Legal analysis of banking contracts

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**In:** Diritto civile e commerciale

1.

**Understanding banking contracts.**

Civil circulation implies the existence of many entities that participate in it. These subjects may be natural or legal persons. In the field of civil legal relations, banking contracts cover a relevant area (1). These contracts mark the formation of certain civil legal relations, which in industrialized countries are widespread. Even, in Albania with the mass spread of commercial banks, the banking market is developing more and more. As significant part of this market are the baking contracts themselves. Through the latter, banks exercise their functions. However, one of the most relevant issues to be clarified is the notion of the bank itself.

Article 4 § I / 1 of Law no. 9662, dated: 18.12.2006 "On Banks in the Republic of Albania", determines that "the "Bank" is a legal entity with headquarters in the territory of the Republic of Albania, which carries out banking and other activities, as defined in this law."

Further to subparagraph (2) of this section is determined that: ""banking" is the acceptance of cash deposits or other repayable funds from the public and their use to extend credit and their disposal on behalf of itself, as their emission as a means of payment in the form of electronic money.".
Given the above, we can say that banking contracts are those contracts formed by the entity named bank in view of the exercise of its banking operations for which is licensed. Regarding this we can say each bank exercises in general three basic functions (except of other services):

1. Accepts and saves clients money deposits;

2. Allows the withdrawal or the transfer of money from one account to another;

3. Provides loans or credit with the residual money to clients who wish to receive this loan or credit.

From the point of view of the activities realized by a bank, even banking contracts are considered part of bank activities. It is worth mentioning that in bank contracts one of the parties is always defined to be a legal person, a bank. This is the main difference with other contracts that resemble with banking contract.

In following this paper, will address the meaning of banking contracts provided by the Civil Code of the Republic of Albania.
2) Bank deposit.

In the article 1024 of the Civil Code, is provided the meaning of the contract of bank deposit bank, as follows:

"When a certain amount of money is deposited in a bank, the later acquires their ownership and is forced to return them in the same kind of currency, with the expiry of the deadline or at the request of depositors, given the notice period specified by the parties or by the banking custom."

On the other hand the bank deposit contract is provided also by law no. 9662, dated: 18.12.2006 "On Banks in the Republic of Albania", where the Article 4 § I / 5 of this law provides that:

"Monetary deposit "is: the credit balance which results from funds deposited in an account or in a temporary situation resulting from the ordinary bank activities and which the bank must repay according to the contractual and legal provisions;

Any obligation established by a document or certificate issued by a bank or foreign bank branch.".

As can be seen from the above provisions, bank deposit contract are concluded between the depositors, who may be natural or legal persons and the bank, which in any case is a legal entity established in the form of a joint-stock company (JSC). The contract of bank deposit is a real contract, because its formation is considered to be completed at the time of deposit of the amount of money in the bank.

Object of the contract of bank deposit can be cash (money) or management holdings. This is the difference with the simple deposit contract, where the latter object may be any personal property object, p.sh: a
precious stone.

If the bank issues savings-book, deposits and withdrawals must be noted in savings-book. Notes on the savings-book signed by bank officer who is assigned to this service, constitute a full proof between the bank and depositors. Any reversed agreement is void. The savings-book serves to prove the existence of the contract of bank deposit, and to certify all actions taken by parties in regards to this bank deposit. In this way the bank deposit contract turns out to be a formal contract, because even if the bank does not issue a savings deposit book, it certainly should give depositors a receipt confirming the payment made by the depositor to the bank on behalf of account bank deposit.

A special feature of bank deposit contract whose object is money, is that ownership of this money is transferred to the bank, via-a-vis the assumption of liability by the latter to return the money in the same currency to the depositor, with the expiration of deadline set by the parties in the contract or in case of failure to define such deadline upon the request made by the depositor.

