ABUSE CLAUSES. PRINCIPLES AND LEGAL RIGHTS OF CONSUMERS IN BANK CREDIT CONTRACTS

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1. **Consumer contract and abusive clauses**

Contract represents the source of the formation of contractual clauses. The bank credit contract falls into the category of consensual contracts – according to the opinion of the scientist Aurel Baiesu [1, p.94] respectively, the written form of the bank contract is required as an ad probationem and ad validitaem condition and in this sense, non-compliance with the written form attracts the effects provided by art. 211 CC RM [2, p.352-353].

The specialized literature presents the Consumer contract as having the following characters:

- It is not a special contract, but only a form of commercial contracts.
- Has as subject the consumer with the status of natural person.
- The purchased products or the services benefited by the consumer must not be related to an entrepreneurial activity.
- The most common type of the consumer contract is an adhesion contract or a standard contract.
- Most consumer contracts contain general provisions that the consumer does not sign and adhere to them en masse. For example: receipt, vouchers, tickets, etc..
- Drawing a parallel with French law, there is established that the consumer contract is a legal institution, an objective legal instrument, and not an agreement of will in the sense of civil law, so that it is designed legislatively as a normative shell that includes the concrete agreement of will between the economic agent and the consumer [1, p.82-83].

According to the Legal Dictionary, the abusive clause is represented by a "contractual clause which has not been negotiated directly with the consumer and which by itself or together with other provisions of the contract creates, to the detriment of consumers and contrary to the requirements of good faith, a significant imbalance between rights and obligations of parties" [3].

Reported to art. 4. points 1, 2 and 3 of Chapter II entitled "The rights

and obligations of the contracting parties” of Law no. 193/2000 [8] on abusive clauses in contracts concluded between professionals and consumers (updated on 31.01.2013), a contractual clause transforms into an abusive clause in the following situations:

1. when a contractual clause has not been negotiated directly with the consumer by itself, or when in conjunction with other provisions of the contract creates a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer and contrary to the requirements of good faith;

2. in the situation when a contractual clause will be considered as imposed without being negotiated directly with the consumer and without giving him the possibility to influence its nature. The law refers to the standard pre-formulated contracts or the general conditions of sale on the market of the respective product or service;

3. the situation in which the contractual clauses: either the contractual clauses have been partially negotiated; or certain aspects of the contractual clauses have been negotiated; or only one of the clauses was negotiated directly with the consumer without excluding the application of the law for the rest of the contract, assuming that a global evaluation of the contract shows that it highlights a unilaterally predetermined situation of professional, being conditioned the situation where a pre-formulated standard clause has been negotiated directly with the consumer, it must be supported by concrete evidence to prove this.

Deviations from the true meaning of the clauses may lead to other effects than the initial ones.

2. Consumer principles and rights when concluding contracts

The basic principles of consumer protection are regulated by article 4 of Law no. 296/2004, the Consumer Code republished in 2008 and are materialized in:

a) adversarial proceedings – involve ensuring the possibility of persons in divergent positions to express themselves regarding any act or fact that is related to the possible violation of the provisions on consumer protection;

b) celerity of the investigation procedure – implies the obligation of the competent authority in the field of consumer protection to proceed, without delay, to the investigation of the consumer notification, respecting the

rights of the involved persons and the rules provided by law;

c) proportionality – according to which a correct ratio must be observed between the gravity or the consequences of the established deed, the circumstances of its commission and the applied sanctioning measure;

d) legality of the proposed/ordered measures – implies that the competent authorities can only propose/order the measures provided by law;

e) confidentiality – the obligation of the staff within the competent authorities to maintain the confidentiality of data, documents, information of any nature, through the disclosure of which damages may be caused to natural or legal persons, who are or may be mentioned in this information;

f) mutual recognition – any legal product manufactured or marketed in a Member State of the European Union or in Turkey or legally manufactured in another state belonging to the European Economic Area is admitted on the Romanian territory, if it offers an equivalent degree of protection with the one imposed by the Romanian norms [7].

The rights that the consumer holds at the conclusion of contracts are found in the same Law through articles 75-84, which consist of:

- Any contract concluded between traders and consumers for the sale of goods or services, will include clear contractual clauses, unequivocally, for the understanding of which no specialized knowledge is required.
- Any information on packages of tourism services, their prices, consumer credit contracts and all other conditions applicable to the contract, communicated by the organizer or retailer to the consumer, must contain correct and clear indications, which do not allow their misinterpretation.
- In case of doubt about the interpretation of some contractual clauses, they will be interpreted in favor of the consumer.
- Traders are prohibited from stipulating abusive clauses in contracts concluded with consumers.
- A contractual clause that has not been negotiated directly with the consumer will be considered abusive 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.
- A contractual clause will be considered as not being negotiated directly with the consumer, if it has been established without enabling the

consumer to influence its nature, such as pre-formulated contracts or general conditions of sale by traders on that product or service market.

