CONSIDERATIONS ON A RECENT INTERPRETATION OF THE OBLIGATION TO INFORM AND ADVISE THE BANK'S CLIENT

Dan VELICU[*]

Abstract

As we know in all legal systems, contracts generate rights and obligations. In the civil law system the obligations that the parties assume are joined to the obligations that appear under the law while in the common law system the parties usually have more autonomy in contract negotiation.

Bank contracts recognized as a special category by the current Romanian Civil Code create legal mechanisms with specific features. In this framework we find pre-contractual and contractual obligations that are not generated by the effect of the law or the will of the parties. Although the obligation to inform and advise the bank's client is not imposed by law, it is recognized in the doctrine and in the sphere of banking usages.

Romania's High Court of Justice recently issued a judgement which aimed to harmonize the judicial practice in this field. In short, it was noted that the value of these savings books has decreased as a result of the denomination of the national currency or that the purchasing power has decreased significantly as a result of the inflationary process. beyond the contractual and legal obligations arising from the conclusion of the deposit contract. In our opinion, this conclusion is not well founded, considering that the bank must inform and advise its client in order to choose the best investment path.

Keywords: *bank contract, obligation to inform, obligation to advise, loyality, High Court of Justice.*

1. Introduction

Undoubtedly, the rights and obligations arising from the conclusion of a bank loan agreement condemn the contract for a heated and possible debate, as it is a long-term contract and a series of economic, social or even political events, sometimes unpredictable at the time of concluding the agreement, turn the parties that have the status of trading partners into irremediable opponents.

Moreover, the lack of adequate legislation or practices to protect the party who bears the burden of obligations often leads to conflicts that can only be settled through justice.

2. The outline of the case

A few years ago, the General Prosecutor of the Public Prosecutor's Office attached to the HCCJ under art. 514 of the Code of Civil Procedure notified the HCCJ on March 26tth, 2019 about the resolution of the appeal on points of law regarding the existence and extension of the right of the holders of savings passbooks with interest at C.E.C. (*Romanian Savings Bank*) and earnings in cars to obtain compensations from C.E.C. Bank - S.A. and the Romanian State for the amounts deposited on these means of savings, compensations consisting in the refund of the deposited amounts and of the related interest, updated in relation to the inflation index, following that the unitary law interpretation and enforcement be ensured by admitting the appeal and pronouncing a judgement.

The contents of such appeal show that the Romanian Courts do not have a common point of view regarding the actions in claims of the holders of savings passbooks *with interest* at C.E.C. and *earnings in cars*, formulated in contradiction with C.E.C. Bank - S.A. and the Romanian State through the Ministry of Public Finance.

We point out that the banking institution offered several types of C.E.C. passbooks. Some of these, the largest part, were the simple standard C.E.C. passbooks. These did not entail accidental earnings, but represented only deposit contracts by paying the depositor an interest throughout the duration of the deposit.

In addition, *passbooks* have been launched for *the purchase of cars* and *passbooks with interest and earnings in cars*, the latter categories being the subject of this discussion.

Therefore, referencing and synthesizing the analyzed case laws, the natural persons holders of savings passbooks with interest at C.E.C. and earnings in cars, have supported their claims either on the Norms of the Civil Code of 1864, which regulates the Deposit Contract, or on the Provisions of the GEO no. 156/2007 regarding the compensation of natural persons who created deposits at the *Romanian Savings Bank* C.E.C. – S.A. in order to purchase cars, approved with amendments and completions by Law no. 232/2008,

[*] Lecturer, PhD, Faculty of International Relations and Administration, "Nicolae Titulescu" University of Bucharest (e-mail: dan.velicu@univnt.ro).

with subsequent completions (GEO no. 156/2007). All the requests submitted to the Court pursued coercing C.E.C. Bank - S.A. and the Romanian State, represented by the Ministry of Public Finance, to repay the amounts deposited and the related interest, the entire amount being updated in relation to the inflation index.

In support of the claims, the following rules of law have been indicated:

- Article 969 of the Civil Code of 1864: 'Legally binding conventions shall have the force of law between the Contracting Parties. They may be revoked by mutual consent or for reasons authorized by law',

- Article 1604 of the Civil Code of 1864: 'The depositary shall return all that they have received. Where the depositary has used the money deposit, in accordance with Article 1602, they shall return those currencies in which the deposit was made, both in the event of an increase and a decrease in their value';

- Article 1618 of the Civil Code of 1864: 'The depositor is obliged to return to the depositary all expenses incurred for the storage of the deposited work and to indemnify them for all losses incurred by them on account of the deposit'.