In Article 1026 of the Civil Code is determined that if savings-book is payable to the bearer, the bank which unintentionally and without serious negligence performs services to the holder, shall not be held liable even if the holder is not the depositor himself. The same provision applies if the savings-book payable to bearer is issued on behalf of a particular person. Provisions of special laws are not applicable.

As stated above, the subject of the contract of bank deposit can be also administered securities. Regarding this in Article 1027 of the Civil Code is determined that:

“The bank that receives and accepts deposits of securities in administration should save the securities or dividends, to verify their trading price or for the repayment of capital, paying special attention to collect the revenues on behalf of the depositor, and in general to ensure the protection of rights relating to the security. Amounts collected shall be credited to the account of depositors.”
If for the deposited securities shall be exercised one choice right, the bank must require at a due time all the necessary instructions from the depositor and exercise all of them in case is has collected the necessary founds. In the absence of such instructions, the rights of election shall be sold on behalf of the depositor through exchange agents.

Bank is entitled to compensation in the amount provided by the agreement of the parties or in the amount that is normally used, except for payment of expenses incurred by it.

Any agreement that excludes the bank from the duty to save and manage the securities with a usual care is void.

Given the above the content of a bank deposit contract consists of rights and obligations of contracting parties that are the bank and the depositor.

Thus, the depositor has the right and obligation to provide to the bank a sum of money according to his will. He must transfer the ownership of money to the bank. Also, if the contract is formed for a determined duration, the depositor must comply with the contract duration set by the parties.

Bank is obliged to accept the amount of money thus opening the bank deposit account. It should record this amount and dispose the money received for the entire duration of the contract. Also, the bank is obliged to repay to the depositor, the amount of money at the end of contract’s term, or upon the depositor’s request, taking into account the period of notice determined by the parties or the banking custom. Further, the bank is obliged to pay to the depositor the bank interest, if the parties have agreed to do so.

In conclusion we can briefly introduce the main classifications of bank deposits. For the determination of
this classification will take into account several criteria such as: contract duration, number of depositors, deposit form, the existence or not of interest, and the nature of the item.

3) Banking service and security safes.

Bank as an institution that carries out specific functions related to banking activity, is considered as a safe place. For this purpose, banks spend a lot of money, to maintain their premises in order to provide to customers perform banking activities all the necessary security.

One of the classic functions of banks is providing the service to security safes. In regards to this banking service, the Article 1028 of the Civil Code provides that: “The Bank, for the service of security safes, is liable to users concerning solvency, maintaining the integrity of the facility and of the safe, except for any force majeure case”.

The object of security safes contract is the taking over from the banks of the obligation to preserve these safes in a safe place, allowing the customer to deposit in them any item individually determined that is not dangerous to the safety of bank (e.g.: gasoline, explosives, etc.). This contract is formed against the client's obligation to pay a reward for the service provided.

Security safes contract is a consensual contract, unlike the bank deposit contract which is the real contract. Further, in security safes contract the items that can be stored in a safe can be any kind of individually defined item (e.g.: precious stones, documents, money, etc.), while in the case of deposit contract, the item can be sole money or securities in administration. Also, between the security safes contract and the bank deposit contract, there is also another distinction that has to do with the fact that in the case of security safes, the item stored in it, is owned by the client (the bank provides only for its
storage security), while in the case of bank deposit contract, the ownership of money is transferred to the bank, which is obligated to return their value. In addition, in case of bank deposit contract, the bank possesses full knowledge on the stored item, while in case of security safes contract, the bank that provides the safe and is not obligated to know what the client stores there. In the case of security safes contract, the client pays for certain secured physical space that is offered by the bank to store their different items for during the entire contract duration.

4) The opening of bank credit

An important part of civil circulation is the flow of money. The economy in general and entrepreneurial initiative in particular, needs money, as a means of financing various development projects. Anyone who intends to set up a business and has not sufficient means of cash, the first thing that he thinks, is how he can secure them. For this purpose, one of the most used tools is the bank credit contract. Through this contract, the bank makes possible the financing of various persons, whom monetary means to realize their objectives in the field of business or private life.

