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THE INCIDENCE OF THE LESION IN THE CASE OF BANK CONTRACTS

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Abstract: *Law No. 193/2000 on unfair terms in contracts between traders and consumers does not refer to the lesion as a legal remedy for the contractual imbalance created by such clauses. However, it is considered that these abusive clauses are a facet of the lesion, which implies an original contractual imbalance. However, the opinion was also expressed that the lesion cannot be invoked in the case of a consumer lending contract because such a contract is unilateral and the lesion entails the existence of a bilateral legal act. This article aims to determine to what extent the lesion can be invoked and used in the case of abusive clauses inserted into bank contracts.*

Key words: *abusive clauses, lesion, bank contracts.*

1. Introduction

It is said that the new civil code changed the contractual paradigm based on the principle of autonomy of will, the new ”controller” of the contract lifetime being considered the principle of contractual balance, whose servants are the lesion and unforeseeability (Mihai, E., 2014, p.17-18). The lesion represents the object of some of the civil code provisions considered to be objectionable, because of improper taking-ups of some legal provisions belonging to other law systems.

Whether we regard it as a vice of consent or as a contract termination clause, lesion is a legal institution aimed at remedying an imbalanced situation occurred as a result of concluding a contract. Thus, they are trying to re-establish a contractual balance.

Law no.193/2000 on unfair terms in contracts between traders and consumers does not refer to the lesion as a legal remedy for the contractual imbalance created by such clauses. However, it is considered that these abusive clauses are a facet of the lesion, which implies an original contractual imbalance.

However, the opinion was also expressed that the lesion cannot be invoked in the case of a consumer lending contract because such a contract is unilateral and the lesion aims at an obvious inequality between services at the moment of concluding the contract, thus entailing the existence of a bilateral legal act.

With this article, we want to determine to what extent the lesion can be invoked and used in the case of abusive clauses inserted into bank contracts.

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2.General aspects regarding lesions

Most often, lesion was regarded in the doctrine as a vice of consent (Beleiu,1989, p.182-183*)*. There were authors, though, who defined lesion as ”a distinct termination clause of the contract, based on the rule of equivalence of services” (Pop, L.,2008, p.82; Piperea, Gh., 2017) or ”a condition of cancellation of the contract due to inability” (Ionașcu, Tr. ,1967, p.289).

The current civil code includes the lesion within the vices of consent (according to art. 1206 para.2: ”… the consent is vitiated in case of lesion”), being regulated by arts. 1221-1224 of the same code.

The lesion is produced when, ”by taking advantage of the condition of need, lack of experience or lack of knowledge of the other party”, one of the parties ”stipulates in his/her favour or in other party’s favour, a service of higher significant value than the value of his/her own service at the date of conclusion of the contract”(art.1221 para.(1) of the same code).

Moreover, the lawmaker established that the lesion can also be appreciated according to the nature and scope of the contract (art.1221 para.(2) of the same code). One of the objections brought against lesion is the fact that it should be regarded only as a contractual imbalance and not ”to sanction the behaviour of the party who explored the contractor’s ignorance of condition of need, allowing the lesion to stay oriented towards the remedy of the unfair contract” (Neculaescu, S., 2010, 73).

Our lawmaker also established that lesion cannot be invoked in case of random contracts, in case of transaction or in case of other contracts purposely provided by law (art.1224 of the same code).

In case of random contracts, the solution chosen by the lawmaker is explained by the fact that such contracts, ”by their nature or by the parties’ will, offer at least to one of the parties the chance of gain and also the exposure to a loss, depending on a future and uncertain event (art.1174 para.(2) of the same code).

Therefore, as it was well expressed in the doctrine, the existence of a balance between the possibility of a gain and of a loss is essential for such contracts, and not a balance between the parties’ services, which is a main aspect in case of commutative contracts (D.Chirică, 2017).

As for transaction, the interdiction of invoking the lesion is justified due to the particularities of the settlement contract, whose purpose is to prevent or settle a dispute, and not to establish a balance, that could be achieved by the judge (Spîrchez, G.B., 2013, p.135).

As for the contracts, the doctrine appreciates that lesion can only occur in case of bilateral contracts, not for unilateral ones (Boroi, G., Stănciulescu, L., 2012, p.114; Ungureanu, O., Munteanu, C., 2013,p. 236).

