, Sudska kontrola ugovorne kazne, *Pravni život*, No. 10, pp. 396–397: in Serbian law a contractual penalty is not a form of damages, as it may be awarded even when no loss has been suffered; its primary role is punitive, while it also performs a compensatory function. This dual character is reflected in the legislator's approach: in the LO the provisions on contractual penalties are placed between the rules on liability for damage arising from breach of contractual or other obligations and those on default interest. See also Jovičić, K., Odnos ugovorne kazne i naknade štete, in: Petrović, Z., Čolović, V., (eds.), 2017, *Odgovornost za štetu, naknada štete i osiguranje*, Belgrade, Institut za uporedno pravo, pp. 219–227; Jovičić, K., Funkcije zatezne kamate u slučaju docnje sa plaćanjem novčane naknade štete, in: Petrović, Z., Čolović, V., (eds.), 2018, *Odgovornost za štetu, naknada štete i osiguranje*, Belgrade, Institut za uporedno pravo, pp. 131–141.

damage. The penalty operates as a private sanction – *clausula in terrorem* – intended to encourage the debtor to perform properly and punctually by exposing him to an additional financial burden in the event of breach.²⁶ It is not a device for improving the creditor's prospects of recovery in insolvency: a debtor who cannot satisfy the primary obligation cannot satisfy an additional one. Its purpose lies in contractual discipline rather than asset protection.

The compensatory function appears in the rule that the penalty is imputable to damages. The creditor may recover the penalty even if the agreed amount exceeds the damage actually sustained or if no damage has occurred at all. If the damage exceeds the penalty, the creditor may recover the difference up to the level of full compensation under the general rules of contractual liability. The penalty thus ensures a minimum guaranteed recovery while preserving the principle of full compensation.

This dual structure also clarifies the creditor's evidentiary burden. For a penalty for nonperformance, the creditor must establish his creditor status and prove that the debtor failed to perform. For a penalty for delay, he must prove the due date and the debtor's failure to perform on time, and

In German law, the contractual penalty also serves a dual function: its first purpose is to exert preventive pressure on the debtor to perform the principal obligation correctly ("pressure function"), while its second purpose is to relieve the creditor of the burden of proving the occurrence and extent of damage resulting from the breach, at least up to the amount of the agreed penalty ("compensatory function"). One purpose may predominate in a given case. The contractual penalty bears no resemblance to a criminal sanction, which aims to restore the authority of the violated norm. See Wolff, R., *Sicherung der Ansprüche aus dem Werkvertrag*, in: Messerschmidt, B., Voit, W., (eds.), 2022, *Privates Baurecht – Kommentar zu §§ 631 ff. BGB samt systematischen Darstellungen sowie Kurz-Kommentierungen zu VOB/B, HOAI und BauFordSiG*, 4th ed., Munich, C. H. Beck, Part M, Rn 234. Even in a broader European context, contractual penalty clauses are recognized as serving a dual function: "conventional penalty clauses are useful for two reasons. On the one hand they serve as a means of exerting pressure on the other party to behave or not to behave in a specific way; on the other hand, they relieve the creditor of the necessity of assessing and proving his claim for damages in case of non-compliance." Zimmermann, R., 1992, p. 95.

- 26 In contrast, under English law contractual terms that operate as penalties are unenforceable. Only clauses that fix in advance the amount of compensation for breach (liquidated damages) are permitted. When a dispute arises, the court determines whether the clause is penal or compensatory. Such disputes typically occur when the debtor refuses to pay the stipulated sum, or seeks restitution of what has already been paid, on the grounds that the clause is penal in character. A clause will be treated as a penalty if it does not protect a legitimate business interest of the creditor, or if the amount stipulated is unconscionable or grossly disproportionate to the loss suffered. See Peel, E., 2015, *Treitel on the Law of Contract*, 14th ed., London, Sweet & Maxwell, §§20–129 ff.; Beale, H., (ed.), 2017, *Chitty on Contracts*, London, Sweet & Maxwell, §§26–216 ff.

– when late performance was accepted – that he duly reserved the right to the penalty.

In earlier stages of its development, the contractual penalty also served a third function: the indirect enforcement of obligations that were not themselves actionable. In Roman law, when a creditor could not stipulate an enforceable undertaking to perform a particular act, he could nonetheless stipulate the payment of a sum of money under the negative suspensive condition of nonperformance of that act. This mechanism created an incentive for voluntary performance. Although this function largely disappeared in modern law with the abandonment of the Roman *actio stricti iuris*, understanding it helps explain the conceptual roots of the improper (or non-accessory) penalties discussed above and their residual presence in certain modern codifications.²⁷

2.5. EFFECTS OF THE PENALTY FOR DELAY

In contemporary Serbian law, the effects of the penalty clause unfold in a clear and structured sequence. When the parties have agreed on a penalty for delay, the creditor's right to payment arises the moment the debtor falls into default, irrespective of whether performance is ultimately rendered. Once this right has matured, it crystallizes into an autonomous monetary claim. Although the penalty clause is accessory at inception and depends on the existence of a valid and enforceable underlying obligation, it becomes legally independent once the period of lateness has triggered its operation.

