Economic and Legal Aspects Regarding the Effects of Unpredictability and Its Impact on Credit Contracts

MIRELA NICULAE
Faculty of Finance, Banking and Accounting
Christian University Dimitrie Cantemir
Bucharest ROMANIA
mirela_s_radu@yahoo.com
BEATRICE-TANTA STRAT
Highest Court of Justice
Bucharest ROMANIA
DIANA GORUN
School of Law
Romanian-American University
Bucharest ROMANIA
diana.gorun@yahoo.com http://www.rau.ro

Abstract - Credit agreements are classified as adhesion contracts, containing clauses to which the customer is obliged to accept. These clauses can be defined as abusive. In order to decrease their effects, it was legally established the unpredictability in the adhesion contracts, which justified the intervention of the court to review or to adapt the contract in the light of the exceptional circumstances' changes

Key-Words – credit, contract, clause, unpredictability, agreement, mortgage, payment, court, legislation

1. Introduction

1.1. Preliminary issues on limiting the binding force of contracts.

In the new Civil Code - entered into force on October 1st , 2011 - the legislator, considering the evolution of the economic and social situation at the level of the Romanian society and the way in which the credit contracts concluded between financial banking institutions and consumers, provided by article 1271, an exception to the principle of binding force of the contract; including credit agreements in this category. Under the latter aspect, it should be noted that many cases have been tried before the courts, with the aim of finding abusive clauses in credit agreements. Of course, we refer to adhesion contracts, whose abusive clauses have been detected by the courts in the proportion of 80% from the point of view of consumer protection legal provisions. [1].

As is well known, credit agreements are classified as adhesion contracts - standard contracts, type contracts - because they contain pre-defined clauses in their content to which the adverse party agrees without being able to negotiate them. In other words, the customer of the bank - the consumer - is obliged to accept the contract and to adhere to the stipulations imposed by the banking institution in the loan agreement concluded by the parties.

The abusive clauses have been identified by the courts with relevant case law on consumer protection.

The historical context was emphasized in all the judgments delivered by the Romanian courts, by the appearance of the unpredictability in the adhesion contracts, which justified the intervention of the court to review or to adapt the contract in the light of the exceptional circumstances' changes.

1.2. Unpredictability in credit agreements. The context of the necessity of the Law no. 77/2016. Legal jurisprudence and relevant doctrine.

The legislative framework is represented by Law no. 77/2016 regarding the payment by returning of real estate in order to settle the obligations assumed by credit contracts.

According to article 1 para. (1) of this law, it applies to legal relationships between consumers and credit institutions, non-banking financial institutions or the transfer of claims on consumers.

Article 3 provides that by derogation from the provisions of Law no. 287/2009 on the Civil Code, republished, as subsequently amended, the consumer has the right to extinguish the debts arising from the credit agreements with all the accessories, without additional costs, by paying/giving back the mortgaged property in favor of the creditor if within the stipulated term to article 5 para. (3) the parties of the credit agreement do not reach another agreement.

Article 5 para. (1) establishes that, for the purpose of applying this law, the consumer shall send to the creditor, through a bailiff, a lawyer or notary, a notice informing him that he has decided to transfer back the ownership of the immovable property in order to settle the debt arising from the contract mortgage, detailing the conditions of admissibility of the application. According to article 8 para. (1) of the abovementioned law, if the creditor fails to comply with the provisions of the law, the debtor may request the court to issue a judgment declaring the obligations arising out of the mortgage credit contract as being settled and to transfer the right of ownership to the creditor. [2]

For example, in the civil decision no. 2886 of September 5th, 2017, pronounced by the Bucharest Court of Instance, 6th Civil Section, file no. 13675/300/2016 highlights, among others, the historical exchange rate of the foreign currency as an exceptional circumstance that affected the execution of the contract in such a way that it became burdensome for the consumers, the banks' customers. [3].

