SOME CONSIDERATIONS RELATING TO THE UNFAIR TERMS WITHIN THE BANK CONTRACTS IN REGULATING OF THE LAW NO. 193/2000

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Abstract
In this study, we intend to make a brief analysis of some issues relating to the unfair terms within the contracts concluded in the banking activity by the credit institutions with the consumers.
The contracts concluded by the credit institutions with the consumers are contracts containing pre-formulated standard terms, meaning that they are set out prior to the conclusion of the contract and submitted to the consumer, substantially reducing the possibility to negotiate them.
On the other hand, due to the highly technical nature of the banking regulations and the terminology used by them, in the bank contracts there are several terms for whose understanding the consumer needs specialized knowledge.
Precisely for this reason, the legislator regulates a number of conditions relating to the negotiation and conclusion of the contracts between the professionals and the consumers, as well as the identification and finding of the unfair terms within the contracts.
At the same time, in the content of the bank contracts may also be identified certain terms that are part of the examples listed in the Appendix to the Law no. 193/2000.

Keywords: *credit institution, consumer, unfair term, bank contract, professionals*

1. Preliminary considerations

By the Law no. 193/2000[1] relating to the unfair terms within the contracts concluded between professionals and consumers have been introduced more regulations which are fully applicable within the contracts concluded between the credit institutions[2] and their customers having the capacity of consumers.

According to the provisions of article 3 of the Government Emergency Ordinance (G.E.O.) no. 99/2006, the credit institutions, Romanian legal entities, may be set up and may operate in one of the following categories:

a) banks;
b) credit cooperative organizations;
c) saving and lending banks in the housing sector;
d) mortgage loan banks[3].

According to the Law no. 193/2000, the consumer[4] means any natural person or group of individuals set up in associations which, pursuant to a contract covered by the law, are acting for purposes outside its commercial, industrial or production, crafted or liberal business.

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[1] Published in the Official Gazette no. 1014 of December 20, 2006.

[2] The main issues regarding the credit institutions are regulated by the G.E.O. no. 99/1996 relating to the credit institutions and the suitability of the capital published in the Official Gazette no. 1027 of December 27, 2006.

[3] For details on the organization and operation of different categories of credit institutions, see Lucian Săuleanu, Lavinia Smarandache, Alina Doocioiu, Banking Law, Academic course, Legal Universe Publishing, Bucharest 2009, page 39 and the following; Rada Postolache, Banking Law, C.H. Beck Publishing, Bucharest 2012, page 45 and the following.

[4] For a detailed analysis of the principles of the consumers' protection, see Anca Nicoleta Gheorghe, Camelia Spasici, Dana Simona Arjoca, Consumption Law, Hamangiu Publishing, Bucharest 2012, page 14 and following.

In regulating of the same Law no. 193/2000, professional means any authorized natural person or legal entity who, pursuant to a contract covered by this law, is acting within its commercial, industrial or production, crafted or liberal business, as well as any person acting for the same purpose, in the name or on behalf thereof[5].

Transposing the content of the article 1, paragraph 1, of the Law no. 193/2000 in the bank lending activity, it means that any contract concluded between the credit institutions, as they are set up and operating according to the G.E.O. no. 99/2006 and their customers with a professional status, for the purposes of the law, will include "clear contractual terms, unequivocally, for whose understanding shall not be required specialized knowledge" (article 1, paragraph 1, of the Law no. 193/2000).

2. Particulars regarding the content and the form to express the terms within the bank credit contracts

As seen above, the legislator requests to the credit institutions to insert within the contracts clear terms, unequivocally, for whose understanding shall not be required specialized knowledge.

In order to comply with the legal requirements, it means that the legal expressions, such as "the debtors and the guarantors are jointly liable and they waive the benefit of discussion and the benefit of division" should be explained to the meaning of a person who has no legal specialized knowledge.

The fact that certain terms are ambiguous and for whose understanding is required specialized knowledge does not automatically entail the nature of unfair terms thereof.

According to the provisions of the article 1, paragraph 1, of the Law no. 193/2000, a contractual term which has not been negotiated directly with the consumer will be considered unfair if, by itself or together 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.

It follows that a strong clue regarding the unfair nature of a term is that it was not negotiated directly with the consumer. Therefore, such a term is not the result of the manifestation of will of both or all parties, as appropriate.

According to the law, a contractual term shall be deemed as not being negotiated directly with the consumer if it was determined without enabling the consumer to influence its nature, such as the pre-formulated standard contracts or the general conditions of sale applied by the traders on the market of that product or service (article 4, paragraph 2).

The Civil Code, in the article 1202, paragraph 2, legislates that the stipulations set up in advance by either party in order to be generally and repeatedly used and which are included in the contract without having been negotiated with the other party shall be deemed standard terms.