When the creditor accepts late performance, the penalty for delay remains available only if he notifies the debtor without undue delay that he reserves the right to claim it, as required by Article 273(5) LO. Failure to give such notice results in the loss of the right to the penalty. This rule balances contractual discipline with legal certainty, ensuring that the debtor is not exposed to a penalty after reasonably believing that late performance has been accepted as sufficient.

Accrued penalties for delay therefore survive subsequent developments in the contractual relationship – including belated performance or even termination – just as accrued damages and statutory default interest

27 The impossibility of directly stipulating and enforcing an undertaking to perform or refrain from an act arose from the *omnis condemnatio pecuniaria* principle, under which every judgment enforcing a contractual obligation had to be framed as an order to pay a sum of money. Because markets were underdeveloped by modern standards, it was often difficult to determine the monetary value of specific acts or omissions. Milošević, M., 2005, p. 294.

continue to exist despite the contract's extinction. Termination releases the parties only from unperformed future obligations; it does not retroactively erase the legal consequences generated by the debtor's prior default.

This reasoning aligns with the broader principle that termination does not erase accrued default interest or damages; by the same logic, the penalty that has already arisen likewise remains intact. To hold otherwise would deprive the penalty clause of its practical and normative function, allowing a debtor to escape the agreed consequence of delay simply by provoking termination. Such an outcome would erode contractual discipline, undermine the compensatory role of the penalty as a guaranteed minimum recovery, and distort the equilibrium of remedies under the LO by rewarding delay rather than deterring it.

2.6. JUDICIAL CONTROL AND RELATED DOCTRINES

Serbian law recognizes limited judicial control over contractual penalties. Under Article 274 LO, the court may, solely upon the debtor's request, reduce a penalty that is disproportionately high in relation to the value and significance of the secured obligation; the court cannot increase the penalty, nor may it reduce it *ex officio*. Judicial moderation is therefore exceptional in nature; it is designed not to rewrite the parties' economic bargain, but to prevent abuse in situations where the agreed sanction would be manifestly excessive in light of what the parties could reasonably have foreseen at the time of contracting. A penalty is not excessive merely because it exceeds the creditor's actual damage; such an excess is inherent to the clause's punitive and preventive functions. Moderation is reserved for cases of clear and serious disproportion, and reduction to the amount of actual loss would efface the clause's primary purpose by transforming it into a purely compensatory mechanism.

Comparative law demonstrates varying degrees of judicial intervention. French law authorizes the courts not only to reduce a penalty that is manifestly excessive but also to increase a derisory one, and to adjust it proportionally in cases of partial performance.²⁸ Serbian law deliberately

28 Art. 1231-5 of the French Civil Code. The French Civil Code does not prohibit agreeing on a penalty for breach of a monetary obligation. Under German law, the court may only reduce the contractual penalty to a reasonable amount, and not *ex officio*, but solely at the debtor's request: § 344 BGB; Dannemann, G., Schulze, R., 2020, pp. 562–563. In Serbian law, the court has no statutory authority to reduce the agreed amount of the contractual penalty on its own motion in the absence of a debtor's request. See Commercial Appellate Court, Decision Pž 117/2014(2) of 13 May 2015. The court is likewise not empowered to increase the contractual penalty, even at the creditor's request, nor should the absence of damage constitute grounds for reduc-

rejects such extensive judicial powers; it confines judicial control strictly to downward revision upon the debtor's initiative, reflecting a principled commitment to contractual autonomy and to respecting the parties' allocation of risk.

Legal doctrine emphasizes that, in order to avoid lengthy disputes, the parties accept a certain degree of aleatory risk when agreeing on a contractual penalty, allowing the actual loss to turn out higher or lower than their initial expectations. It follows that the court should assess the disproportionality between the agreed penalty and the foreseeable damage as of the time of contracting, and if the disproportionality is not excessive, the court should refrain from intervening.²⁹

The prevailing view in modern Serbian legal theory is that the court's power to reduce a contractual penalty is exceptional and must therefore be applied restrictively. Not every excessive penalty warrants reduction; only a manifest disproportionality justifies intervention. In such cases, the court may reduce the penalty only when payment of the full agreed amount would defeat its essential purpose and lead to unjust enrichment of the creditor at the debtor's expense.³⁰

Serbian doctrine also distinguishes contractual penalties from forfeiture clauses, which is another form of internal contractual sanction. A forfeiture clause does not impose a new secondary obligation on the debtor; rather, it provides that the debtor will lose an existing contractual right if he fails to perform the secured obligation as agreed. In the event of breach, a penalty gives rise to a new obligation to pay a specified sum or confer another pecuniary benefit, whereas a forfeiture clause results in the extinction of a right the debtor already possessed. Both mechanisms are admissible under the principle of freedom of contract and must operate within the bounds of good faith and public policy.

tion, as the creditor is entitled to the penalty irrespective of whether any damage has been suffered. See Karanikić Mirić, M., 2025, pp. 804–805. “A contractual penalty constitutes presumed damages and, as such, may or may not correspond to the actual amount of loss suffered by the creditor as a result of the debtor's nonperformance. It cannot, however, be set at an excessively high level so as to become a means of unjust enrichment for the creditor. [...] The parameters for determining the contractual penalty must be assessed in light of the circumstances of each individual case.” Commercial Appellate Court, Decision Pž 2804/22 of 29 March 2023. In addition, “[i]n reducing the contractual penalty, the court shall also take into account the extent of the damage suffered by the other party as a result of the delay in performance of the contractual obligation.” District Court in Valjevo, Decision Gž 1368/2004 of 29 November 2004.

