

JURIDICAL ANALYSIS FROM THEORETICAL AND PRACTICAL POINT OF VIEW OF THE BANK CREDIT CONTRACT

Candidate to Ph.D Assistant **Aida Diana Dumitrescu** University of Craiova, „Nicolae Titulescu” Faculty of Law and Administrative Sciences
aida_dumitrescu@yahoo.com

Abstract:

The contract in general and the bank credit contract in special are realities of an irrefutable need into the scenery of the modern economy.

The analysis of a bank credit contract is justified in our days taking into consideration the fact that on world and on national level appear invoked repeatedly subjects as financial crisis, credit contract, the difficulty of conditions for a credit, etc. also a complete view over this problem can be made only through a double expectation theoretical and practical.

The bank credit represents any payment engagement in exchange of the repayment right of the paid amount of money and also to the payment of the interest or another expenses concerning this amount or any kind of prolongation for the date of payment (term) and any kind of engagement of acquisition for a title which incorporate a claim or of another payment right for an amount of money.

Key words: bank credit contract, annulment, nullity, authority of being judged.

I. Theoretical aspects

The bank credit contract¹⁴³ represents a one sided and intuitu personae convention that oblige a bank or another similar credit institution, in exchange of a remuneration, to offer money to a person for a time and in a established amount or to assume for somebody interest an money engagement or a guarantee¹⁴⁴ letter.

The bank credit represents any payment engagement in exchange of the repayment right of the paid amount of money and also to the payment of the interest or another expenses concerning this amount or any kind of prolongation for the date of payment (term) and any kind of engagement of acquisition for a title which incorporate a claim or of another payment right for an amount of money.

¹⁴³ Dan Drosu Saguna - Financial and fiscal law, - vol. I, Oscar Print Publishing House, 1997, p.272 and next.

¹⁴⁴ Dan Drosu Saguna - some book, p.272 and next.

The doctrine realized more classifications of the credit contracts, from which we hold that :

- conforming to the period of reimbursement exist: credit bank contracts on short term (no more then 12 months), credit bank contracts on medium term (between 1-5 years) and credit bank contracts on long term (more then 5 years),
- conforming to the credit destination: credit linked to a certain operation and credit for covering general needs; credit for financing some positions on the balance and specific credits (consume credit)
- from the point of view of juridical techniques: opening account, crediting under the transfer on a debt (discount for the bill of exchange), and credits through signature (guaranty of a bill of exchange and the acceptance).

Choosing the type of credit means to take into consideration the needs of the client and the interests of the bank. The credit is given on base of the client initiative which represents a manifestation of wish materialized into an application for the credit. The remuneration of bank is different from one kind of credit to another but it always include the interest counted to the given for the amount and the bank commission.

The credit contracts include usual clauses and specific clauses. The usual clauses from a credit contract concern: name and residence of the bank, name and function of the persons that represent it, the identification of the debtor and of the persons that represent him, the quantum of the credit in lei and the percent of the interest, the signatures of the representatives of the banks and of the debtor.

The open credit is accompanied by common right guarantees (security, guaranty of the bill of exchange, assurance, etc.) or special guarantees (endorsement of the bill of exchange, transmission of property of a protestable invoice, factoring etc.).

II. Practical aspects

a. The annulment of credit contract. Modification of the conditions for accordance the credit. Express resolute pact under IV degree. If one of the parties go to law in front of the instance, the instance can only constant if the conditions mentioned into the express resolute pact are fulfill.(Commercial section, decision no.907 from the 2 of march 2006).

Annulment represents the sanction for the guilty non execution of the sinalagmatic contract and it consist on the contract retroactive abolish and the reinstate of the parties into the situation they had before the contract¹⁴⁵.

The express clauses from the contract regarding the annulment for non-execution are known under the name of express resolute pact and they depart from

¹⁴⁵ Constantin Stătescu, Corneliu Barsan- Civil Law. General theory of obligations, All Educational Publishing House, p.86 and next., Valeriu Stoica - The annulment and the cancellation of the civil contracts, All Publishing House, 1997.

the provision of art.1021 Civil Code in order to reduce or even to eliminate the role of the instance into the annulment of contracts. This clauses are wrote in different manners and they produce more powerful or less powerful effects but the only one which can appreciate if there is or if there is not the case to apply annulment is the creditor which executed or declare himself ready to executed his obligations.

