DETERMINATION OF THE LEGAL INTEREST APPLICABLE TO THE AMOUNTS CHARGED UNDER ABUSIVE CLAUSES INCLUDED IN CREDIT CONTRACTS CONCLUDED IN ROMANIA, IN FOREIGN CURRENCY

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Abstract

Romanian legislation allows the granting of loans in foreign currency, even if both the credit institution and the borrower have Romanian nationality. To the extent that these contracts contain abusive clauses allowing the charging of certain commissions or the modification of the interest rate, they may lead to the collection by the credit institution of sums subsequently subject to restitution as a result of the annulment of those clauses by the courts. In such situations, the principle of full reparation of the damage suffered by the borrower imposes the obligation of the credit institution not only to return the amount of money unduly charged, but also to moratorium damages from the time of collection of said sums until the time of their effective return.

The legal regulation, respectively GO no. 13/2011, establishes two mechanisms to determine the moratorium damages (or, in other words, the applicable punitive legal interest): a mechanism based on the reference interest rate of the National Bank of Romania and another that involves the application of a fixed legal interest of 6% per year. The latter is applicable in legal relations with a foreign element, if Romanian law is applicable and the payment was established in foreign currency (art. 4 of GO no. 13/2011).

Keywords: *credit contracts, foreign element, foreign currency, moratorium damages, legal interest.*

1. Introduction

This study analyses the method of determining the legal penalty interest applicable to amounts charged in foreign currency by credit institutions, based on contractual clauses whose abusive nature is established by the courts. The premise of the incidence of legal interest in the analysed situation is that of the conclusion of a credit contract in foreign currency (usually EUR or CHF) between a credit institution in Romania and a Romanian consumer. Typically, these contracts include clauses regarding the possibility of the creditor to adjust the interest rate, as well as clauses that establish various commissions that remunerate the bank for administrative services provided for the benefit of the consumer. In the situation where the credit is granted in foreign currency, the interest and the contractually stipulated commissions are also charged in foreign currency. Not infrequently, due to the ambiguity of their formulation or the unclear mechanism of their activation, the aforementioned clauses have been qualified as abusive by the courts, and their annulment has been ordered[1]. In these situations, consumers obtained the obligation of the co-contracting credit institutions to refund the amounts collected under the aforementioned clauses, as well as to pay legal penalty interest, for full compensation for the damage suffered.

The usefulness of this scientific approach is determined by the heterogeneous judicial practice in the matter of the method of determining the legal interest owed by credit institutions in the hypothesis presented above.

Thus, in a first jurisprudential orientation, it was assessed that, since it is a dispute without an element of foreignness (the granting of the loan in foreign currency having no vocation to modify this qualification), the provisions of art. 3 para. (2) of GO no. 13/2011[2], according to which „the legal penalty interest rate is set at the level of the reference interest rate plus 4 percentage points”[3], and „the amounts as penalty interest were

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[1] For a summary of the judicial practice on the matter, see: L. Mihali-Viorel, *Clauzele abuzive în contractele de credit*, 2nd ed., Hamangiu Publishing House, Bucharest, 2018, C.D. Enache, *Clauze abuzive în contractele încheiate între profesioniști și consumatori*, Hamangiu Publishing House, Bucharest, 2012.

[2] GO no. 13/2011 regarding the legal interest rate and penalty for monetary obligations, as well as for the regulation of certain financial and fiscal measures in the banking sector, published in the Official Gazette of Romania no. 607/29.08.2011.

[3] According to art. 3 para. (1) of GO no. 13/2011, „the legal remunerative interest rate is set at the level of the reference interest rate of the National Bank of Romania, which is the monetary policy interest rate established by decision of the Board of Directors of the National Bank of Romania”.