29 Pavić, D., 2000, p. 395.

30 Hiber, D., Živković, M., 2015, pp. 461–462 (citing further authorities); Pavić, D., 2000, p. 395 (the courts only exceptionally exercise their power to intervene in respect of the amount of the contractual penalty).

Forfeiture clauses need not be punitive. They may perform a transactional function by restoring the equilibrium of interests disturbed by one party's conduct – for example, by providing that the seller forfeits part of the price if delivery is late; that all remaining installments become immediately due if the buyer delays in payment; or that the buyer loses a guarantee right if he breaches a contractual duty of notification. Their legitimacy stems from their role in structuring risk and organizing the internal balance of the contract, not from sanctioning the debtor.

3. THE INTERACTION BETWEEN DELAY, TERMINATION AND THE SURVIVAL OF THE CONTRACTUAL PENALTY

3.1. THE DOCTRINAL CONTROVERSY: DOES THE PENALTY FOR DELAY SURVIVE TERMINATION?

The debate in Serbian doctrine has centered on whether a contractual penalty for delay may continue to operate once the contract has been terminated for breach. One strand of scholarship denies the survival of the penalty, arguing that delay presupposes the possibility of eventual performance. Once termination occurs, performance is no longer owed, and the debtor's conduct must therefore be characterized not as delay but as nonperformance.³¹ On this view, the temporal interval that defines delay – the period between maturity and performance – cannot exist where the obligation is never fulfilled. Termination is said to convert delay into nonperformance, thereby extinguishing the basis for the penalty. Because the creditor, by terminating the contract, elects the remedy for nonperformance, he may no longer rely on a penalty stipulated exclusively for delay.

This position rests on two conceptual premises: the strict bifurcation between delay and nonperformance, and the view that termination retroactively requalifies the debtor's conduct. On this account, "termination for delay" becomes a contradiction in terms, because delay is legally intelligible only where performance ultimately occurs. The conclusion is therefore that a penalty stipulated solely for delay must fall away once the contract is terminated. Even the possibility that the creditor might claim the penalty for the period between maturity and termination is rejected. By characterizing the breach as nonperformance – which is said to be implicit in the act of termination – the creditor is thought to forgo reliance on the legal consequences of delay, including the penalty. Based on this reasoning, a clause providing only for a penalty for delay cannot

31 Hiber, D., Živković, M., 2015, pp. 422–424.

be extended or transposed to cover nonperformance. In this paper, a different position is advanced.

3.2. DELAY AS A TEMPORALLY BOUNDED STATE AND ITS ROLE IN TRIGGERING THE PENALTY

The position outlined above overlooks a fundamental temporal feature of default: delay is a legally relevant state that begins the moment performance falls due and persists until the obligation is either performed or extinguished, including by termination of the contract. The debtor remains in delay throughout this entire period. Termination does not retroactively negate the fact that the debtor was in delay for a certain period of time, nor does it extinguish the legal consequences that arose during that period.

The LO treats delay as a legally defined state that arises automatically upon failure to perform when due and attaches legal effects to that state irrespective of the contract's subsequent fate. Default interest, damages for delay and contractual penalties accrue from the moment delay begins and do not vanish merely because the contract is later terminated. This is illustrated clearly in the regime governing monetary obligations. Statutory default interest accrues from the onset of delay until performance or until the obligation otherwise ceases, including through termination. Serbian law has never suggested that interest accrued before termination evaporates at that point; on the contrary, it remains fully payable as a matured claim.

The same logic applies to contractual penalties for delay in nonmonetary obligations. The penalty accrues for as long as the debtor is in delay and survives termination to the extent that it had already matured during the pre-termination period.

3.3. ACCESSORINESS, MATURITY AND THE AUTONOMY OF THE PENALTY

The next argument that requires consideration is the claim that the penalty, being accessory to the secured obligation, cannot survive once that obligation has been extinguished through termination. This view misconceives the operation of accessoriness within the regime of penalty clauses. Accessoriness governs the existence of the penalty clause as a contractual mechanism: the penalty cannot subsist if the secured obligation never arose or ceased for reasons unrelated to breach – for example, if the obligation is void, if the parties mutually terminate the contract, or if the

creditor remits the debt. But once the obligation has been breached and delay has occurred, the penalty crystallizes into a matured claim, typically of a monetary nature. From that point onwards, its operation is autonomous: it depends not on the continued existence of the secured obligation but on the historical fact of the debtor's default.

Accessoriness thus explains why the penalty clause does not produce effects if the principal obligation never came into being or ceased for reasons unrelated to breach; it does not support the notion that an already accrued penalty is extinguished merely because the creditor has exercised the statutory remedy of termination. Rights already acquired through prior default, including accrued damages, default interest and penalties, are unaffected by termination.