The evoked decision states the currency risk clause, meaning:

"The accelerated increase in the value of the Swiss franc in relation to the national currency, as well as the expenditures generated by the ROL exchange mechanism in Swiss francs and Swiss francs in ROL, the lack of Swiss francs in foreign exchange offices over a long period of time, of the bank's exchange rate and exchange rate, respectively the exchange rate set by the NBR, the differences in the selling and buying-in rates led to a continuous increase in the cost of the contracts, causing a major imbalance in the reciprocal benefits of the parties, to the detriment of the borrowers, the effect of obtaining a loan from the lending bank without any consideration from the bank. The Bank stipulated in the contract with the applicant their obligation to exclusively bear all the foreign exchange differences without limiting in any way the extent of this obligation, so that in the event of doubling the value of the Swiss franc in relation to the national currency, the credit agreements between the parties acquire a random nature, which leads to a breach of the criterion of equivalence of benefits.

The foreign exchange risk clause provided solely for consumers distorts the binding legal relationship by overburdening the consumer's situation and, at the same time, conferring on the bank a manifestly disproportionate economic advantage, gaining unfair advantage to the detriment of consumers contrary to the principles of equity and good faith, which must govern contractual relations. The financier, as a professional banking system, with a wide portfolio of Swiss franc loans, both directly in Romania and through the parent bank in Hungary, knew or ought to know the specialty studies and reports from 2005 - 2007, prior to the granting of credit, made by specialists of the National Bank of Switzerland - SNB (A. Ranaldo, P. Soderlind, Safe Haven Currencies, SNB Working Paper, 14 September 2007, p.2 Quarterly Report of the National Bank of Switzerland on September 3, 2007, pp. 32-33) as well as by National Bank of Romania specialists (Florian Neagu, Angela Mărgărit, Risks to Financial Stability in Romania Generated by the People's Sector, BNR , Study books, August 2005, p. 10; Financial stability report of 2006 conducted by the National Bank of Romania in 2007, p.33), which showed that the Swiss franc is a currency with the highest refugee property, registering significant appreciation during the episodes of crisis, 20 in number, from 1993-2006, and that exchange rate risks are transferred entirely to uncovered borrowers, consumers who do not earn Swiss francs. The National Bank of Romania has warned all banks over time (see in this respect the retrospective study of the NBR in February 2015 entitled Analysis of loans in Swiss francs, p. 29) about the risks of lending, especially in exotic currencies as is the Swiss franc, the currency of a country with which Romania does not have very extensive economic relations. Quotation of this coin (CHF) is made in Romania through the euro, not directly, by National Bank of Romania. not having any goals or levers related to the coinage of this coin against the Romanian Ron "

In most cases, the banks did not inform the client of the risk of overvaluation of CHF, a

predictable phenomenon for financial experts operating within them, given that CHF is an unstable currency and at the time of the conclusion of the contract - 2007-2008 - this was at a historic minimum.

By the occurrence of this phenomenon, the effects of the legal act have come to be different from those which the parties have agreed to establish, which necessarily led to the revision of the effects of the contract based on the theory of unpredictability which, with the entry into force of the New Civil Code, being the general regulation, establishes a legislative transposition of the solutions outlined in practice.

In this situation, in most causes the courts considered that it is necessary to review the effects of the contract by stabilizing the exchange rate and the denomination of the payment, since the change of economic conditions was unpredictable, the consumers lacking specialized knowledge in the financial-banking field to allow them to anticipate a marked devaluation of the Ron against CHF. In the same context, it was stated that the revision of the effects of the contract corresponds to the agreement of the parties' will, since the hyper valorisation of the CHF diverts the contract from the purpose for which it was concluded whose execution no longer corresponds to the concordant will of the parties.

