BEATING BANKS THROUGH KNOWLEDGE

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Abstract

In Romania, in the last decade, a significant number of solutions favorable to consumers with foreign currency denominated loans were obtained in courts against the banks or non-bank financial institutions. The judges noted the unfairness of the contractual terms inserted in the loans agreement and absolute nullity of these clauses. Also, in the context of the global economic and financial crisis triggered by the collapse of the banking system with the consequence of depreciation and/or sudden and high fluctuation of domestic currencies against the "safe-haven currencies", the theory of unpredictability becomes a particularly important institution.

This paper deals with the concepts of „abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices". It is also presenting a view of good faith and equity on the performance of contract and the "distribution of the risk" of the contract in the conditions of applying to the "unpredictability theory" in the context of terms of law doctrine and the relevant case law.

The objective of this study is to demonstrate that by applying the theory of unpredictability to the occurrence of currency risk associated with loans in foreign currency and by subjecting to examination by court to the clauses whereby the consumer must assume the risk given by the changing of the circumstances of the execution of the contract can be obtain by the consumer or a rebalancing of the understanding of the parties or the cancellation clause which significantly unbalanced the consumer's obligation to bear any risk.

Keywords: *„abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices", "distribution of the risk", "theory of unpredictability".*

1. Introduction

In the last ten years, Romanian courts had to face a large number of files in which the National Agency for the Protection of the Consumers and/or the consumers requested the lack of effects of the abusive clauses included in the agreements of bank credits entered into between consumers and professionals. Although for most of the times the courts established the presence of abusive clauses and admitted the complaints, other contracts of the same type belonging to the same professional continued to produce their effects. Moreover, that final solutions obtained in court did not stopped the professionals from concluding other contracts whose content include the clauses qualified by the court as abusive. Starting from this reality and in order to stop its continuation in the future, certain aspects on abusive clauses of the Law no 193/2000 were modified in 2010. Given that the problem of the over indebtedness of the consumers due to the contracts concluded before the economic and financial crisis

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starts, the existence of the abusive clauses in loan contracts is currently an important topic of public debate in Romania, as well as in other European States.

Although it is prohibited by law for professionals to insert abusive clauses in contracts (paragraph 3 of art.1 of Law 193/2000 regarding abusive clauses from the contracts concluded between professionals and consumers, republished), the Romanian credit contracts contains unfair terms which stipulates e.g.: risk commissions, account administration fees, unilateral increase in interest rates, modifiable fixed interest, variable interests which vary and increase only upward, even if they were connected to the ROBOR/ EURIBOR/ LIBOR indexes or variable interests calculated following an internal and non-transparent bank indexes. Also we can meet clauses providing for the extension of mortgage in favor of the bank or terms excluding the consumer's right to undertake legal actions or to exercise a different legal remedy or the obligation of the consumer to give up to all legal actions in course and to any pretention when concluded a novation of contract in the case for the initial contract the consumer is having a dispute in front of the court.

1.1. The Romanian legislation regarding abusive clauses

The European Directive 1993/13/CEE, whose provisions were transposed into Romanian legislation by Law 193/2000, defines abusive clauses as being those contractual clauses which have not been negotiated directly with the consumer, and will be considered abusive if by themselves or together with other provisions generate disadvantage for the consumers and, in a manner contrary to good faith, a significant imbalance between the rights and obligations of the parties.

The abusive clauses from the contracts concluded between the professionals and the consumers are being enumerated by the Law 193/2000 and we can enumerate from it:

The trader's exclusive right to interpret the contractual clauses;

The trader's right to unilaterally alter the terms of the contract;

Provisions that limit or cancel the consumer's right to demand indemnifications in case the professional does not comply with his/her contractual obligations.

The consumer's obligation to obey some contract terms he never had the real possibility to know when signing the contract;

Provisions that restrict or cancel the client's right to denounce or to unilaterally cancel the contract, in cases when the professional either unilaterally changed the contractual clauses, or he/she did not fulfil his/her obligations or he/she imposed to the client clauses regarding payment of a fixed amount (in case of unilateral denunciation);

According to Law no. 193/2000, the provisions regarding the abusive clauses are applicable to those juridical reports that take place between consumers and traders. Art.1, paragraph 1 of this law, provides that any contract concluded between traders and consumers for the sale of goods or for providing services will include clear contractual clauses, in no uncertain terms, for their understanding not being necessary specialty knowledge.

