UNPREDICTABILITY IN BANKING CONTRACTS. UNFAIR TERMS

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Abstract

In accordance with the provisions of Article 1270, paragraph 1 of the Civil Code, the valid contract concluded between the parties bears a juridical power equal to the law. The condition is met in a situation in which the legal act is validly concluded, in accordance with the legal provisions. Although the parties in such a contract may not derogate from the mandatory provisions of the law during the performance of contracts, within the legal system, however, certain situations may occur that determine whether courts shall assess the balance of benefits between contractors. This article is calling into question the legal character of unpredictability, the assessment method of the courts, as well as the frequency of this phenomenon in our national judicial system.

Keywords: *contract, credit, consumer, unpredictability.*

JEL Classification: *K12*

1. Introduction

As regards the implementation of the principle of the binding force of contracts[2], we have encountered in doctrine, but also in court practice, legal situations due to which a review of the benefits of parties may occur even in the absence of their common will. In this respect we have in view particularly the contracts with successive performance, as well as those affected by standstill periods of execution on which actuates a random event. That random event that may affect subsequent contracts may be represented in particular by the existence of monetary fluctuations that affect the ability of the parties to configure the development of their future obligations. Thus, if at the time a contract is concluded the parties are fully able to undertake responsibility knowing the realities of the moment, once the purchasing power of the currency depreciates all contractual circumstances change. We are, from this moment on, in the legal field of unpredictability, as between the parties intervened a marked imbalance between considerations. Of course not only currency fluctuations may determine the modification in the legal balance of benefits, as are included here some methods of legal interventionism imposed by the state, which increases the cost of these benefits by default.

From the point of view of the way unpredictability[3] may be identified, we note that this only occurs in the contracts for consideration[4], when due to the appearance of some overriding causes the balance of parties' benefits shall be affected to such an extent that one of them is prejudiced. Of course that in these circumstances the parties may renegotiate the contract and therefore they can change it by agreement, legally balancing the benefits. The conventional review of a contract may take place either through indexation clauses, or through the introduction by the parties of some indexing clauses that shall carry with them an obligation from the parties to periodically review the contract. However, in the absence of such clauses, whenever there is a serious imbalance between the benefits of the parties, the revision can only be legal. Certainly the judicial review is limited[5], and can operate in restrictive conditions, in view of the fact that, in accordance with the provisions of Article 1271 of the Civil Code the parties are held to execute their benefits regardless of whether their obligation has become more onerous. For these reasons,

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[2] Stătescu Constantin, Bîrsan Corneliu, *Drept civil. Teoria general a obligaţiilor*, All Beck, Bucharest, 2000, p.59.

[3] A Georgescu Banc, *Noul Cod Civil. Note şi explicaţii*, C.H.Beck, Bucharest, 2011, p.478;

[4] Stănciulescu Liviu, *Curs de drept civil.Contracte*, Hamangiu, Bucharest, 2012, p.24 ;

[5] Baias Flavius Antoniu, Chebeleu Eugen, Constantinivici Rodica, Macovei Ioan, *Noul Cod Civil. Comentariu pe articole*, C.H.Beck, Bucharest, 2012, p.1649;

the revision shall take place when the change in circumstances occurred after the conclusion of the contract and it could have not been reasonably foreseen by the parties. In the same way, the debtor is requested not to have taken the risk of such events, if at all, and if they occurred, to have tried within a reasonable period to try and renegotiate with the other party.

If the review of the contract shall be made judicially, in accordance with the conditions referred to above, the effects shall either be adapting it for the purpose of redistributing the risks between the parties[6], or terminating[7] the contract under the conditions[8] specified by a judge.

2. Bank credit agreement

In judicial practice, the contract for personal loans by mortgages has a special legal nature[9], the debtor's obligation consisting mainly in repaying the loan within the time limits specified in the document. As regards payments due, the change of the debtor's financial opportunities can subscribe to the unpredictability theory, especially when initially the debtor has respected even partially its obligations. The abusive character of some contractual clauses determines according to the theory of unpredictability a significant imbalance between the parties to such contracts.

Under this aspect, if a current account has been opened for the debtor, in which payments have to be deposited then the termination of these deposits after the period of maturity of the credit may be based on a broken equilibrium between the considerations of the two parties. Thus, if the debtor has not paid in full the remaining credits at the maturity date, but partial installments were still carried out with a certain frequency, the debtor shall be able to request in court the balancing of benefits for both contractual parties. At the basis of this request are the consequences of the economic crisis, the debtor lacking fault in execution, as well as the acceptance of partial payments by the creditor.

In this case, the creditor, albeit all the payments made by the borrower have continued and have been accepted, declares at a given time in writing that the credit expired, refusing to continue collection. The debtor requests from the creditor a loan repayment schedule, as well as resetting the credit on account for the purpose of continuing payments, but all applications remained unanswered. Instead, the creditor notifies the debtor in relation to the conclusion of a contract of transfer of debt to a non-banking company, modifying the nature of the claim. The leasing contract provided changes in the terms of payment, the maturity of the credit being declared to one year from the term of ten years previously.

