THE CONSENT VICE IN ADDENDUMS TO BANK CONSUMER CONTRACTS INFORCING THE DISPOSITIONS OF EMERGENCY ORDINANCE 50/2010

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ABSTRACT: *This paper aims to analyse the possibility to seek the judicial annulment of additional contracts to credit agreements concluded by bank institutions in order to comply with the Government Emergency Ordinance no. 50/2010. We shall demonstrate that contracts that were concluded by some bank institutions in Romania are invalid, as the consent of the customer was unlawfully obtained. For this, customers that have been wronged by bank institutions we shall argue that they can initiate judicial proceedings seeking the annulment of such additional contracts.*

KEYWORDS: *Consent vice; Emergency Ordinance 50/2010; bank contracts; null clauses.*
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1. INTRODUCTORY REMARKS

In this article we shall analyse the practice adopted by some bank institutions that carry business in Romania in concluding addendums to credit agreements that are concluded with customers, as an effect of art. 95 of the Government Emergency Ordinance no. 50/2010. Therefore, we will plead for the annulment of the additional acts. On one hand, we shall argue that the contract are null as they were concluded for an unlawful cause. On the other hand, we shall show that bank institutions have used fraudulent mechanisms to trick costumers in concluding the additional acts, and as a consequence, these contracts are null and void.

2. THE CONTRACT ADDENDUMS WERE CONCLUCED FOR AN ILICIT PURPOSE

In the structure of the contracts that we consider in this analysis, the amount of the costs incurred by the clients also includes the risk commission. This commission was severely sanctioned by doctrine, then case law, being finally banned by Emergency Ordinance 50/2010. However, the thesis that we are going to plead is that, in fact, the bank institutions that practiced this commission, by concluding the additional act to the

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credit contracts, instead of acting in the sense shown by Emergency Ordinance 50/2010, actually resolved to evade the dispositions of the law in order to keep this cost in the contracts. Therefore, we consider that for this reason, since the bank mainly sought to safeguard the unfair benefit gained by this commission to the consumer's detriment, it concluded the additional act to the credit agreements for illicit cause.

In order to analyse this invalidity case it is necessary to remember the provisions of art. 948 of the Civil Code from 1864, applicable at the time of the conclusion of the credit agreements that provided for this commission. Thus, according to this article "*The essential conditions for the validity of a convention are: 1. The ability to contract; 2. The valid consent of the obliging party; 3. A particular object; 4. A legitimate cause.* "

According to art. 968 of the Civil Code of 1864, "*The cause is unlawful when it is prohibited by laws, when it is contrary to good morals and public order*", and the sanction that intervenes in the case of a illicit cause is nullity, as provided by art. . 966 of the Civil Code of 1864: "*Obligation without cause or founded on a false, or unlawful cause can have no effect*."

Having these legal benchmarks, we consider that the premises that we analyse in this section and that we are going to develop, makes the above legal provisions applicable and determines the invalidity of the additional act for an illicit cause.

We recall that we are mainly considering a certain practice used be banks in Romania that has become notorious regarding the abusive perception of the risk commission. This commission, in fact, is a hidden interest, which complements the bank's profit and the costs incurred by consumers. This conclusion is also sustained by case-law (Decision, 2014); (Decision 2665/2014, 2014); (Decision 2797/2014, 2014).

These banking institution found themselves in a situation in which they had to bear a loss equivalent to approximately 30% of the profit obtained through the revenues generated by the credit agreements concluded with its clients before the date of entry into force of Emergency Ordinance 50/2010. As a solution, the banks found it advisable to unilaterally re-qualify the risk commission (contract provision forbidden by Emergency Ordinance 50/2010) into the such called *management commission*, enabled by Emergency Ordinance 50/2010. As a preliminary conclusion, we believe it to be quite clear that the interest of the bank institutions in concluding addendums to contracts was to safeguard this profit gained by means of a clause declared void by law.