These clauses are mentioned in contracts of adhesion and the consumers does not have the possibility to negotiate the terms of the contract with the bank. The biggest problem for the consumers is that the bank has the possibility to appreciate discretionarily when financial imbalance occurs in the market. The consequence is the modification of the contract terms without any real negotiation between the parties. Furthermore, if the consumers do not agree with these terms, the banks notify them to

pay back in advance the money (ECJ, Kušionová v. SMART Capital a.s, 2014) within 30 days.

2. The Theory of unpredictability in Romanian Civil Code

During the execution of the contract, might appear certain circumstances which can make the execution of the contract excessively burdensome for the consumer. Sometimes, during their execution, contracts are exposed to certain events related to the economic conjuncture. Most often, they are related to currency fluctuations. An example represent the acceleration growth of the currency in which the loan was granted which leads to an increased monthly installments owned to the bank. We can mention the case of Swiss franc which in 2007 had a rate of 1.9 RON and in 2015, a rate of 4.6 RON.

In this case, should be applied the principle of unpredictability.

Art.1.271 New Civil Code, in paragraph 1 provides that "The parties are bound to fulfil their obligations even if their fulfilment has become more onerous, either due to the increase in the costs of fulfilling their own obligations or due to the decrease of the value of counter performance"

Art.1.271 paragraph 2 provides "However, if the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order: a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances; b) the termination of the contract at the moment and under the conditions established by it".

Art.1.271 paragraph 3 provides that "The provisions of para. 2 are applicable only if: a) the change in circumstances intervened after the conclusion of the contract; b) the change in circumstances as well as their extent were not and could not have been reasonably considered by the debtor at the moment of contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and it could not have been reasonably considered that he had undertaken that risk; d) the debtor tried within reasonable term and in good faith to negotiate the reasonable and equitable adaptation of the contract."

The Romanian Civil Code of 1864 did not expressly regulate unpredictability, but doctrine and case-law accepted it as per art. 970 para.2 Civ. Code of 1864 (the current 1.272, paragraph 1 N.C.C.). Art. 970 paragraph 2 Civ. Code of 1864 provided that: "They (the agreements) bind not only for what is expressly contained in them, but for all consequences, what equity, custom or law endue the obligation with, according to its nature."

According to Art. 1170 from the New Civil Code, "the parties must act in good faith, at the negotiation and at the signing of the contract, and also during its execution. They cannot remove or limit this obligation" which means that the risk of the grown of currency of the loan has to be assumed properly, by both parties, the creditor and the debtor.

The modification of consequences is relevant only in exceptional cases. The principle according to which agreements lawfully concluded between the parties are legally binding is not absolute, sacrosanct. When occurred events have the capacity to fundamentally alter the balance of the contract, there results the exceptional situation which the theory of unpredictability refers to.

In the context of the global economic crisis triggered by the collapse of the banking system, the theory of

unpredictability becomes a particularly important institution. These circumstances affected the execution of loans contracts. Major discrepancies appeared between the value of performance on the conclusion of the contract and the value of performance on the date of fulfilment of obligations. It became excessively onerous (in the case of the debtor). In other words, we will refer to the category of loan contracts in which, during their execution, an event that may produce a severe imbalance in value between the parties' performances is likely to occur. At the beginning of the financial crisis, the national currency depreciated against euro by up to 50% and more than doubled against Swiss franc, placing consumers with forex denominated loans in an extremely difficult position.

Good faith in contract execution was the most viable argument to justify the necessity of accepting the theory of unpredictability. In the case of unpredictability, the bad faith of the debtor in triggering the modification of circumstances cannot be considered. The lack of fault of the debtor is a fundamental condition, also considered in the regulation of the theory of unpredictability in the NCC.

Regarding the bank credit agreements, in judicial practice, the contract for personal loans by mortgages has a special legal nature, the debtor's obligation consisting mainly in repaying the loan within the time limits specified in the document. As regards payments due, the substantial change of the debtor's financial opportunities can give to the consumer the possibility to invoke the unpredictability, especially when initially the debtor has respected even partially his obligations. The abusive character of some contractual clauses determines according to the theory of unpredictability a significant imbalance between the parties to such contracts. The theory of unpredictability applies to long or open term contracts and sometimes to fixed term contracts. Even if the possibility that unpredictability may be invoked regarding other types of contracts is not excluded, it preponderantly applies to long-term contracts. The category of long-term contracts includes successive performance contracts and some contracts that are under suspensive conditions (legal, conventional, judicial).