The presented context has set up this legal operation in order to revise or to correct unfair terms in credit agreements to ensure that the parties are in a fair trial, promptly safeguarding the existence of the contract. Thus, it appears that "court intervention" in such litigation is impetuous in establishing the contractual balance with the correlation between the principles of good-faith and equity. These issues have been laid down by the courts through trials with actions brought under Law no. 77/2016, for example Decision no. 1143 of 13th December 2017 issued by the Dolj County Court of Instance, 2nd Civil Section; in other cases, without listing them, the courts merely summarized their examination of the conditions of admissibility provided for by article 4 of the law. [4]

Courts have extensively motivated the phenomenon of the foreign currency in the context of the economic crisis in cases of finding unfair terms in credit agreements, for example: decision no. 723 of December 12th, 2017, pronounced by Buzău County Court of Instance, 2nd Civil, Administrative and Fiscal Contentious Section, Decision no. 2886 of September 5, 2017, pronounced by the Bucharest Court of Instance, 6th Civil Section, decision no. 799 of December 11th, 2017, issued by the Dolj County Court of Instance, 2nd Civil Section etc. [5]

In this paper, we present the evolution of the average foreign exchange rate in the period 2007-2018

Tab. no. 1. Evolution of the average foreign exchange rate over the period 2007-2018

YEAR	EUR/RON	CHF/RON
2007	3,3373 RON	2,0320 RON
2008	3,6827 RON	2,3238 RON
2009	4,2373 RON	2,8063 RON
2010	4,2099 RON	3,0540 RON
2011	4,2379 RON	3,4409 RON
2012	4,4560 RON	3,6972 RON
2013	4,4190 RON	3,5899 RON
2014	4,4446 RON	3,6592 RON
2015	4,4450 RON	4,1684 RON
2016	4,4908 RON	4,1195 RON
2017	4,5682 RON	4,1139 RON
*2018**	4,6557 RON	3,9869 RON

** until 19.04.2018* [6]

Apart from the above, it is necessary to mention some arguments in the explanation of the reasons for the drafting of the law on payment, namely:

"Restoring the contractual balance means that in the event of a "contract crunch" the parties share the risk. Under the forced execution procedure, the good, which has reached a very low value from its original value, will only partly cover the claim and the debtor who does not have another traceable good obviously will not be able to pay off the credit remains uncovered. The creditor, who would receive the goods executed in payment, could mark the loss with a quick and low cost. Thus, this procedure saves the debtor's situation (as opposed to unlimited liability, receiving the chance of a new start) as well as the cash-flow of the creditor (which will no longer constitute provisions and incur legal costs). The debtor will therefore share the risk of lowering the value of the property with the lender."

Actually, the purpose of the law is a fair solution for both the debtor and the creditor in the context of restoring contractual equilibrium in the event of an economic crisis of the contract, by dividing the risk of the contract.

Thus, the legislator provided in the new Civil Code the unpredictability by article 1271 as an exception to the binding force of contracts

established on the basis of *pacta sunt servanda* principle. [7]

Concluding, if there interferes a phenomenon not considered by the contracting parties at the time of the conclusion of the contract, which significantly affects the contractual balance so that it becomes very burdensome for one of the parties, we are in the hypothesis of unpredictability or hardship (unpredictable); this clause is known in the doctrine in two forms, namely *hardship* in English, and the clause *d'imprevision*, a form derived from French. The concept of hardship is a creation of Anglo-Saxon practice, using it by the parties integrating into the dominant tendency to ensure the stability of foreign trade contracts by promoting legal mechanisms capable of adapting them to the dynamic market dynamics.

In support of the theory of unpredictability (imprevision), the clause *rebus sic stantibus*, a Latin expression used to denote the clause that whenever unforeseeable events occurring to change the contractual conditions are maintained, the situation existing at the time of the conclusion of the convention will be maintained. [8]

It should be added that under the Civil Code system of 1864 the unpredictability was not regulated. The theory and mechanism of contractual unpredictability (imprevision) have been recognized and developed by doctrine and jurisprudence, based on the relationship between the countries. Before that, there were very important the provisions of article 969 of previous Civil Code, which enshrines the binding force of the contract, as well as article 970, according to which it is established the principle of the performance of contracts in good faith. Nevertheless, the conditions of the imprudence derived from the doctrine and jurisprudence of the 1864 Civil Code have not been unified and judicial practice has not been and still it is not consistent and uniform in this respect.