- Law no. 348/2004 on the denomination of the national currency, with subsequent amendments and completions;

GEO no. 156/2007 on the compensation of natural persons who created deposits at the Romanian Savings Bank C.E.C. – S.A. for the purchase of cars, approved with amendments and completions by Law no. 232/2008, with subsequent completions.

According to art. 1, para. 1, 'The natural persons who until February 15th, 1992 made deposits to the *Romanian Savings Bank* C.E.C. – S.A., as well as those who transferred these amounts after December 22nd, 1989 into the accounts of the *Romanian Development Bank* - B.R.D. - S.A., in order to purchase cars, have the right to obtain monetary compensation if the deposits thus created, existing in the active accounts of the *Romanian Savings Bank* C.E.C. – S.A., respectively of the *Romanian Development Bank* - B.R.D. - S.A., meet the condition that the initial balance has not been affected'.

According to art. 1, para. 2 'for the purposes of this Emergency Ordinance, the existing deposits in the active accounts which meet the condition that the initial balance has not been affected, in accordance with paragraph 1, shall be those deposits made up of amounts representing advance payments or full deposits in order to purchase cars, existing in the balance, excluding the interest thereon and from which no withdrawals have been made'.

Thereby, the General Prosecutor points out that in the legal practice there is no unitary point of view on the question of law regarding 'the existence and extent of the right of holders of savings passbooks with interest and earnings in cars to get compensations from C.E.C. and the Romanian State for the amounts deposited on these savings, compensations consisting in the refund of the deposited amounts and the related interests, updated with the inflation index'[1].

Thus, two guidelines have been identified in the case-law:

1. A first guideline of the Courts - considered majority – for the rejection of applications was briefly based on the following arguments[2]:

1.1. An Irregular Deposit Agreement has been concluded between the Credit Institution and the plaintiffs, agreement to which the Provisions of the Common Law, namely of the Civil Code of 1864, apply;

1.2. In the period between the date of the deposit and the date of the denomination (July 1st, 2005), the Bank calculated and added to the original balance the amounts corresponding to the interest applicable to these Savings Instruments;

1.3. The Depositary - the credit institution in question - is not responsible for the decrease in the purchasing power of the deposited amounts, decrease which was determined by the inflation during that period. To support this, the Principle of Monetary Nominalism laid down in the Provisions of art. 1604 of the Civil Code 1864 shall apply. As such, C.E.C. Bank did not have any indexation or update obligation, but only upon the request of its customers had to return exactly the amount of currency regardless of the increase or decrease in value.

1.4. The lack of due diligence of the plaintiffs, which allegedly would have known the effects of inflation or those of denomination on July 1st, 2005, cannot be attributed to C.E.C. Bank in the absence of any legal norms requiring an update with the inflation index.

1.5. The provisions of GEO no. 156/2007 cannot be applied, as they are 'banking products other than deposits made for the purchase of a car'.

2. A second minority guideline for the admission of applications was briefly based on the following arguments[3]:

2.1. C.E.C. Bank has to pay the plaintiffs the amounts deposited updated with the inflation index,

[1] Decision no. 5/2020 on the examination of the appeal on points of law declared by the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, subject of Case no. 885/1/2019, published in the Official Gazette of Romania, Part I, no. 131 of February 19th, 2020, pp. 8 et seq.

[2] *Idem*, pp. 9 et seq.

[3] *Idem*, pp. 10 et seq.

since upon each deposit, legal deposit and mandate relationships have been created between the plaintiff and C.E.C.; these contracts represent the will of the parties and must be executed in good faith.

2.2. It was also noted by the Courts that 'the plaintiff had fulfilled their essential obligations, by complying with the specific conditions of this type of contract, namely that they had not made any balance movements on these accounts throughout the whole period and the amounts deposited remain at the disposal of the defendant who, under that contract, used them throughout the entire period'.

3. Finally, a third minority guideline for the admission of applications was briefly based on the following arguments:

3.1. The plaintiff is entitled to receive the same kind of compensation from C.E.C Bank jointly with the Romanian State as the persons making deposits for the purchase of cars, compensated under art. 1 of GEO no. 156/2007.

3.2. The legal basis is art. 16 para. 1 of the Romanian Constitution 'citizens are equal before the law and the public authorities, without privileges and without discrimination.' The principle of equality does not mean legal uniformity, so in similar factual situations equal legal treatment must correspond, in different factual situations, the treatment may be different. Violation of the principle of equality occurs when differentiated legal treatment is applied to similar factual situations, without reasonable objective justification or if there is a clear disproportion between the aim pursued and the unequal treatment and the means employed.