Even that the Romanian Constitutional Court (CCR) decided through 62/ 7.02. 2017 that the conversion of loans in Swiss francs at historical rates is unconstitutional, basically the Romanian Constitutional Court in the motivation of the Decision confirms what we want to prove, namely, extract from the decision: 49 (...) "Adapting to the new conditions may be performed inclusive through the conversion of the payment of the monthly installments into Romanian national currency at an exchange rate established by the court related to the particular circumstances of the case in order to rebalance the obligations, an exchange ratio which can be those at the date of conclusion of the contract or at the date of occurrence of unpredictable event or at the value at the date of conversion."

So, if the court finds the intervene of unpredictability, it can balance the contract by converting the balance of the credit at the foreign exchange rate from the date of concluding the contract or at the date of the appearing of unpredictable event or to order recalculation the monthly installments in foreign exchange at a ratio determined by the court as in Civil Sentence 21.02.2017a 1920/2017 of District Court of 2nd Sector Bucharest.

In short, if unpredictability is proven, then the court may include in the decision, a solution to freeze the exchange rate at the time of occurrence the state of unpredictability.

The Decision 62/2017 also does not intervene in any way on the possibility of

declaring as unfair the terms of the contract related to the assuming the entire currency risk, so that consumers will be able to choose between appealing to law 193/2000 and subsequently to obtain the freezing of the exchange rate at the date of conclusion of the contract or will request the balancing of the contract, due to occurrence of unpredictability.

Among the conditions listed above for finding unpredictability is reflected negative condition of not assuming the risk of exceptional change of circumstances by one of the parties to the contract.

Customizing to the situation of credit agreements in foreign currency, in the event that there is a clause aimed award-added risk over this negative condition cannot be considered fulfilled.

Finally, the remaining unresolved issue is the delicate relationship between clauses related to risk theory unfair and unpredictability. Sketch primary indicates the prevalence of the idea that it would be necessary to invoke the unfairness of a term (of course this can be covered and indirectly - the judge is not bound to rule effectively on invalidity, but may ignore the impact of this clause if it considers abusive.

A compatibility between theory unpredictability and performance of contracts for credit is only possible if the indexation clause is regarded as unfair because it covers risks not contemplated at the time of contracting (possibly associated with the idea of lack of information on the risk of over-added.

The normal risk is defined as being: "predictable fluctuations of the value of performances by considering the nature of the contract and the original balance established by the parties." The initial situation represents the landmark to which the current situation is compared in order to establish the fundamental alteration of the contractual balance. 2. The non-existence of a clause to maintain the contract value – the premise for applying unpredictability under the conditions of art. 1.271 NCC A.

The contracting parties, by their agreement, may intervene with the purpose of rebalancing the contract by concluding an agreement to adapt it to the new conditions. Furthermore, they will be diligent in the sense that they will anticipate certain unpredictable events that may occur during the execution of the contract and even in the contract that regulates the legal relationship between them (the initial contract), to regulate certain clauses that are aimed at maintaining the contract value. In order to apply the theory of unpredictability, as it is regulated in art.1.271 para.2 and 3 of the NCC, it is necessary that the contract does not contain a clause whose aim is to maintain the contract value, a preventive unpredictability clause. If a clause to maintain the contract value existed (preventive unpredictability clause), then what would apply is the legal regime of that clause, by virtue of the principle of contractual freedom, and not the provisions of art.1.271 para. 2 and 3 of the NCC. It is preferable, of course, and even recommended that the parties, when they conclude a contract, be cautious and provide clauses for its maintenance. This is also recommended in practice, considering the exceptional nature and the limited scope of unpredictability, as the fulfilment of all the conditions for unpredictability is rarely possible. As a result, the parties may provide in the contract more flexible clauses with regard to the restrictive conditions of unpredictability regulated by art.1.271 of the NCC

In case of adhesion contracts – like the loan contracts – that comprise abusive clauses, the law authorizes certain control authorities to notify the court from the professional's domicile or headquarters and to request his/her obligation to change the

contracts under developments, by removing the abusive clauses, as it is provided by art.12 of Law no.193/2000. These authorities are represented, according to art.8 of the law, by the National Authority for Consumers' Protection representatives, as well as by the authorized specialists of other public administration authorities, according to their competencies. Besides them, the consumers prejudiced through the respective contracts have the right to address to the court.