According to art. 95, para. (1) of Emergency Ordinance 50/2010, for the ongoing contracts, the creditors had the obligation, within 90 days from the date of entry into force of the emergency ordinance, to ensure the compliance of the credit contracts with the provisions of the emergency ordinance. But the same article stipulates in paragraph 4 the following: "*It is forbidden to introduce in the additional documents other provisions than those of this emergency ordinance. The introduction in the additional documents of any provisions other than those imposed by this emergency ordinance are considered null and void.* "

The discussion that is required here considers the dichotonic character of the cause, which splits into immediate and mediated cause (Boroi, 2011) p. 159..

The immediate cause of the conclusion of such additional acts concerns the adaptation of the credit agreements concluded prior to the appearance of the ordinance to the rigors imposed by the new provisions. However, the mediated and main cause considers, as we have pointed out above, was to mediate the losses.

In order to conclude on the main cause of the conclusion of the additional act to the credit convention, the following three aspects must also be considered: (i) the purpose of a company in general, namely to obtain profit; (ii) the general policy of the institution towards the clients and the mechanism used to conclude the contract; (iii) as well as the most important nature and object of the management commission. Only by considering all these aspects we can identify the real reason that determined the banking institution to conclude the additional act, namely saving the profit by means f masking the risk commission as a new *commission*.

The credit administration commission inserted by the additional acts concluded by this bank are in kind and object the risk commission charged by the original agreement. This factual and legal reality can be easily observed from the text of the two clauses.

Another argument in support of the identity between the two commissions is given by the following factual situation. If we are to analyze the special conditions of the credit agreements in the forms prior to the amendments brought by the additional acts, we will observe that in most cases there is no mention regarding the collection of a credit administration commission. Instead, we will find in the content of the contracts a risk commission that adds up to about 30% of the costs of consumer credit. The credit administration commission was usually introduced by the additional documents, producing the same additional cost for the consumer of 30%. We conclude that the credit administration commission could not be levied before the completion of the additional acts as it has the same nature and purpose as the risk commission, which would have determined a cost claimed twice from the consumer for the same alleged benefit from the bank.

Comparing the two clauses, we consider that their legal identity is evident. The two clauses not only have the same object and nature, but even the formulation of the clauses themselves reveal the identity between their purpose. We consider that the interpretation of the two clauses should not be limited to its formulation, but must take into account its meaning and purpose, as required by the interpretation rules established by the Civil Code. In fact, the bank's unfair intention to mask this commission comes from a series of reasons, some set out above (refer to those of an economic nature) and others concern strategic criteria to reduce the costs associated with the processes initiated by the bank's clients at the time of occurrence of Emergency Ordinance 50/2010. Thus, we think that due to the arguments presented above, it is necessary to establish the identity between the risk commission and the credit administration commission, as regards its nature, the object and the mechanism of perception, which makes it illegal from the perspective of the Emergency Ordinance 50/2010.

These elements noted above that had the role of highlighting the true cause of the act inevitably leads to the conclusion that it is illegal. The illegality of the cause is given by the fact that its role is to escape the law by including a commission that was forbidden (as a result of the exhaustive list provided by art. 36 of Emergency Ordinance 50/2010) by formally disguising it under the title of management commission. Thus, as a result of the provisions of the common law at that time (the Civil Code from 1864 art. 948, 966 and 968) as well as the provision of art. 95, para. 4 of Emergency Ordinance 50/2010 (*which stipulates: "the introduction in the additional acts of provisions other than those of this emergency ordinance is forbidden. The introduction in the additional acts of any provisions other than those imposed by this emergency ordinance are considered null*

and void. The Additional Act is null ") the additional acts concluded in these conditions are in our opinion null (Decision 11919/2013, 2013).

Now, with regard to the effects of nullity, we do not argue exclusively for a total nullity of the addendum. We consider that the arguments set out above regarding the nature of the cause and its illegality can be analyzed separately with regard to the risk commission, since the object of the credit agreements is a complex one.

3. THE FRAUDULOS MECANISM USED BY THE BANK IN ORDER TO CONCLUDE THE ADDENDUMS WITH THE COSTUMERS RENDER THE CONTRACTS VOID

The argument to be made in this section has the disadvantage of looking at a factual situation whose wrongdoer was not vehemently condemned by the legislation at the time of the conclusion of the additional acts stipulated by Emergency Ordinance 50/2010, but was anticipated by doctrine, and finally enforced by the present Civil Code. However, the set of legal provisions existing at that time, as we will identify in the following, make the negotiation of the additional acts by the bank in question an abusive one, contrary to the good faith and consequently, we consider that it violates the consent of the consumers.