calculated in RON because the reference level of the National Bank according to which the legal interest is set refers to the national currency – RON. The calculation of the penalty interest in another currency, namely CHF in this case, should be calculated according to art. 4 of GO no. 13/2011 – which refers to legal relationships with an element of foreignness. Foreign currency credit contracts cannot be classified as legal relationships with a foreignness character, which is why art. 3 applies, making it necessary to convert the amounts paid in excess as interest into lei"[4]. At the level of the courts that embrace the cited solution, there is, however, no uniform practice on the moment at which the conversion into lei of amounts unduly paid in foreign currency must be carried out, in order to determine the legal interest. Thus, in a first opinion, it was held that „(…) the accounting expert (…) erroneously established the legal interest by reference to the CHF currency. In order to establish the amount of the legal interest, it was necessary to convert it into the equivalent in lei from the date of each payment made (…) and apply the legal penalty interest"[5]. In contrast, in a second opinion, it was stated that „(…) the obligation to pay the legal interest refers to the CHF value in lei on the date of the enforcement expert report, respectively at the exchange rate on the date of the report"[6] (*i.e.*, not from the date on which the amounts on which the legal interest is calculated were paid by consumers without due consideration).

In another jurisprudential orientation, it was held that „(…) the provisions of art. 3 of GO no. 13/2011 establish the value of the legal interest and do not contain rules regarding the currency in which it is calculated (…). In such a situation, it cannot be argued that there is a prohibition on calculating the legal interest in CHF"[7].

Starting from the aspects reported by judicial practice, the study aims to establish successively: a) the nature of the legal relationship deriving from the foreign currency credit contract (*i.e.*, legal relationship with or without an element of foreignness), b) the method of determining the legal penalty interest rate and c) possible obstacles regarding the payment of the legal penalty interest in foreign currency determined by the status of the parties to the legal relationship.

The interest of this scientific approach is justified on the one hand by the jurisprudential divergences evoked above, and, on the other hand, by the lack of doctrinal references on this issue. Thus, although the legal regime of moratorium damages is analysed in the specialized literature both in the field of domestic commercial law (from the perspective of art. 3 of GO no. 13/2011)[8] and in the field of international trade law (from the perspective of art. 4 of GO no. 13/2011)[9], the situation of the legal penalty interest owed by the credit institution of Romanian nationality for the amounts unduly charged under a loan granted in foreign currency to a Romanian consumer is not taken into account.

2. Legal nature of the relationship deriving from the foreign currency credit agreement

The need to determine the legal nature of the legal relationship arising from the foreign currency credit contract is determined by the distinction made by GO no. 13/2011 between legal relationships with a foreign element and those that do not contain such an element.

Thus, according to art. 4, „In legal relationships with a foreign element, when Romanian law is applicable and when payment in foreign currency has been stipulated, the legal interest rate is 6% per year". *Per a contrario*, the legal penal interest rate will be related to the reference interest rate of the BNR, as provided for in art. 3 para. (2) of GO no. 13/2011, in the case of legal relationships without a foreign element.

In the hypothesis that is the subject of this research, the difficulty of qualification is determined by the fact that, on the one hand, the credit agreement is concluded between persons of Romanian nationality, and, on the other hand, the currency of the credit is a foreign one. In order to establish the relevance of each of these two

[4] 1st District Court of Bucharest, civ. sent. no. 9403/04.12.2020, final by rejecting the appeal by Bucharest Court, 6th civ. s., civ. dec. no. 3234/15.06.2022, unpublished.

[5] 2nd District Court of Bucharest, civ. sent. no. 11139/14.11.2018, final by rejecting the appeal by Bucharest Court, 5th civ. s., civ. dec. no. 2559/09.09.2019, unpublished.

[6] 1st District Court of Bucharest, civ. sent. no. 6411/07.07.2021, final by rejecting the appeal by Bucharest Court, 3rd civ. s., civ. dec. no. 2486/A/09.07.2024, unpublished.

[7] Bucharest Court, 5th civ. s., civ. dec. no. 3226/02.12.2021, final, unpublished.

[8] St.D. Cărpenaru, *Tratat de drept comercial român*, 6th ed., Universul Juridic Publishing House, Bucharest, 2019, pp. 431-433; Gh. Piperea, *Contracte si obligații comerciale*, C.H. Beck Publishing House, Bucharest, 2022, pp. 256-292, V. Nemeș, *Drept comercial*, 2nd ed., Hamangiu Publishing House, Bucharest, 2018, pp. 289-293, A.T. Stănescu, *Drept comercial. Contracte profesionale*, 5th ed., Hamangiu Publishing House, Bucharest, 2022, pp. 14-23.

