

CONTRACTUAL FREEDOM AND FORMALISM IN THE CREDIT AGREEMENT

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Abstract:

The credit agreement meaning is trust. It involves a psychological relationship between two or more persons, characterized by predictability the third one involving present or future action on the status of a particular person.

This relationship is psychological, in a certain context, social relationship and may take legal meanings. If at the beginning, people borrowed food and tools, later borrowed money to buy everything you wanted. Financial lending institution has become very popular, creating a group of people who have dealt with this service.

Over time, this community has turned into banks. Being originally a loan of money covered by the Civil Code, the credit is used daily by both individuals and by professionals, becoming an engine of capitalist society. Unprecedented expansion of this contract led to a strict control of public authorities and subsequent legislative interventions, the articles of the Civil Code is supplemented by regulations governing the progressive banking, legal interest, namely consumer credit.

Under the credit agreement, the economic situation of the parties is not equal, one party is disadvantaged in comparison to the other, protecting the disadvantaged part of the legislature making it a target in credit operations.

In French doctrine, consumer credit has been praised as “a contract of all pleasures”; but at the same time “an agreement of all risks”.

Key words: *credit agreement, formalism, pre-offer, vices, contractual freedom*

Introduction

According to the principle of contractual freedom, any person capable of contracting may conclude a contract of loan money, as the lender. In the case of consumer credit, the legislature has intervened to limit freedom of contract, by strict definition of categories of persons who can act as „creditors”, and control over their work.

The legislature has limited category of persons who may be professionals creditors.

Thus, firstly, consumer credit may be granted only by a professional, ie a legal person, in the course of his trade or professional activities (article 7, section 5 of the OUG. 50/2010)

Secondly, the field of consumer credit can speak of a monopoly of the credit institutions established by law. Can creditors, according to GEO. 99/2006 and GEO. 50/2010, credit institutions: banks, credit cooperatives, credit institutions, foreign branches, which operate in Romania, foreign non-bank financial institutions that operate on the territory of Romania. Banks and financial institutions are traditional forms of credit institutions.

The major difference between them lies in the fact that non-bank financial institutions to finance lending operations they carry out are not allowed to collect deposits from the public, but are obliged to use their own funds or interbank market.

This monopoly of credit institutions is likely to ensure reliability and competence of individuals, but also to protect a hazard specialists of their profession, the invasion of any persons.

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This status allows credit institutions to comply with an order that certain statutory provisions and be subject to control.

For a contract which the parties have content they wish, they must express their will freely and consciously. To this end, the legislature has established certain limitations on freedom of contract, in terms of consent, subject matter and because of the credit. Under art. 948 Civil Code, one of the essential conditions for the validity of an agreement constitutes a valid consent of the party who undertakes. Expressed to be valid, consent must come from a person with discernment, to be expressed with the intention of producing legal effects, to be externalized and not tainted by any defect of consent¹.

These common law rules applicable in the case of consumer credit. Given, however, the specifics of this contract, and especially the desire of the legislature to protect the consumer, certain rules designed to ensure a free and conscious consent of it have emerged in the EU and national legislation. Protecting consumer consent is subject to numerous laws, the legislature from its position in inferiority relation with professional lender.

Consumer is not always able to understand grativitatea its commitment with its immediate consequence of duty. Protection of their consent is secured by means of both common law and the law through specific consumptions.

Common law makes domestic consumer will prevail by the vices of consent theory. Protection provided by the vices of consent legislation applies to all types of lending, including consumer credit. The most common defects of consent for a loan of money is the error, the fraud and violence, the presence of any of them at the time the forfeiture may act.

Consumer vices of consent takes the form of a pre obligations incumbent upon the creditor, the borrower consumer information and advice.

If at home, the theory that a liberal society, composed of free men and managers, each was obliged to inform gradually abandoned this theory, the concern heading towards consumer protection.

The basis of the obligation of information and advice can be found in the provisions of art. 970 par. 2 of the Civil Code

The Convention obliges not only express what is in themselves, but all the consequences which equity, custom or law gives the obligation according to its nature.

French Court of Cassation affirmed the existence of the obligation borne by the creditor information and advice.

The question has arisen whether a bank, giving the consumer a credit agreement, based on a prior offer strictly regulated, was held and an obligation to advise his client. The Court held that the submission of a prior offer the creditor does not dispense professional advice to the borrower's obligation, especially if, for professional, total cost of credit appears to be excessive in relation to the limited resources of the consumer. In the same way, Romanian legal doctrine holds that the bank is obliged to inform customers of all banks and all terms of contracts of mutual commitments of the Parties².

Freedom of borrower-consumer contract is extended at the expense of freedom of contract to the creditor. To ensure that consumer consent is free and uncorrupted, that the balance between consumer and professional lender is retained, the legislature amended the usual conditions of formation of a contract.

¹ See Gh Beleiu, Romanian Civil Law, Introduction to civil law, civil rights issues, 6th edition -, revised and enlarged by M. Nicholas and P. Trusca, Ed Chance, Bucharest, 1999, p. 151.

