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ATTORNEYS AT LAW

Overview of the consumer litigation files

Andrada Bulgaru
Managing Associate

Even though the legal core of the consumer protection issue has been existing for the last 15 -20 years both at national and European levels, the number of litigations in the field has grown significantly only in the last 5 years (2010 – 2015). This situation has been generated by the entrance into force of certain legal enactments (e.g. EGO no. 50/2010 regarding on credit agreements for the consumers) and, in the same time, by the economic, social and politic climate which had a significant role.

The economic crisis, accompanied by the trend consisting in dismissals and salary reductions taken by the State companies, as well as by privately held ones, have "facilitated" the deterioration of the borrowers' capacity to observe the contractual obligations undertaken upon the signing of the credit agreements. This is why most of them have tried to find a way out of the burdening situation by making use of the legislation regarding the consumer protection.

Cătălin Petrea
Senior Associate

Our intention, reflected in the below, is to make an assessment of the current status of the litigations against banking institutions and to try to determine whether the consumers' approach to invest the courts with an impressive volume of claims represents the sole solution in order to re-establish the trust and the equilibrium in the relations between the two parties.

First, it is worth mentioning that, at a European level, the legal framework is established by Directive 1993/13/EEC of 5 April on unfair terms in consumer contracts, Directive 2008/48/EC

On credit agreements for consumers and repealing Council Directive 87/102/EEC, Directive 2009/22/EC on injunctions for the protection of consumers' interests. In addition, in 2014, Directive 17/2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 has been adopted.

As for the national legislative framework, part of the aforementioned directives have been transposed by means of the already famous (i) Law no. 193/2000 regarding abusive clauses from the contracts concluded between professionals and consumers and (ii) EGO no. 50/2010 on credit agreements for consumers. As for Directive 17/2014, the deadline given to the State members in order to transpose its provisions in the national legislation was on 21 March 2016 (in Romania, its transposing has not been accomplished yet).

The consumer litigations against the banks have now come to know a certain magnitude upon the entrance into force of the EGO no. 50/2010, which was intended to clarify the costs associated to a credit agreement concluded with a consumer. The phenomenon took considerable proportions and consistence on the grounds of an excessive and sometimes aggressive promotion turned into a genuine campaign to stigmatize the entire banking system and to identify it with the main responsible of the situation in which certain consumers find themselves.

When addressing the issue regarding the subjective factor, we might add the influencing capacity the personal example has or, better yet, the power of the neighbor's, relative's, acquaintance's example. Unfortunately, most consumers file claims against banks just because their close ones have already done it, without considering the fact that every situation has its specific that requires prior individual assessment.

Within the last five years during which a massive attack against banks has been undertaken, we have witnessed a three level evolution of the consumers' claims. It all started with the individual claims, followed by the collective ones (the so-called "*class actions*") and it appears that will culminate in the actions initiated by the National Authority for Consumer Protection or the consumer associations.

However, in essence, amongst the many litigations grounded on the consumer protection legislation, one may observe certain defining characteristics regarding elements such as the period in which the envisaged agreements have been concluded, the main requests of the consumers, as well as the non-unitary character of the decisions issued by courts.

As such, the most criticized clauses are contained by the agreements concluded between 2006 – 2009 and the borrowers claims do not vary that much; they mostly focus on the annulment of the so-called abusive clauses regarding the commissions (administration, risk monitoring, granting, transforming or reimbursement before due date etc.) and the interest (the majority of them with a focus on the variable character of the interest, depending on the internal indicators of the bank). Lately, the courts have also been invested to solve claims that regard the freezing of the foreign exchange rate at the NBR rate as of the signing of the agreement (e.g. the situation of the agreements granted in CHF).

Without having the intention to enter into technical discussions regarding the conditions whose non-observance need to be cumulatively met in order to declare a clause as being abusive, regarding the distortion of the legal principles and the civil procedure rules, we emphasize the fact that the totally non-unitary jurisprudence and the lack of efficacy of certain court decisions are becoming more and more alarming.

For example, we mention the fact that there have been certain courts that have decided to annul the clauses regarding the interest, without considering the fact that, by issuing these types of decisions, they deprive the credit agreement of the very cause for which it has been concluded; this a reason for the absolute nullity of the entire agreement that has as consequence the immediate reimbursement of the credit in its entirety, thus transforming it from an onerous agreement into a gratuitous one. In addition, there have been cases when certain courts have intervened between the signatory parties' will and have decided the replacement of the interest calculation formula either with the one requested by the plaintiff or with the one considered to be fair by the court itself.

If, in case of the annulment of the clauses regarding the commissions, a direct consequence might consist in the reimbursement of the amounts perceived by the bank (that are quite easy to quantify), when talking about annulling the interest related clauses, things get seriously complicated, as they are numerous decisions that cannot be enforced by the plaintiffs, even though their claims have been apparently admitted.

We believe that the possible annulment of the clauses regarding the interest cannot justify any consumer's behavior that would consist in him stop paying the interest of the loan or him requesting the reimbursement of the amounts paid as interest. Such an annulment should be interpreted as a starting point for negotiations to be carried between the bank and the consumer.

As a conclusion, we have come to a situation where the economic context accompanied by a demonization campaign efficiently run against the banks have directly led to courts' overload with claims that envisage the analysis of the abusive character and the annulment of certain clauses contained by the credit agreements. However, the finality of such actions seems to be often doubtful considering the involved high costs and the impossibility of the consumers to enforce certain decisions that they have considered favorable.

A first step towards getting these things normal would consist in people realizing the finality desired by the consumers consisting in declaring a clause as being abusive cannot be almost ever anticipated especially further to the entrance into force of the EGO no. 50/2010 which clarified certain aspects intensely debated. This can only be achieved by raising the population's financial and economic alphabetization degree; this exercise has to have as central element the understanding that the financial decision shall be taken after a thorough analysis, that it must be assumed and that certain risk elements are impossible to eliminate from the agreements that are concluded for longer periods of time: 10, 15, 25 or even 30 years.

A solution to relax the situation may reside in the honest negotiation between the banks and the consumers if a real chance is given to such amicable solutions and this cause is not considered, from the very start, a Trojan horse or the poisoned apple. In this manner, one may avoid strange situations in which advantageous offers have been refused due to the fact that "*the offer is a trap"* or the conventional representative of the consumers did not encourage, to say the least, the conclusion of a transaction, out of subjective reasons: he either did not agree, together with the consumer, upon charging a success fee, in case of a settlement or the aggressive attitude or the publicity of which he benefited were the ones that prevailed.

Strada Dumbrava Roşie nr. 10, Sector 2, Bucureşti, 020463, România
T: (+ 40 21) 4088900, **F:** (+ 40 21) 4088911
office@bulboaca.com, www.bulboaca.com