

CONSUMER CONTRACT, RIGHTS AND OBLIGATIONS

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ABSTRACT: *Contractual obligations of an international character are facing many challenges that I will address in this scientific paper in the international view of private entities and the obstacles that appear in the legislation between countries. This paper aims to investigate whether it may create concerns about national legal gaps or eventual problems as a result of differences in the international contract of European Union member countries and non-member countries; If there are problems and legal or real difficulties in this area, if the internal trade and the legal system functions, the interpreter of their difficult treaty between the parties when entering into the contract international or interstate obligations; The case of the contract, interpretation, rights and obligations or other legal issues related to the implementation of private international law and private EU. The challenges of the international private line should be seen in the field of contract harmonization that may come into existence at European level and beyond as an obstacle that limits the fundamental and legal rights of private citizens and the rights of the individual's benefit. This consists of three parts as; Personal relations between citizens, property relations with persons of authority as titular property and the procedural right for the protection of personal rights and property of subjective character in practice face more difficulties in international private law.*

KEYWORDS: Obligations, Contracts, Common International Trade, European Union Law, Consensual Contracts

INTRODUCTION

Legal and institutional Context

The role of Roman law or *Ius romanus* historical background

The Roman law or *Ius romanus* as it is otherwise known in Roman Perannia did not stop there, but the need for legal and economic communication required¹ new further paths from the request that obligations could only be created through written agreements, because everything written can be more easily protected from the legal and procedural point of view. Based on contemporary legislation, we can say that private law or *Ius privatum* includes personal rights, real rights and procedural rights. From this point of view, private law and contracts in our country are generally protected by domestic laws and international ones have a consensual character², which implies that no one can force someone to make contractual arrangements without the will of the parties. So, we can say that in the Republic of Albania and its legislation are practiced consensual contracts. Whereas, when it comes to real contracts, we can conclude that these types of contracts are more apparent in banking systems, where some of the citizens have credit obligations and, as a bank guarantee, apply for real estate mortgages.

¹Bashkim Dr. Selmani "Roman law and influence on contemporary justice systems", pg. 506-519. State University of Tetova

²Elaine Kempson, Sharon Collard, Nick Moore, "An Assessment of the Financial Ombudsman Service", Personal Finance Research Centre, University of Bristol, July 2004, fq. 2, 5, 20-22

The emergence of contracts in the system of contemporary banking law

Roman Contracts and their impact on the national and international law system have as the main purpose of what are the factors that affect the conclusion of real contracts such as; mortgages, deposits, credits, credit-use, and obligations arising from such contracts between the parties to the private law of the Law System of the Macedonian Republic, the International Law and the International Private Law. Based on this, this scientific paper which is about real contracts can conclude that these types of contracts are more apparent in banking systems, where some of the citizens have credit obligations, and as a bank guarantee apply for real estate mortgages. We intend to note the factual situation of the status of contractual parties at the state and international level for the investigation of the real rights between the contracting parties and the legal resources regulating the contractual right of private law. In this subject of the Master we will also base on the subject of private and civil law in general, because in these case studies also arise all the views of contractual right from the most ancient times to the present day, or that of the contemporary society in general that has exactly affected the Roman law that today is being used by the largest systems of contemporary law in this respect: The role of the obliging entities in a legal relationship of obligation, as well as the legal-civil rights based on real loan-mutuum, loan use-comomodatum, mortgage-pignus contracts and the position of the parties at national, international and EU private international law. Real contracts and contractual rights will be treated as a special part of the national, international and international civil rights of the EU³. The right of obligations as well as the legal and civil right of a mortgage character and the role of the parties in the national legal-civil status, and international private law of the EU⁴.

Switching from consumer-like contracts to the development of consumer law in the world

Consumer protection has its roots in people's daily lives. The concept of being a consumer finds its expression in the ancient times, at the time when people lived in caves. People exchanged goods in order to satisfy their needs for food. In its origins, the most ancient form of sale consists in the exchange or replacement of some items with others. According to Roman lawyer Paulus: "Transaction originates in the exchange of items. The sales contract or as it was called at that time, the transaction contract reflects the first stages of the civil legal relationship, where one of the parties was weaker than the other. In the absence of matching exchange interests, people created some kind of valuable material that would serve as an equivalence of goods. In this way was born the concept of prize. Roman law regulated in detail the elements of this contract, such as the existence of consensus, the contract object, the price, the rights and obligations of the parties as well as the law suits with which they could be protected. What matters is the price link with the qualities of the item.

