LEGAL ISSUES REGARDING CREDIT IN THE JUDICIAL PRACTICE OF BALKAN COUNTRIES

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ABSTRACT

Credit in modern conditions represents one of the most significant sources of financing. Through credit, the broadest needs of both the economy and the population are satisfied. Credit enables entities with surplus financial resources to employ them in the most rational manner, thereby achieving a certain profit. At the same time, credit allows entities lacking financial resources to acquire them and use these funds to realize their projects. Each of explored court decisions of Balkan countries provides insights into how local courts interpret and apply legal frameworks regarding financial agreements, particularly those involving currency clauses or loans denominated in foreign currencies. They reflect the legal landscape and judicial approaches in their respective jurisdictions. Policies governing credit and interest rates should prioritize the safety, liquidity, and profitability of banks, employing monetary and credit policy measures throughout the entire state to achieve these objectives.

KEYWORDS

credit, law, practice, Balkan

INTRODUCTION

Credit mobilizes and concentrates free financial resources, thereby facilitating the financing of the reproduction process. This ensures liquidity and maintains the continuity of economic activity, especially since production today cannot be financed solely from internal sources.

After nearly a decade of isolation and economic blockade by developed market countries, following almost sixty years of dominant rule under the economically illogical form of ownership – social ownership, and after who knows how many inflationary and monetary shocks, today perhaps more than ever, credits are needed by our economic entities. In our current circumstances, financing the reproduction of economic activities through credit mechanisms is a fundamental necessity, whether sourced externally or internally. It's noteworthy that internal financing during production shows more pronounced advantages due to intensified financial effects. Despite the inherent pros and cons in credit relationships, effective implementation of credit policies can substantially amplify benefits while mitigating drawbacks.

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Each of exploring court decisions in different Balkan countries provides insights into how local courts interpret and apply legal frameworks regarding financial agreements, particularly those involving currency clauses or loans denominated in foreign currencies. They reflect the legal landscape and judicial approaches in their respective jurisdictions.

THE LEGAL NATURE OF CREDIT

According to Article 1065 of the Law of Obligations and Contracts of the Republic of Serbia a loan agreement obligates the bank to make a specified amount of money available to the borrower for a determined or undetermined period, either for a specific purpose or without a specified purpose. In return, the borrower undertakes to pay the agreed interest to the bank and to repay the borrowed amount within the time and in the manner stipulated in the contract. In line with the principle of monetary nominalism and Articles 394 and 395 of this legal act, when the obligation pertains to a sum of money, the debtor must discharge the obligation by delivering the exact number of monetary units specified, unless otherwise provided by law. If a monetary obligation is denominated in a foreign currency or gold, its fulfillment may be demanded in domestic currency based on the exchange rate applicable at the time of fulfillment.

Under international legal norms, particularly Directive 93/13/EEC of the European Community concerning unfair terms in consumer contracts, Article 3 stipulates that contractual terms not individually negotiated are considered unfair if they significantly disturb the balance to the detriment of the consumer, contrary to the principle of good faith. A term is considered not individually negotiated if it is drafted in advance in a standardized contract.

There is an evident need for legislation to play a more active role in regulating fundamental legal provisions to prevent major issues, thereby preserving the integrity of banks as market participants and ensuring their survival as active players. The essential theoretical characteristics of credit agreements come to the forefront in analyzing judicial practices, both in the Republic of Serbia and in examples from Montenegro, Croatia, Greece, Slovenia and Bosnia and Herzegovina.

CREDIT IN THE JUDICIAL PRACTICE OF BALKAN COUNTRIES

Research of judicial practice was conducted based on available court decisions. By analyzing the state of judicial practice in the observed judicial systems, commonalities and differences in court procedures among the analyzed states can be observed. This provides a common comparative review and commentary. Most commonly, the research concerns long-term residential loan agreements, where the issue arose due to the appreciation of the Swiss franc, resulting in a significant increase in monthly loan installments. It is concluded that courts in the observed states have generally dealt with the following issues concerning loan agreements indexed in Swiss francs:

- classification of the subject loan agreements,
- permissibility of negotiating a currency clause in CHF,
- voidability of variable interest rates, and

– issues of termination or modification of contracts due to changed circumstances.