Judicial practice confirms that termination does not extinguish rights already accrued through the debtor's delay. Courts have emphasized that extinguishing such rights would defeat the purpose of the penalty clause and contradict the structure of the LO, under which termination has no retroactive effect on matured claims.³²

32 Supreme Court of Cassation, Decision Prevlj 299/2017 of 3 October 2017. The Court held that the right to a contractual penalty cannot be excluded merely because the contract whose performance it secures has been terminated. If termination were to entail the loss of the penalty, enforcement of penalty would be entirely precluded and the very purpose of the institution defeated. The Court further noted that if termination of the principal contract were to extinguish the penalty as an accessory right, a penalty for nonperformance under fixed-term contracts could never be collected, since such contracts expire by operation of law once the time for performance has lapsed. Finally, the Court held that a claim for payment of a contractual penalty cannot be made conditional upon prior termination of the principal contract. The operative part of this decision addresses only the contractual penalty for nonperformance, as this was the subject of the dispute; however, in its reasoning the Court analyzes the contractual penalty in general terms and extends its analysis to both nonperformance and delay. The same general position – that termination does not extinguish accrued rights to a contractual penalty – has been adopted in cases concerning penalties for nonperformance, including Supreme Court of Cassation, Decision Prevlj 390/2017 of 12 April 2018; Supreme Court of Cassation, Decision Prevlj 73/2020 of 4 June 2020; and Supreme Court of Cassation, Decision Prevlj 301/2020 of 17 December 2020.

See also Supreme Court of Cassation, Decision Prevlj 63/2017 of 16 March 2017. The case concerned a contractual penalty for delay: the contractor failed to complete the works within the agreed time limit and remained in delay until the termination of the contract. The Court expressly qualified the breach as delay and calculated the period of delay from the contractual maturity of the obligation until the return of the construction site. It held that termination does not extinguish accrued rights to a contractual penalty, stating that “the claim that the plaintiff loses the right to a contractual penalty upon termination of the contract is legally unfounded. A contractual penalty, by its very nature, represents a contractually determined form of presumed damages, as follows unequivocally from Art. 275 LO. Accordingly, pursuant to Art.

The structure of the LO confirms that amounts accruing during delay operate as matured and autonomous debts. Under Serbian law, the assignment of rights transfers ancillary rights together with the principal claim.³³ In addition, there is a rebuttable presumption that any matured but unpaid default interest passes to the assignee with the principal claim.³⁴ By contrast, in an assumption of debt the new debtor is not liable for unpaid interest that matured before the assumption, unless otherwise agreed.³⁵ Both provisions treat accrued ancillary amounts as independent debts and regulate their allocation accordingly. This reflects the mature and self-standing character of such claims: once they have fallen due, they are no longer mere accessories to a continuing obligation but autonomous monetary debts whose legal destiny depends on the mechanism applied. The same approach governs assignments of contract, to which the rules on ancillary rights in the context of debt assumption apply *mutatis mutandis*.³⁶ This framework illustrates the broader principle that once an ancillary amount has matured it exists as an autonomous debt, independent of the future fate of the underlying obligation.

3.4. CUMULATION AND THE DOCTRINAL SEPARATION OF DELAY FROM NONPERFORMANCE

Concerns about the alleged indeterminacy of penalties for delay do not withstand scrutiny. Daily penalties, in particular, rely on a fixed contractual formula – commonly a percentage or a fixed amount per day – and on objective temporal reference points. The fact that the precise termination date is not known in advance does not render the penalty indeterminable, nor does temporary uncertainty as to whether the breach will ultimately manifest as mere delay or as definitive nonperformance affect its determinability. What matters is that the contractual formula

132(1) LO, the plaintiff retains the right to the contractually stipulated amount of presumed damages even after termination of the contract in which the penalty was agreed.” Notably, the Court also awarded the contractual penalty for a short period following termination, thus going beyond the position advanced in this article, which is confined to the survival of penalties accrued prior to termination.

See also Commercial Court in Požarevac, Decision P 82/21 of 3 September 2021, upheld by the Commercial Appellate Court, Pž 10626/21 of 26 October 2022. The courts confirmed that when the claimant’s delay led to termination of the contract, the defendant remained entitled to calculate the contractual penalty for each day of delay in accordance with the contract and Art. 273 LO.

33 Art. 437(1) LO.

34 Art. 437(3) LO.

35 Art. 449(2) LO.

36 Art. 145(4) LO.

enables the amount of the penalty to be objectively calculated once delay begins; the law does not require the creditor to know the duration of the delay in advance, only that the amount be ascertainable on the basis of objective criteria. The structure is identical for statutory default interest: the amount of interest is determinable even though the duration of delay depends on future events, including termination. Penalty clauses tied to other calculable bases – such as percentages of the contract price – are likewise sufficiently determinate so long as the formula is objective and the variables are ascertainable at the moment delay begins.

When the parties have agreed only a penalty for delay, that penalty applies for the duration of the delay. A penalty for nonperformance applies only if the parties have expressly provided for one. The two mechanisms are mutually exclusive in their temporal and functional scope. There is no room for cumulating penalties for delay and for nonperformance unless the contract clearly provides for separate penalties for these two distinct breaches.³⁷

A further question is whether a penalty that has been expressly agreed for the period between maturity and termination might, in substance, operate as a disguised penalty for nonperformance, thereby collapsing the distinction between the two regimes. This conflates two conceptually distinct categories: a penalty for delay sanctions lateness; a penalty for nonperformance sanctions definitive failure. Termination does not erase the fact that lateness occurred before the contractual relationship ended. Denying the creditor the right to recover the penalty for the pre-termination period would create an unwarranted gap in protection and undermine both the preventive and compensatory purposes of the penalty clause.