Pomponius stated that it is logical for the very nature of the transaction that contractors trick over the price of the good. If the price was not fair, therefore, did not correspond to the true value of the merx at the moment of the contract, the classical law sanctioned by legal remedies in the form of sanction the deception of one party to the disadvantage of the other as a sale under the price charged by the seller and that over the price, consciously accepted by the buyer. Another stage of Roman law that connects us to aspects similar to the consumer concept, exactly to the consumer credit, is the mandate for giving money. This mandate is based on the

³ EFSE "Rural Finance Gap Analysis" Albania, 2009, fq.25-29

⁴Bashkim Dr. Selmani "Roman law and influence on contemporary justice systems", pg. 467-493. Publisher: State university of Tetova. Tetovë, 2013.

order that the proxy giver gives to the proxy recipient in order to give money to a third party or to open a third party credit. In this case a credit is created between the proxy giver and the third person. These reflect the first moments of the jurists aiming to regulate and establish the principle of equality between the parties. The buyer was the weakest economically and less legally protected party. Above all, there was the risk of falling prey to vendor fraud regarding the price, quality of the items or their shortcomings. In the conditions where the principle of autonomy of will had not yet taken its form and structure, the legal regulations sanctioned by the Roman law constitute the first embryo of establishing a market balance, a balance which is invoked by the defense of the weaker party, the buyers.

Consumer protection is one of the most important policies of the European Union. Albania, with the signing of the Stabilization and Association Agreement, has undertaken to give the Albanian consumer the same rights and protections as the European consumer. One of the areas that is specifically regulated by this law and the European legal framework for consumer protection is consumer credit. This field is also regulated horizontally by other articles of general character of this law, which supplement the protection that is guaranteed to the consumer in relation to consumer credit⁵. In addition, consumer credit, as it is considered as a financial activity, is regulated in more detail by regulations of the Albanian Bank. Regarding European legislation, consumer credit is regulated through the Directive "On Consumer Credit Agreements", which have harmonized the above acts. Consumer Protection Legislation balancing the professional power of the bank in order to protect the weakest party in this relationship, which is the consumer. The alignment of Albanian legislation with European legislation is accompanied by the establishment of responsible structures in the field of consumer protection and market surveillance, the organization and operation of which is foreseen in other by-laws.

Consumer Protection Commission

This commission is one of the administrative structures provided for in the Law, which is specifically charged with reviewing violations and taking measures for the implementation of its provisions, as well as by-laws in its implementation. Another key institution for overseeing the implementation of legislation in the area of consumer credits is the Bank of Albania, which is responsible for regulating and overseeing the financial activities in Albania, and consequently also for monitoring the implementation of legal provisions relating to consumer credits.

The area of application

The Law "On Consumer Protection" makes some exceptions in the area of implementation of consumer credit adjustments where a certain category of credit agreements are listed, which are not considered as consumer credits, and consequently no special adjustments are made to these type of credit agreements. Some type of credit agreements are: a) secured by a mortgage or by any other comparable insurance that is commonly used on immovable property or secured through a right related to immovable property. The European Union has adopted the Directive "On Mortgage Credits", which applies to credits secured by mortgage, in order to provide a better protection to the consumer in the function of respecting his right to information. b) the purpose of which is to obtain/acquire or retain property rights over land or on existing or