An argument in supporting this point of view would be that lesion represents an obvious imbalance of values between the parties’ services, at the moment of conclusion of the contract, and that would require the conclusion of an onerous bilateral deed. As a consequence of such assertion, for example, the lesion could not be invoked in case of a consumer loan, as this is a unilateral contract.

The doctrine also expressed another point of view, that we support, that invoking the lesion in case of unilateral contracts is not forbidden by the lawmaker (there is no legal text in this regard) and, on the other hand, lesion is possible in case of such contracts. (Chirică, D., 2017). They give as an example of a loan contract for a loan with interest. Indeed, the interest stipulated in such a contract can be lesionary for the borrower, i.e. it can be imbalanced as compared to the service provided by the lender. The French legislation makes references to lesion in case of consumer loan contracts (Code de consumation, art.313-3).

3.The commutative or random character of bank contracts

Bank contracts are commercial contracts by which the bank offers its own services to its customers to gain profit.

Bank contracts are often considered to be adhesion contracts, the main contractual clauses being pre-set by the bank which is the more powerful economic party. The customer has either the possibility to accept such clauses in full, or to refuse the conclusion of the contract (Săuleanu, L., Smarandache, L., Dodocioiu, A., 2011, p.376).

The civil code does not include a general regulation of bank contracts, it is limited to the summary rule of four types of contracts: current account bank contract, bank deposit, credit facility and safe deposit box rentals. But there are much more contracts specific to bank activities. The regulation of the four types of bank contracts by the civil code is questionable anyway, as this regulation does not bring any novelty (being a translation of some provisions from the Italian civil code from 1942 – Dei contratti bancari, art.1834-1860) and it only creates confusion regarding certain aspects. Moreover, it would be advisable to define the bank credit, as it would bring into practice a unit of interpretation of such notion (Săuleanu, L., Smarandache, L., Dodocioiu, A., 2011, p.384). The most important bank contract with the most significant impact on the market and on the consumer, is of course the bank credit contract.

The bank credit contract can be defined as the contract pursuant to which a credit institution assumes the obligation to offer a person a certain amount of money, the respective person having the obligation to pay back the borrowed amount in full, plus the payment obligation of the interest to the respective amount.

Basically, the bank credit contract has the following features: it is a named, bilateral, consensual, onerous and *intuitu personae* contract (Postolache, R., 2011,p. 256-261).

Against the background of the economic crisis, the bank credit contract and the way of granting the credits by the credit institutions became extremely debatable. One of the most controversial aspects was the commutative or random character of the bank credit contract. This is a present-day subject along with the issue of credits granted in Swiss Francs.

Due to the many regulations appeared in this regard, it is appreciated that the *random* element is excluded in case of retail bank credit contracts, as they have an acute commutative character. (Piperea, Gh., 2017). In order to support this, they emphasize a series of laws on the protection of consumers of retail bank credits, resulting in a ”principle of perennity of the commutative character of such contracts”.

In this regard, we speak about Directive 87/102 on consumer credits (imposing the conception of a contract whose clauses should be clear and coherent, that should be presented and explained to the customer, Directive 2008/48/EC on real estate credit agreements, repealing Directive 87/102 (which provided the obligation of the credit institution to offer information to the customer both before and during the contract, all the information having to be included into the contents of the contract), Directive 2014/17/EC on credit agreements for consumers relating to residential immovable property (also bringing back the existence of other obligations, besides the provision of information one, of credit institutions, such as: obligation to warn the potential customer regarding the contract risks, obligation to ensure a considerate management and a pro-active management of the crediting emerging risks, obligation to offer counseling to the consumer – appreciated as the plenary manifestation of the commutative character of the credit contract.

At national level, Law no. 193/2010 on unfair terms in contracts between traders and consumers is the one imposing the maintenance of a commutative character for the credit contract (Piperea, Gh., 2017).

However, the national courts were compelled to ascertain that the inadequate practices of the banks have the tendency to transform the bank credit contract, "being able to transform an essentially commutative contract, where the extension of rights and obligation should be well known since its conclusion or at least determinable, into a random contract, whose costs should not have been accepted by borrowers if they had known them" (Decision of the High Court of cassation and Justice ÎCCJ no.2123 of 20.10.2015, p.106).

