DISCREPANCIES BETWEEN THE CREDIT CONTRACT AND THE GENERAL BUSINESS CONDITIONS. MORAL AND LEGAL IMPLICATIONS

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At the beginning of 2008, a series of clients of a commercial bank from Romania received an unwanted "gift": a notification by means of which they were informed that the bank had decided to raise the bank fees associated to the credit portfolio; as a consequence, they were to pay a supplementary 0.5% worth monthly fee, applied to the credit balance; therefore, the new terms imposed a recalculation of the monthly installment, as well as the draw up of a new reimbursement schedule, which could be obtained at branch of the bank where the account had been opened.

There are also bank clients that, while reading the contractual clauses, have raised the problem of the legality of these modifications, thus realizing that there is no provision in the contract that gives the bank the right to introduce a new fee or to modify the existing one over the credit's period of validity.

Key-words: credit contract, general business conditions, bank fees

An "error" that made things worse

The bank issued a public communiqué announcing the modifications on the 28th of January, a month and a day after the clients were sent the notifications, a week after the modifications came into effect and after the bank received the first signals of discontent from the part of several clients concerning the new contractual provisions.

The second paragraph of the communiqué mentioned that "out of error, the modification was also notifies to a series of clients which were not affected by the respective adjustments." However, the announcement claimed that the modifications had been operated in the information system of the bank for the entire database and assured the interested parties that reversal invoices would be transmitted to those who had received the notification "out of error".

It is obviously very difficult to establish if a real error was made or the bank decided to rectify its position following the harsh reactions from the part of many of its clients. It does not matter so much, anyway. What finally counts is the fact that the bank reacted, thus assuming the responsibility for that error, at least partially.

Unfortunately, the communiqué left several problems unsolved. Which were those contracts which allow, at least in the bank's opinion, the introduction of the new fee and which are not? Why did the bank resort to that new harmonization of its fees, due to raise the credit costs, as the bank itself implicitly admitted? Why did they not deliver the new reimbursement book to the clients' residences, together with the notification, as did other banks that substantially changed their crediting costs? What were the solutions for those who wanted to unilaterally denounce the contract?

Contracts with ambiguous provisions

We have tried and found out the answers at the bank's representatives, who promptly and openly responded to our inquiries concerning the clients aimed by the bank notification.

First, we have been informed on the types of contracts for which the bank will not apply the new provisions. They are the ones which do not mention an management fee in the "fees" chapter or which wrongly mention it.

For example, the formulation in one of the contracts concluded by one of the bank's clients is the following: "a fee to cover the administration expenses related to the loan, further termed as management fee. The management fee is of 4% and is calculated as a percentage of the entire amount of the loan, as mentioned in the third chapter, "Terms of Loan". The management fee is collected on loan approval, in cash or by debiting the borrower's account". The respective clause DOES NOT refer in fact to an management fee, but to a credit approval fee; as a result, the clients having signed such contracts will be exempted from paying the new fee.

The clients encountering formulations like "an annual fee to cover the administration expenses related to the loan, further termed as management fee. The management fee is calculated on an annual basis as a percentage of the entire amount of the loan, as mentioned in the third chapter, "Terms of Loan". For the first year of crediting, the management fee is collected on loan approval; for the rest of the period, it is collected at the beginning of each year of crediting, together with the annuity."

The bank claims that, in this case, we are not dealing with the introduction of a new fee, but with stage payments of the same fee over several months. However, the situation is at least questionable – the initial formulation mentioned an annual fee, while the new version specifies a monthly fee. The bank argues that, in several contracts concluded with its clients, there are formulations which give it the right to modify the fees. "The contract is submitted to the general business conditions", reads one of the formulations. Another stipulated that "the terms of the contract are consistent with the terms of the general business conditions".

However, both above-mentioned formulations are immediately followed by a statement that can give rise to interpretations. "In case of conflict (or disagreement) between the contractual and the General Business Conditions' terms, the terms and conditions of the hereby contract prevail."

The bank also sustains that, even if there is no such provision in the contract stipulating that "the bank cannot modify the fees" or that this management fee "is fixed over the entire validity period of the contract", the credit contract and the general business conditions are not in conflict.

In other words, the bank considers that it acted in conformity with the credit contract and the general business conditions, the latter coming to supplement the credit contract's provisions when not mentioned otherwise. There is also the possibility of another interpretation, according to which the contract prevails over the general business conditions in the light of the general law principle stating that the special rule departs from the general one.

It is interesting the fact that in the contract, a certain level of the monthly fee is settled (for example, 0.2% calculated on the monthly balance), without any other specifications. In its replies sent to the discontented clients, the bank considers itself entitled "to modify the level" and "to operate modifications (introducing penalties, fees, taxes or new costs), while informing the clients in due time of all the operated modifications, in accordance with the general business conditions.

According to the Communication Department of the bank, taking into account the dysfunctions occurred in some territorial units, no penalties will be applied to those paying their first monthly installments in 2008 in conformity with the old reimbursement books. More than that, all the clients unhappy with the new conditions will be granted the possibility to annul the credit contracts WITHOUT any prepayment fees until the end of April.

The bank will also inform the clients who received notifications by mistake that they will not be affected by the operated modifications. The President of the bank's Administration Board insisted that he would not hesitate to present his excuses in person to all the clients affected by the bank's "error".

It is important that the civil society watch closely this subject and involve whenever similar situations arise with other commercial banks, if elements bringing further clarifications or information are to appear.

Moreover, the necessity to create the institution of the banking mediator is becoming stringent; the mediator should adopt a neutral position, he should be a true arbitrator of the conflicts between the bank and its clients; therefore the expenses associated to the creation and the functioning of the respective institution should not devolve upon the banks, as the mass-media speculated at a certain point. In the same respect, a deeper involvement from the part of the National Authority for the Consumer Protection is needed, as the respective institution is legally entitled to take measures to protect the interests of the banking product and service consumers.

By virtue of acknowledging that a banking credit contract is, in fact, an adhesion contract, those provisions referring to the levels of the bank fees must be clearer and more accurately formulated, so that not to allow

interpretations; on the contrary, the provisions stipulating the interest rates are much more articulately drawn up. This necessity becomes even more stringent in the light of the fact that the banking offer equally addresses to all the categories of citizens, some more or less familiar with the legal or banking terminology. Moreover, the authors of the present article propose that every credit contract should have enclosed the General Business Conditions (usually posted only on the bank's site), so that they are known by the clients when signing the credit contract.

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