The credit institutions belong to the category of professionals who, according to the applicable law, are required to establish their own lending conditions and policies which will be communicated to the National Bank of Romania and which, obviously, are inserted in the contracts concluded with different customers.

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[5] According to the article 3, paragraph 2, of Civil Code, are considered professionals all those who operates an enterprise. And according to the article 3, paragraph 3, of Civil Code, the operation of an enterprise represents the systematic exercise, by one or more persons, of an organized activity consisting of production, administration or alienation of goods or provision of services, whether it is or is not for profit. For details concerning the legal meaning of the professional and enterprise concepts in regulating of the current Civil Code, we recommend St. D. Cărpenaru, Romanian Commercial Law Treaty, in compliance with the new Civil Code, Legal Universe Publishing, Bucharest 2012, page 29 and the following; Gh. Piperea, Commercial Law. Enterprise in NCC regulating, C.H. Beck Publishing, Bucharest 2012, page 31 and the following; V. Nemeş, Commercial Law, in compliance with the new Civil Code, Hamangiu Publishing, Bucharest 2012, page 15 and the following.

Therefore, in the context of the above mentioned regulations, the professional - credit institution is required to explain and to negotiate each term inserted in the contracts concluded with the consumers.

In case the consumer claims that some terms have not been negotiated, the credit institution is required to prove the contrary. This requirement is stipulated in the article 4, paragraph 3, the final thesis of the Law no. 19/2000 which provides that if a professional claims that a reformulated standard term has been negotiated directly with the consumer, is his duty to submit evidence to that effect.

Therefore, the clues leading to the unfair nature of the terms of a bank contract are those containing ambiguous terms, for whose understanding is required specialized knowledge or/and which have not been negotiated directly with the consumer, such as the pre-formulated standard terms.

In order to confer the nature of unfair terms, is not enough that these terms to be ambiguous or have not been negotiated directly with the consumer, but they must create, eventually together with other provisions of the contract, 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.

Unfortunately, the legislator does not regulate, by way of indication, some criteria to appreciate that a term or more create(s) a "significant imbalance" between the rights and obligations of the parties.

Failing any other legal issues, is up to the exclusive discretion of the court to find the existence of such significant imbalance between the contracting parties.

Examples of such terms creating a significant imbalance between the rights and obligations of the parties in the banking field may be those which set up an obligation incumbent to the consumer without any consideration from the credit institution, as well as the payment of a fee that is not covered in the contract.

3. The identification and finding of the unfair nature of the terms within the bank contracts

The law establishes the way to identify and to find the unfair terms within the contracts concluded between professionals and consumers.

In this respect, the article 6 of the Law no. 193/2000 stipulates the principle according to which the unfair terms may be found either by the consumer of banking products and services or by the bodies authorized by law.

In the category of bodies authorized by law are found the authorized representatives of the National Authority for Consumers' Protection, as well as other authorized specialists of other public administration bodies, according to their competencies.

4. The effects of identification and finding of the unfair terms

As a principle, the law provides that those unfair terms will not affect the consumer and the contract will be carried out further, with the consumer's consent, only if it can continue after their disposal.

Therefore, (the article 6 of the law) the preservation of the contract concluded between the credit institution and the consumer, if it contains unfair terms, is up to the sole discretion of the consumer in that it will continue to have legal effect only if the consumer expresses his consent in this respect, provided that these terms to be removed and thus the contract may have legal effects.

It is possible that the operation of finding the unfair terms within the contracts to be carried out without the knowledge and consent of the consumer. In this regard, the article 12, paragraph 1, of the Law no. 193/2000 provides that, if it finds the use of some adhesion contracts containing unfair terms, the supervisory bodies foreseen by law shall notify the court related to the domicile or, where

appropriate, the premises of the professional, requiring to him to change the ongoing contracts by eliminating the unfair terms.

Likewise, the associations for the consumer's protection meeting the conditions provided in the articles 30 and 32 of the G.O. no. 21/1992 regarding the consumer's protection, may sue the professional who uses adhesion contracts containing unfair terms, so that the court may order the cessation of their use, as well as the amendment of the ongoing contracts by eliminating the unfair terms (the article 12, paragraph 3, of the Law).

It is therefore noticed a genuine exception to the principle of the binding force of the contract regulated in the previous Civil Code, in article 969, as well as in the current Civil Code, in article 1270, paragraph 1, according to which the validly concluded contract has the force of law between the contracting parties.

We have argued that it is a genuine exception because, as shown in the above mentioned text of law, if the court finds the unfair nature of some terms, it may require the professional to amend the ongoing contracts.

From this legal norm does not result that the amendment must be made with the consent of each consumer, meaning that the credit institution will unilaterally amend the ongoing contracts.