Only in Croatia have these issues been primarily considered from the perspective of consumer protection (collective interests), alongside purely contractual legal viewpoints. There are specific cases and decisions from the Croatian judiciary related to issues likely involving Swiss franc-indexed loans. Here's a brief overview of the cases mentioned. Decision of the Supreme Court of the Republic of Croatia, No. Rev-249/14-2 dated April 9, 2015 would typically represent a significant ruling by the highest court in Croatia on a particular legal issue, possibly related to consumer protection or contractual law concerning loans indexed in Swiss francs. Decision of the High Commercial Court of the Republic of Croatia, No. Pž-7129/13-4 dated June 13, 2014 handles commercial disputes and this decision could pertain to a specific case involving commercial aspects of Swiss franc-indexed loans, such as contractual interpretation or business-related implications.

Decision of the Commercial Court in Zagreb, No. P-1401/2012 dated July 4, 2013 indicating it deals with similar issues but at the lower court level, possibly providing insights into initial rulings or specific local interpretations. Each of these decisions would involve legal analysis and judgments specific to the circumstances of the cases, potentially addressing issues such as the validity of currency clauses in loan agreements, consumer protection concerns, or contractual obligations in the context of changing economic circumstances affecting Swiss franc-indexed loans. The consumer aspect includes the application of both domestic and European regulations on consumer protection, including EU directives. This is the case not only in Croatia but also in Hungary and some other countries. These regulations aim to safeguard consumers' rights and interests when dealing with financial agreements such as loans indexed in foreign currencies like the Swiss franc.

The directives from the EU provide a framework for member states to ensure a level of protection consistent across the European Union, addressing issues such as transparency, fairness in contract terms, and consumer rights in financial transactions. Similar considerations and legal frameworks are likely applied in Hungary and other EU countries facing similar issues related to Swiss franc-indexed loans. The Croatian court maintains that cases from Hungary or Austria cannot be directly used to settle disputes in Croatia. This position is evident in the ruling of the Supreme Court of the Republic of Croatia, No. Rev 249/14-2 dated April 9, 2015. For more insights into the Hungarian case, one could consult the judgment of the Court of Justice of the European Union, Case C-26/13 dated April 30, 2014. This case likely addresses issues concerning the application of EU laws and directives related to consumer protection and financial agreements involving currencies such as the Swiss franc. The European Court's decision offers guidance on how EU law should be interpreted and implemented across member states, including Croatia, Hungary, and Austria, in similar disputes.

Except in Bosnia and Herzegovina and partially in Serbia, courts in the observed countries have not specifically delved into the elaboration of whether loans are foreign currency-denominated or contain an agreed currency clause. However, they have addressed the issue of the permissibility of negotiating a currency clause in Swiss francs (CHF). Comparatively, all courts in these countries have reached the identical conclusion that negotiating a currency clause is permissible. This indicates a uniform approach across these jurisdictions regarding the permissibility of including Swiss franc currency clauses in loan agreements, despite not extensively distinguishing between foreign currency loans and those with currency clauses in their deliberations.

In Bosnia and Herzegovina, the Supreme Court concluded that the agreement indeed contained a currency clause because the loan funds were disbursed in KM (Bosnian Convertible Mark), the currency in which both the principal and interest payments are made. This legal interpretation was provided in the decision of the Supreme Court of the Federation of Bosnia and Herzegovina, No. 58 0 P 135023 16 Spp dated May 25, 2016. This decision highlights that despite the use of KM for payments, the underlying loan agreement was considered to have a currency clause, impacting how the legal framework applies to such financial contracts in Bosnia and Herzegovina.

