Bank Contracts in Albanian Legislation, Legal and Practical Issues in this Field

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Abstract

Banks perform an economic activity that is based on principles similar to those of an ordinary business. Banking activity includes the acceptance of deposits of individuals, firms, etc. As a result of the major needs and demands of the economy, household credit, with pertaining high interest rates, the banking sector dynamics experienced a high development. This progress has emerged since the establishment of relations between these banks and individuals by creating a particular system of rights as the law of banking, the focus of which is in the relationship between banks and customers. This kind of relationship is focused on banking contract. Various problems that have emerged from the effect of agreements between parties have brought the need for rating this field of law. Except the provisions provided in the Civil Code about the banking contract, specific laws for the regulation of this relation were approved. As instance could be mentioned the Law on Banks in the Republic of Albania and the normative framework that addresses the whole activity of banks in the territory, upon which the Albanian state has sovereignty. Specific treatment is required about the relations of banks with the customers, where may arise major legal and economic difficulties, because banks are major monetary formations.

Keywords: banking contract, interest, credit institution, loans, deposits, contractual relationship, legal relationship.

I. Introduction

Banks in world history have ancient initiation and many studies have determined their beginnings in Ancient Rome. In 1407 was created the first bank of modern world history, which was named San Giorgio and located in Italy.

During 1913, for the first time in Albania, was created an institution of the Central Bank. This was a result of the first acts in a concession among Banka Commerciale Italiana and Weinner Bank Verein. Due to the problems of the epoch, as well as of the political and socio-economic conditions, this institution did not have a long life. The main reason was the beginning of the First World War. Banking resumed activity in year 1925 and conducts it even today.1

1https://www.bankofalbania.org/web/Historik_i_shkurter_i_Bankes_5338_1.php

2Xhavara, A. Robo, M. "Basis of enterprise", "ShtëpiaBotuese e LibritUniversitar", Tirana, 2012, p. 23

Bank of Albania status enshrined in Article 161 of the Constitution of Albania and Law no. 8269 dated, 27.12.1997 "On the Bank of Albania", which defines the objectives, tasks and relations with the state banking system, organization and management, ownership of capital, financial statements and profit allocation. Another important law is also the law no. 9662, dated, 18.12.2006 "On banks in the Republic of Albania".

Albania has a system of financial institutions, which act as intermediaries between lenders and borrowers. Lenders offer money to the institutions against interest. Borrowers withdraw money from such institutions by paying an even higher interest. The difference between the interest that institutions receive from borrowers with the interest they pay to the lenders serves for the creation and maintenance of profit for these institutions. Due to the nature but also the services they offer, financial institutions in Albania are divided into banking and non-banking institutions.2

Banking Law as well as other branches of law are defined by their object. Generally, the banking law implies a set of rules which are related to banking operations, with which is understood a set of norms that regulate the status, organization and the operation of a credit institution. The theory of banking law divides the banking operations in typical and atypical. All banking operations are complemented by an unspecified number of persons. From this fact derives the requests for legislative intervention to discipline banking activity, protect depositors and also to regulate the money market.

Banking contracts are the contracts with which the bank expects to provide money, put money in circulation and provide other services. Contract Law defines a set of assumptions that apply almost for all the types of contracts, ranging from the parties to participate in, the legal relationship between them, the object, etc.

Banking contracts are provided in the Law "On banks in the Republic of Albania", where these contracts appear as the legal relationship of obligation to deliver a sum of money in exchange for the right for repayment of the amount and interest or other charges.3

3 Law no. 9662, dt.18.12.2006 "On Banks in the Republic of Albania".

In the doctrine are positioned two different theories regarding the need of the bank to enter in a banking contract or not. The first theory is the subjective theory, which considers the presence of a bank necessary to set up a banking contract. The second theory is the objective theory which states that in practice exist norms that make the bank presence necessary in a contract, where these norms also affect the content or object of the contract.

The jurisprudence is focused on various issues which will be addressed within the paper.

II. The function and characteristics of banking contracts.

The norms of banking law are involved in both private and public law because of the importance that they have and the consequences that they directly bring into the economy and the activity of various banks. Regarding the legal nature of banking contracts, there exist several approaches and different ideas, but in general, the civil law considers banking activity as a venture activity, with an emphasis on professional and organized form of this type of activity.

Bank contract is one of the most important sources of different binding agreements under the law of contract. Such contract is a bilateral legal action.

This type of contract is regulated in a diverse manner compared to other common contracts provided by the Civil Code in terms of subject and object. Even though there are several types of similar contracts to bank contracts that include natural or legal non-bank persons, the second contract type is a particular as it is the bank that gives legitimacy to the contract and makes it unique from other contracts.

There are many subjects that may lend or may on deposit an amount of money, but when such contracts are linked to an entity that is involved in professional activities, they are subject to a separate discipline dictated by special laws and the Civil Code.4

4Civil Code of the Republic of Albania, Chapter 18, Banking Contracts.

5http://www.aab.al/bankieri/3/Bankieri_3_alb.pdf

6Bontempi, P. "The DirittoBancarioFinanziario", "GiuffrèEditore", Milan, 2014, p. 223.