[9] D.Al. Sitaru, *Dreptul comerțului internațional. Tratat. Partea generală*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2017, pp. 592-595.

elements (the nationality of the parties and, respectively, the currency in which the credit was granted), it is necessary to clarify the notion of „element of foreignness".

In a working definition, the „element of foreignness" represents a feature (particularity) of the legal relationship consisting in the fact that one or some of its component elements have links with a country other than that of the forum. It follows that the element of foreignness can characterize, as the case may be, the subjects, the object or the content of the legal relationship. Thus, in the case of the *subjects* of the legal relationship, their citizenship, domicile, residence or headquarters, etc. may be related to a foreign country. Also, as regards the derived *object* of the legal relationship, this may be an asset located in another state. Finally, the rights and obligations that make up the *content* of the legal relationship could be exercised or executed, as the case may be, in a foreign country[10].

It follows, therefore, that the currency in which the credit was granted cannot by itself constitute an element of foreignness of the legal relationship, as long as the parties have Romanian nationality and the contractual obligations are performed in Romania.

Consequently, the legal relationship analysed is one without an element of foreignness.

3. Method of determining the legal penalty interest rate

The qualification of the legal relationship between the credit institution and the consumer as lacking an element of foreignness attracts the incidence of art. 3 para. (2) of GO no. 13/2011, and not of art. 4 of the same normative act, which determines that the applicable interest rate is not a fixed one (at a percentage rate of 6% per year), but a variable one depending on the reference interest rate of the BNR.

An obstacle to the application of art. 3 para. (2) of GO no. 13/2011 seems to be, however, as follows from the aforementioned case-law, the fact that the amounts unduly collected by the credit institution are expressed in foreign currency, and not in national currency.

Under these conditions, on the one hand, the principle of full compensation for the damage caused imposes the obligation of the debtor (respectively of the credit institution that collected the respective amounts) to refund both the amounts unduly collected and the default damages according to art. 1535 para. (1) CC[11]. The refund obligation therefore covers both the amounts in foreign currency unduly collected and the legal interest (default damages) on these amounts, from the date of collection until the date of effective refund.

On the other hand, the question arises whether art. 3 para. (2) of GO no. 13/2011, applicable in the present situation as we have already shown, allows the calculation of legal interest, according to the mechanism it establishes, also in the case where the currency in which the amount of money owed is expressed is other than the national one (the leu).

At a superficial approach, from the corroboration of art. 3 and 4 of OG no. 13/2011, the conclusion that seems to emerge is that of the application of the interest rate provided for by the last legal provision mentioned in the case of amounts expressed in foreign currency and, *per a contrario*, of the first legal provision in the case of amounts expressed in lei. The conclusion seems reinforced by the mechanism for determining the interest rate established by art. 3 of OG no. 13/2011, namely by reference to the reference interest rate of the BNR which can be assumed to be established for amounts expressed in national currency.

In reality, however, art. 3 and 4 should not be read in this interpretation key, but in a different one. Thus, art. 3 of OG no. 13/2011 represents the common law on legal interest (remunerative or penal as the case may be) and establishes as a reporting criterion the reference interest rate of the BNR. It follows that the mechanism established by this legal provision is applicable whenever a special provision does not provide otherwise. Art. 4 constitutes exactly this special provision, and its incidence presupposes the cumulative meeting of the following conditions: a) the legal relationship must present an element of foreignness, b) Romanian law must be applicable to it and c) the payment must have been stipulated in foreign currency. Failure to meet any of the listed conditions will obviously determine the non-application of the exceptional provision and a return to the rule situation – the application of art. 3 of OG no. 13/2011.

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[10] See, for developments, D.Al. Sitaru, *Drept internațional privat. Partea generală. Partea specială – Normele conflictuale în diferite și instituții ale dreptului privat*, C.H. Beck Publishing House, Bucharest, 2013, pp. 1-2.

[11] According to art. 1535 para. (1) CC, „if a sum of money is not paid when due, the creditor is entitled to damages for late payment, from the due date until the moment of payment, in the amount agreed upon by the parties or, failing that, in the amount provided by law, without having to prove any prejudice."

