

Dispute Settlement through Banking Mediation

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Abstract: The systems through which cross-border financial transactions are being accomplished are much more complex than domestic funds transfer systems, because it involves one or more intermediate institutions, networks using different compensation from countries that have different currencies and even performed, including operations exchange. The European Community is constantly concerned about efficient cross-border payments but also about the consumer protection of these services, so as to ensure the same conditions for cross-border services, but also for national services and to stimulate cross-border investment was adopted Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, repealed by Directive 2007/64/EC. Article 10 of Directive 97/5/EC established a series of minimum requirements and measures relating to cross-border credit transfers. Thus Member States shall ensure that there are adequate and effective complaints and redress procedures for the settlement of disputes between an originator and his institution or between a beneficiary and his institution in case of failure transfers. In Romania, the provisions of Directive 2007/64/EC were transposed by the adoption of Emergency Ordinance no. 113/2009 which repeals the Government Ordinance no. 6 / 2004 on cross-border transfers. This document provides that each institution must have appropriate procedures for resolving customer complaints in connection with the execution of a cross border institution or commitments in connection with such transfer. In the legal doctrine prior to the adoption of Government Ordinance no. 6 / 2004, it was proposed that the National Bank of Romania, as banking supervisory authority, in some specialized structures, ensure procedures to enforce the settlement of disputes between consumers and financial service providers of banking and insurance. The solution was acquired by the Romanian legislature, so the earlier legislation and the current legislation, the Emergency Ordinance no. 113/2009, this document proposing the establishment of a specialized department that is responsible with the resolution of disputes between consumers and financial service providers of banking and insurance. However, although in 2004 we have legislation that enables the implementation of mediation as a means of dispute settlement in the banking sector (Government Ordinance. 6 / 2004), the practical delays occur.

Keywords: mediation; communitarian acquis; arbitration

The systems through which cross-border financial transactions are being accomplished are much more complex than domestic funds transfer systems, because it involves one or more intermediate institutions, networks using different

compensation from countries that have different currencies and even performed, including operations exchange.

The European Community, constantly seeking more efficient cross-border payments but also the consumer protection of these services, has perceived the need to establish minimum requirements and measures relating to cross-border credit transfers. Thus, these measures should ensure the existence of adequate and effective complaints and redress procedures for the settlement of disputes between an originator and his institution or between a beneficiary¹ and his institution in case of failure transfers. These schemes are essentially extrajudicial dispute resolution methods which should involve lower costs and greater confidence.

Growing demand for implementation of alternative dispute resolution mechanisms reflects, in fact, the general policy pursued by the European Union Member States and the European Free Trade Association² to ensure the same conditions for cross-border services and national services and cross-border investment incentives.

At the national level in the European Union Member States and the European Free Trade Association³, the provisions of Directive 97/5/EC of the European Parliament and Council on cross-border credit transfers were applied by the mandatory affiliation of credit institutions and other institutions⁴ who carried out cross-border credit transfers at least to one scheme for handling complaints and redress procedures, not excluding the possibility to participate in several schemes simultaneously.

¹ See art. 10 of the Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 regulating cross-border credit transfers, published in Official Journal no. L 043 of February, 14, 1997, p. 25. This directive was repealed on November 1, 2009, according to art. 93 of the Directive 2007/64/EC on payment services in the internal market and amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, Directive 2006/48/EC and repealing 97 / 5/CE (published in Official Journal no. L 319, 12.5.2007, p. 1).

² The European Free Trade association (EFTA) was founded in 1960 by the signing of the Stockholm Convention. Because they did not accept advanced cooperation between states within the European Economic Community in 1960, six European countries (Austria, Denmark, Britain, Norway, Portugal and Sweden) decided to establish the European Free Trade Association in which later joined: Iceland in 1970, Finland in 1986 and Liechtenstein in 1991. EFTA aimed to create a free trade area limited to industrial products and processed agricultural products (thus excluding fisheries products and agricultural commodities), not to set a common external customs tariff and no common policies. Starting in 1966, were eliminated tariffs and import taxes between the EFTA countries for industrial goods and processed agricultural products. In 1990, the scheme was extended to trade in sea products and fish. Denmark, Ireland and Britain joined the European Communities in 1973, Portugal and Spain in 1986, Austria, Finland and Sweden in 1995, so EFTA currently has four members: Iceland, Liechtenstein and Norway.

