

Loan Agreements with Currency Clause in Light of Their Application in Case Law

The borrowers with foreign currency clause in Bosnia and Herzegovina, as well as other users of these loans in the region, and generally in countries where these loans are applicable, have been meeting with great difficulties in their repayment for several years.

Unfortunately until now the situation is unchanged. At the time of entering into such contracts, borrowers couldn't imagine the damaging consequences which can be caused by entering into a contractual relationship with the bank which has placed such loan product.

Clients have come in order to obtain the correct information, so before making a decision on accepting the terms of the contract, bank officials advised clients to enter into such exact contracts, explaining that it is a currency clause which is tied to a stable currency- CHF, and that the value of the currency during the contractual relationship will not change, or will not significantly change. It is important to note that these contracts at the time of conclusion had the lowest interest rates and borrowers are in most cases handled existential issues – purchased apartments.

Despite the fact that Swiss Franc was growing enormously, reference rate Libor has been constantly decreasing since 2010, and bank, who is aware of this fact, did not adjust the interest rate with real movement of Libor, but on the contrary, in order to compensate for the decreasing interest rate it raises the spread which represents the fixed element of interest rate, regulating it with internal decisions and adapting it to their. It is worth noting that the Bank of such changes is not always informed their clients.

The Law on obligations of Republic of Srpska, as well as the Law on obligations of Federation of Bosnia and Herzegovina, stipulated the possibility of contracting and fulfilling obligations in foreign currency.

Therefore, both entities of Bosnia and Herzegovina provide this kind of legal possibility, but according to the Law on Obligations of the Republic of Srpska, if financial obligation is to be paid in a foreign currency or gold, its fulfillment may be required in the domestic currency at the rate valid at the time of fulfillment of obligations, and in Federation of B&H, on the day when the obligation arises.

It is worth mentioning that in Republic of Srpska this provision was amended in 1993, during the Bosnian war, when it was reasonable for bank, given the complete depreciation of domestic currency, to protect itself by contracting currency clause, because it is entirely logical that the exchange rate of the domestic currency changes and

the bank as a lender must ensure to receive the same amount of money it placed to the borrower.

What is very important for Bosnia and Herzegovina is its specificity which, in this segment of the presentation, reflects in the fact that it protects its domestic currency in a manner that is tightly tied to Euro. Thus, Convertible mark is the official currency tightly tied to Euro so that BAM 1 is equal to EUR 0,51129, and one of the duties of Central Bank of BiH is to protect BAM in relation to EUR. Convertible mark in relation to Euro did not suffer a decline in the period of last ten years and more, that is, there was no devaluation as an act of monetary authority, while inflation did not occur or it was insignificant in comparison to how much rate of CHF increased compared to BAM.

Therefore, in BiH fixed exchange rate is applied, so it is completely unclear what is bank protecting itself from, since the domestic currency is entirely stable and so is Euro which is the basis of domestic currency, in period where domestic currency has not decreased more than ten years back, nor is the decrease expected in the future.

On the other hand, it is unclear in which way the principle of monetary nominalism is accomplished in currency clause contracts, and above all, how is there is a balance in the mutual rights and obligations when the borrower at the end of the repayment period returns the double amount of money compared to the one received and pays interest to that amount?

In that regard, there are cases where clients repaid the amount of money received in domestic currency, but because of growth of Swiss Franc and interest rate they were not able to follow payment of each annuity causing the bank to terminate the contract, activate mortgage as a mean of securing the fulfillment of obligation, so that in the end the client is left without both the pledged property and money he received in placement of the loan.

What is the extent of mutual considerations here? For bank this is certainly convenient, but for the borrower is completely impoverishing.

In all contracts noticeable is a contractual provision by which the borrower waives a right to invoke the changed circumstances. This contractual provision is certainly null and void, but its essence is clear, the bank requires the client to accept such provision because of indications that foreign currency exchange rate will grow, and so will client's obligation which would represent the change of circumstances for the client, so bank wants to insure itself with a legal maxim-pacta sunt servanda, hence the contract is parties' law and has to be respected and fulfilled as it reads. For this reason the bank in initial contractual provisions contracts the variability of interest rate by tying the spread to reference rate Libor, or Euribor, depending on the type of contract,

but in the final provisions it contracts for itself the possibility to change interest rates in accordance with the internal decisions of the bank.

Basic courts in Bosnia and Herzegovina, in both entities, have so far adopted the claims seeking to establish a balance between the rights and obligations of the contractual parties in a way to tie CHF exchange rate to the value of this currency at the time of the beginning of the contractual relationship, and also the bank is ordered not to change the interest rate arbitrarily, but to follow the real movement of Libor.

However, the appellate court took a different view. It adopted the part of the claim regarding the illegally calculated interest rate, but the part of the claim regarding the currency clause was rejected.

The reasoning of the rejection of this part of the claim given by the second instance court is the fact that the contract was made so that it is understandable for an average consumer and that the claimant, loan beneficiary, knew what kind of contractual relationship he was entering into. Furthermore, the court concludes that the claimant did not provide evidence to the court which show that he had not understood what kind of contractual relationship it was and had not been informed about the potential risks that contracts with currency clause can create.

On the other hand, the second instance court states that this particular case complied with the Principle of monetary nominalism, because the claimant had allegedly received an exact number of monetary units in CHF, and that he returns that number to the bank, but in local currency in accordance with the exchange rate valid on the day of payment each individual installment.

First of all, the loan beneficiary did not receive CHF at all, nor the bank offers any proof that CHF was made available to the loan beneficiary, and the money was then converted into local currency. Hence, CHF is a virtual element, and this had been proven during first instance proceedings, because expert's opinion clearly indicates that the beneficiary was given a loan in local currency, and there is no evidence of converting from CHF to the national currency. Especially since it has been proven that loan beneficiary returns twice more than the amount he received in local currency, so there is no place for the argument that the Principle of monetary nominalism was complied with. Also, the bank has not shown that it borrowed in foreign currency for the purpose of lending these loans.

What sort of evidence can a claimant offer to show that he did not know what kind of contractual relationship he was entering into? It is logical that the bank proves it warned

the claimant of the possible risks of the contractual relationship and that the loan beneficiary agreed to those risks?

It can be concluded that this attitude is the second instance court on weak fundamentals. It can't be extracted from only one of the context of the law and conclude that goes in favor of front-claims. In what way is then currency clause in accordance with one of the basic principles of the Law of Obligations, the principle of equal value of mutual considerations?

How is implemented the principle of good faith and, also the principle of equality between the contracting parties?

All these regulations are imperative and can not be a legal provision interpreted in isolation from the principle from which it emerged that provision.

These are all reasons why we filed a revision to the Supreme Court. To date we have not received a decision of the Supreme Court, but it would be devastating for the legal background to the decision is in favor of the bank when it comes to the application of foreign currency clause.

I must say that the opinions of judges on this issue is divided and it is a very complex matter, and that customers are willing to use all legal means to achieve their rights.

It is also important to point out that I personally participated in the drafting of the law on conversion of the loan, which would all loans indexed in foreign currency converted into loans with local currency, but the resistance to the adoption of the law was very strong by the current government.

The process of adopting and enacting the law has not yet been completed, as the process has not been completed not before the Supreme Court, so it remains to be seen how this will be important issues to resolve.