Since we have already shown that the analysed legal relationship does not present an element of foreignness, the conditions for the application of art. 4 of OG no. 13/2011 are not met, so the provisions of art. 3 of this normative act become incidental, which leads to the determination of the legal interest rate in relation to the reference interest rate of the BNR.

4. Possible obstacles regarding the payment of legal penalty interest in foreign currency determined by the status of the parties to the legal relationship

According to art. 3 para. (1) of the BNR Regulation no. 4/2005 on the foreign exchange regime[12], „payments, receipts, transfers and any other such operations arising from sales of goods and provision of services between residents, regardless of the legal relationship that regulates them, shall be carried out only in the national currency (leu) (…)".

In the situation analysed, both the credit institution and the consumer (borrower) are residents from a currency point of view, falling under the incidence of art. 4 point 4.2 of annex no. 1 of the aforementioned regulation, as a legal entity having its headquarters in Romania and, respectively, as a natural person having his domicile in Romania. Consequently, as a matter of principle, all payments made between them should be made on the territory of Romania in national currency.

An exception to the stated principle is regulated, however, in art. 3 para. (2) of BNR Regulation no. 4/2005, according to which „All other operations between residents (…) may be carried out freely, either in the national currency (leu) or in foreign currency. These operations include, without being limited to, operations representing financial flows generated by the granting of loans, the establishment of deposits, transactions with securities and the distribution of dividends". The legislator's option for a formulation with a wide scope, namely „financial flows generated by the granting of credits", instead of the restrictive one of „payments made under the credit agreement", denotes its intention to exempt from the rule of making payments between residents exclusively in the national currency not only the provision of the borrowed amount to the consumer and the payment by him of the credit instalments, interest and commissions due, but also any other payments generated by the granting of credit („financial flows"), *i.e.*, including the refund by the credit institution of amounts unduly charged under the credit agreement and the penalty interest determined by such charging.

Consequently, the prohibition, in principle, of making payments in foreign currency between residents, established by BNR Regulation no. 4/2005 does not in reality constitute an obstacle to the payment in foreign currency by the credit institution of the legal penalty interest due for collecting from the borrower amounts that were not owed to him according to the credit agreement.

If the contrary opinion were accepted (which in our opinion violates the provisions of art. 3 para. (2) of BNR Regulation no. 4/2005) and it were concluded that the obligation of the credit institution to pay legal penalty interest can only be enforced in national currency, this could not lead in any case, however, to the conclusion of determining the interest by reporting the equivalent in lei calculated on the date of collection of the amounts not owed, but from the date of enforcement of the obligation to refund these amounts. Any other interpretation would lead to preventing the consumer from fully recovering the damage suffered, namely an amount that, in national currency, corresponds, on the date of refund, to the amount in foreign currency paid unduly (*damnum emergens*), as well as the legal penalty interest for the lack of use of this amount until the date of effective refund (*lucrum cessans*).

5. Conclusions

As results from the analysis carried out, the legal relationship between a credit institution of Romanian nationality and a Romanian consumer does not acquire an element of foreignness from the simple contractual stipulation according to which the granting of the loan and its repayment are made in foreign currency.

Consequently, the legal penalty interest due by the credit institution in the event of abusive collection of amounts from a consumer will not be determined according to the provisions of art. 4 of GO no. 13/2011 (which regulates a fixed interest rate of 6% per annum), but according to the provisions of art. 3 of the same normative act (which establishes as a criterion the reference interest rate of the BNR). In the absence of limitations established by the latter legal text, there is no reason to consider that it would not allow the determination of

[12] Published in Official Gazette of Romania no. 616/06.09.2007, as subsequently amended and supplemented.

the legal interest related to a monetary debt in foreign currency. Likewise, the status of the parties to the legal relationship as residents from a currency point of view does not restrict their possibility of making mutual payments in foreign currency, as long as they constitute „financial flows generated by the granting of loans", such as the payment of the legal penal interest by the credit institution, as a result of the abusive collection from the consumer of amounts allegedly owed under the credit agreement.

Through these conclusions, the present study can contribute to stabilizing judicial practice on an issue where solutions are currently divergent, as highlighted above. At the same time, it can constitute the starting point of future research devoted to the legal relationship between the Romanian branch of a foreign credit institution and a Romanian consumer.

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