Creditor's actions can be considered to be made in mala fide as the reasons that determined the creditor to accept the partial payments but declare the credit due in advance failed to be understood at any point. What's more, it can be considered that the acceptance of partial payments by the creditor, while subsequently declaring the credit expired, constitutes an abuse of law, therefore the parties shall be reinstated in the previous situation by the judgment of the court ruling in the case.

3. Character of abusive clauses

With regard to the bank credit agreement, its intuituu personae character determines the partial cause of invalidity reported at the introduction of an abusive clause. In this respect, the abusive clause can make reference to the creditor's right to declare early maturity or to the transfer of his claim. Also, in a situation in which there is a transfer of bank debt not unaccepted by the debtor, the operation can be considered a simulation of an illicit operation, simulation that determines the absolute nullity of the debt assignment agreement. In this respect, by the assignment of debt neither the nature of the claim may be changed nor could a termination of the debtor’s rights

[6] Cristea Silvia Lucia, *Dreptul afacerilor*, Editura Universitară, Bucharest, 2008, p. 275;
[7] Boroi Gabriel, Stănciulescu Liviu, *Instituţii de drept civil,* Hamangiu, Bucharest, 2012, p. 181;
[8] Ciobanu Viorel Mihai, Boroi Gabriel, *Drept procesual civil*, C.H.Beck, Bucharest, 2009, p. 21;
[9] Acostioaei Constantin, *Elemente de drept pentru economişti*, All Beck, Bucharest, 2001, p. 249.

be attempted. Concluding the contract of assignment with a non-banking company totally changes the legal relationship between the parties, including the existence of their rights and obligations. As a result, the debtor holds no longer the quality of customer in relation with the non-banking company, which reflects negatively on his possibility to defend his rights properly. In addition, the confidentiality clause between the debtor and the old creditor is infringed by further assigning the debt contract.

As a result, the nullity of the assignment contract takes account of the fact that the assignment was not accepted by the debtor, him being only communicated the existence of this legal operation. Moreover, by assignment the maturity has been abusively amended, the creditor proving its bad faith towards the debtor's attempt to continue payments even if they were partial. Creditor's bad faith may be reported including with regard to the selection of the assignee. The assignee's quality of non-banking company would render the debtor unable to litigate the clauses considered abusive in his contract with the bank, as in the new legal relationship his quality of consumer cannot be found.

This legal situation created an imbalance[10] between the rights and obligations of the debtor and creditor, because the assignee is no longer subject to the special rules in the banking sector as the assignor was. The assignee, a non-banking company, shall be applied general rules which do not extend the legal protection on the special rules in the field of consumer protection or banking. As far as the legal imbalance between the legal quality of the creditor and that of the debtor is concerned, it shall be presumed that as he is not a specialist in banking matters he would not be able to guess that the assignee possesses a legal status different than the assignor. In this respect an imbalance operates even when the debtor would have given his acceptance on the introduction of the abusive clause, acceptance obtained after negotiating with the creditor.

On the other hand, the rejection of the application relating to absolute nullity of a debt assignment may not be based on the principle of legal acts, i.e. on the principle of binding force, the irrevocability principle and the principle of relativity, in accordance with Article 969 and 973 of the Civil Code. Nor the conditions of the civil legal act, i.e. the capacity to enter a contract, the valid consent, the determined object or licit cause, may determine the consideration as valid of the acts made in debtor's fraud. In terms of cause, even if it is not missing but is immoral, the penalty shall be based on Article 968 and 1966 of the Civil Code, especially when debt is guaranteed, legal fact usually encountered in bank credit agreements. The existence of unethical cause shall be presumed because the creditor might try to recover the claim with priority from the securities available in the contract and only secondarily to assign the contract.

At the basis of these provisions is Law No 193/2000, on unfair terms in contracts concluded between traders and consumers and the GO no. 21-1992, for the purposes of considering these regulations as fully applicable to the factual situation. We consider thus the application of the provisions of the Article 4 of the law, according to which " the contractual clause which has not been negotiated directly with the consumer, if, by itself or in conjunction with other provisions of the contract, creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties " shall constitute an abusive clause when it is to be found in a contract of adhesion.

4. Jurisprudence

Moreover, the case law considers that a decision of the court has an active role in relation to the existence in a legal act of abusive contractual clauses. In this respect, the case law of the Court of Justice of the European Union (cause C-484/2008 - Caja de Madrid and the Court Ordinance of 16.11.2010)[11] establishes the fact that national courts are required to determine ex officio the

[10] Pop Liviu, Popa Ionuț Florin, Vidu Stelian Ioan, *Tratat elementar de drept civil. Obligațiile*, Universul Juridic, Bucharest, 2012, p.154.