Bank Credit is one of the used contracts used in the business field. If we refer to the etymology of the word credit, we would emphasize that it is derived from the Latin phrase "credere", which means "believe". So the bank credit contract is a contract formed between the parties, when the bank is confident that the borrower will repay the obligations assumed via contract.

The contract through which the bank credit is opened is regulated by the provisions of Civil Code and by the law no. 9662, dated: 18.12.2006 "On Banks in the Republic of Albania". Regarding the meaning of bank credit contracts, in the Article 1031 of the Civil Code is provided that:
"The opening of bank credit is a contract by which the bank is obliged to keep available to the other party a sum of money for a certain period of time or for indefinitely."

Whereas in the Article 4 § I / 6 of Law no. 9662, dated: 18.12.2006 "On Banks in the Republic of Albania", is determined that: "the Credit” is the legal relationship of obligation to disburse a sum of money in exchange of the right for repayment of the amount disbursed and the interest or other banking fees banking on these amounts, and any extension of the maturity date of a debt security or of any other right to pay a sum of money.".

As can be seen from the above, our legislation provides for the credit as a bank obligation to make available a sum of money. The legal relationship that is formed as a result of the opening of bank credit is a reciprocal relationship in which the contracting parties appear as holder of mutual rights and obligations. Parties to this contract are called the lending (the bank) and the borrowers (the client).

As to the manner of implementation of bank credit in present times it is worth mentioning two ways:

1. **Credit in foreign currency.**

This is disbursed for the purchase of goods from imports where belong the goods for general use, foodstuffs, etc. The credit is disbursed to state and private economic entities, including domestic and foreign legal persons operating in the Republic of Albania, who own accounts at a commercial bank, have a license for conducting export-import activity and guarantee the repayment of the credit.
This credit can be disbursed also to non legal persons that carry out activities in the Republic of Albania, who provide acceptable and sufficient guarantee from banks or financial institutions. Foreign currency credit taken by the borrower must be repaid to the bank in the same currency. It can be repaid in Albanian Leke (ALL), if signed loan agreement provides so. The credit in foreign currency is used at the moment of opening the account or when the order for payment is issued. At this moment the loan amount is disbursed to client's account and hence the banking operation is completed.

1.

Credit in Leke (ALL)

Generally are given for the purchase of goods within the country, which may include goods for general use, foodstuffs, raw materials, machinery, equipment, tools service activity, etc.

This credit is provided by bank transfer against documents submitted by the borrower. Besides the specific criteria, the bank sets also general criteria such as:

1.

Required documentation submitted by the client.

2.

Review and approval of credit.
If you we would start to do an analysis of this contract we would primarily focus on the Article 031 of the Code Civil, who provides for us the definition of bank credit contract.

We would say that this contract differs from the loan contract, which actually is a real contract because the opening of credit is a consensual contract, which is considered to be formed when the parties have expressed their will for its formation, regardless of money delivery, unlike the loan contract which is a real contract. This kind of contract is a contract with loan, because its user pays always to the bank a certain interest (usury).

Doctrine recognizes that a loan contract is a typical banking active job. The contract for opening credit implies two effects: the immediate effect is to provide credit to a given customer and the following eventual impact is the use of the available credit. The opening of the credit can be classified by reference to different criteria in:

1. **By the method of using credit.**

   a. Opening cash credits that can to be simple and current account.

   b. The opening credits with the signature that can with acceptance, or in good faith.
2 - According to guarantees acceptable to the opening of the loan.

a. Opening credit in white or "in discovery".

b. Opening of credits guaranteed by real guarantees or personal guarantees.

3 - According to the subject of credit users.

a. The opening credits for the benefit of the client.

b. The opening credits for the benefit of third parties.

4 - According to the duration of use.

a. The opening credits indefinitely.

b. The opening credits for a predetermined time.

c. The opening credits with unilateral revocation (withdrawal) of the bank.