When it comes to bank contracts, it should be noted that they can be named like that only because they involve a subject as the bank in the legal relation. There are cases – such as in the case of deposits – where the subject is a bank, but the contract is not a typical bank contract. Regarding the legal basis of the bank contract, we will find support in the Civil Code which sanctions this type of contract and its elements. In connection with this type of contract should be mentioned a series of recommendations of the European Commission or the provisions of the Civil Code of the Republic of Albania.

Legal relationships bank - customer have been reconceived in a qualitative way after the changes done by the Bank of Albania, providing customers with essential information in order to enable them taking decisions that are appropriate and valuable for their interests. The emphasis here is on transparency. In this context, transparency of contractual terms of banking products and services has special attention in order to avoid conflicts with different persons and reduction of reputation.5

Law no. 9662, dated 18.12.2006 "On banks in the Republic of Albania", stipulates the fact that for every banking product or service offer must be signed a document or a written agreement between the parties. According to the complex nature of these contracts, the law requires the provision of pre-contractual information to be complete and comprehensive, so that

the client can understand thoroughly every detail of the banking transaction, turning the formal part in a condition of validity for the existence of legal relationship.6

Bank deposits, on the other side, are contracts with which a subject deposits a sum of money at a bank. The bank subsequently acquires ownership over the sum and has to return the same amount on expiration or request of the depositor, except when there is a period of notice agreed between the parties. Through this instrument, the bank collects the public savings. Bank deposits doctrine has proposed different classifications based on duration, which comprises deposits with specified term and deposits payable against notification, and based on form, according to which there are ordinary and savings deposits. Concerning its legal nature, the emphasis is on the effects of the transfer of ownership of money to the bank and on the obligation to return the money received under contractual terms.7 7 Misha, E. "The Banking Law", "Express", Tirana, 2009, p. 67

Deposits can be considered as an investment that benefits the future or as a loan granted by the bank. Deposits are insured under the provisions of law no. 8873, dated 29.03.2002 "On deposit insurance", amended by law no. 10106, dated 30.03.2009.

III. Legal issues of bank contracts

Bank contracts are generally in favor of one of the parties, that in the most of the cases is the bank. The applied interest rate is one of the most important conditions for this type of contract. Any interest type, be it fixed or variable, should be clearly defined. The basis for calculating the interest rate is the one that the lender has stated or the one defined and calculated by the financial institution. This is a frequent problem in bank loan contracts, as the client does not clearly understand the proportion of principal and interest repayment in the monthly installment. This way, the client is confronted with unforeseen difficulties and this leads to non-correct repayment of the loan. The customer should ensure that the duration of loan repayment will not bring problems and demand before contract signing the right to extend the maturity. The client should also be aware of additional expenses and date of their payment as well as potential legal costs in order to have a clear conclusion of this loan cost.

A borrower often relies more on the commitments provided by the lender. An existing loan may be maturing and the client may have requested and signed a loan for the purchase of another company or land, and the closing date of the acquisition negotiations can be very close. Borrowers may not have assurance that the bank terminates the loan contract and disburses the amounts in time, due to various conditions to be met by the client. This could bring to the client the risk of losing the opportunity to invest. However, there are ways to avoid this risk.

In practice, the right of loan prepayment has brought a number of problems because borrowers generally assume that there is no problem if the terms of the agreement do not mention anything about early repayment. But early repayment can be a real problem for the party in question. Various decisions of the courts have considered it because, as the contract does not mention a specific right for early termination, the lender has the right to obtain the latest version with the highest benefit, which is the payment of all interest for the entire period of loan repayment, regardless of the stage in which the premature closure can be done. In those cases, the solution is left to the customer, who should seek to explicitly clarify the right of early repayment within time, amount and penalties.

The right of sale is another problem encountered in practice. According to this right, which can be expressed as a clause, the lender is allowed to declare the termination of the contract and demand early loan repayment if the client sells the collateral (real estate) to third parties without consent. In order for the legal actions to be valid, they should be expressed in written form. In such cases of credit for real estate, where the property is the only collateral, it is very important that the clause respected.

IV. Conclusions

As a result of the interventions of the Bank of Albania in the formulation of contractual provisions appeared the phenomenon of "uniformization of bank contracts". The banking contracts, as standard contracts, the formulation of which took place unilaterally by the bank, and that allowed the client to accept or reject them in the provided format, are being transformed into contracts, the formulation of which is regulated by the Bank of Albania. Here arises the question: How free are banks in building contractual relations with the client and how much freedom do customers have in accordance with contractual

conditions? At a first sight, it looks like we are dealing with a violation of the principle of free will of contracting, but the quality and comprehensive interpretation concludes that as long as the banking activity is part of a public interest and as such "bound" to be exercised within a defined legal framework, it is the duty of the legislature (in this context, the Bank of Albania) to balance the various principles of law that apply, such as "freedom of contracts" versus the "consumer protection" and further establish a fair balance between them.

In addition to the addressed problems, one of the most acute issues for the banks is the credit risk analysis, which has led to the Bank of Albania’s intervention in the nomination of these agreements. So, in the banking system today, we have problem loans that arose mainly: from the young age of the banking system; as a result of abuse and unprofessionalism credit analysts; inappropriate granting of loans aiming at maximizing profit; economic problems of the borrowers, etc. These issues require the intervention of higher authorities to put the functionality and efficiency of these monetary institutions.

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