Decision of the District Court in Banja Luka, No. 71 0 P 150675 14 Gzh dated February 9, 2016 (Republic of Srpska, Bosnia and Herzegovina) pertains to a specific case involving financial matters, possibly related to loan agreements or currency clauses. It would reflect the legal interpretation and application of local laws in the Republic of Srpska. Legal opinions of the Supreme Court of the Federation of Bosnia and Herzegovina, No. 58 0 P 135023 16 Spp dated May 25, 2016 brings legal opinions from the Supreme Court of the Federation of Bosnia and Herzegovina are likely related to the interpretation of financial contracts, possibly addressing issues such as the presence of currency clauses in loan agreements.

Decision of the Court of Appeals in Novi Sad, No. Gzh. 1781/16 dated September 1, 2016 (Serbia) would involve legal considerations specific to Serbian law regarding financial agreements, potentially including issues related to currency clauses or foreign currency loans.

Decision and ruling of the Supreme Court of the Republic of Croatia, No. Revt 249/14-2 dated April 9, 2015 is likely significant in the context of legal principles concerning financial agreements, possibly addressing aspects such as the validity or interpretation of currency clauses in loan contracts.

Only in Republika Srpska was there discussion in relation to the conversion of loans before the court and payment of amounts due to exchange rate differences, to which the appellate court provided a negative response. The judgment of the District Court in Banja Luka, No. 71 0 P 150675 14 Gzh dated February 9, 2016, concerns this point.

In the judicial practice of Montenegro, the permissibility of negotiating this clause has not been posed as problematic. However, there has been a narrow discussion concerning the possibility for banks to simultaneously utilize protective clauses in the form of both a currency clause and agreed-upon interest rates. This discussion is contextualized by the principle that disproportionate property benefits must not be realized, linked with the principle of equal value of mutual exchanges. The Higher Court in Podgorica holds the view that protective clauses, such as currency clauses and agreed-upon interest rates, cannot be used if they would result in disproportionate property benefits. (Judgment of the Higher Court in Podgorica, No. Gzh. 5754/12-11 dated October 1, 2013.) In Croatian legal practice, particularly in the realm of consumer rights protection, courts have assessed whether contractual clauses are clear, understandable, conspicuous, and fair. Generally, courts have consistently supported this standard (except for the initial commercial court, which held a different view).

Regarding the legality of variable interest rates, courts in Serbia, Bosnia and Herzegovina, and Croatia have reached similar conclusions. They argue that such provisions are unilaterally established without negotiation or addendum, considered incomprehensible, unfair, null, and contrary to fundamental principles of contract law. Consequently, they determine these obligations as indefinite and impossible to ascertain, leading to the reimbursement of excessive interest payments (in Croatia, Serbia, and Republika Srpska). In Montenegro, courts have also addressed the application of conversion laws concerning these loans, applying them to the transfer of receivables in case of assignment and considering the deadlines for invoking the excessive damage doctrine. However, their treatment of this doctrine has been relatively limited.

The European Court ruled in case C-26/13 dated April 30, 2013, following a request from a Hungarian court for a preliminary ruling regarding unfair terms in Swiss franc (CHF) loans, declaring the currency clause invalid. Furthermore, the Court of Appeal in Piraeus, handling a collective lawsuit involving 70,000 consumers organized by Greek consumer associations and users' association of franc-indexed loans against EFG Eurobank in Greece, completely voided and annulled franc indexing, both prospectively and retroactively from the contracts' inception. This ruling nullified the currency clause due to the bank's unfair practices in negotiating CHF clauses. Likewise, Slovenia's Higher Court issued a comparable ruling, nullifying an entire housing loan agreement with a franc currency clause. Consequently, the debtor is obligated to repay only the principal amount to the bank, devoid of interest and franc indexing.