³ Under the provisions of the Treaty of Porto.

⁴ In accordance to article 2 of the Directive 97/5/EC, other institutions conducting cross-border credit transfers shall mean any natural or legal person, other than a credit institution, that by way of business executes cross-border credit transfers.

In the process regarding the implementation in Romania of the provisions of art.10 of the Directive 97/5/EC has been adopted by the Government the Ordinance no. 6 / 2004 on cross-border credit transfers¹, document that was recently repealed by the Emergency Ordinance no. 113/2009².

The need for that last piece of legislation is required, since the transposition and implementation into the national law of the Directive 2007/64/EC on payment services in the internal market amending Directives 97/7/EC³, 2002/65/EC⁴, 2005/60/EC⁵ and 2006/48/EC⁶ and repealing Directive 97/5/EC must be realized until November 1, 2009⁷.

Chapter IV of the Government Ordinance no. 6 / 2004, entitled "Final Provisions", provides that each institution must have appropriate procedures for resolving customer complaints in connection with the execution of a cross border institution or commitments in connection with such transfer.

Prior to adoption of the Government Ordinance no. 6 / 2004, in the legal doctrine⁸ were proposed ways that lead to the harmonization of Romanian legislation with

¹ Published in the Official Gazette, Part I, no. 82 of January 30, 2004, approved by the Law no. 119/2004, published in the Official Gazette, Part I, no. 357 of April 23, 2004.

² Published in the Official Gazette, Part I, no. 685 of October 12, 2009.

³ The Directive 97/7/EC of the European Parliament and Council of May 20, 1997 on consumer protection in distance contracts was published in the Official Journal no. L 144, 04.06.1997, p. 22.

⁴ The Directive 2002/65/EC of the European Parliament and the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27 / EC Official Journal no. L 126, 26.05.2000, p. 1.

⁵ The Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on preventing use of the financial system for money laundering and terrorist financing, Official Journal no. L 309, 25.11.2005, p. 15.

⁶ The Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 on the initiation and pursuit of credit institutions Official Journal no. L 177, 30.06.2006, p. 1, amended - last time - on March 20, 2008 by Directive 2008/24/EC of the European Parliament and the Council of 11 March 2008, Official Journal no. L 81, 02.03.2008, p. 38.

⁷ Governing priority of payment services in the European Union and the European Economic Area and the activity of providers of such services and the contracts that arise between them and the users of those services involved in carrying out payment transactions, including cross-currency made with scriptural, the Directive 2007 / 64/CE recommends them to consider and how to handle any disputes that might have incurred in connection with payment services. The Directive requires to competent authorities to regulate the opportunity of the parties to a contract for services and payment to resolve their disputes through alternative means of resolution, including mediation, calling on already existing structures and bodies or that can be built for this purpose, entities which, although using extrajudicial procedures, may provide appropriate remedies. See Vartolomei, Răzvan - „Soluționarea litigiilor legate de prestarea serviciilor de plată în cadrul Uniunii Europene”, in *RRDC* nr. 6/2008, p. 55.

⁸ For the application of the 10 article of the Directive 97/5/EC in the European Union Member States and the four models of schemes to resolve consumer complaints, including possible solutions for the implementation in Romania, see Răzvan Vartolomei, „Considerații privind armonizarea legislației bancare românești cu dreptul comunitar, cu specială privire la armonizarea cu prevederile art. 10 al

the communitarian *acquis* regarding the implementation of alternative means of settling disputes in the field of cross-border credit transfers. Thus, four models of schemes for handling complaints have been suggested: a first model considered persons nominated by the state to investigate, mediate and conciliate in complaints from consumers – „Mediators/Ombudsman Schemes”¹; a second model concerned the establishment of committees of consumer complaints (decisions will be regarded as recommendations, and committees were to be financed exclusively from public funds)²; the third model concerned the resolution of consumer complaints by the institutions established under field supervisors³; the fourth model was represented by the establishment of commissions of arbitration for consumers to act on their status, their decisions being binding.