2. Interpretation of Law no. 77/2016 from the perspective of criticism of unconstitutionality invoked in the complaints. Decision no. 623/2016 of the Constitutional Court

The Constitutional Court, by Decision no. 623 of October 25th, 2016, published in the Official Gazette of Romania, Part I, no. 53 of January 18th , 2017, found that the phrase "as well as the devaluation of immovable property" in article 11, first sentence of Law no. 77/2016 is unconstitutional, while the provisions of article 11 the first thesis reported in article 3, second sentence, article 4, 7 and 8 of Law no. 77/2016 are constitutional as the court verifies the conditions for the existence of unpredictability.

By Decision no. 639 of October 27th, 2016, published in the Official Gazette of Romania, Part I, no. 35 of January 12th, 2017, the Constitutional Court rejected, as inadmissible, the objection of unconstitutionality of the provisions of article 1 para. (3), article 3, article 8 para. (5), article 10 and article 11 of Law no. 77/2016 regarding the payment back of real estate in order to settle the obligations assumed by credits. The Constitutional Court ruled on the decision no. 623/2016, which, in our opinion, hijacked the purpose of this law, making it difficult for the courts. The way in which the Constitutional Court understood the law violates the principle of the right to a fair trial and free access to justice. In the opinion of the Constitutional Court, even if the existence of unpredictability is found in other cases, it imposes in such a case the obligation of banks to renegotiate credit agreements in order to adapt to the new economic conditions in accordance with the principle of equity and good faith.

In addition, at present, the judicial practice of judicial courts reveals the existence of unpredictability in the cases of finding abusive clauses in credit agreements, issues which are contrary to the interpretation of the Constitutional Court.

The Court found, according to the same decision, that "its purpose is to regulate those situations arising from the economic crisis in which the debtors were no longer able to fulfill their obligations under the credit agreements. Thus, according to the Explanatory Memorandum of the Act, its adoption was determined by the idea of fairness and the sharing of contractual risks in the execution of the credit agreement. Therefore, the main problem that arises is that of reconciling the principle of pacta are serving with the provisions of the criticized law. In order to carry out this operation, the Court must determine the content of that principle. According to this fundamental principle of civil law, once concluded, the contract must be executed in full compliance with its content, the contractual provisions being enforced (legally) by both the parties (and, where applicable, the successors in rights) and the courts and the bodies called upon to ensure forced execution.

This principle was based on the provisions of article 969 of the previous Civil Code, according

to which the legally established conventions have the force of law between the contracting parties, and they may be revoked only by mutual consent or by causes authorized by law. It is closely related to the voluntarist theory of autonomy of will, according to which the free individual creates the right, his will being sufficient to explain the legal effects of a legal act. The will is autonomous, because it alone and independently has the force to generate the legal act, with the effect that the objective right only confirms the legal force of the individual will. In other words, the effects of the contract consist in the birth, modification or extinction of civil rights and obligations under *pacta sunt servanda* rule (mandatory contract force). Thus, the parties are obliged to execute exactly and in good faith the contract concluded under the applicable law. Under these circumstances, the only way in which the effects of the contract thus concluded can be changed is the agreement of the parties as an expression of their autonomy of will. However, the *pacta sunt servanda* rule may be subject to mitigation imposed by situations that occur during the performance of the contract, situations which could not be considered at its conclusion and which put one of the parties to the contract in the situation of not being able to honorable contractual obligations.

Last but not least, the law was enacted in order to balance the legal relationships concluded by banks and consumers by this legal means, which is easy for both parties, both the debtor and the creditor. Thus, the law takes into account an economic and social context emerging from the devaluation of the currency, which led to a significant debilitation in the concluded contracts. Thus, the credit went up considerably, and the mortgaged property reached a much lower value than it had at the end of the loan agreement. It is well-known that, for the granting of a high credit, it was necessary to guarantee it with a property which was valued only by the bank's valuation experts - a condition imposed also - and only after its valuation is granted the limited amount of the value of the real estate and the salary incomes of the consumers.