The express resolute pact known as having the powerful effects it is the express resolute pact under IV degree. In conformity with this pact the contract is considered as being rightly abolished without asking for formal notice or another previous formality.

Taking into consideration these theoretical aspects we observe that in front of the High Court of Cassation and Justice parties asked for a solution in a cause concerning the application of a resolute pact under IV degree.

So, the claimant A S.A¹⁴⁶.asked to force the defendant the bank B S.A. to respect the credit contract that was transact on 31 of may 2004, to accord him the credit in amount of 1.590.0 euro necessary to buy a brick factory from the German company T.H.G.

Between parties transacted the credit contract from the 31 of may 2001, this contract included a clause on who the parties agreed on the 44 article of the credit contract, this clause foresee that „if any clauses of quilt from article 43 appears, the contract is considered as being complete annulled without the need to respect another formality, without formal notice and instances intervention”.

The claimant began the deploy of the contract for payment of the first part of the established amount, 280.000 euro, payment executed through an open documentary letter of credit and the part affirm that this payment represent an irrevocable operation.

The defendant invoked the annulment of the contract declaring in front of the judge that it received on 21st of June 2004, from M.F.P., Big Contributor Administration Office, addresses of making attachment under the money availability of the company for the amount if 62,3 milliard lei, representing its debts toward the stat budget. The defendant affirmed about the clause from the art.44 of the contract that it have the value of a resolute pact under IV degree and so the annulment of the contract is conceivable.

Also it affirms that the reason of annulment it is not caused by the accounts lockout, this fact does not represent a guilty case under the article 43 of the credit contract. So, not the attachment under the accounts represent a guilty cause but the non execution from the claimant part of the obligation to announce the bank in term of 5 days about the existence of the report control that represent a writ of execution.

Instances had different opinions on this case but finally, on the appeal of the defendant in front of the High Court of Cassation and Justice against the decision of Court Appeal, being invoke the reason of not being legal (art.304 p.9 Code of civil procedure), (under the judgment is not legal or is the result of a not legal application) and under the art.312 al.2 Code of civil procedure and art.315(1) Code

¹⁴⁶ S.A.- it represents a stock company.

of civil procedure admitted the appeal, pronounce the cassation of the judgment attacked and send the cause to the Court Appeal Craiova in order to be re-judged.

The appeal was appreciated as founded, the previous judgment did not respect art.969 Code of civil procedure, conforming to who, the legal conventions have law power for parties and for instance.

Instance considered that this clause on who parties agreed on art. 44 from the credit contract, represents a express resolute pact under IV degree, so the role of instance about the application of the annulment does not exist.

So, if one of the parties come in front of the judge on this cause, the instance can only verify if they are respected the conditions from the express resolute pact under IV degree, in this case if there is a case of guilty from art.43 letter j of the contract (invoked by the defendant on appeal).

b. Concerning the bank credit, the authority of judgment done and force fulfillment. The High Court of Cassation and Justice decided that if the claimant-creditor formulate a new action against the unique association of the debtor company, this fact does not mean that it can be broke the authority of done judge of the judgment that obliged the debtor, physics person solider with the debtor company to pay the rest of the credit and the bank interests. (Commercial section, decision no. 800 from 10th of February 2005).

c. Analyzing the credit contract and this contract causes of nullity, into a recent decision, the supreme court affirmed that because the amount mentioned as a credit title was not granted, it observed the nullity of the credit contract, as long as an act to sustain the wish of parties to make a novation (substitution of a new obligation to an old one does not exist).

d. Into a case of forced fulfillment of the credit contract and the application of art.79 al.2 from Law58/1998 republished, the supreme instance decided: "The bank credit contracts and the real and personal guarantees constituted in purpose to guarantee the bank credit represent writ of execution. (The High Court of Cassation and Justice, United sections, decision no. XIII from 20th of March 2006

e. Absolute nullity of the credit contract. The claimants were misguide by the defendant when they transact the documents for real guarantee, they understood that they are signing an act of real guarantee for the quality of employee and not some acts for real guarantee for the credit that the company obtained. This fact represents a lack of consent and under art.948 Civil Code it conducive to the absolute nullity of the juridical paper. (Commercial section, decision no. 1844 from 17th of March 2005).

The theoretical and practical aspects presents as a short juridical analyze of the bank credit contract are suppose to underline the actuality, the complexity and the importance of this contract.

A good acquaintance of the legal stipulations on this field, knowing the practices of the instance abut also a economical perspective under this contract converge to the idea of a successful business..