The author then quoted stressed that the existence of a single institution to resolve all disputes between consumers and providers of financial intermediation services would be particularly beneficial for Romanian banking system and it can be a solution in line with current developments in Europe. It was considered that a viable model would be the resolution of consumer’s disputes within organized structures inside of the National Bank of Romania as the banking supervisory authority.

The solution was acquired by the Romanian legislature, both in the previous legislation (Ordinance no. 6/2004, dealing with the fact that, later than three months to register a complaint, the institution has not taken any step to resolve complainant, has failed its amicable settlement or no answer to the complaint lodged by customer) and the current regulator, respectively the Emergency Ordinance no. 113/2009.

This document states that "the National Bank of Romania ensures the application of extrajudicial, adequate and effective redress procedures for complaints brought before it by the payment service users who consider themselves injured by payment service providers that operate in the territory Romania. Payment service users may resort to these procedures to resolve complaints on a voluntary basis "(article 179).

To this end, within the structure of the National Bank „it will be created a specialized department that will provide mediation of disputes arising between classes of service providers as stated in art. 2⁴ and the payment service as stated in the regulations

Directivei 97/5/EC a Consiliului și a Parlamentului European reglementând efectuarea transferurilor credit transfrontaliere”, in *Revista de drept comercial* nr. 2/2002, Bucharest: Lumina Lex, p. 205.

¹ This model operates successfully in Great Britain, with “The Banking Ombudsman”, only specialized in banking and the “Financial Services Ombudsman”, specialized in financial services including banking, in Belgium by the “Association Belge des Banques” and “Mediateur aupres de la Poste” in Ireland by “The Ombudsman for the Credit Institutions”, in Italy by “Ombudsmna Bancario” in Greece by the “Hellenic Banking Ombudsman”.

² Such a model works, for example, in Sweden by “The National Board for Consumer Complaints”.

³ See Germany with “Deutsche Bundesbank”.

⁴ Article 2 of the Government Emergency Ordinance no. 113/2009 provides that the Ordinance “applies to services rendered by the following categories of payment service providers: credit

issued by the National Bank”¹. We must point out however that such a department does not exclude the possibility for stakeholders to address the National Authority for Consumer Protection or to the court.

To ensure compliance with that legislation (art. 178 of the Emergency Ordinance no. 113/2009), payment service providers, consumers, other stakeholders, including consumer associations can either announce their National Authority for Consumer Protection on the violation by payment service providers to the provisions of Titles III and IV of this emergency ordinance or to initiate legal action against payment service providers which violated the provisions of that legislation.

The National Authority for Consumer Protection shall inform, where appropriate, the applicant, in reply to it, about the existence of extrajudicial procedures for dispute resolution. To resolve any disputes amicably and without prejudice to the right of consumers to initiate legal action against payment service providers which violated the provisions of Emergency Ordinance no. 113/2009 and their right to notify the National Authority for Consumer Protection, consumers can call on Extrajudicial dispute resolution procedures.

The European Commission is behind the organization of two European networks of organizations that share the objective of facilitating the consumers’ access to alternative ways of extrajudicial procedures for dispute settlement, where the trader

institutions within the meaning of art. 7 align (1) pct. 10 lit. a) of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments by Law no. 227/2007, with subsequent amendments; b) electronic money institutions within the meaning of art. 7 align (1) pct. 10 lit. a) of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments by Law no. 227/2007, with subsequent amendments; c) giro postal services providers providing for payment under the applicable national legal framework; d) payment institutions under this emergency ordinance; e) the European Central Bank and the national central banks when not acting as monetary authorities or otherwise as exercising public authority; f) Member States or their regional or local authorities, when not acting in their capacity as public authorities”.