In general, the mechanism for concluding these additional acts followed a uniform pattern. The clients of the bank who had concluded credit agreements were approached within the period immediately following the entry into force of Emergency Ordinance 50/2010 by the following mechanism : the client who came to the bank's office to pay the mortgage was presented with a copy of the addendum; he was asked to sign for the receipt on this copy; no information was provided regarding the nature of the act, its purpose, the consequences it can produce, nor the obligations and more importantly the rights the client has during the "negotiation" period of the additional act or after its adoption. As a rule, regarding the content of the addendum, it is important to point out the following irregularities: lack of mention regarding the identity of the bank's representatives as well as of the issuing branch.

3.1. The obligation to inform the customer

As the consumer society developed, the idea of the existence of an information obligation that works between the contracting parties emerged - first in case law, then in legislation. This obligation has been developed from the beginning to ensure the equality of the contractors from the negotiation phase(Thisbierge-Guelfucci, 1997).

A first application of the information obligation was identified by doctrine in German case-law, in a decision of the Imperial Court of 1903, where it was stated: *according to the rules of good faith, the seller has the obligation to inform the buyer of all the circumstances which they know, and which, after a reasonable appreciation, find that they can have a considerable importance on the intention to buy of the buyer*.

In the attempt to identify the circumstances that impose this obligation, in German literature it was indicated on the first hand, the need to protect one of the parties, who is in a less favourable negotiation position due to the lack of experience, age, social or family situation, and, on the other hand in the distribution of information - one of the parties is in possession of the information that the other party does not have and cannot access.

Thus, the foundation of the information obligation is considered to be given on the one hand by the inequality of information, at the stage of contract formation and on the other hand, it constitutes a remedy of the limits of the classical theory of the vices of consent. Another justification was based on the idea of a pre-contractual obligation of information, arising from the obligation of good faith (Jaluzot, 2001).

Based on these considerations, the obligation to inform was defined as the obligation to communicate to the creditor this obligation, a minimum of knowledge necessary for a valid consent at the conclusion of the contract, the good performance of the contract or the use of the product / service properly (alli, 1999).

The obligation of inform was developed especially by the French doctrine and jurisprudence and especially in the matter of commercial contracts, stating the idea that the professional contractor is always obliged to inform the profane partner about all the data needed to conclude the contract and which would be decisive in the conclusion of the contract (Buric, 2004).

The establishment of this obligation starts from the premise that the professional partner is in a much more favorable position than the other, because, by the nature of his activity, he knows much better the work that forms the object of the contract, with his deficiencies and qualities.

Also in French literature, regarding the nature of the information obligation, it was claimed that it includes, on the one hand, an obligation of result, an obligation to transmit information to the creditor, and an obligation of means, namely the obligation to use such ways of transmitting the information so that they are understood by the creditor, the result cannot be guaranteed(Goicovici, 2002).Regarding the object of the information obligation, it was considered that it carries on all the information able to influence the attention of the beneficiary to purchase a product / service and useful for its use. The negotiator is obliged to provide the partner with all the information they possess and which could be decisive for the partner in making the decision to conclude the contract. In particular, it is obliged to report its risks regarding the use of a product.

Regarding the conditions to be met by the information obligation, in the legal literature the following were retained: the information held by the information debtor is relevant, that is, able to influence the creditor's consent to the obligation and that the creditor's ignorance is legitimate, ie the lack of knowledge regarding the object of the contract is not to be blamed. In case-law it was held that a serious difficulty is sufficient, with no absolute difficulty required (Noșlăcan, 2014).

