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CONSIDERATIONS ON THE NATIONAL CASE LAW REGARDING THE CONTROL OF ABUSIVE CLAUSES IN THE MATTER OF CREDIT LOAN REPAYMENT

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Abstract

The issue of abusive clauses referring to the repayment in the currency of the long term bank loan, on the grounds of the obligation of the parties to fulfill exactly the undertaken obligations, created a case-law that is rich in contradictions.

This state of affairs brings up the selected subject as one with a significant potential for scientific research. The present article replies with a summarized study on the main court rulings that created the existing contradictions at the Romanian and European Union level of case-law concerning the protection of the consumer’s rights.

The analysis of the mentioned rulings will be realized from the standpoint of the existing normative regulations and also form the standpoints of the law and economics doctrine, with the main purpose to bring clarity in a field that is mainly speculative in the present time.

Keywords:
abusive clause, bank loan, currency of credit, contractual negotiations, judicial control

JEL Classification: K10, K12

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1. INTRODUCTION

During the period between 2006 and 2009, after a period of general economic growth, a massive indebtedness of individuals with bank loans was recorded, with credits accessed for consumption purposes.

Some of the loans from banks were taken in Romanian currency (lei), and another significant amount of bank loans was taken in foreign currency, such as the euro, dollars or Swiss francs.

Statistically, according to data issued by the Credit Risk Center of the National Bank of Romania, more than 75,000 individuals have loans in Swiss francs (the responses of the NBR specialized departments, the answer to question 6) and 360,000 persons have bank loans in euro (NBR Financial Stability Report for 2011).

In total, the approximate number of individuals indebted in foreign currency loans in the period reached reaches the threshold of 435,000. Due to the quality of the consumers, of the persons who have benefited from the loans granted by the banks, as well as of the professional quality of the banking institutions that have made the bank loans available to the population, the legal relations established between these parties fall under the legislation on the protection of consumer’s rights: Law 193/2000 and Directive 93/13 / EEC.

Since foreign currency lending has been granted, foreign currency appreciation has been appreciated against the national currency in which most of the credited persons receive salaries and in which they pay the monthly installments, which has made the repayment of the loan more onerous.

As a result, there have been numerous litigation concerning the judicial censorship of unfair terms in credit agreements between consumers and banks, the purpose of legal actions being to reduce the costs of the consideration from the applicants debtors.

A novelty in the litigation of bank-to-consumer relations, deducted from judicial control, is the contractual clauses regarding the currency in which the bank loan is to be repaid, the aim pursued by the applicants is to "stabilize" the value of the foreign currency in which Bank credit was requested at the exchange rate on the date the credit was granted.

Compared to the date of the conclusion of the credit agreements, respectively 2006-2009, legal relations were born under the Civil Code of 1864, which is the law applicable in these cases.
2. JUDICIAL CREDIT CONVERSION, A POSSIBLE INFRINGEMENT OF LAW?

The exact execution of the obligations assumed under a valid contract concluded in accordance with the term of execution, the quality and quantity of the agreed benefit is a principal legal principle in the field of execution of civil benefits. It derives from the civil law principle of binding force of the effects of the contract between the contracting parties ("pacta sunt servanda"), provided by the art. 969 of the Romanian Civil Code of 1864.

By virtue of the specificity of the legal relationship arising from the conclusion of a loan agreement, the latter having a secondary legal object, consisting of monetary pecuniary rights, the issue of unfair terms regarding

Problems encountered in judicial practice concern how the principle of binding force of the contract and the execution of the contractual obligations assumed will continue to subsist after the abusive control of the contractual clause relating to the currency in which the repayment obligation is to be performed in form of a monthly installment.

3. JUDICIAL IMPLICATIONS OF THE DENOMINATION PROBLEM

By judgment in Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, the European Union Court of Justice had the task of answering three preliminary questions from a Hungarian court.

Some of the questions included the question whether the main object of the contract covers a clause of a credit agreement that stipulates that the installment should be provided into a foreign currency may be the object of the judicial control for unfair terms if that clause was not negotiated in particular.