3. The main considerations of the judgement

On January 20th, 2020, the HCCJ allowed the appeal by issuing the above-mentioned operative part.

The examination of the considerations of Decision no. 5/2020 highlights a number of issues for discussion at least at academic level.

According to Decision no. 5/2020[4],

'46. However, it is noted that the object of the present appeal on points of law, as formulated and specified (within the limits of the initial notification), ***does not capture the real source of non-unitary practice*** *in litigations in which holders of savings passbooks with interest at C.E.C. and earnings in cars, based on the provisions of the Civil Code of 1864 on the deposit contract, but also on the provisions of the GEO no. 156/2007, have requested in Court, in contradiction with C.E.C. Bank - S.A. and with the Romanian State, represented by the Ministry of Public Finance, the refund of the deposited amounts and the related interest, updated with the inflation index.*

48. The existence or non-existence of the plaintiffs' right to compensation or, where appropriate, the extent of such compensation is merely a consequence of the application of the relevant rule or rules of law and is the result of the direct jurisdictional activity of Courts in enforcing the law, namely the administration of justice.

49. It is established, however, that such a ruling does not entail the resolution of a legal issue (the valid subject-matter of an appeal on points of law), but represents the resolution of the case itself, which falls within the exclusive jurisdiction of the Courts involved in resolving cases with such a subject-matter.

52. Consequently, it is observed that the non-unitary judicial practice was generated by the rules of law applied or by the identification by the Courts of the legal basis in these cases, in the exercise of the Judge's prerogative regulated by art. 22 para. (4) of the Code of Civil Procedure, according to which: 'The Judge gives or restores the legal qualification of the acts and facts deduced to the Court, even if the parties have given them another name. In this case, the Judge is obliged to question the exact legal qualification of the parties.'

53. Under these circumstances, the HCCJ - Panel for resolving the appeal on points of law ***finds that it is necessary to reclassify the object of the appeal on points of law, in order to determine whether or not the provisions of the GEO no. 156/2007 in solving the actions formulated by the holders of savings passbooks with interest at C.E.C. and earnings in cars are incident, having as object the obligation of C.E.C. Bank - S.A. and of the Romanian State to the payment of compensations consisting in the refund of the deposited amounts and of the related interest, updated with the inflation index***[5].

1. Thus, a first preliminary aspect of the debate - as it inherently affects the operative part - is, in our view, the reclassification of the Prosecutor General's subject-matter. It is perfectly true that art. 22 para. 4 of the Civil Procedure Code orders that the Judge give or re-establish the legal qualification *of the acts and facts* brought before the Court, even if the parties have given them a different name.

However, in our opinion art. 22 para. 4 of the Civil Procedure Code is intended to assist the Court in clarifying the claim of the plaintiff or the defendant, tacitly assuming that one or both may have misqualified the legal act referred to, leading to the choice of a

[4] *Idem*, pp. 14 et seq.

[5] *Idem*, p. 15.

procedural course of action which may prove to be erroneous.

In the present case, without entering into a debate on the application of the text of law evoked in an appeal on points of law, we consider that the Prosecutor General's request is as clear as possible, with the aim of resolving the issue of the extent to which holders of savings passbooks with interest at C.E.C. and earnings in cars have the right to demand the application of the inflation coefficient on the deposited amounts. The fact that some Courts used as arguments various analogies with the other category which received satisfaction by issuing the GEO no. 156/2007 does not change the substance of the appeal.

The reclassification of the appeal led, as is easy to see, to a decision which not only does not definitely resolve this issue, but is limited to finding that the provisions of the GEO no. 156/2007 will only apply to those who had those types of passbooks, an aspect that obviously emerged from the very title of the normative act.

2. With regard to the fundamental issue, the Decision is limited to a number of Supreme Court judgments, namely:

60. At the same time, based on the provisions of art. 1604 para. (2) of the Civil Code of 1864, which established the Principle of Monetary Nominalism, C.E.C. was required to return the amount they received in the same currency, regardless of the increase or decrease of its value.

61. By applying the provisions of Law no. 348/2004, starting with July 1st, 2005, the amounts not withdrawn from such instruments were converted into the new monetary unit, according to the proportion of 10,000 old lei (ROL) for 1 new leu (RON). As a result of this denomination, intervened through legislation and intensely publicized in the previous period, the value in RON of the amounts deposited on these C.E.C. passsbooks, whose initial value was 5,000 ROL, decreased considerably, becoming even derisory.

(.....)