Such behavior of the credit institutions is also an exception to the binding force and to the principle of the expressed contractual freedom in that only the parties who concluded the contract can amend it, not just one of them.

The principle is provided by the article 1270, paragraph 2, of Civil Code according to which the contract shall be amended or terminated only with the consent of the parties or for reasons authorized by law.

Corroborating the two categories of regulations, we may conclude the amendment referred to in the article 12 of the Law no. 193/2000 is made "for reasons authorized by law", according to the article 1270, paragraph 2, of Civil Code.

This situation governed by special rules is not only an exception to the principle of relativity of the legal act and of the binding force thereof, but also cause deep legal consequences from procedural law prospects.

This is because the article 13 of the Law no. 193/2000 stipulates that the court, if it finds the existence of unfair terms within the contract, may require the professional to amend all the ongoing adhesion contracts and to remove the unfair terms from the pre-formulated contracts intended to be used within the professional activity.

We show that we met a genuine exception also in terms of the procedural law since from the above legal regulation follows that the decision of the court is compulsory for all the ongoing contracts, even if by hypothesis the consumers were not a party in the process by which was found the existence of the unfair terms within the contract.

Therefore, the professional shall be required to amend all the ongoing contracts without consulting the consumers, meaning that the judgment will take full legal effects also relating to them.

Such an effect is a genuine exception to relativity of the effects of the judgment[6], knowing the fact that, according to the Code of Civil Procedure, a judgment cause legal effects only between the parties to the process.

As concerns the amendments to the articles 12 and 13 of the Law no. 193/2000 arises the question of what happens if the consumer in the direct process with the financer obtains from the court an unfavorable judgment, meaning that shall be set up, by res judicata, that the terms have not

[6] For the detailed analyze on the effects of the judgments, see Ilie Stoenescu, Grațian Porumb, Romanian Civil Procedural Law, Didactic and Pedagogic Publishing, Bucharest 1966, page 271 and the following; Gabriel Boroi, Dumitru Rădescu, Code of Civil Procedure commented and annotated, All Publishing, Bucharest 1995, page 371 and the following; Viorel Mihai Ciobanu, Theoretical and practical Treaty of Civil Procedure, 2nd volume, National Publishing, Bucharest 1997, page 268 and the following.

an unfair nature, thus remaining binding on the consumer, and subsequently another court seized this time by the bodies authorized by law finds the opposite, namely that the professional's contracts contain unfair terms.

This is especially since the legal texts require the professional to amend all the ongoing contracts and to remove the unfair terms without making any statement, as they were or were not subject to a previous judgment.

Compared to the imperative and unconditional expression of the legislator arises the conclusion according to which will be amended all the ongoing adhesion contracts, even if some of them were subject to a previous judgment in which the courts have rejected the requests for finding the unfair terms.

The main argument for such a conclusion is the article 13 of the law requiring the professional to amend "all the ongoing adhesion contracts" without distinguishing any condition or circumstance.

In supporting the text argument may also be brought the principle of the consumers' protection, meaning that a judgment favorable to a consumer within a category of contracts should take advantage to all the consumers-parties within that category of contracts.

5. Analysis of some common terms within the bank contracts

In the following lines we shall make a brief reference to two of the examples of unfair terms covered by the appendix to the Law no. 193/2000.

Specifically, it is about the letter l and the letter n from the Appendix to the law.

According to the letter I, shall be deemed unfair terms those contractual provisions requiring the consumer to pay some disproportionately high amounts in the event of failure to fulfill his contractual obligations, compared to the damages suffered by the professional.

Within the content of such a term may be included the situation in which the credit institution assigns the debt to a recovery company at a price considerably lower than the amount of the debt (between 20-60% of the nominal value of the loan).

More specifically, it is about the fact that, if we consider the professional - credit institution, the amounts are "disproportionately high" compared to the damages suffered by him as long as he receives a price pursuant to the assignment and if we consider the professional - recovery company, the amounts are "disproportionately high" compared to the damages suffered, since the consumer shall have to pay the entire debt, not just up to the price paid by the recovery company.

Such a term also brings the invocation of the litigious retract by the consumer to the institution for selling the litigious rights between the credit institution and the recovery company.

Another example of term is the one from the letter n which entitles the professional (credit institution) to transfer the contractual obligations to third persons - agent, attorney-in-fact etc. - (recovery companies) without the consumer's consent, if such transfer is performed in order to reduce the guarantees or other liabilities towards the consumer.

Specifically, the consumer could invoke the loss of the guarantee for the repayment term considering that within the contract he had a repayment period (of 10, 20, 30 years), and following the transfer of the contractual obligations by the recovery company, the consumer shall be required to repay the loan at once.

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