In this case of unpredictable event, the Civil Code points out, the court can order "the updating of the contract, to fairly distribute between the parties both the losses and benefits" or "the cessation of the contract." Both options can be ordered by court only if "the change in circumstances occurred after the contract was signed" and "was not and could not have been foreseen by the debtor," provided "the debtor did not take on the risk of changing circumstances" and if "the debtor tried, within a reasonable period and in good faith, to negotiate the reasonable and fair updating of the contract."

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law to which we refer to. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

According to the civil provisions, nobody can exercise any right with the purpose of being detrimental to or to prejudice another person excessively, unreasonably and contrary to good faith, without being penalized for reasons of abusive exercise of rights (art.15 Civil Code). In the juridical literature, it is considered that the penalty applied to the abusive clauses is the nullity of the contract included by it. Actually, the penalty of nullity is also based on the legal provisions comprised in art.1 paragraph 1 of Law no. 193/2000, according to which any contract must include clauses which are clear, in no uncertain terms and easy to understand for all parties. Actually, the nullity has as basis also incompliance with the basic condition for the validity of a contract regarding its cause which must be licit and moral, due to the fact that an abusive clause has as grounds bad faith at concluding the contract. Having in view the fact that through inserting an abusive clause, only a part of the professional's will is corrupted by the bad faith at concluding the contract, breaching the legal condition regarding the cause affects only a part of the contract, respectively the abusive clause. This partial nullity will demolish only one part of the contract concluded, respectively the clause considered as being abusive and the contract remains partially valid. In case the abusive clauses do not produce effects against the consumer client, then, with his/her agreement, the contract will continue to produce effects, if the contract can be continued following to eliminating the clauses under discussion. In case the contract cannot produce effects following to eliminating the abusive clauses, then the consumer has the right to pretend its cancellation, according to art. 7 of Law no. 193/2000, case when he/she is entitled to obtain indemnifications also, the professional's responsibility being a liability in tort. Both in practice and in the doctrine there are numerous discussions based on the penalty of the abusive clauses motivated by the reality that the law regarding these

clauses does not refer to a juridical procedure through which to be removed the effects of the abusive clauses, as it is provided by other legislations, like the French or Quebec region legislations. The existence of the abusive clauses must be proved by the one who invokes it, respectively by the consumer / client, according to the civil provisions in force, through evidences provided by the Civil Procedure Code; Law no. 193/2000 does not comprise special provisions in the domain. The object of the evidence can be represented by any of the three conditions necessary to the existence of such a clause: lack of negotiation, lack of good faith, the presence of a significant imbalance.

3. Conclusions

Into the loan contract where there is a series of clauses that already breach the legal norms and a certain clauses have already been proven as unfair, they can be considered as being abusive clauses, not being able to be directly negotiated with the client and not being in his/her favor, as well as being contrary to good faith. It would be desired to be brought modifications to the actual Romanian law regarding the abusive clauses for clarifying these aspects that refer to the above mentioned juridical mechanism to remove the effects of these clauses.

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law 193/2000. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

These abusive clauses in loan agreements must be eliminated even in cases where the consumers have not denounced them yet. The economic imbalance between consumers and banks is obvious and the lack of predictability of consumers is seriously affected. In contracts of adhesion, the consumers have no option but to adhere to the contract, negotiation being impossible. So, we believe it is necessary to eliminate all the abusive clauses and ensure predictability of the contracts if we want to protect the consumers. To legislate the consumers' rights to be fully, correctly and accurately informed on the main characteristics of the products and services provided by the trading companies, which is attained through the elements of identification and characterization provided by law.

Although there is still a long way to go, Romanian consumers do not lose hope that their rights will be better protected through the harmonization of European Union legislation with national legislation and after the years of fights against the abuse of economic power the first step in defending their rights would be a better quality legislation.

The situation of Romanian consumers may not be unique in Europe and it seems the same pattern can be seen in most of situations: low level of consumers' financial literacy, lack of any responsibility from the banks in lending, weak reaction from the authorities, not only to the methods used by the banks, but also in regards to the involvement in public education. The situation has begun to change, painfully slow for those affected, although it still faces a very strong reaction from the banks. It is very important the things our organization warned about even since 2004-2005, such as over-indebtedness or irresponsible lending, are in the public discussion and there are small steps taken to improve the situation of those affected and to prevent such situations to appear in the future.

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