In examining the matter in advance, the European Union Court of Justice argued that Jelzálogbank, as a defendant before the Hungarian court, granted a loan to the borrowers in the amount of 14 400 000 Hungarian HUF, stating that "the determination of the foreign currency value of the loan is made At the currency exchange rate applied by the bank in force at the date of unblocking the funds". Subsequent to the unblocking of the funds, the amount of the loan, the associated interests and the administration expenses, as well as the interest and other expenses, were determined in foreign currency, by reference to the exchange rate of Swiss
francs (CHF) applied by Jelzálogbank to unblocking the funds, the amount of the loan being CHF 94,240.84.

According to point III / 2 of the contract concluded between the parties to the dispute, the lender established the value in Hungarian forints of each of the monthly installments due on the foreign exchange rate of the foreign currency applied by the bank on the day before the maturity.

For these reasons, the European Union Court of Justice held that such clauses, in so far as they involve a pecuniary obligation on the part of the consumer to pay, within the loan rates, the amounts resulting from the difference between the selling rate and the exchange rate of the Foreign currency can’t be regarded as constituting a 'remuneration' of a suitable nature as a counterpart of a service provided by the lender which can’t be assessed in order to determine whether it is abusive under Article 4 (2) of the Directive 93/13.

The solution is explicable from the point of view of the speculative nature of the exchange rate used as a reference for the calculation of rates, the more so as the loan was made available to consumers in the Hungarian national currency and not in Swiss francs, which is why there is no connection The factuality between the borrowing currency and the currency against which the extent of the loan repayment obligation is calculated.

This solution, however, was interpreted contradictorily by the national courts, with two irreconcilable points of view at present.

On the one hand, most national courts consider that banks can’t be compelled by a third party to guarantee consumers against monetary risk, provided that such an obligation is not mentioned in the contract, and that the loan is repaid in the currency of the loan or, In the equivalent in lei from the date of payment, rejecting as unfounded the demand for money that required the stabilization of the exchange rate of the currency (Pascariu).

This opinion is balanced, in line with the jurisprudence of the European Union Court of Justice, Case C-26/13 Árpád Kásler, Hajnalka Kásterné Rábai v. OTP Jelzálogbank Zrt, because if in the situation inferred from the assessment of CJEU the credit was made available The monthly instalments were also paid in the forints, but they were calculated in relation to the exchange rate of the Swiss franc, in the court cases before the national courts, the loan is made available to the borrowers in foreign currency, and the latter are to Execute their obligation to pay the rates in the same currency, which they can obtain from any exchange and not only from the defendant bank, or they can pay the rates in the equivalent in Romanian lei
Considerations on the National Case Law Regarding the Control of Abusive (...) of the amount expressed in that currency (Decision no. 3653/2014 of Rădăuți District Court, Decision no. 2948/2014 of Bârlad District Court).

A diametrically opposed solution in a similar case was given in Decision no. 230 / R / 2014 of the Galați Tribunal, in which the court considered that in 2008 and prior to the signing of the contract, the exchange rate of the Swiss franc was for a long time a stable one, which would otherwise have led the borrower to conclude a loan agreement in this currency. The exchange rate stability was also reflected in the relatively low interest rate for this type of loan, which made lending to customers even more attractive.

Against the backdrop of the contractual clauses established between the parties to the convention, the bank had the right but not the obligation to convert the credit balance from Swiss francs into Romanian leu, if there would be a decrease or appreciation of the exchange rate of the Swiss franc with more than 10 percentage points. Such an increase in the Swiss franc exchange rate took place on 02.10.2008.

The Galați Tribunal considered that, by granting the bank only the right to make such a change without allowing the borrower to benefit from such protection and without establishing transparent criteria that are known by both parties and on the basis of which the bank would take the decision to convert the Swiss franc loan into lei, an abusive clause was inserted into the contract, and as of 02.10.2008 the Swiss franc currency in lei could be changed. Although the clients requested such a transformation, the bank constantly refused to comply with the contractual clause without any plausible argument, thus requiring the bank to convert the loan granted to the plaintiff from Swiss francs into Romanian lei at a higher exchange rate by 10% compared to the one envisaged by the parties at the date of granting the credit, which is in effect from 02.10.2008, after the rate of increase of the exchange rate was recorded by more than 10% compared to the one envisaged at the moment the signing of the contract by the parties.