3.5. FUNCTIONAL AND SYSTEMIC ARGUMENTS IN FAVOR OF SURVIVAL

Practical considerations reinforce this doctrinal analysis. In many commercial relationships, termination is not the creditor's first resort, but a last resort. A creditor may be compelled to terminate in order to release himself from a stalled contractual relationship and recover what he has already performed. If termination extinguished accrued penalties, the debtor would effectively be rewarded for prolonged default: he could delay performance indefinitely, knowing that the penalty would disappear once the creditor finally exercised the right to terminate. The creditor would

37 Also, when it suits their interests, the parties may agree on two penalties – one for delay and one for nonperformance of the same obligation. See Strezovski, S., 1983, p. 948.

face a structural dilemma – either remain bound to preserve the penalty or terminate and lose it.

Such a dilemma is not compatible with the remedial structure of the LO and its principles of good faith and prohibition of abuse of rights. If termination extinguished the penalty, the creditor would have to maintain an unproductive contractual relationship solely to preserve a claim that has already accrued. If he terminated, the penalty would disappear; and if he had already been paid the penalty, it could be argued that he would have to return it because the basis for it no longer existed. The system would therefore force the creditor either to litigate for the penalty, while remaining bound to a nonfunctioning contract, or to abandon the penalty altogether. This would be inconsistent with the purpose of termination under the LO, which is to restore balance to the relationship, not to deprive the creditor of rights that have already matured.

3.6. THE LO FRAMEWORK: DELAY, TERMINATION AND EXPRESS EXTINCTION OF THE PENALTY

The statutory framework of the LO confirms this analysis. Article 324 defines delay as arising at the moment the debtor fails to perform when due or, when no deadline is fixed, at the moment when the creditor requests performance. Delay does not depend on whether performance will ultimately occur; it is established at maturity and continues until the obligation is performed or the contract ends. Its legal consequences arise at the same moment and persist irrespective of how the contractual relationship terminates. Default interest, damages for delay, and contractual penalties all arise from the state of delay, and none is extinguished by later performance or termination.

Article 273(5) LO expressly regulates the only situation in which the right to the penalty for delay is lost: when the creditor accepts late performance without reserving the right to the penalty.³⁸ Termination is not acceptance of performance and therefore does not fall within this exception. The LO provides only this specific ground for loss of the penalty, and that rule cannot be extended to termination.³⁹

38 Konstantinović was expressly opposed to this rule, noting that such a loss of rights constitutes an unwelcome surprise for the creditor and did not accord with Yugoslav commercial practice at the time. He therefore omitted it from his Draft Code of Obligations and Contracts (*Skica za zakonik o obligacijama i ugovorima*), which served as a model for the LO. See Stanković, V., Član 273. Poveriočeva prava, in: Perović, S., (ed.), 1995, *Komentar Zakona o obligacionim odnosima*, Belgrade, Savremena administracija, p. 635.

39 The LO adopts a restrictive approach to the extinction of creditor rights. Where the legislator intends extinction, it says so expressly (e.g., Art. 273(5)). The absence of

Taken together, these elements show that a contractual penalty for delay survives termination, with respect to the period during which the debtor was already in delay. Termination stops further accrual of the penalty but cannot retroactively extinguish rights that have already matured. This conclusion aligns with the structure of the LO, doctrinal analysis, judicial practice, functional considerations and the foundational principles of Serbian contract law.

4. THE CASE FOR THE SURVIVAL OF THE PENALTY FOR DELAY

The discussion that follows sets out the principal reasons supporting the survival of the penalty for delay. Some overlap with the preceding analysis is inevitable. The argument proceeds along four dimensions: the doctrinal structure of the LO, the temporal framework and progressive accrual of the penalty, considerations of public policy, good faith and commercial logic, and the broader scholarly consensus on the functional rationale of the penalty. Taken together, these considerations point to a single conclusion: the penalty for delay survives termination.

4.1. THE DOCTRINAL FOUNDATIONS OF SURVIVAL

The position advanced in this paper accords with the structure of the LO and with the prevailing view in Serbian scholarship. The essential point is straightforward: the creditor's right to a contractual penalty for delay arises at the moment the debtor falls into delay, and once that right has matured, it cannot be extinguished by termination for breach. Termination affects only obligations and duties for the future; it does not undo rights that have already crystallized as sanctions for the debtor's prior breach, such as accrued default interest, damages for delay already incurred, or contractual penalties that have matured.

Article 324 LO defines delay as arising at the moment the debtor fails to perform an obligation when due or, if no fixed due date exists, when the creditor requests performance. Delay is therefore a legally relevant state that does not depend on whether performance will ever occur. Its legal consequences are attached immediately and automatically: default interest, damages for delay and penalties agreed for delay begin to operate at that moment. Their existence depends on the historical fact of the delay,

any such rule for termination is therefore not accidental but reflects a deliberate legislative decision to preserve matured rights.

not on the eventual fate of the contract. The legal system treats delay as a self-standing legal fact whose consequences cannot be invalidated by a later elective remedy, such as termination.