It is important to note that the obligation to inform is relative and not absolute. For example, in the absence of an express invitation regarding the fulfillment of this obligation, not informing the contractual partner about all the details that present for him importance, it is not contrary to the good faith, if he could, based on his own investigations to become aware of relevant data. An arbitral decision, of the International Chamber of Commerce, no. 1990/1972, in which an Italian concessionaire, disappointed with the results obtained on the Spanish market, invoked the error on the substance of the good and the arbitration court found that the importer was aware of the technical and commercial characteristics of the product, and his failure to perform a study. The arbitral tribunal, rejecting the concessioner's argument based on the existence of a vice of consent, argued its solution in the following terms: the dealer was aware of the technical characteristics of the product, and by failing to carry out a careful study of the Spanish

market, he committed an unacceptable negligence that he can only reproach himself, as the business partner was not responsible(Jarvis, 1985).

The obligation of information, viewed as an expression of loyalty, concerns any contract. For example, in the case of the employment contract, Law no. 53/2003 expressly establishes the obligation of the employer to inform the future employee about the working conditions or the need to modify them. According to this obligation, the employee's right to information and consultation is provided.

As for the legal nature of the obligation of information in our law, with application in the contract of sale-purchase, this is an object of controversy. A first theory supports its contractual nature by considering it an accessory to the teaching obligation; in this case the obligation of information to be executed by the seller prior to the formation of the contract, in order to express a valid consent, is confused with the contractual duty of the seller to inform the buyer about the composition of the good, the possible risks in use as well as the use, having the purpose to ensure the good performance of the contract. The second theory supports the precontractual nature of the information obligation. According to this theory, it is born during the formation of the sale-purchase contract. It is not an obligation born from the conclusion of the contract, but it will precede the formation of the agreement of wills of the parties, whose purpose is to ensure an equal position of informing the co-contractors in those cases where the complexity of the good and the low degree of its knowledge by the buyer implies the risk that the latter cannot express a valid consent by not knowing the properties of the good. The obligation to inform is an obligation of means: the seller, even unprofessional, must inform the buyer about the thing sold and communicate the useful information available to him; in furniture sales, this obligation is especially focused on the manufacturer and the professional seller who must describe the product, indicate its use and provide the necessary warnings, but does not guarantee the result (Malaurie, 2009).

Thus, given the nature and status of the parties, the obligation to inform should be viewed differently (Buric, 2004). If one of the contractual partners is a professional and the other "profane", the obligation is predominantly unique, ie it is due only to the one who holds the information on the object of the contract. In the case of a negotiation between the lay people, the obligation to inform is mutual.

3.2. The banks obligation to offer guidance

The obligation of counseling, doctrinal and jurisprudential creation, evolved from the obligation of information, acquiring in time a status of its own, independent, with a specific content, as an obligation of guidance meant to set relevant benchmarks for obtaining the consent of the other contractor (Malaurie, 2009).

The obligation of counseling in the pre-contractual phase does not appear as a general obligation in the Civil Code, its favorite sphere, enshrined in other systems of law being in the relations between professionals and consumers and having relevance only when the anticipated contract is concluded. This obligation derives from the principle of good pre-contractual beliefs, through the information obligation chain and especially the loyalty obligation, going beyond providing the contractual partner with the elements of appreciation that would allow him to make a decision to contract(Floare, 2012). French case law provides examples in this regard. In a decision it was shown that the professional is obliged to refuse the execution of certain works whenever it is clear,

based on his technical knowledge, that a decision according to the client's choice would result in a disastrous result.

Thus, in the relations between the professionals and the profane, a good execution of the duty of counseling does not consist in the mere attention of the buyer on the technical aspects of an equipment or another, but in ensuring that the profane has acquired a good corresponding to his concrete needs.

Also in France, the duty of counseling and relations between lay persons was extended in France, retaining the duty of the seller not only to inform the partner in an objective manner about the conditions of use of the work, but also to guide him in choosing the work and to prevent any inconvenience, debts of a nature to materialize an obligation to advise the buyer (Decision no. 211/1985, 1985).

Regarding the limits of the debt of counseling, the doctrine concluded that they are flexible and should be appreciated on a case-by-case basis, taking into account, inter alia, the following aspects: the legitimacy of the professional's ignorance of the needs of his client; buyer competence; assisting the buyer with a professional advisor; and, the client taking the risk.

