BANK CONTRACTS IN THE NEW ROMANIAN CIVIL CODE

DAN VELICU*

Abstract
The adoption of the new Civil Code and its entry into force on October 1st 2011 has involved an extensive reform of the private law. The new Code, as its authors notice, has aimed primarily to achieve a unification of the private law, the largest part of the land commerce regulations from the commerce code adopted in 1887 being absorbed into the new text and, secondly, to harmonize the basic institutions of the private law with the European regulations and directives.
Beyond these two major objectives, the new Civil Code comprises regulations with innovative character compared to the Romanian law, such as bank contracts.
This study is preliminary and aims to highlight the inspiring models of the new Civil Code and to analyse the functionality of the newly used concepts.

Keywords: *new Civil Code, bank contracts, bank current account, bank deposit, rental of value boxes*

1. Preliminary considerations.

The new Romanian Civil Code, which entered into force on October 1st 2011, has contributed, besides from the modernization of some institutions of civil and commercial law and the harmonization of various legal mechanisms with the norms of European Union law, to the innovative regulation of some types of contracts.

The typology of banking contracts seems to be this respect one of the aspects with obviously innovative character.

The old Commercial Code, although mentioning banking contracts between operations considered acts of trade (art.3), did not offer any definition about them and did not regulate them separately. In the predominant conception of the legal literature of the XIXth century, the banking contracts are nothing but mere applications of civil contracts like the civil deposit or loan. They acquire a commercial character when they are used exclusively and permanently by the commercial banks to increase their profit.

It was only in the XXth century, by the contribution of important theorists such as Joseph Hamel, Joaquin Garrigues or Giaccomo Molle, that the banking contracts acquired an autonomous profile. The Italian Civil Code from 1942 has established this recognition, the regulation being included in Chapter XVII – Contratti bancari.

2. Current account in the new Civil Code.

With the new reform, the regulation of the current account contract was transferred from the Commercial Code (art.370-373) – partly repealed at this moment – to the content of the new Civil Code. The previous provisions had into consideration only the effects produced by the closure of a current account contract and the way in which it could be dissolved. There were no legal rules defining the concept itself or its scope of applicability[1].

The current provisions of NCC resolve such a situation. Thus, art.2171 NCC retains the current account contract as that contract by which the parties, referred to as account holders, are

---

* Senior Lecturer, Ph. D., Faculty of Social and Administrative Sciences, “Nicolae Titulescu” University, Bucharest (email: dan.velicu@univnt.ro).

[1] See Decision of *Curtea de Casație*, 7 ianuarie 1901, quoted in Dumitrescu, *op. cit.*, II, 207.

committed to register in an account the receivables arising from mutual remittance, considering them non-eligible and unavailable until the closure of the account.

On the other hand, it is stated that the credit balance of the account upon its closure represents an eligible receivable. If its payment is not required, the balance represents the first remittance from a new account and the contract is considered renewed indefinitely.

Although the current bank account contract is individualised, having an entire section of the Civil Code dedicated to it, it is not very clear if in the vision of its authors the current bank account is a legal independent institution or just a version of the current account (on one hand, as shown above, the relevant provisions (art.2184-art.2190 NCC) are found in another section and, on the other hand, this section does not comprise any definition of the concept.

The provisions which, as a matter of fact, are numerous seem rather applications of the current account. For instance, according to art. 2184, if the bank deposit, credit or any other banking operation is done though the current account, the account holder may, at any time, dispose of the credit balance of the account, in compliance with the notice, if the latter has been agreed by the parties.

According to art.2188 NCC, if the current bank account is concluded for an indefinite period of time, wither party may terminate the current account contract, observing a 15-day notice, unless the contract or practices mention another term, under the damages sanction.

The reference period of 15 days is unnecessary, considering that art.2183 paragraph 2 NCC referring to the current account, as generic figure, mentioned that in the case of the contract concluded for an indefinite period of time, each party may declare its termination upon the closure of the account, informing the other party 15 days in advance.

Another norm, art.2187NCC provides that if the account owner dies, before reaching partition, the heirs are considered co-owners of the account, account and the consent of all co-owners is necessary for performing the operations in the account.

Thus, the personal creditor of one of the joint-heirs cannot seize legally the credit balance of the joint account. He can only ask for partition. The joint-heirs are kept divisible by the credit institution for the balance due of the account, unless otherwise determined by law or convention.

None of these provisions contribute, in our opinion, to shaping the autonomy of this contract. Moreover, art.2187 paragraph 3 states that the provisions outlined are applicable properly and in other cases of severalty between current account holders, unless otherwise provided by law.