4.2. TEMPORAL STRUCTURE AND THE PROGRESSIVE MATURITY OF THE PENALTY

The temporal structure of the delay penalty likewise supports its survival. Once the debtor falls into delay, the penalty begins to accrue progressively in accordance with the agreed formula – whether as a lump sum, a percentage, a daily amount, or in another objectively determinable manner. Each unit of time spent in delay generates a fixed and ascertainable portion of the final amount. Termination cannot retroactively erase periods of delay that have already elapsed, and the penalty that matured during those periods cannot be extinguished by termination. By its very nature, the penalty either matures in full at the onset of delay (when agreed as a single amount) or accrues incrementally over time (when agreed as a progressive penalty), and each accrued portion constitutes a completed legal fact unaffected by the subsequent termination of the contract.

The principle of accessoriness under Article 272 LO does not undermine this reasoning. As previously noted, the penalty agreement cannot subsist where the secured obligation never arose or ceased to exist for reasons for which the debtor is not responsible, such as impossibility, fault of the creditor, remission, or mutual termination. However, once a delay has occurred and the penalty has begun to mature, each installment becomes an autonomous (usually monetary) claim. Article 272(2) LO states only that the penalty does not arise when the debtor is not responsible for the nonperformance or delay. It does not provide that penalties already accrued disappear upon termination for breach. Accessoriness therefore governs the inception of the penalty, not the elimination of rights that have already matured as a result of default.

4.3. PUBLIC POLICY, GOOD FAITH AND COMMERCIAL LOGIC

Public policy considerations likewise support the conclusion that accrued penalties survive termination. As previously noted, extinguishing matured penalties would reward the debtor for remaining in delay until the creditor is compelled to terminate and would penalize the creditor for exercising a statutory remedy. Such an outcome would contradict good faith and the prohibition of abuse of rights and would distort the equilib-

rium among damages, default interest and penalties. That equilibrium reflects the LO's system of cumulative but nonoverlapping consequences of delay: default interest compensates for the time-value of money; damages compensate for actual loss; and the penalty serves both penal and compensatory functions in the realm of nonmonetary obligations. Removing the penalty while leaving the other consequences intact would disrupt this balance and weaken the position of the creditor of a nonmonetary obligation during the very period in which the debtor was in breach.

It also follows that penalties already paid cannot be reclaimed merely because the contract later ends or performance is eventually rendered. Extinguishing accrued penalties would create an unjustified asymmetry: the debtor would be relieved of liability for the period of default, while the creditor would still bear the losses and time-risk associated with that same period. The LO favors remedies that deter breach and stabilize contractual performance, and the survival of accrued penalties supports this broader preventive function.

4.4. SCHOLARLY SUPPORT AND THE FUNCTIONAL RATIONALE OF THE PENALTY

According to one view, however, when a penalty has been agreed for delay rather than for nonperformance, and the contract from which the secured obligation arises is subsequently terminated for nonperformance, the obligation to pay the penalty is said to cease.⁴⁰

Nevertheless, a substantial strand of Serbian scholarship supports the conclusion that the creditor does not lose the right to a contractual penalty for delay upon terminating the contract from which the secured obligation arises. Although the relevant analyses are dispersed across different works and written in varying contexts, they converge on the core position that the right to the penalty is founded on past default and not on the continued existence of the contractual relationship.

The earliest and most influential formulation appears in Konstantinović's treatment of contractual penalties, where he emphasized that, for the creditor's entitlement, it is sufficient that the debtor has fallen into delay. He further stressed that this condition must in fact be met: delay presupposes failure to perform when due, without lawful justification, and

40 Hiber, D., Živković, M., 2015, p. 424. Grujić explicitly argues that a penalty for delay arises only if the debtor belatedly performs and that it "can be collected only together with the principal obligation which it secures." See Grujić, N., 2016, *Pravo na ugovornu kaznu u slučaju raskida ugovora zbog neispunjenja*, *Pravni zapisi*, No. 2, pp. 341–342.

the debtor is not deemed to be in delay if performance was prevented by force majeure or by the creditor's own fault. A debtor who invokes such causes to deny delay and avoid liability must, of course, prove that the delay resulted from them. The decisive point for present purposes is that, once a delay occurs, the creditor's entitlement to the penalty arises independently of the subsequent fate of the contract.⁴¹

In a later and more explicit analysis, Jankovec directly addressed the question of survival upon termination. He argued that where a penalty has been stipulated for late performance and the creditor terminates the contract on account of that delay, the debtor must, at the creditor's request, pay the penalty for the entire period of delay up to termination. The debtor cannot rely on the fact that the contract has been terminated, nor on the absence of a penalty agreed for that eventuality, to resist payment. Jankovec further noted that any damage resulting from termination constitutes a separate and independent claim for compensation, provided that the debtor is liable for the nonperformance. For present purposes, his conclusion is categorical: termination does not extinguish the creditor's accrued right to the penalty.⁴²

Marković likewise maintained that once the right to a contractual penalty has matured, it acquires an independent legal existence and no longer depends on the continued existence of the principal right. It does not automatically transfer with the principal right in the event of an assignment, unless this has been expressly agreed.⁴³ This view underscores the autonomy of the matured penalty: it becomes a self-standing monetary claim generated by past default, not a mere accessory mechanically following the future trajectory of the principal obligation.