² See, I. Turcu, Operations and banking contracts. Banking Law Treaty , vol II, Editura Lumina Lex, Bucharest, 2004, p. 20-22;

The formalism of the consumer credit

In the consumer credit agreement may exist situations of inequality between the parties, whereas the contractual partners, even though they have the same rights, same legal capacity, don't have the same level of knowledge or proper understanding of the consequences of their commitment.

On the other hand, consumers pressured by the need to obtain a loan, risk to assume a commitment without properly assess its consequences, because of lack of expertise.

To avoid excessive consumer debt, the legislature has provided, in close correlation with the substance, certain special rules on formal requirements to be met by a consumer credit agreement..

To restore consumer contractual freedom, the principle of mutual consent is removed by an formalism information, rigorously regulated by law, with the inevitable result of the encroachment of creditors contractual freedom.

On the other hand, the lender obligations can not be considered contractual obligations, but legal obligations, as they do not arise from the contract.

Contractual freedom of the creditors is restricted because they can not circumvent this formalism information provided by the legislature. It can be said that in the case of consumer credit, the legislature created a special legislation in derogation of common law obligations.

Pre - formalism

In relation to consumer credit, the formalism is essentially challenging the very existence of the contract.. The aim of the legislature is to dispel any doubt, to prevent any disputes.

This formalism has led to massive limitation of freedom of contract, consumer credit is, as stated, a contract of adhesion, the negotiations on the valid conditions have a limited framework. The validity of the legal act depends more on what is written, rather than what is desired by the parties.

This limitation of contract freedom, is found both in terms of advertising of consumer credit and in offers of the creditors to consumers.

Formalism in a prior offer of consumer credit agreement

Directive no. 87/102/CEE , does not include special reference to the prior offer of consumer credit contract, and is concluded, attaching the same regime as an advertising (Article 3).

Act no. 289 of 2004, our legislation transposing the Directive, reflects the provisions of Article 3, adding certain obligations for the creditor, before the conclusion of the agreement, that is offering for free to the consumer, on paper or another durable medium, a repayment schedule, and a copy of the draft credit agreement, by request from a consumer; and provide the consumer ,full, fair and accurate information about the credit agreement envisaged., to inform the consumer of all documentation necessary to award a loan credit.³

Formalism in the supply offer is clear, the creditor not having the freedom to provide information required by law in the form desired by him.

Thus, article 5 states that the information provided on paper or durable, are supplied via form „The Standard European Consumer Credit Informations” contained in the annex. 2. Any additional information that the lender would like to deliver to consumer must be provided in a separate document that can be attached to that form.. However, the consumer will be provided on request and free of charge, in addition to the standard form of contract, a project loan agreement.

³ Article 6 of Law no. 289 of 2004: The documents that must include at least: 1. Current financial statements of the borrower and any guarantor of its compliance with relevant regulations; 2. a description of how to guarantee full payment of the debt or, if appropriate, an assessment of the goods covered by the warranty.

State legislature has regulated also the credit agreement by using a means of distance communication which does not allow providing standard information; in this case, the creditor has the obligation to provide all the information pre-consumer, using the form „The Standard European Consumer Credit Informations”, immediately after the credit agreement.

We note that efforts at EU level, on harmonization of national laws in the consumer protection, have led to the development and implementation into national law of the form „Standard information on Consumer Credit Informations” contained in the annex. 2. But the directive leaves the Member free to regulate potentially binding nature of the information provided before the consumer credit agreement, that period the information is bound to the lender. Such standardization is meant to provide complete information to consumers and an aware and informed of their decision to conclude a credit agreement, restricts freedom of professional creditors. On the other hand standardization, highlights the character of adhesion of consumer credit agreement. Consumers can join or not, the standardized contract, negotiations on the substantive conditions are very low.

In all cases, the purpose of a detailed information to a consumer, expressed as free and conscious consent to the conclusion of a consumer credit agreement is secured.

Transposing this Directive into national law, the Emergency Ordinance no. 50/2010 devote Section 2 -, Chapter II „pre-information” covering both the content of the information obligation incumbent on creditors and credit intermediaries but also form you need to wear any offer of credit, creditors freedom in this area is much smaller.

Thus, Article 11 provides that the creditor or credit intermediary to provide the consumer information required by law, on paper or on another durable medium, in writing, clearly and easily read. Failure to comply with legal provisions on credit supply formalism is in accordance with Article 86 para. 1 offense and is punishable by a fine of 10,000 to 80,000 lei.

Contract Formalism

Directive. No. 87/102/EEC., provide in article 4 item 1, the obligation to conclude the credit agreement in writing, the consumer receives a copy of the written agreement. The written contract should include the mandatory elements set out specifically. Article 7 of Law no. 289 of 2004, provide that credit agreements be in writing, on paper or another durable medium, at least two copies, one original copy is delivered to each party. The written agreement must include all data specified by law.