IN THE SHADOW OF OBLIGATORY RULES

From a socio-legal standpoint, the focal issue revolves around the implications of court rulings, particularly those that nullify contracts or specific contractual terms (while upholding other clauses in line with civil law principles) or terminate contracts due to changed circumstances. Typically, each party is required to undertake restitution, which includes addressing the fate of tangible security measures such as mortgages. The future course of action by courts remains uncertain, especially in jurisdictions lacking clear legal precedents from supreme courts. There may also be potential claims seeking application of alternative legal frameworks. It's important not to dismiss the possibility of reaching contrary conclusions outright, given the circumstances outlined in court decisions. Banks, as specialized entities, may possess insights into these matters that differ from those of individual loan users. Nevertheless, since such insights have not been conclusively proven in court, other legal mechanisms must be employed to resolve disputes, adhering to the principles of contract law as interpreted by the judiciary. Is voiding the contract the optimal solution, or might termination or revision be more appropriate? The latter involves potential court decisions to terminate or revise a contract due to changed circumstances, known as the "rebus sic stantibus" clause. In broader terms, the principle suggests that agreements remain binding only as long as the fundamental circumstances or conditions remain unchanged. If significant changes occur, parties may seek to modify or terminate the agreement based on these altered circumstances. For instance, in international law, "rebus sic stantibus" can be invoked to argue for adjusting or ending treaties when there has been a substantial change in circumstances since the treaty's inception. Ultimately, "rebus sic stantibus" emphasizes that agreements are contingent upon existing conditions and may be subject to revision if those conditions undergo significant transformation over time.

Under our legal system, the conditions for applying this clause include:

- The contract must be mutually obligatory,
- It involves enduring obligations,
- Significant changes have occurred after the contract's conclusion, leading to a substantial imbalance in the performance of obligations by one party,
- As a result, the original purpose of the contract can no longer be fulfilled,
- The contract no longer aligns with the reasonable expectations of the parties involved;
- Maintaining the contract in its current form would generally be unjust,
- These changes were unforeseeable, unavoidable, and insurmountable at the time of contract formation,
- The affected party promptly informed the other party about these changes.

In terms of sanctions, preference is given to contract termination, which can be sought only by the affected party, while contract revision (a fair change of contract terms) is available to the other contracting party that wishes to keep the contract in force. (Dragicevic, 2012, 309) The reason for nullity exists from the very drafting of the contract, whereas termination of the contract occurs after that moment. The court's decision in the case of nullity is declarative, while in the case of termination, it is constitutive. However, in terms of consequences or actions (court-initiated) of termination and nullity of the contract, the situation is similar. Termination, much like nullity, operates retroactively, and restitution (unilateral or mutual) is carried out, meaning repayment in money, without affecting the right to default interest from the date of receiving the money and compensation for damages.(Perovic, 1980, 517) The European Union addressed the issue of loans with currency clauses by adopting Directive 2014/17/EU of the European Parliament and Council on February 4, 2014. This directive pertains to consumer credit agreements related to residential real estate, amending Directives 2008/48/EC and 2013/36/EU, as well as Regulation (EU) No 1093/201017.

CONCLUSION

Restoring public trust in banks stands out as a critical objective for the state during our economy and society's transition phase. This aim is crucial to prevent a scenario where more than three billion euros, converted from various EU currencies, remain outside the banking system despite a consistent demand for loans. This funding should ideally serve as the strongest and most reliable source for bolstering our struggling economy, facilitating the resurgence of production, higher employment rates, optimal capacity utilization, and ensuring adequate liquidity. Given that many of our businesses are equipped with aging infrastructure like deteriorating factory buildings, outdated technology, excessive workforce, and financial constraints such as blocked accounts, substantial receivables, and even larger liabilities (sometimes triple their total capital), this financing source gains significant importance. Our businesses often lack internal resources for financing their operations, and with uncertain political conditions both domestically and regionally, the inflow of foreign direct investment is likely to be delayed.

Furthermore, credit and interest rate policies must ensure the stability, liquidity, and profitability of banks, achieved through comprehensive monetary and credit policy measures enacted across the entire state. The authors underscores the need for enhanced and more rigorous market oversight to deter misuse and to keep abreast of developments in European Union laws. They anticipate future revisions to national regulatory frameworks to converge with EU regulations, seeking to standardize legal provisions for enhancing fairness and creating an ideal environment for parties engaging in credit transactions. Policies governing credit and interest rates should prioritize the safety, liquidity, and profitability of banks, employing monetary and credit policy measures throughout the entire state to achieve these objectives.

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