3.3. The proposed addendums – offer/invitation to negotiation

In the light of the above considerations, we consider that given the nature of the mechanism proposed by GEO 50/2010 for the conclusion of the additional acts to the credit agreements falling under its scope, which, as we have seen, presupposed an effective negotiation between the parties (borrower and lender), the additional documents received under the above conditions could have the value, at most, we believe, of an invitation to negotiate and not of an offer to contract, which can by simple acceptance (or in this case by the tacit acceptance provided by art 95 of GEO 50/2010) to give birth to a contract.

In order for the additional documents concluded under the above conditions to be considered as offers to contract, capable of producing legal effects upon acceptance (both it and tacit), we consider that it must meet three minimum conditions: (i) the offer must be fill; (ii) the offer must be firm; and (iii) the offer must be issued in the form required by law for the validity of the designed contract. Of these, at least one of the conditions is not met, namely the firm character. By the firm nature of the offer, it is understood that it must express the unquestionable willingness to conclude the contract by its simple acceptance, that is to say, it is unequivocal. The unequivocal character is given by the lack of any reservations regarding the content of this offer. In this sense, the offer that includes the "negotiable" cause, or as it is in some cases, the mention of "draft", cannot be considered a valid offer (Pop, 2012). As a consequence, we consider that the additional acts handed down by the representatives of the consumer bank under the above conditions, cannot be considered offers according to the provisions of the common law, let alone under the special law provisions OUG 50/2010, which presupposed a prior negotiation, and as therefore they cannot be considered as concluded according to the latter.

3.4. Legal conditions for invoking fraud

We consider that under the above conditions, the additional acts were concluded by mourning. According to art. 960 of the Civil Code of 1864, “The mourning is a cause of nullity of the convention when the mischievous means, used by one of the parties, are

such that it is obvious that without these machines, the other party would not have contracted. Mourning is not supposed. ”

Thus, in order for a court seized with a request in order to ascertain the existence of the mourning, it is for the applicant to show that the conditions of this consent defect are fulfilled: (i) the defect is decisive and (ii) it comes from the other party. Regarding the first condition, as we have shown above, the consumers, usually profane in legal and economic matters, were in error regarding the nature of the acts handed down by the officers of the bank, not knowing their intention, the nature of the acts and the consequences produced by these, in the absence of adequate information to be carried out by the bank. If the consumers had known the above data and following a fair and adequate information from the bank, they would certainly have been in a position to negotiate and adapt the contract clauses subject to negotiation (such as the administration fee clause credit) so that they serve the common interests, the issue of consent cannot be posed. But as we have shown, consumers, in the vast majority of cases were in error regarding the nature of the act.

The lack of information coming from the bank, despite its obligation to proceed to an effective negotiation, translates into the present situation through the element that led to the conclusion of the act. We consider that if the consumers had been properly informed about the nature of the delivered documents, they would not have remained liabilities, a fact intended by the bank to proceed to conclude the additional acts under the conditions established unilaterally, abusively and with bad faith by the this, through the express mechanism provided by art. 95 to Emergency Ordinance no/ 50/2010.

We therefore consider, from the above observations, that the conditions of mourning are fulfilled, which leads to the nullity of the additional acts concluded under these conditions, since we believe that only this sanction is capable of restoring the legal balance between the parties.

4. CONCLUSION

The purpose of this article was to identify the legal mechanisms by which the unfair approach of some banking institutions, which proceeded to conclude the additional contracts to ongoing credit contracts, in order to comply with the provisions of the Emergency Ordinance no. 50/2010 in bad faith, by breaching the obligations of effective negotiation, information and advice of clients, can be sanctioned. Given the sanction of absolute nullity for an unlawful cause (the cause in its acceptance of the general condition of validity of the civil legal act) as well as of the relative nullity in the case of a vice of consent, we consider that these legal constructions can be used to put consumers in an effective negotiating position as a result of the invalidity of the additional documents concluded to the credit agreements. Given the evolution of the jurisprudence regarding the abusive clauses in the banking contracts, we consider that an assisted renegotiation of the contractual terms will be much easier and more convenient for the bank's client in this economic climate.

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