- The fact that certain aspects of the contractual clauses or only one of the clauses was negotiated directly with the consumer does not exclude the application of legal provisions for the rest of the contract, if a global evaluation of the contract shows that it was pre-established unilaterally by the trader. If a trader claims that a pre-formulated clause has been negotiated directly with the consumer, it is his duty to provide evidence in this regard.
- The contract must stipulate, in large print and in the immediate vicinity of the place reserved for the consumer's signature, the express clause on the right of unilateral termination of the contract, as the case may be, and the name and address of the trader to whom the consumer may exercise this right according to the legal provisions.
- The trader is obliged to give the consumer a copy of the concluded contract and to be able to prove this in front of the control bodies.
- The consumer's right to terminate the contract may not be annulled by any contractual clause or agreement between the parties, in the cases provided by law, this being considered null and void [7].

The legislative acts used in our research are from Romania.

We appreciate the fact that educating consumers through knowledge ensures largely or even totally, their protection.

In this sense, the specialized literature from the Republic of Moldova in the context of subject V, point 4 entitled Education in the field of consumer protection [1, p78-79] scientist Aurel Baiesu defines the concept of education, presents aspects of consumer education, talks about consumer education provided by the state and the procedures of the Consumer Protection Strategy for 2013-2020 on consumer education [7].

Conclusions:

Traders are prohibited from inserting abusive clauses in contracts concluded with consumers. The proven existence of an abusive clause is sanctioned. However, these abusive clauses exist because we are talking about adhesion contracts, which are bank contracts and which are sometimes predefined and the contractual clauses are only partially negotiated or contain contractual clauses with ambiguous content that they generate. The legislator refers to issues that generate significant imbalances between the

rights and obligations of the parties due to the total or partial lack of negotiation of contractual clauses and against good faith. In the case of bank credit contracts, these are adhesion contracts, being predefined bank contracts that no longer leave room for negotiations either in whole or in part or only a single contractual clause is negotiated, which will determine effects on the entire contract. In the idea in which the professional claims that he proceeded to negotiate the clauses within some predefined contracts, he will have to prove this with evidence.

According to art. 150 of the NCC, the evidence is concretized in: documents, witnesses, presumptions, confession of one of the parties, made on his own initiative or obtained at interrogation, expertise, material means of evidence, on-site research or by any other means provided by law. The treatment of the negotiation of contractual clauses concerns them in full and not selectively, in part or not at all and involves good faith. We believe that good faith should be replaced by the concept of maximum good faith based on professionalism, professional ethics, public order and good morals. We have noticed that the French literature speaks and associates abusive clauses with gray clauses and has even challenged good faith and removed it from the definition of abusive clauses. Of course, according to art. 5 of the law, the abusive nature of a contractual clause is evaluated according to: a) the nature of the products or services that are the object of the contract at the moment of its conclusion; b) all the factors that determined the conclusion of the contract; c) other clauses of the contract or of other contracts on which it depends [7].

The assessment of the abusive nature of the clauses is neither associated with the definition of the main object of the contract, nor with the quality of satisfying the price and payment requirements, on the one hand, nor with the products and services offered in return, on the other hand if these clauses are expressed in easily intelligible language. Art. 5 of the law supposes that in the case of pre-formulated standard contracts, the professional has the obligation to send a copy of the contract he proposes, upon request, to any interested person. The abusive clauses found and included in the contract will be eliminated. If the abusive clauses do not produce effects on the consumer and are removed from the contract, then the contract based on the agreement given by the consumer can continue,

respectively the contract will continue with the consent of the consumer.

In the hypothesis of Art. 7, to the extent that the contract can no longer produce its effects after the removal of the clauses considered abusive, the consumer is entitled to request the termination of the contract, and may request, as appropriate, damages.

We notice that at the conclusion of the bank credit agreements the parties are not on equal positions because the bank credit contract is an adhesion contract, belonging to the bank. Practice has shown that in the relationships established between banks as professionals and its customers, consumer imbalances have existed, exist and will exist under various formulas. Not every inequality is relevant, but only "a significant imbalance between the rights and obligations of the parties” [7].

We consider that:

1. educating consumers through knowledge is a lever that ensures most or even totally their protection;

2. The LIST containing the clauses considered as abusive in the form of an annex to Law no. 193/2000 of 11/06/2000 comes to support the consumer in the case of bank credit services if they know it.

Bibliography:

1. BAIEȘU, A. & PLOTNIC, O. *Consumer protection law*. Course support, Chisinau, 2014, ISBN 978-9975-71-511-9
2. Civil Code of the Republic of Moldova.
3. *Legal Dictionary.*
4. Law 33/2015 for the amendment of Law no. 363/2007 on combating unfair practices of trades in relation to consumers and harmonizing regulations with European legislation on consumer protection.
5. Law 25/2015 on the approval of GEO 14/2011 for consumer protection.
6. Law 134/2013 on the approval of GEO 73/2012 for the amendment of point II of annex no. 1 to GEO 50/2010 on credit contracts for consumers.
7. Law no. 296/2004, regarding the Consumer Code, law republished in 2008.
8. Law no. 193/2000 on abusive clauses in contracts concluded between professionals and consumers updated on 31.01.2013.
9. Government Decision no. 560 of 24.07.2013 on the Strategy for consumer protection for the years 2013-2020 on consumer education.
10. http://www.dreptonline.ro/dictionar_juridic/termen_juridic.php?cuvant=Clauza%20abuziva.