The analysis of various types of bank credit contracts mentioned above will be done together with the analysis of the relevant articles of the Civil Code. However, we shall analyze first a subsection of the Civil
Code which does not provide for any special legal regime that is precisely the opening of credits with signature.

"Opening credits with the signature" is the most prevalent form of cash loans or ordinary lending banks. Through this operation, the bank opens a bank loan with signature when accepts the liability to provide a guarantee in the form of bail, overdraft credits, or bill of exchange approval. Thus, implying an obligation on behalf of a client or accepting an obligation of the customer arising from this contract.

On one hand it exposes the Bank to risk of liability to fulfill the obligations assumed on behalf of the client, when the client at the time of deadline is in insolvency. Doctrine and case law states that in this kind of contract effective distribution of money has a character because there will be money exit only if obligation is not fulfilled by the credit applicant.

This type of loan is reserved sole for firsthand customers, from which often are requested also other specific guarantees. This type of loan in specific practice appears in three forms:

**Overdraft Credits**

Overdraft credits are those kinds of credits when the bank pledges to provide guarantees through signing an overdraft agreement for promissory notes issued by the client on behalf of third parties. While we should note that the overdraft credit is an action by which a person who in our case is the Bank undertakes bail for the proper fulfillment of obligations arising from by the bill.
Opening credit with bail

This type of credit actually consists in the contract of bank bail as a contract through which the bank guarantees the fulfillment of an obligation on behalf of its customer.

Unlike rebate credits, here the guarantee provided by the bank is confirmed by a "guarantee letter" issued by bank itself in special forms, but can be found also in the form of a regular registered contract.

For this service the bank receives a certain commission calculated as a percentage of the amount of the guarantee. Its level is determined by the length of "coverage".

The opening of credit with acceptance

Via the opening of credits with accepts the bank pledges to accept on behalf of trusted clients bills by customer’s order or third parties’ order, thus assuming a direct bill of exchange obligation.

Different cases and types of credits

1.
An important form of credit is consumer credit. This credits is defined by the doctrine as a form of giving credit in a determine form of payment, of debt or financial relief in favor of natural persons or legal entities (customers) to exercise a trade or professional activity. This type of loan should actually be of a limited value, and provide a refund in installments.

In the context of short-term credits are included the following credits:

1. **Rebate credits**

This is one of the oldest works of banks and simultaneously the most common. It is granted on the basis of a bill once the bank will be sure that the signatories to the bill guarantee the return of money at the appointed time. This type of credit is granted for a period of three months.

1. **LOMBARDE Credit**
It has taken the name after the name of Lombardi where has been developed for the first time and this belongs also to one of oldest works of banks. This type of loan is given by banks on real basis of the pledge. In this type of credit the pledge can be securities or precious metals. In this case the bank gives no more than 70-80% of the price of these securities. If this kind of credit is not repaid back in due time and in accordance with the terms and conditions determined by the bank, then the latter has the right to sell the securities in stock exchange.

1.

**Acceptable credit.**

This credit applies in cases of seller-buyer relationship and is executed by bill by having several specifications that are:

1. When the seller to guarantee besides the signing of the bill by the buyer requires also the signature of the bank.

2. Credit is drawn in another bank.
**d - Overdraft credit**

In contrast to acceptable credit, in this credit is taken as guarantee not the acceptance of the bank, but a letter of guarantee in which is guaranteed that if the buyer (debtor) does perform the obligations, the bank interferes with its one initiative.

**d- Current account credit**

Under this contract, the bank transfers an amount of money to the current account in use of applicant. In this case the interest is paid for the respective amount that has been effectively used.

**Long terms credits**

Through these types of credits bank provide funds to finance investments in building new facilities or modernizing existing ones. In these kinds of credits, the interest rate is higher as funds become available for a much longer time than other types of loans.
To provide these kinds of credits, banks must have enough very well prepared experts who can calculate everything with highest possible safety and professional standards.