In other words, the rules of derogatory nature will also be applied on grounds of analogy in the case of the current account, although this is considered a general typology.

3. Bank deposit.

The new regulation makes a clear distinction between the two forms: the deposit of funds and the deposit of titles.

According to article 2191 NCC, by creating a deposit of funds, the credit institution acquires ownership of the money deposited and is committed to repaying the same amount, of the same kind, upon the agreed deadline or, where appropriate, at any time, at the depositor's request, within the deadline established by the parties or, in its absence, within the deadline established by the practices.

The provisions outlined reproduce the content of art.1834 from the Italian Civil Code, according to which "nei depositi di una somma di danaro presso una banca, questa ne acquista la proprietà ed è obbligata a restituirla nella stessa specie monetaria, alla scadenza del termine convenuto ovvero a richiesta del depositante, con l'osservanza del periodo di preavviso stabilito dalle parti o dagli usi"[2].

[2] See on this matter Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 87-91; id, *Per la gualificazione giuridica del deposito bancario*, in *Banca, borsa e titoli di credito,* 1948, I, p.7 et seg. Also, Hamel, II, 95.

In general, the deposits and the withdrawals will be made at the headquarters of the operative unit of the credit institution where the deposit has been created. As compared to art.1834 from the Italian code, which states that "salvo patto contrario, i versamenti e i prelevamenti si eseguono alla sede della banca presso la quale si e costituito il rapporto", the regulation contained in NCC highlighting the principle of performing all the operations by account in the agency or branch where the bank account was opened.

The credit institution is committed to ensure, free of charge, the information of the client about the operations performed in his accounts.

Unless the client requests otherwise, this information is made on a monthly basis, under the conditions and procedures agreed by the parties.

By creating a deposit of securities, pursuant to article 2192 NCC, the credit institution is entitled to their administration.

The Italian Civil Code comprises, within art.1838, a synthetic regulation of the obligation's content assumed by the credit institution: La banca che assume il deposito di titoli in amministrazione deve custodire i titoli, esigerne gli interessi o i dividendi, verificare i sorteggi per l'attribuzione di premi o per il rimborso di capitale, curare le riscossioni per conto del depositante, e in generale provvedere alla tutela dei diritti inerenti ai titoli. Le somme riscosse devono essere accreditate al depositante.

The NCC authors preferred to use a provision of reference, in the absence of special rules, at the institution of Administration of another person's goods (Title V, art. 792-857 NCC respectively).

Unlike the NCC regulation, art.1838 paragraph 2 requires the bank's obligation to request instructions in certain specified cases: Se per i titoli depositati si deve provvedere al versamento di decimi o si deve esercitare un diritto di opzione, la banca deve chiedere in tempo utile istruzioni al depositante e deve eseguirle, qualora abbia ricevuto i fondi all'uopo occorrenti. In mancanza d'istruzioni, i diritti di opzione devono essere venduti per conto del depositante a mezzo di un agente di cambio.

The credit institution is entitled to the reimbursement of the expenses incurred for the necessary operations, as well as to a remuneration, to the extent determined by agreement or by practices.

The text is a reproduction of art.1838 paragraph 3 from the Italian Civil Code: Alla banca spetta un compenso nella misura stabilita dalla convenzione o dagli usi, nonché il rimborso delle spese necessarie da essa fatte.

In order to avoid the possibility of limiting the liability of the bank, art.2192 paragraph 2 NCC sanctions by nullity any clause by which the credit institution would be relieved of liability for failure to comply with its obligations in managing the securities with care and diligence.

The correspondent regulation of the Italian code is more concise, broading the scope of the sanction and, upon any understanding, envisaging this scope outside the regular contractual framework: E' nullo il patto col quale si esonera la banca dall'osservare, nell'amministrazione dei titoli, l'ordinaria diligenza.

4. Credit facility.

The credit facility is defined according to art. 2193 NCC as the contract by which a credit institution, a non-banking financial institution or any other authorized entity by special law, called the financer, is committed to keep at the client's disposal an amount of money for a specified or indefinite period of time.

The term credit facility corresponds to the opening credit, as it is defined by art. 1842 of the Italian Civil Code: L'apertura di credito bancario è il contratto col quale la banca si obbliga a tenere a disposizione dell'altra parte una somma di danaro per un dato periodo di tempo o a tempo indeterminato.

The parties ensure, by contract, to put at the client's disposal an amount of money that he can use in certain circumstances to achieve various objectives previously established.

The credit facility, as defined by art. 2193 NCC is not a loan agreement since the customer acquires only the right to remove various amounts within a certain limit[3]. He does not have the obligation to use the full amount or to withdraw amounts of money once the contract has been closed.