In the case of contracts concluded after the entry into force of the new Civil Code in 2011, payment back may be made on condition that the courts decide on a case-by-case basis whether the payment is justified, more precisely if the principle of unpredictability is applicable.

Article 11 of the law provides as follows: "In order to balance the risks arising from the credit agreement as well as from the devaluation of immovable property, this law applies both to credit agreements in progress at the time of its entry into force and to all contracts concluded after that date."

In other words, the provisions of article 11 on the retroactive application of the law, for example to the contracts in progress, are considered constitutional, with the exception of the phrase "as well as the devaluation of immovable property", which has to be abolished.

In this respect, it was stated that article 11 of Law no. 77/2016 also refers to the contracts concluded before the entry into force in 2011 of the new Civil Code, meaning that the courts will apply the imprecision as it was configured under the 1864 Civil Code regime and with the details to be found in the final motivation of the Constitutional Court's decision.

According to the Court's judgment, impunity exists when an exceptional event occurred during the execution of the contract, which could not reasonably be foreseen by the parties at the date of its signing, which makes the debtor's obligation excessively onerous. The verification of these conditions rests in each case with the court which, under the terms of the law, is independent in its assessment, pronouncing either the adaptation of the contract or its cessation in the form it decides and which may go until the creditor takes over the property guaranteed warranty with the extinguishment of all accessories.

As regards the interpretation of the pact's rule, it is necessary to take into account elements such as good faith and equity, subject to the fundamental change in the conditions for the execution of the contract. As a general principle, equity is manifested in two perspectives: objective - by naming the principle of exact compensation with the involvement of equal treatment - and subjective - meaning a particular situation, as a rule, the weakness of a contracting party. Remaining at the same general level, the functions of equity are to interpret and supplement legal norms, including the expressed will of the parties. From the corroboration of the provisions of article 969 and article 970 of the 1864 Civil Code, there are two interdependent principles on which the civil contract is based on the power of law/binding force for the contracting parties, on the one hand, and good faith in its execution, on the other. The power of law of the contract covers not only what the contract expressly provides in its clauses, but also all the consequences that equity, habit or law implies by its nature (article 970 para. (2) of the Civil Code from 1864). In other words, the equity, the corollary of good faith, governs the civil contract from its birth to the exhaustion of all effects, regardless of the existence

of an express clause in the contract. Therefore, the execution of a civil contract is legitimate as long as it results from the cumulative assembly of the two principles (binding force and execution in good faith), principles that do not have a stand-alone existence, but are mutually conditioned. The theory of unpredictability, based on the two principles, mitigates the binding nature of the contract insofar as, during its execution, an unforeseeable situation occurs, but none of the contracting parties waives its obligations under the good faith execution contract. So equity, alongside good faith, provides a foundation for imprecision, starting from the existing relationship between them.

The Court held that most of the loan agreements covered by the Criminal Law were concluded during the period 2007-2009, these contracts being applicable to the legal framework in force at that time. Thus, the common law was the Civil Code in force at that time, and additional regulations, specific to the banking sector, were contained in Law no. 190/1999 regarding the mortgage loan for real estate investments, published in the Official Gazette of Romania, Part I, no. 611 of 14th December 1999. The Court notes, however, that Law no. 77/2016 also applies to contracts which have been concluded under other legal provisions than those of Law no. 190/1999. In other words, some loans that were not contracted for the purpose of acquiring real estate were secured by mortgages on real estate.

The Court has also held that payment may be successful if we prove that a situation whereby the contract has become too burdensome for the debtor has occurred, the unpredictability being proved by: loss of employment, lowering the value of the property, diminishing the income , the loss of work capacity, the increase in the exchange rate, the destruction of the real estate or any other change likely to change the good course of the contract.