Formalism, specific to consumer protection is maintained during the execution of credit agreement, Article 9, providing the creditor must inform the consumer in writing about any changes during the duration of the agreement, on the annual interest or costs incurred after signing the contract, when this change occurs.

The legislature has provided that such disclosure is made by registered letter with acknowledgment of receipt or statement of account through which the consumer is provided free of charge. The penalty provided by law for breach of contract formalism is fine offenses. In the case of consumer credit contracts in which the total amount of loan repayment is made in installments, creditor has the obligations to provide the consumer with a statement as an amortization table or reimbursement schedule on paper or on another durable medium, as determined by the consumer.

The table should indicate the rates payable, terms and conditions of payment of these amounts, should contain a breakdown of each repayment showing the total amount of loan repayment, interest at the borrowing rate, any additional costs.

Article 50 para. 1 of the Ordinance provides for the creditor the obligation to inform, on paper or on another durable consumer in connection with any change in borrowing rates.

Formalism refers also to the termination of the credit, the creditor has the obligation to provide the consumer, free, by default, a document attesting the extinction all obligations of the parties arising from the credit agreement. In connection with the penalty that occurs for failure to

comply form conditions, is required some discussion, as interesting to determine whether that form is required by law *ad validitatem* or only *ad probationem*.

Considering the scope of these laws, to protect the consumer found in a inferior position to the professional creditor, it appears obvious that the penalty occurs in the formal non-compliance is the absolute nullity of the contract, form as required by the legislature as a condition of validity of the agreement.

Clearly, however, written form will serve as proof of the existence and content of consumer credit contract, and to prove that the creditor has the obligation to inform the consumer.

Such a penalty is not, however, likely to protect consumer interests in the event of detection of absolute nullity of the contract, being in a position to repay the loan amount immediately.

In the absence of legal provisions, legal doctrine expressed within the meaning of decay professional lender from the right to claim interest stipulated in the contract, following the French model⁴. Loss of professional law regarding debt interest is a more effective comminatory sanction and appropriate to consumer needs whenever information formalism required by law has been infringed⁵.

Binding of consumer credit agreement

Binding force principle of contract⁶, enshrined in Article 969 para. 1 Civil Code, works also for the credit agreement: parties to such a contract are also bound by obligations arising from their agreement. In other words, the consumer credit agreement, legally bound the parties as strictly as the law. Parties are free to choose whether or not a contract ends, but once completed they are required to fulfill the obligations arising from that contract in their task. In order to protect the party in the contract, the right of consumption tend to restrict the effects of this principle.

A new concept of binding force is defined as opening the emergence of the rule of proportionality or balance of contract, that good faith in contract performance. Along with limiting freedom of contract and mutual consent, the principle of binding force of contract, knows a real decline. Parties are not free to determine the contents of consumer credit contract, making him a contract of adhesion. The legislature is to decide how to execute a credit agreement, so that we can say that the law became the foundation of the principle of binding force of this agreement.

In terms of the binding force of contract is interesting to consider both the actual execution of the consumer credit agreement and also the cases where any party fails to fulfill its contractual obligations.

Binding of the contract, regards both the performance the execution of professional creditor obligations - mainly payment of capital, starting as a genuine act of commencement of performing the contract -, and fulfilling the obligations incumbent upon the consumer, in particular capital repayment loan, plus interest due.

On the other hand, binding force of the agreement must be followed in respect of the funds destination, in those situations where the parties have agreed on a particular destination.

Compliance with the founds destination interested in both the consumers whether he is free to use the destination borrowed funds, and the creditor to know when the task arises, the obligation to monitor the use of funds by the consumer, according to the agreed destination. An incorrect use of borrowed funds can produce prejudice both consumer and professional lender.

If the consumer does not comply with the destination of the funds borrowed, the lender is entitled to terminate the contract, the refund of the money borrowed and any damages.

⁴ See V. Magnier, *Les Sanctions du informatif formalisms*, in "La Semaine juridique" no 5. May 2004, p. 178

⁵ See Juanita Goicovici, Sergey Golub, "Formalism information - a special view to credit consumer" in *Consumerism contract. Benchmarks for a general theory of consumer contracts*, coordinator Paul Vasilescu, Legal Publishing Sphere, Cluj-Napoca, 2006, p. 94.

⁶ Civil Code Article 969: "Legal agreements have the force of law between contracting parties".

Similarly, if the parties have agreed that payment be made by creditor directly to a third party and the creditor does not comply with these destinations will incur contractual liability to the creditor, subject to proof by the consumer injury.

On the basis of such liability, the creditor will be required, to perform in good faith their commitments under the contract of consumer credit.

Conclusions

According to the principle of binding force of contract, the parties are required to fulfill obligations under the contract. Being a contract with successive execution, consumer credit contract is extended in time so that the parties may be at random in this interval. In economic crisis, consumer credit contract enforcement is not a certainty, and so the consumer may have financial difficulties in repaying the loan.

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