4.Lesion and bank credit contracts

As we said in the beginning, the regulation of lesion has the purpose of achieving a contractual balance, so that, at the moment of conclusion of a contract, due to a condition of need, lack of experience or lack of knowledge, known and speculated by the other party, a customer accepts the offer of a service of a significantly higher value than the value of the similar service.

The sanction established by the lawmaker in case of ascertaining a lesion, is the cancellation of the contract or the reduction of the obviously imbalanced obligations with the value of the damages that the party could be entitled to (art.1222 para.(1) of the civil code). Except for the case when they ascertain the lesion of an underage person, the action for annulment is to be admitted only if the lesion exceeds half of the value of the service promised or executed by the injured party at the moment of conclusion of the contract (art.1222 para. (2) of the same code).

Apparently, invoking the lesion could be indicated in case of bank contracts qualified as commutative contracts, as mentioned above, and not random, when the existence of such a contractual imbalance is ascertained. The doctrine also expressed the idea that, on principle, all contracts concluded between such a professional, such as the credit institution, and the consumer, such as the client of the institution, are based on a power ratio, where the position of the parties is always unequal.

The above mentioned opinion exposes in a very interesting way the consequences of such ”unequal contracts” which, as they are not negotiated or balanced, ”can degenerate into subordinating the customers or maintaining them captive, and the customers, when concluding contracts with the traders, find themselves in a situation of quadruple inferiority – economic, technical, juridical and temporal, regarding both the power to negotiate and the level of information, a situation determined by the need of consumption” (Piperea, Gh., 2017). We agree with the author's opinion that this inequality between the contracting parties is the object of the legislation on consumer protection, assuming the role of remedying the imbalance existing at the moment of conclusion of the contract or occurred subsequently to the conclusion of the contract “by regulating some rules which counterbalance the juridical power ratio”.

This is the reason why we consider that lesion, as it is regulated by the civil code, is not incident to bank contracts, i.e. to bank credit contracts, as they are subject to a special law, respectively Law no. 193/2000 on unfair terms in contracts between traders and consumers. We also keep in mind that Law no. 193/2000 itself is considered to be ”the vehicle which introduced lesion as ground for inefficiency of some contracts in the Romanian law system”, as, when shaping the contractual imbalance, it did not only refer to its legal side, as regulated in Directive no.93/133/CEE of the Council, on abusive clauses concluded with consumers, transposing its provisions into the Romanian legislation, but it also referred to its economic side (Mihai, E., 2011, p.26). But we consider that lesion acquired its own identity compared to the regulation concerning consumer protection, which led to a parallel evolution of the regulations.

Pursuant to art. 4 para.91) from Law no. 193/2000, the clauses that were not negotiated with the consumer and which create a significant imbalance of the services between the parties, are considered to be abusive clauses. The lawmaker sanctions the inclusion of such clauses into the contract, by making them void of legal effects. Thus, pursuant to art. 6 from the law: “The abusive clauses included in the contract and ascertained either personally or by means of the legal authorised authorities, shall not produce effects on the consumer, and the contract shall continue to be performed, with the consumer's consent, only if it can continue following their removal”.

We consider that the special law does not establish a criterion of value, as the civil code does, in case of action for annulment on grounds of lesion, in order to apply specific sanctions. Although the provisions of the special law on the nullity of abusive clauses are similar to those regarding the nullity of agreements for lesion, we ascertain that the legal regime of abusive clauses is a derogatory one compared to common law, concerning the sentencing regime of lesion (Bălan, I.I., 2001, p.34-42).

Moreover, we can say that there is a very wide spectrum where abusive clauses can occur, as opposed to lesion. In this regard, the doctrine expresses the situation of insertion of ”an arbitration clause in the credit contract, thus binding the consumer, before the occurrence of any dispute, to accept the removal of the competence of state courts in favour of an arbitrary one, that the dispute will not be settled on the grounds of lesion, having nothing in common with it, but on the grounds of the provisions of Law no. 193/2000 on unfair terms, with further amendments – with all the deficiencies that can appear for the consumer (taking into account the higher costs of arbitrage, the disappearance of the means of appeal and of second appeal, as the arbitrary decision can only be attacked by an appeal for annulment” (J.Goicovici, *Iurisprudentia* nr.4/2014).

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