The determination of the circumstances justifying the application of the unpredictability/imprevision theory, a concept derived from the good faith that must characterize the execution of the contract, must be made taking into account the risk of the contract. It should be analyzed from a bivalent point of view when it materializes; the contract itself entails an inherent risk assumed voluntarily by the two parties to the contract on the basis of their autonomy of will, a principle which characterizes the matter of the conclusion of the contract and an over-addendum which could not be the subject of a foreseeable by none of them, a risk which goes beyond the contractual power of the contracting parties and which involves the intervention of elements which could not be taken into account at the time of a quo.

The Constitutional Court proposes the option before the court, the renegotiation of the contract, which must be effective in relation to the new reality.

The judge in the action for damages must proceed to the extent to which the debtor is in good faith or in bad faith or, as the Court points out, "between those who can no longer pay and those who are no longer want to pay ".

In the context of the statement of reasons for the decision, the Court gives a ruling to the ordinary courts, including on the manner in which the court proceedings for payment are to be enforced - "when the creditor challenges the debtor's claim or the debtor's action, he will verify the fulfillment of the condition of notification to the creditor, the fulfillment of the criteria provided by art. 4 of the law, necessarily applying the theory of imprevision in article 7 of the law, respectively article 8 times within article 9 of the same law. "Adaptation to the new conditions may also be effected by a conversion of the payment rates in the national currency at a rate that the court may determine depending on the concrete circumstances of the case for the purposes of rebalancing liabilities, foreign exchange rate which may be the one from the date of the conclusion of the contract, the one from the date of the occurrence of the unforeseeable event or from the date of the conversion. "

3. Conclusions

Thus, judges will have a decisive role to distinguish between good faith and bad faith debtors, with the case-by-case assessment, taking into account the concrete circumstances presented in the petition for a lawsuit under the Law no. 77/2016. The Constitutional Court upheld the exception and found that the provisions of article 11 the first thesis reported to article 3, second sentence, article 4, article 7 and article 8 of the Law no. 77/2016 on the payment back of immovable property in order to settle the obligations assumed by credit, are constitutional as the court verifies the conditions for the existence of unpredictability.

In such cases, it is natural and legal that these laws are suspended and repealed, or amended accordingly to the decision of the Constitutional Court. However, the interpretation given by the Court has resulted in many decisions with different

solutions, thus creating a non-unitary practice at the level of the courts.

The lawsuits on the Paying Law have been won in most cases by banks. Up to now, at the first instance, only about 30% of the processes settled were in favor of the borrowers and 70% for the credit units.

References:

[1] The binding force of the contract is a basic principle of civil law, meaning that the contract is ''the law of the parties"

[2] Law no. 77/2016, published in Romanian Official Gazette of May, 13th 2016

[3] Civil decision no. 2886/05.09.2017, pronounced by the Bucharest Court of Instance, 6th Civil Section

[4] Civil decision no. 1143/13.12.2017 issued by the Dolj County Court of Instance, 2nd Civil Section

[5] Civil decision no. 723/12.12.2017, pronounced by Buzău County Court of Instance, 2nd Civil, Administrative and Fiscal Contentious Section, civil decision no. 2886/05.09.2017, pronounced by the Bucharest Court of Instance, 6th Civil Section, decision no. 799/11.12.2017, issued by the Dolj County Court of Instance, 2nd Civil Section

[6] https://www.curs-valutar-bnr.ro/curs-valutar-mediu-lunar

[7] *Pacta sunt servanda* is the rule of law that the legally concluded civil legal act is imposed on the parties (in the case of contracts) or the party (in the case of unilateral legal acts) just as the law. In other words, enforcement of the civil legal act is binding on the parties and not optional

[8] *Rebus sic stantibus* (Latin for "things thus standing") is the legal doctrine allowing for a treaty to become inapplicable because of a fundamental change of circumstances. The doctrine is essentially an "escape clause" to the general rule of *pacta sunt servanda*