Unless the parties have stipulated otherwise, the client may use the loan in several installments, according to the practices, and may, by successive repayments, renew the amount available.

The unilateral termination of the contract at the request of the bank cannot operate, unless provided otherwise, and before the expiry of the term unless it is for sound reasons and only if these relate to the beneficiary of the credit facility (art. 2195 NCC).

According to the Italian Civil Code, the termination may not occur unless it is for a just cause: Salvo patto contrario, la banca non può recedere dal contratto prima della scadenza del termine, se non per giusta causa (art. 1845 paragraph 1).

Similar to art. 1845 paragraph 2 from the Italian Civil Code, the Romanian regulation stipulates that the effects of a unilateral termination consist in the immediate termination of the client's right to use the credit, with the observation that the bank should provide at least a 15-day term for returning the amounts used and their accessories.

When the credit facility has concluded for an indefinite period, each of the parties may terminate the agreement, observing a 15-day notice, unless the agreement or practices indicate otherwise.

5. Rental of value boxes.

This service provided by the credit institutions is essentially a neutral operation, because its goal is to ensure the protection of small movables of small dimensions with great economic value.

It is relevant that despite the banking character of the operation, the rental of value boxes is not a typical contract, because the essential obligation is not of financial nature service.

With the exception of the Italian Civil Code, the rental of value boxes is not covered by the main European legal systems.

It can be said that the absence of legal definitions may well characterize this unnamed contract. The Italian Civil Code itself avoids defining the concept of contract, limiting itself by art.1839 to identifying the bank obligations: Nel servizio delle cassette di sicurezza, la banca risponde verso l'utente per l'idoneità e la custodia dei locali e per l'integrità della cassetta, salvo il caso fortuito.

In a close sense, art. 2196 NCC provides that in the execution of the rental of value boxes contract, the credit institution or other entity providing such services under the law, hereby referred to as the provider, responds to the client to ensure an adequate and safe room, as well as the box integrity.

The legal nature of the contract was the subject of several debates in recent Western doctrine[4].

Since the bank allows the use of a space by one if its customers for a period of time, whether or not agreed, and since the latter undertakes to pay a sum of money for the service provided, a variety of the rental contract is configured.

The terminology, which is found in the banking practice, would also be an argument to assimilate the civil lease contract.

---

[3] See Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 154.

[4] See on this matter Molle, *I contratti bancari,* (Milan: Giuffré, 1966), 607.

However, contrary to this thesis, one could argue that in fact the value box is only a good value property by incorporation, as it is fixed and cannot be moved from the bank building. If the rental of value boxes were merely a variety of the civil contract with the same name, the effects are felt including over the nature and characteristics of the contract, as the latter cannot be real because, regardless of the box usage, the client owes the payment of the sum of money.

Likewise, it is an impediment for such an assimilation the fact that the possession or detention of the box is impossible or, in the case of rental by material remittance, the tenant becomes the temporary holder of the lased asset, thus configurating a material relationship characterized by continuity.

In a completely different manner, in the case of the value boxes, the bank is required to allow access to such box whenever its client wants, within the public work hours. Therefore, the hypothesis when the client or the user of the box can be qualified as holder is excluded, because there is no material remittance of the leased asset.

In the systems based on the distinction between civil and commercial law, like the Romanian one before 2011, framing the contract in a civil or commercial profile is particularly relevant in the matter of the proof or the third party rights[5].

According to a second thesis, despite its name, the contract is a variety of the deposit, since the objective pursued by the depositor is precisely the one of preservation or conservation of a movable good of considerable value. However, the mechanism of using the value box is exactly what constitutes an impediment. Therefore, it is beyond any doubt that the purpose of the contract is to preserve an asset, thus showing some similarities with the civil or banking deposit, but nevertheless the depositary is not a temporary holder; in other words, the bank virtually cannot act over the asset and cannot trace the asset.

The essential obligation of the bank is that of providing an external safety for the value box, but depositing the asset in the value box does not determine its delivery to the bank as in the hypothesis of the deposit[6].

Precisely from this perspective the obligation of restitution, which underlies any typology of the deposit contract cannot arise because the bank does not receive the asset deposited in the value box.

At the time of closing the contractual relationship or before this moment, the user will collect the asset deposited in the box without having to report to the bank the material delivery of the asset. At the same time, in the case of the deposit the contractual obligations and implicitly the contractual relationship are terminated by returning the asset and repossessing it. In the case of the rental of value boxes contract the fact that the user collects the asset from the box has no effect on the contract itself.

Accordingly, the mixed nature of the contract is the only answer we can offer.