⁵EFSE "Rural Finance Gap Analysis" Albania, 2009, fq.25-29

projected buildings;c) which include a total amount of credits less than 30 thousand lek or more than 10 million lek; ç) lease or lease agreements, where the obligation to purchase the object of the agreement is not defined in the agreement itself or in any particular agreement. Such an obligation will be presumed to exist if it is so unilaterally set by the creditor; d) in the form of an overdraft and where the credit has to be repaid within one month; dh) where the credit is provided without interest and without any other obligation/payment and credit agreements under which conditions the credit should be repaid within three months and are payable only for small, negligible obligations; e) where the credit is provided by the employer to his employee as a non-interest-bearing activity or at an annual rate of payments/obligations lower than those which exist in the market and which are generally not offered to the public; ë) which are the result of a settlement reached in court or another legal authority; f) dealing with a deferred payment, without any obligation/payment, of an existing debt; g) from which the customer is required to deposit an item as security in custody of the creditor and where the customer's responsibility towards this item is strictly limited⁶;gj) which relate to credits granted to a limited public on the basis of a legal provision for the purpose of general interest and at lower interest rates than those existing in the market, or without interest, or under conditions of other that are more favorable to the consumer than those that exist in the market and with interest rates not higher than those that exist in the market. So, as a conclusion we can say that, the customer who will make a deal with one of the above credit agreements can not benefit from the special protection offered to the consumer - customer in the case of consumer credit.

Understanding Consumer Credit

Consumer credit is a credit agreement that enables the consumer to make purchases to meet his needs in the absence of financial means, realizing these interests quickly and timely. The lawmaker has not limited the form by which it is possible to provide the credit. It may be in the form of a deferred payment (by agreement of the parties, the disbursement of the credit is made at a later date, while its settlement begins at the time of signing the contract), in the form of lending or other similar financial agreements. The consumer credit contract, as a typical contract, may be a standard contract previously drafted by the lender or a contract drawn up with the free will of both parties (customer-client and lender).

Parties of the consumer credit

A consumer is any person who carries out goods purchases or uses services to meet his/her personal needs. In Albanian law, this concept is left open by the definition of "every person", while in the EC Directive it is explicitly defined that the consumer is only the natural person, ie the individual. However, in light of the interpretation of the EC Directive that has harmonized Albanian law, it is concluded that these two concepts are the same⁷. In addition to the above, it is important to make an explanation on two distinct categories within the consumer concept, which are the average consumer and the vulnerable customer. The concept of average consumer is widely used in law, in articles related to unfair commercial practices. In the framework of European Consumer Law, the European Court of Justice (ECJ) has considered it reasonable to analyze the effects on an imaginary consumer type. In accordance with the principle of proportionality, as well as to ensure the effective implementation of the protective

⁶ Elaine Kempson, Sharon Collard, Nick Moore, "An Assessment of the Financial Ombudsman Service", Personal Finance Research Centre, University of Bristol, July 2004, fq. 2, 5, 20-22

⁷ Mehedi J. Hetemi; "Obligations and contracts", Publishing house "Luarasi" 1998 "Obligations and General Contracts", Publishing house "Luarasi" Published as original 1932

measures⁸ provided for in this Directive, this Directive takes as a benchmark the average consumer, who is normally informed and reasonably, observant and attentive, taking into account the social, cultural and linguistic factors, as interpreted by the ECJ. Then the European legislator's logic with regard to the average consumer goes on: "The average consumer's notion is not statistically. Judicial bodies and national authorities are completely free in determining the typical or average vulnerable consumer response, in any case, having regard to the jurisprudence of the European Court of Justice. While the vulnerable customer is a widely used term, but there is no legal definition because of the heterogeneity of this group. Each sector has its own specifics regarding the definition of a group to be considered as a "*vulnerable consumer*". Temporary life events (such as childhood, illness, etc.), market factors (inequalities in information, market power, complex transactions, education, etc.), as well as inaccessible environments, systems, products or services, turn a consumer in vulnerable consumer. Despite these, one should keep in mind that certain groups are most structurally affected by being vulnerable or unprotected, such as: minority groups, elderly people, people with disabilities etc. The Consumer Advisory Group at the European Commission claims that this term is closely related to the term "average consumer". The impossibility of providing a rigid definition is a consequence of the movement of the "vulnerable" concept within and outside the market structures, depending on the relevant industry⁹.

The Lender

The other party that is in front of the consumer, according to the definition provided by the law, is the lender, who may be the creditor or credit intermediary. The Law "On Consumer Protection" stipulates that the credit intermediary is any natural or legal person who does not act as a creditor. Entities entitled to exercise financial activities are banks, branches of foreign banks and non-bank financial institutions that are licensed by the Bank of Albania to carry out this activity. As a consequence, the Bank of Albania Regulation also defines as subjects of its implementation those provided by the above law. Meanwhile, the European legislator refers in credit terms or credit intermediaries, defining as a creditor the natural or legal person that offers or promises to provide credit within his business, trade or professional practice. So, from a comparative point of view, Albanian legislation, unlike European legislation, limits the application of rules relating to consumer credit only to the entities mentioned above.