71. The fact that the nominal value of these passbooks has decreased as a result of the denomination of the national currency or that the purchasing power has decreased significantly, as a result of the inflationary process, are not circumstances attributable to the depositary and cannot be held liable beyond contractual and legal obligations arising from the conclusion of the deposit contract, which means these limits extend to the alleged state guarantee.

Finally, *the provisions of the GEO no. 156/2007 regarding the compensation of natural persons who created deposits at C.E.C. - S.A. in order to purchase cars, approved with amendments and completions by Law no. 232/2008, with subsequent completions are not applicable in resolving the requests made by the holders of savings passbooks with interest at C.E.C. and earnings in cars, which have as object the obligation of C.E.C. Bank - S.A. and of the Romanian State to refund the deposited amounts and the related interest, updated with the inflation index.*

4. Conclusions

1. As we have already anticipated, the Operative Part of the Decision merely states that a normative act intended for a clearly defined social category will apply to that category of subjects. In addition, the analogies made by the lower Courts will be blocked by this Decision.

And yet, the issue of holders of savings passbooks with interest at C.E.C. and earnings in cars remains unresolved, despite the appeal on points of law.

It is true that the Supreme Court evokes the Principle of Monetary Nominalism, but can this evocation still be mandatory in the context in which the Supreme Court itself has reclassified the appeal, practically taking other issues such as the issue of indexation out of the question?

With the natural reservations with which we are constrained by the non-unitary judicial practice at court and even section level, we thereby consider that, based on the above arguments, by way of elementary logic, the Operative Part obviously still allows the claims of holders of savings passbooks with interest at C.E.C. and earnings in cars, without being able to evoke analogies with the satisfaction of the claims of the other category.

2. The appeal on points of law was, unfortunately, a wasted opportunity not only because it did not resolve the issue of holders of savings passbooks with interest at C.E.C., but also because it avoided a discussion necessary to clarify the relationship between the credit institution and the customer.

It is obvious that, as the doctrine of authority has pointed out, the savings passbook is a variety of the irregular deposit agreement[6].

However, we argue that the interpretation of the entire report cannot be made in a reductionist manner by resorting exclusively to the provisions of common law, namely the Civil Code of 1864, and especially to art. 1604, para. (2) of the Civil Code of 1864, which established the Principle of Monetary Nominalism.

This principle was valid at a time when the Civil Code was enacted, when inflation was extremely limited and European central banks issued currency covered in gold or silver, and Romania did not make an exception to this principle until 1918. Therefore, not

[6] See Francisc Deak, *Contracte speciale*, Actami Publishing House, Bucharest, 1998, p. 339.

only has the Principle of Monetary Nominalism been enclosed in a marginal application rule but, moreover, the situation has completely changed from the moment when even the Federal Reserve gave up the gold coating of the American currency.

But beyond these facts, which would suggest a possible obsolescence of the rule, the characterization of the agreement between the credit institution and the customer remains in place, especially when the latter is a natural person.

Thus, in the doctrine of authority and in French jurisprudence, the existence of two obligations has emerged over decades, as these obligations are incumbent on the commercial bank, namely the *obligation of information*[7] and the *obligation of vigilance*[8], with the obligation of vigilance implying the warning of the customer on the financial context and the results their decision can determine. Obviously, as the doctrine points out, this did not mean that the bank would make decisions on behalf of the customer, but the bank had to be loyal to them and draw attention to their own decisions. In other words, loyalty and vigilance required the bank, based on its knowledge as a professional operator, to draw their attention to the consequences of keeping the savings passbook and by virtue of its advisory obligation to offer other products that would allow keeping the value of the deposited amounts.

'The issue of the bank's liability, as it is stated in the Romanian authority doctrine[9], can be discussed only where the loss would have been avoidable, if the bank had had the initiative to inform and advise the customer. The lack of such an initiative can result in the bank being held liable only if it were a reckless fault'.

The aforementioned, for the lack of any evidence to that effect, allows us to state that the credit institution did not comply, obviously breaching those obligations because, just as obviously, the customer's passivity allowed the use of money in financing, clearly with other interest rates, for its own benefit.

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[7] Christian Gavalda and Jean Stoufflet, *Droit bancaire*, Lex Nexis, Paris, 2008, pp. 143 et seq. See also *Cour de cassation, Chambre commerciale,* December 14th 1965.

[8] Christian Gavalda and Jean Stoufflet, *op. cit.*, pp. 144 et seq.

[9] Ion Turcu, *Drept bancar*, Lumina Lex Publishing House, Bucharest, 1999, vol. II, p. 50.