**Mortgage Credits**

This loan is given on the basis of mortgages over real estate of the credit seekers. The credit applies as a certain percentage of the value of real estate. This type of credit is generally given for building housing facilities.

**Credit for investment in the economy**

This has in its content all the additional needs that have different investors to finance their investments.

A very important form of intervention of banks in international trade is exactly the **documentary credit**. Through this, a maximum security is guaranteed for the importer as well as for the exporter. “Documentary Credit” is called a credit issued from a bank on the basis of an order of one its client (the importer) for the benefit of a third party (the exporter) who can use it in a certain form and in certain conditions, only against the delivery to the bank of designated documents for the supply of goods subject of the transaction. 

This type of loan recently is very developed and is currently regulated by standard rules and forms of use set by the International Chamber of Commerce. Documentary credit appears in two forms:
1 - In the form of cancelable documentary credit. Under this form, the issuing bank has the right to cancel or to change the credit almost at every moment. For this reason it is considered as a documentary credit with limited promise. But in fact this type of loan violates the most important quality of the loan that is exactly the maximum safety of the parties.

2 - Non cancelable documentary credit. Under this credit, the bank receives a promise liable to the beneficiaries. This type of credit can be reinforced or not reinforced. It is reinforced when the issuing bank authorizes another bank to strengthen the non cancelable credit and the latter being guaranteed in a manner acts in accordance with the authorization of the bank. Meantime the documentary credit without reinforcing is in those cases where the issuing bank restricts the use of another bank just by giving notice to the beneficiary's credit.

Thus we see that documentary credit has four subjects:

**Instructor** - This is the importer who orders its bank for opening the documentary credit for the benefit of the exporter.

**Beneficiary** - This is the party in whose favor the credit is issued, and this is the exporter.

**Issuing or crediting bank** - This is the instructor bank, which opens the documentary credit for the benefit of the exporter.

**Notifying bank** - This is the foreign bank, usually of exporter’s country, who is the correspondent of the issuing bank and who notify the beneficiary for the opening of the credit for his benefit.
In documentary credit may be included also a special condition known as "red clause ". It is so called because it is written in red ink for the announcement of credit opening. Under this condition, the ordering bank authorizes a foreign correspondent bank, to give to credit beneficiaries, certain overdraft upon the submission of documents provided for the use of credit.

Red clause can be safe and unsafe.

In uncertain red clause, credit recipient, at the time of using the overdraft is not required to give specific guarantees. He should issue a simple note or a note, sometimes accompanied by a statement. In this statement he promises to use the amount withdrawn against certain supplies. But in certain red clause beneficiary at the time of use, must send to the bank receipt of goods deposit and sometimes provide evidence of their insurance.

Within the technical forms of disbursement we may mention that one of these forms is the documentary credit for rebate. This type of credit is given to vendors of goods and is otherwise called as export credits. Through this the bank or other pledges to rebate to the exporter issued on behalf of importer.

First, the importer requests from his bank that through its branch or an acting correspondent in the country of exporter, disburse a rebate credit against the withdrawal of documents representing the goods.

In this manner, the issuing bank after receiving the required guarantees authorizes the correspondent branch operating in the market or the place of the exporters to rebate. After the rebate in this form, the exporter of the seller becomes bill of exchange binding. This is practice is avoided by seeking to the buyers or importer a statement that frees the seller from possible actions of regression. In other words that liberates the latter from liability.
1<sup>(i)</sup> Intervention held in “Sapienza” University of Rome, in data may 26<sup>th</sup>, 2011, in occasion of the International Conference “Italo-abanian day. Italy, Albania and Kosovo: social and legal experiences comparison”.

2 Article 1025 of the Civil Code.

3 It is natural that the verification of any force majeure case, the bank shall not be responsible for items left on the security safe. This constitutes a case of termination of the contractual obligation. Such case may be e.g.: an earthquake which completely destroys the bank building, or the explosion of a volcano, etc..

https://www.diritto.it/legal-analysis-of-banking-contracts/