Rights and obligations of parties in consumer credit

Phase I - Publicity

Banks have the discretion to decide whether to make publicity about providing consumer credit or not. They also have the right to choose the form of publicity, which can be through their websites, leaflets, billboards, television, etc. This is their right in line with the policies set by each bank for the products it offers. However, the law has established the obligation that, if it is given publicity for the provision of a consumer credit, which indicates an interest rate or any figure relative to the credit price, banks should ensure that publicity includes the standard information defined in the law. Not only that, but this standard information should be clearly, accurately and visibly, by means of a representative example. It should be noted that the use of

⁸See more:

http://ec.europa.eu/consumers/empowerment/docs/eccg_opinion_consumers_vulnerability_022013_en.pdf

⁹Mariana Dr. Tutlani-Semini "The right to obligations and contracts" Tirana, 2006

the term consumer credit in publicity made for credits that are actually excluded from the scope of the application of specific articles for trade, business or profession. Explanatory notes on consumer credit relate to this credit, besides being considered as wrong implementation of the law, has negative effects on the consumer. This is because the consumer may withdraw from credit advertising as a "consumer", creating a false impression of the benefits that it may have. On the other hand, he can not benefit from the special protection for consumer credit provided by this law and the by-laws of the Bank of Albania, and consequently his relationship with the bank will be subject to legal regulations of a general nature.

Phase II - Pre-Contracts Information

The law provides that, at a reasonable time, before the customer accepts any bid or concludes a contract, the creditor provides the consumer, on the basis of the terms and conditions of the credit and the terms provided by the lender, and if applicable¹⁰, expressed preferences or information provided by the consumer, the data necessary to compare the various offers in order to obtain, according to these data, a decision to conclude a credit agreement.

In short, this is called Pre-Contracts Information and is crucial to consumer decision-making because it is presumed to present complete transparency on the issuance of consumer credit by banks. Thanks to this information, the customer will be able to evaluate the various offers before entering into a contractual relationship with the bank, thus making the right choice and the best for him. Regarding the mandatory elements to be included in the pre-contractual information for practical purposes of understanding, they are structured into three groups, as follows, placing them under the concept of rights and obligations of the parties.

Phase III –The Contract

The contract phase is the most important stage in the relationship between the consumer and the lender (the bank) since this moment marks the acquisition of rights and the assumption of legal obligations of the parties in this relationship. Lender's obligations on the consumer credit contract are regulated by the law "On Consumer Protection" and the Bank of Albania Regulation regulates contractual relations, the information that should contain the consumer credit contract as well as the rights that arise to the consumer after the bond of this contract. The lender's obligation to correctly comply with the legal provisions established by the above acts increases the level of understanding and awareness of the consumer in relation to the rights and obligations arising from this contractual relationship. This also affects to increasing the consumer's ability to express his willingness to draft the conditions in the consumer credit contract and above all to protect his autonomy in defining mutual rights and obligations with the aim of not falling prey of the lender's power. Given that the party that drafts the contract is practically and almost always the lender, ie the bank, the obligation to include in the contract all the elements, weighs on the bank. Some elements in the consumer credit contract, seen from the point of view of consumer protection and in the light of the the consequences in the relationship created with the bank and for the practical effects of the explanation, these data are grouped in the first group: -General information. This set of data has a general and descriptive character. This includes information about the purpose of the credit, full details of the identity and addresses of the contracting parties, the total value of the credit and the

¹⁰Galgano, Francesco. Private law, Tiranë: Luarasi, 2006

conditions for its disbursement and the maturity of the credit¹¹. - The second group: Financial data related to information that has a direct impact on the financial condition of the consumer and affect his economic interests protected by law and can therefore be considered as financial information. - Group 3: The legal rights of consumers with the information that must contain the consumer credit contract is mostly related to the main rights, which are also affirmed by the European Union as tools that the consumer enjoys in achieving the consumer - merchant equilibrium.

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¹¹Law Nr.8730, date 18.1.2001 "On the organization and functioning of the judicial bailiff service", Law on Contested Procedure