The same approach is adopted by Jakšić and Stojanović.⁴⁴ They observe that once the contractual penalty has matured, it becomes an independent

41 Konstantinović, M., 1982, *Priroda ugovorne kazne – Smanjenje od strane suda*, *Anali Pravnog fakulteta u Beogradu*, Nos. 3–4, p. 521. In a similar vein, other authors emphasize that the creditor acquires the right to demand payment of the contractual penalty for delay as soon as the debtor falls into default. See Đorđević, Ž., Stanković, V., 1987, pp. 661–662.

42 “Where a penalty has been stipulated for the debtor's late performance of a contractual obligation, and the creditor terminates the contract on account of that delay, the debtor must, at the creditor's request, pay the penalty for the period of delay up to the termination. The debtor cannot argue that the contract was terminated and that no penalty was stipulated for that eventuality. Any damage resulting from termination should give rise to a separate claim for compensation, independent of the contractual penalty for delay, provided that the debtor is liable for the nonperformance.” Jankovec, I., 1993, p. 305.

43 Marković, L., 1997, *Obligaciono pravo*, Belgrade, Službeni list SRJ, p. 264.

44 Jakšić, A., Stojanović, S., 1995, *Elementi za jedno ugovorno pravo*, Belgrade, self-published, p. 303.

obligation in its own right. Even if the principal obligation is subsequently extinguished – whether through performance, remission, or termination – the creditor’s right to the penalty continues to subsist. Their analysis reinforces the point that the operative moment for the penalty is the occurrence of delay itself, not the later evolution of the contractual relationship.

The most recent and detailed contribution comes from Radovanović and Mišćević, who emphasize that the creditor should not be deprived of the possibility of asserting an independent claim for a contractual penalty for delay, even when no belated performance ever occurs. In their view, the right to the penalty for delay arises from the fact of the delay itself and is not contingent on eventual late performance.⁴⁵ This position directly supports the survival thesis: if the right to the penalty arises irrespective of whether performance is ever rendered, it cannot logically depend on whether the contract remains in force.

Taken together, these authors – writing across different periods and within different doctrinal frameworks – point consistently in the same direction. Their analyses collectively affirm that the penalty for delay arises from the historical fact of default, matures progressively as delay continues, and survives irrespective of whether the contractual relationship later ends.

The practical consequences would be severe: the creditor would have to choose between remaining bound to a paralyzed contract and forfeiting the penalty, while the debtor would be encouraged to prolong delay. Such an incentive structure contradicts both the deterrent and compensatory functions of the penalty clause and undermines good faith and contractual discipline. Restitution-related problems would also arise: if the penalties accrued before termination were extinguished, a creditor who had already received and used the penalty might be compelled to return it on the basis that its legal grounds had disappeared.

In commercial practice, delay penalties are drafted precisely because they compensate for time-risk, encourage punctuality, and provide a predictable minimum of recovery. Termination is often the only effective means for a creditor to exit a nonperforming contractual relationship. To eliminate penalties at the moment when delay becomes most harmful would erode the economic logic of the clause and contradict legitimate contractual expectations.

A comparative perspective reinforces this conclusion. German law, whose doctrine on the *Vertragsstrafe* is among the most developed in continental systems, provides a clear illustration: a contractual penalty already

45 Radovanović, S., Mišćević, N., 2017, O realizaciji ugovora o ugovornoj kazni zaključenog u formi javnobeležničkog zapisa, *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4, pp. 1613–1616.

incurred as a result of delay generally survives withdrawal or termination. Termination brings the primary obligation of performance to an end, but it does not extinguish liabilities already triggered by breach.⁴⁶ Under §§ 339–345 BGB, the contractual penalty is accessory at the moment of its inception: it cannot arise if the principal obligation never existed or has ceased for reasons unrelated to breach. Once incurred, however, it becomes an autonomous claim. As German commentary explains, the contractual penalty is a conditionally suspended promise of payment that becomes due when the debtor fails to perform properly; it is accessory only until the penalty arises. If the principal obligation never arose or has already ceased, the penalty cannot arise – but once it has arisen, it is independent of the continued existence of the principal obligation, it may be transferred separately, and it may still be claimed even if the principal obligation ceases to exist *ex nunc* through withdrawal or termination.⁴⁷ This structure closely parallels the logic of the Serbian LO and supports the conclusion that accrued penalties are breach-based monetary claims that survive termination and are unaffected by the creditor's exercise of a future-oriented remedy.