[11] application reference for a preliminary hearing formulated by Krajsky south v Presove - The Slovak Republic - case C-76/2010;

unfairness of contractual terms. The role of the court is apparent even where the consumer has not invoked the unfairness of a clause due to not knowing his rights or being held by the legal fees.

By these regulations all those considered traders shall be prohibited from the introduction of abusive clauses in the contracts concluded with consumers, legal situations appropriate to the Directive 93/13/EEC.

Thus, if asked to eliminate risk premiums from banking contracts, commissions considered unfair in relation to debtors, courts have granted damages for emotional distress, inclusively. As a result, the creditor is bound to return the debtor all amounts collected by way of commissions for these operations plus the legal interest.

In general, granting compensation via courts[12] was motivated by the status of uncertainty of the debtors when they became acutely aware the creditor changed unilaterally the fixed interest rate for the variable interest rate. By means of this operation, debtors could have no longer been able to predict the amount owed, situation which claimed the possibility of granting damages for emotional distress, followed by the creditor's obligation to return to fixed interest rate. However it may be observed that granting moral damages remains, however, a little extended practice in Romania.

On the other hand, debtors from bank credit agreements have the possibility to inclusively report the unfair clauses to a specialized institution, respectively the National Commission for the Protection of Consumers. The procedure provisioned the possibility that this institution summons in court the creditor, via county offices. The effects of this procedure mediated by Consumer Protection were favorable to the injured party under the conditions in which the refund of amounts owed by way of risk premiums did not mean starting new legal proceedings.

Court rulings under the aspects referred to above have been stated by the practice of the HCCJ[13], its decisions being issued in defense of consumers rights and in particular in respect of the invalidity of the unfair clauses in contracts. The decisions of the court were directed in particular for the purposes of nullity of clauses relating to the risk premium or to the arbitrary change of interest.

The court may establish[14] absolute nullity for the unfair clauses regardless of whether they are inserted into the main contract, in subsequent amendments, notices or communications issued without the express consent of the debtor and hence may oblige the bank to return the amounts unduly paid by the beneficiary of the credit concluding the documents to date.

5. Community legislation

Community legislation on unfair clauses is based on Directive 93/13/EEC of the European Council of 5 April 1993, which stipulates the responsibility of the Member States to verify their existence in contracts concluded with consumers, taking into account, in particular, the contractual terms which have not been individually negotiated. For this purpose, the balance of force on the contracting parties shall be analyzed, as well as the consumer's position in relation to his agreement to the clauses, or his express request in this respect.

At the bottom of this regulation shall be the inability of consumers to know or truly understand the legal rules, as well as ensuring the marketing circuit that could be otherwise restricted by deterring consumers to further participate in purchase of services. These provisions shall apply even in a situation in which consumers participate in concluding contracts that are governed by the legislation of a Member State other than the Member State of origin, regardless of whether they are concluded orally or in writing.

In the matter of contracts, protecting consumers shall be carried out in the light of the overt disproportion between consumers and creditors. Protecting the economic interests of the consumers

[12]The document is available online at http://curieruljudiciar.ro/2013/04/08/victorii-zdrobitoare-ale-clientilor-impotriva-volksbank-la-inalta-curte-de-casatie-si-justitie/;

[13]The document is available online at http://www.economica.net/bancile-pierd-pe-banda-rulanta-procesele-cu-clientii_19806.html;

[14] The document is available online at http://clientivb.wordpress.com/2012/11/24/directiva-9313cee-a-consiliului-din-5-aprilie-1993-privind-clauzele-abuzive-in-contractele-incheiate-cu-consumatorii/.

consists in limiting what is called abuse of power by the creditor, in particular in the matter of contracts of accession, both as main documents and as additional contractual terms.

In conclusion, the Directive contains provisions aimed at restricting the introduction of some unfair clauses in the contracts which exclude essential rights of consumers, the interests of the parties being appraised comprehensively.

6. Conclusions

In fact, court sentences in Romania, in relation to unfair terms in banking contracts have generally concerned not only the risk premium, but also the unilateral modification of the credit interest level, the declaration of early maturity or the call for sums of money in addition to those already provided for in the contract. Interpreting the provisions of Law No 193/2000[15] enables courts to intervene in the examination of contractual clauses, namely those concerning unilateral amendment of interest rates, as well as the costs of ancillary services. Moreover, debtors have requested findings of the abusive character of the clauses, including those by which the bank assumes the right to change the interest rate unilaterally, problems relating to hidden interest rates, commissions charged without direct consideration by the bank or regarding the declaration of early maturity. Also, we have to consider the terms by which the bank is allowed to modify the interest rate when changes occur on the money market, those that establish a risk premium (commission of administration), the administration of guarantees, the minimum compulsory reserve or the extra costs. The same legal treatment is enjoyed by the clauses regarding the debtor's obligation to conclude the insurance contract with a company imposed by the bank or the right of the creditor bank to choose the insurance company when the policy should be renewed.

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[15] The law 193/2000 on unfair terms in contracts concluded between consumers and traders.