¹ Article 179 align. (1) of the Government Emergency Ordinance no. 113/2009. We must specify that the National Bank of Romania adopted on 25 March 2004 the Regulation no. 3 on the mediation procedure of disputes arising in the execution of cross-border transfers (published in the Official Gazette, Part I, no. 296 of April 5, 2004). The applicability of this Regulation is limited to disputes arising between the institutions in Romania border transfers with a value less than the equivalent of 50,000 euro and their clients during the execution of these operations. Mediate disputes is the task of NBR by its specialized departments of the Directorate Legal. It consists of five members, who elect a quarterly mediation committee consisting of three persons, one of them being the president. The application to mediate disputes may be brought only if the procedure was performed prior to address customer complaints institution involved in cross-border transfers, and it has not taken any step to resolve the complaint, failed to resolve its amicable or no answer to the complaint lodged by the customer. The mediation Committee of the specialized departments will formulate a solution within 30 days from the date of application for mediation solution to be recorded in a report. The findings in the report are not binding on the parties concerned, but for the court to be seized of the unhappy solution made by specialized departments; this has advisory status (Article 14 of the Regulation).

is established in another Member State than their consumer resides. They pursue the same objective, but operate in different ways (Roşu, 2010, pp. 190-191). Thus, the European extrajudicial network “ECC Net” - European Consumer Centers Network is a structure that provides support and information to consumers, composed of national contact points in each member state and Norway and Iceland. Each operates as a contact point for information exchange about 400 bodies that they consider two recommendations comply with the Commission¹ on principles applicable to bodies responsible for resolving disputes about matters.

On January 1, 2008, Romania² joined the ECC Net network to support the citizens of EU regarding the cross-border shopping. In parallel with this whole quasi-legislative activity, the European Union provides financial support for certain initiatives, in particular on resolving consumer disputes online. The European Commission was involved in financial terms in launching ECODIR (Electronic Consumer Dispute Resolution), a pilot project that provides online consumer conflict resolution services.

Returning to the functions of the specialized department within the National Bank of Romania, the Government Emergency Ordinance no. 113/2009 contains provisions on its cooperation with the courts. Thus, the specialized department “may issue advisory nature views on disputes that were not subject to mediation organized by the National Bank of Romania, if such views are required by the courts before which proceedings” [according to art. 179 (3) of the Emergency Ordinance no. 113/2009]. The 4th paragraph of the same article states that “the dispute settlement procedure by the National Bank of Romania, through the specialized compartment is free”.

As regards the period within which specialized departments will formulate a solution to the questions raised, it should not exceed 30 days to the registration for demand mediation to NBR. If there are required additional documents and / or information, a new term of 30 days will run from the date of the presentation of such documents or information³.

The Emergency Ordinance no. 113/2009 [art. 179 para. (6)] covers, also, the National Bank of Romania's cooperation with the organizations which provide out of court settlement of disputes between payment service users and providers of payment

¹ The Recommendation 98/257/EC of 30 March 1998 on the principles of dispute settlement institutions with consumers (published in Official Journal no. L 115 of 17 April 1998, p. 31) and Commission Recommendation 2001/310/EC from 04.04.2001 on the principles for the institutions involved in solving extrajudicial settlement of disputes with customers (published in Official Journal no. L 109 of 19 April 2001, p. 56).

² ECC Romania is co financed by the European Commission and the Romanian Government through the National Authority for Consumer Protection. ECC Romania is logistically supported by the Association for Consumer Protection in Romania (Romania PCA).

³ Article 179 align. (4) of GEO no. 113/2009.

services in connection with the rights and the obligations that issue from this emergency ordinance regarding the border disputes.