5. CONCLUSION

The analysis presented in this paper shows that the contractual penalty for delay occupies a structurally coherent and functionally important place within the remedial architecture of the Serbian LO. Its survival after

46 “Where, in a property developer’s contract, the buyer exercises a contractually granted right of withdrawal because the contractor failed to complete the building on time and in an acceptance-ready condition, the withdrawal does not extinguish a contractual penalty that has already accrued as a result of the contractor’s delay, unless the parties have agreed otherwise.” BGH, Urteil vom 22. Mai 2025 – VII ZR 129/24, (https://www.bundesgerichtshof.de/SharedDocs/Entscheidungen/DE/Zivilsenate/VII_ZS/2024/VII_ZR_129-24.pdf?__blob=publicationFile&v=1, 25. 2. 2026). See also: When the creditor is entitled to terminate the contract for breach, he may do so without losing the right to claim the penalty. Faust, F., 2015, Contractual Penalties in German Law, *European Review of Private Law*, Vol. 23, No. 3, p. 295.

47 The incurrence of the contractual penalty presupposes the improper performance of a principal obligation; the contractual penalty is therefore accessory only until it comes into existence. If the principal obligation did not validly arise or has ceased to exist, the claim to the penalty cannot arise. The debtor of the principal obligation and of the contractual penalty must always be the same person. Upon assignment of the principal claim, the claim to the penalty is transferred in accordance with § 401 BGB. Once the claim to the penalty has arisen, however, it is independent of the continued existence of the principal obligation; it may be assigned separately and may still be asserted, even if the principal obligation ceases to exist *ex nunc*. See Wolff, R., 2022, Rn 233.

termination is not an anomaly or an interpretative extension, but the natural consequence of the conceptual foundations of Serbian contract law: the temporal nature of delay, the progressive accrual of its effects, the autonomous status acquired by a matured penalty, and the consistent legislative treatment of legal consequences of default. Delay, as defined in Article 324 LO, arises the moment the debtor fails to perform when due. Its legal consequences attach immediately and continue regardless of the later trajectory of the contractual relationship. The doctrinal structure reinforces this outcome. Article 273(5) LO identifies a single, narrowly framed situation in which the creditor loses the right to a penalty for delay – acceptance of late performance without a timely reservation of rights. Termination does not fall within this rule. Extending the provision by analogy would contradict its text, undermine its purpose, and disturb the statutory allocation of risks. Likewise, Article 272 LO on accessoriness governs the inception of the penalty clause, not the retroactive extinction of matured independent monetary claims. Once delay has occurred and the penalty begins to accrue, each portion becomes an autonomous monetary claim. The same applies when the penalty has been agreed as a single amount; termination does not eliminate sanctions for delay that have already matured.

The judicial authority supports the same reading. The Supreme Court of Cassation has held that penalty claims accrued before termination survive and remain enforceable. This aligns with the long-established position in Serbian scholarship that the penalty right arises from the fact of the delay itself, not from the persistence of the contractual relationship or the eventual performance of the secured obligation.

Commercial and policy considerations point in the same direction. Extinguishing accrued penalties upon termination would reward prolonged default and place the creditor in an untenable position. To preserve the penalty, the creditor would need to remain bound to a nonperforming contract, often for lengthy periods; by terminating, the creditor would forfeit the very mechanism designed to internalize the cost of delay. Such a result would incentivize strategic nonperformance and weaken contractual discipline; the penalty clause would lose its deterrent and protective functions precisely when delay is most harmful.

Comparative law confirms this understanding. German law adopts the same structure: the penalty is accessory only until it arises; once incurred, it becomes an autonomous claim. Even if the principal obligation later ceases to exist through withdrawal or termination, the accrued claim to the penalty remains intact and may be assigned or enforced independently.

The internal coherence of the LO offers further confirmation. Default interest, damages and contractual penalties all derive from the same conceptual point: the debtor's failure to perform on time. No such right is extinguished by termination in so far as it has already arisen. To extinguish the penalty alone would fragment the remedial system and introduce an asymmetry unsupported by the statute; nothing in the LO suggests such an exception. For these reasons, a contractual penalty for delay survives termination of the contract for breach: termination halts further accrual, but does not extinguish what has already matured.

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DEJSTVO RASKIDA UGOVORA NA DOSPELU UGOVORNU KAZNU ZA ZADOCNJENJE U SRPSKOM PRAVU

Marija Karanikić Mirić

APSTRAKT

U radu se ispituje da li poverilac gubi pravo na dospelu ugovornu kaznu za zadocnjenje ako raskine ugovor zbog neispunjenja. Zakonom nije propisano da to pravo prestaje samim raskidom. Iako je ugovorna kazna akcesorna u svome nastanku, o dospeću ona poprima karakter samostalnog potraživanja. Na to upućuju sistemsko tumačenje zakonskih odredaba, pravna doktrina, shvatanja sudova, primeri iz uporednog prava i funkcija ugovorne kazne u poslovnoj praksi. Kao što raskid zbog neispunjenja ne utiče na dospеле iznose zatezne kamate i naknade štete, tako ne utiče ni na dospeli iznos ugovorne kazne za zadocnjenje, već samo sprečava njegovo povećavanje. Suprotno rešenje narušilo bi sistemsku povezanost pravnih posledica docnje i stavilo poverioca pred izbor između raskida radi povraćaja onoga što je već dao po osnovu ugovora i očuvanja prava na ugovornu kaznu.

Ključne reči: ugovorna kazna, zadocnjenje, raskid, Zakon o obligacionim odnosima, dospela potraživanja.

Article History:

Received: 25 February 2026

Accepted: 10 June 2026