The rental of value boxes contract is a perfectly autonomous contractual illustration which cannot be assimilated to any other named contract.

Considering the objective pursued by the parties, the obligations assumed by the bank envisage the custody of the asset. In this perspective, we can say that the bank has two basic obligations:

- that of allowing the user the access to the value box and
- that of taking any safety measures for the external protection of the box.

Therefore, the first obligation requires a specific conduct; upon request, the user can enter the area where the value boxes are, deposit and collect the values he wishes to preserve. Clearly, in order to use a box the bank provides its customer with specific safe mechanisms such as ciphers, special keys etc.

---

[5] Garrigues, *Contratos bancarios*, (Madrid, 1958), 448.
[6] Garrigues, *Contratos bancarios*, (Madrid, 1958), 452.

The second obligation has a general and abstract character. The bank will provide the external permanent protection of the value boxes without being able to enter the 'private' space of the box. The main obligation of the user is that of paying the fee requested by the bank for providing such a service. As with the rental, a certain obligation of restitution of the space can be configured at the termination of the contract, by handing over the keys or other safety elements. A second obligation – obligation of not doing – requires the user not to introduce in the value box a series of assets which can either be degraded, thus affecting the space they are deposited in, or are dangerous for the safety of those using value boxes, or are forbidden to commercial traffic.

If the box is rented out to several people, art.2197 NCC provides that any of these may require opening the box, unless otherwise provided by the contract.

In case of death of the client or any of the clients using the same box, the provider, once he has been notified, cannot consent to opening the box without the consent of everyone who is entitled or, failing that, under the circumstances established by the court.

These provisions will also apply accordingly upon termination or reorganization of the legal person; in this case, the official receiver or judicial liquidator can require the opening of the value box.

The value box can be opened forcibly only under the requirements provided by art.2198 NCC. Thus, upon the completion of the term provided in the contract, following the expiration of the 3-month period since the notification to the customer, the provider may ask the court, by presiding judge's order, the authorization to open the value box. The customer notification may be done by registered letter with acknowledgement of receipt to the last home or office brought to the knowledge of the credit institution.

The opening of the value box will be made in the presence of a notary public and, where appropriate, in compliance with the prudential measures established by the court.

The court may also dispose measures of conservation of the objects discovered, as well as their sale to the extent necessary to cover rent and expenses incurred by the provider, as well as, if applicable, for the damage caused onto him.

6. Conclusions.

First of all, the recognition of the independent nature of the bank contracts was absolutely necessary, especially since the use of these legal instruments, though which financial intermediation operations were carried out, has become the exclusive activity of some subjects of law identified and supervised by the banking law.

However, although through the new Civil Code the bank contracts are identified, its authors did not include in them the bank credit agreement, although at this moment the credit agreement is one of the defining instruments of a commercial bank's activity; basically, in the case of analysis of any credit agreement, the applicable texts will be those regulating the loan in general.

It is also noted that unlike the Italian Civil Code which clearly regulated the discount of the commercial bills, an essential operation in the history of commercial law, the new Civil Code did not engage such an institution in the broader framework of the banking contracts.

We believe that despite the innovations brought by the new regulation, its improvement is absolutely necessary to adapt it to the requirements of the banking practices.

References:

- Bonneau, Thierry. *Droit bancaire*. Paris: Montchrestien, 2003.
- Cranston, Ross. *Principles of banking law.* Oxford : Oxford university press, 2002.
- Dumitrescu, M. A. *Codul de comerciu: (cu texte corespunzătoare italiene, franceze, belgiene, austriece), adnotat cu jurisprudența până la zi*. București: Cugetarea,1926.

- Ellinger, E.P., Lomnicka, Eva, Hooley, Richard. *Ellingers modern banking law*. Oxford: Oxford UniversityPress, 2006.
- Fiorentino, Adriano. *Del conto corrente, dei contratti bancari: art. 1823-1860.* Bologna: Zanichelli, 1969.
- Garrigues, Joaquin. *Contratos bancarios*. Madrid, 1958.
- Gavalda, Christian, Stoufflet Jean. *Droit bancaire: institutions, comptes, opérations, services*. Paris: Lexis nexis Litec, 2008.
- Guggenheim, Daniel. *Les contrats de la pratique bancaire suisse*. Geneve: Librairie de l'université, 1981.
- Hamel, Joseph. *Banques et opérations de banque.* Paris: Rousseau et C., 1933.
- Martorano, Francesco. “Conto corrente” in *Enciclopedia del diritto*, vol. IX, Milan: Giuffré, 1961.
- Molle, Giacomo. *I contratti bancari.* Milan: Giuffré, 1966.