However, we must observe that, although from the creation of the regulatory framework that lead to the effective operation of the system for handling complaints under the Government Ordinance no. 6/2004 (which was taken over by Government Emergency Ordinance no. 113/2009) have already passed six years, the term “will be created a specialized department” remained only a goal that seems to be impossible¹.

After the adoption of the Directive 2007/64/EC, but before the adoption of the Ordinance No. 113/2009, the literature has argued (Vartolomei, 2008, p. 225) that national legislation transposing the Directive could lead to the expansion of the mediation committee held power under the National Bank of Romania's Regulation no. 3/2004² and to the examination of disputes arising in the mechanism of carrying out a cross-border payment services. Given this fact, the quoted author points out that objections might be raised about the fact that being concerned the consumer interests - individuals, mainly in the sense of the Romanian legislation, the jurisdiction to hear of possible disputes arising in connection with the provision payment services should be given to organized structures in addition to NACP, when the dispute in question has as a party such an individual consumer.

The conclusion might seem logical, since the purpose of the NACP is not the protection of the consumer as legal person. Such disputes in which a legal person is a

¹ “The operation of Banking Ombudsman, that that judge empowered to investigate cases in which bank did not properly respond after receiving a complaint, almost became an illusion. The more you think you approach, the more it departs. And that's because a new obstacle arose in deploying this project started in 2006 by the Romanian Association of Banks. The Competition Council set the condition to give notice of its foundation: the existence of professionals, respectively the banking ombudsmen. And as the Romanian school does not include such majors, a number of lawyers will have to come to pursue postgraduate studies. Then, also at the Competition's recommendation, they will be organized in an association profile and they will be designated to resolute the complaints. All these together would seem to again delay the project implementation in practice. In response to these requirements of the Competition Council, Radu Ghețea, ARB Chairman, proposed that, initially, Banking mediators come from among lawyers who have obtained a degree abroad and who practice banking environment in Romania. Regarding the establishment of the association, says Radu Ghețea, ARB might set up a company together with the Credit Bureau, the Romanian Banking Institute or Transfond, which could be financed by all banks. See, Ada Ștefan, *Mediatorul bancar în rol de Fata Morgana*, article published in the „Financiarul” newspaper, from 14/05/2008.

² The National Romanian Bank issued on March 25, 2004, the Regulation no. 3/2004 on the procedure for mediation of disputes encountered in the execution of cross-border transfers, according to the provisions of art. 10 align (3) lit. b) of the Government Ordinance no. 6 / 2004 on cross-border transfers (recently repealed legislative act, as I stated above), pursuant to art. 50 of the Law no. 101/1998 on the Statute of the NBR (normative act that was subsequently repealed by the Law no. 312/2004, published in the Official Gazette, Part I, no. 582 of June 30, 2004, with the last amendment brought by the Ordinance no. 94/2004, which in turn has been amended on several occasions, the last amendment was made by the Law no. 99/2008 for the approval of the Government Emergency Ordinance no. 25/2007 on the establishment of measures to reorganize the unit of the Government.

party (as a payer or recipient) shall be resolved through mediation organized by the National Bank of Romania. However, it was argued that the mechanism of alternative dispute resolution that may arise in connection with the execution of payment transactions must be uniform, so that the mediation mechanism of possible litigation in this area should also be organized in the structures besides NBR. (Vartolomei, 2008, p. 61)

We appreciate, however, that there is no impediment to the parties to the contract payment service to use a mediator authorized to operate under Law no. 192/2006. Emphasize that there is no legal impediment in the sense that an authorized mediator specialized in such disputes could always comply with the request of the parties to assist them in resolving it.

But it provides no way to Directive set. The reason behind such assertions is that always a mediator authorized to provide this service for a fee so that the consumer is not only protected, but is exposed to additional costs. If the parties assumes these costs, mediate such a dispute is possible. The existence of specialized compartments within the central bank does not remove the right of the payment service provider and of the beneficiary to request the assistance of a mediator, someone who, through competence, honesty, impartiality, enjoy their trust.

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