We consider the judicial interpretation of the contractual clauses made by the Galați Tribunal as questionable because the interpretation given by that national court to the CJEU ruling in Case C-26/13 Arpad Kasler and Hajnalka Kaslerne Rabai v OTP Jelzalogbank Zrt. is contrary to its spirit.

We believe that the European Union Court of Justice’s view is not prejudiced in the case of inferior judgment that the factual situation retained by the European Union Court of Justice is radically different from the one in the present case because, unlike the conduct of the Hungarian bank, the

national credit institution which made available to the debtors Credit in Swiss francs and repayment of the loan was to be made in Swiss francs.

In relation to the facts, the decision of the European Union Court of Justice only gives priority to the principle of enforcement in the nature of the obligations, which has not been upheld by the Court.

On the other hand, this solution also contravenes the provisions of art. 1578 par. (1) of Civil Code 1864, the obligation arising from a loan in money is always for the same numerical amount shown in the contract.

If, prior to the maturity of the payment obligation, an increase or decrease in the price of the currency of the benefit occurs, the debtor is to return the numerical amount expressed in the currency of the benefit, according to art. 1578 par. (2) of Civil Code 1864.

In a similar opinion, judging by the provisions of art. 1578 par. (1) and (2) of the Civil Code 1864, it can be argued that the amount to be repaid was to be determined in relation to the amount actually borrowed.

In other words, the amount of units sent to be repaid expressly formulated considered, moreover, a truism based on the nature of the obligation, because in reality, the text recalled recalls a rule that can be deduced easily by following the logic set by civil law in matters of obligations as the above, and the second paragraph of art. 1578 Civil Code 1864 refers to the face value of the claim regardless of the intervention of changes in the value of the currency. And moreover, the second paragraph of art. 1578 Civil Code 1864 refers to the face value of the claim regardless of any change in the value of the currency.

As a consequence, it would have been natural for the courts to maintain the effects of the principle of nominalism, which is typical of the bond-related amounts of money, so as not to bring about any harm, as a consequence of the judicial constraints of the unfairness of the contractual clauses Without the legal basis of the obligation to fulfill precisely the civil obligations, regarding the extent and quality of the benefit.

4. CONCLUSION

Controversy over the practical application of judicial control over contractual clauses regarding the currency of repayment of a bank loan has become current in recent years due to its socio-economic substrate.

Nevertheless, the opinions of the national courts, contrary to the conclusions of the present paper, reveal the existence of a non-unitary practice in the matter of credits made available in Swiss francs. Taking into

consideration the non-unitary practice in the field, the participants in the meeting of the representatives of the Superior Council of Magistracy of Romania with the chairs of the sections specialized in commercial materials at the level of the courts of appeal, in the matter of professional disputes and insolvency, where the decision to submit a proposal to the General Prosecutor’s Office attached to the High Court of Cassation and Justice, for the promotion of an appeal in the interest of the law, on matters concerning the interpretation and application of the provisions of Art. 4 of the Law no. 193/2000 regarding the abusive nature of the clause on the exchange rate at which the conversion, the interpretation and the application of art. 1271 C. civ., the application of the contractual unpredicted theory in the case of credit agreements concluded prior to the entry into force of the new Civil Code and the admissibility of requests for legal settlement of the interest rate and / or the conversion of credit from a foreign currency into the national currency.

We consider that in the event of the promotion of the procedures for deciding on an appeal in the interest of the law having as its object the issues set out in the previous paragraph, the solution of the Supreme Court of Romania seems foreseeable if we consider the legal provisions of the 1864 Civil Code and the Civil Code 2009 on the timely applicability of civil law, and the absolute majority of bank loans contracted in foreign currency date back to the 1864 Civil Code period, as well as the possibility of judicial intervention in the content of credit agreements subjected to the control of abusiveness.

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