

**“Banking Loan Contracts, guarantee means,
and their execution ”**

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ABSTRACT

The concept on warranty means in bank contracts and their execution is a very important concept that is closely related to complete structure of this civil legal relations, such as bank contracts, because it sets a balance in this relationship. So on one hand we have the credit given by the creditor - the bank and on the other hand the means that guarantees the provided loan on part of the entity – the debtor.

The importance of treating in this paper the concept of assets pledged as collateral in loan contracts is of particular concern because once more it explains the banking contract as a obligatory and bilateral relationship and guaranteed as such. Another important element treated here is the problematic matter concerning the execution of warranty means reflecting those specific elements that are closely related to the process.

Currently we are facing a considerable increase of execution orders issued by the court on bank loan contracts. The execution of these orders and bank guarantee means becomes more and more difficult if we take under consideration the evolution of the market. One of the ways to facilitate this process is the liberalization of bailiff service. Actually, the Albania bailiff service is liberalized , under Law 10031 dated 11.12.2008, and is performed by private licensed entities, thus increasing the transparency and effectiveness in this type of public service. Now, more than ever is evident the necessity of having an effective and transparent bailiff system.

In the context of major global economic difficulties and internal, in the context of the difficulties and the need for proper implementation of judicial decisions thus restore the right, in the context of conflict resolution and mediation between the parties becomes extremely important the judicial figure of Bailiff institute that represents the solution and implementation of all the above-mentioned circumstances.

Already the Strasbourg jurisprudence, which is part of the internal legal order and source of law, elaborated clearly and consolidate the position that the execution of court decisions is part of due process, which could not be understood as such, if they lacked the guarantee of the execution phase. ECHR has a rich jurisprudence in this regard with Albania, where issues related to the execution of mandatory occupying the leading place.

Finally, by reiterating the importance of high receiving treatment of this topic in the current economic market Albanian and his legal mirror, I think it is necessary to make possible a better recognition of the process of bank loan contract until the execution conclusively. All this process is characterized by numerous of elements which will examine in more detail during the preparation of the thesis.

Keywords: *Bank contracts, execution orders, bailiff service, mandatory, jurisprudence.*

INTRODUCTION

The concept on warranty means in bank contracts and their execution is a very important concept that is closely related to complete structure of this civil legal relations, such as bank contracts, because it sets a balance in this relationship. So on one hand we have the credit given by the creditor - the bank and on the other hand the means that guarantees the provided loan on part of the entity – the debtor.

The importance of treating in this paper the concept of assets pledged as collateral in loan contracts is of particular concern because once more it explains the banking contract as a obligatory and bilateral relationship and guaranteed as such. Another important element treated here is the problematic matter concerning the execution of warranty means reflecting those specific elements that are closely related to the process, such as: real and closer to the truth assesment of the asset provided as guarantee on the part of the licensed assessor, the necessary legal procedures concerning the execution of a contract as an executive title, the efficiency of the bailiff's procedures, the involvement of local government and the police of public order in those cases where the execution has turned to be mandatory because the debtor party on his turn has shown no good-will to fulfil the execution on voluntary basis .

Also, the successful accomplishment of the execution process on warranty means realizing its disposal in the possession and realizing that income which will be complementary to the loss of the creditor – the Bank resulting from the bank loan, is important too.

Currently we are facing a considerable increase of execution orders issued by the court on bank loan contracts. The execution of these orders and bank guarantee means becomes more and more difficult if we take under consideration the evolution of the market. One of the ways to facilitate this process is the liberalization of bailiff service. Actually, the Albania bailiff service is liberalized , under Law 10031 dated 11.12.2008, and is performed by private licensed entities, thus increasing the transparency and effectiveness in this type of public service. Now, more than ever is evident the necessity of having an effective and transparent bailiff system.

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CHAPTER I

1.1 Banking Loan Contracts

An important part of civil circulation is the flow of money. The Economy in general and entrepreneurial initiatives in particular needs money, as a means of financing various development projects. Anyone who intends to set up a certain business and does not have sufficient cash resources, the first thing that comes into his mind is; how he can find them. On this purpose, one of the most frequent means is Banking Loan Contract. Through this contract, bank enables the financing of different persons, who are in need of cash to realize their goals in business or private life. Banking Loan is one of the most frequent contracts in the field of business. Concerning the etymology of the word "credit"/loan, we note that it derives from the Latin word "credere", which means "I believe". So the Banking Loan Contract is a contract concluded between the parties, when the bank is confident that the borrower will repay the obligations assumed by contract.

Regarding the provisions of the contract of bank loan, Article 1031 of the Civil Code stipulates that: "Opening a banking loan is a contract, through which a bank must keep available to the other party a sum of money for a certain period of time or for an indefinite period of time".

Whereas the Article 2/1/d of Law no.8365, of 02.07.1998 "On Banks in the Republic of Albania", is stipulated that:

"Loan means any legal obligation to release a sum of money in exchange of the liability of repayment of the amount disbursed, surplus and interest, or other charges on these amounts, as well as any postponement of the maturity date of a debt security or securities or any other right to pay a sum of money. "

As can be seen from the above, the legislation treats the loan as a liability to the bank to make available a lot of money. The Contract by which the banking loan is made available, is arranged either pursuant to the provisions of the Civil Code or the Law no. 8365 of 02.07.1998 "On Banks in the Republic of Albania". The parties to this contract are called the Lender (Bank) and the Borrower (Client).

The doctrine recognizes that the loan contract is typical active action of banks. The contract on loan- opening [lending] has two effects: the immediate effect providing the loan to the customer and subsequent and eventual effects concerning the use of loan that is made available.

On the one hand, this exposes the bank to the risk of liability to accomplish the obligations assumed on behalf of the client, when the latter on termination of the term is under insolvency. The doctrine and practice affirms that in this kind of contract the effective distribution of money has a potential character as it will bring about a flow of money, only if the loan applicant's obligation is not fulfilled. This type of loan is

reserved only to first hand customers, to whom specific guarantees are often required.

The Bank may incur losses or faces different risks, from its activity. One of the most typical of this type of risk is that of lending. So, after a survey conducted on a broad and widespread banking activity we should say: "A good lended loan is half granted back".

So its good administration takes a paramount importance. This good administration is accomplished through a series of measures which directly or indirectly affect the return of the loan on time and simultaneously the economic and financial strengthening of borrowers.

1.2 Banking Loan Contract as an executive title

Forced execution can be executed based on an executive title, only. Executive titles are concerned: d) Notary acts that contain an obligation in cash, as well as the acts on lending banking loans;

So, Article 510 of the Code of Civil Procedure stipulates as an executive title "the acts of banking loan lending"¹. Before amendments to the Code of Civil Procedure, bank credit was not treated as an executive title. Also, Notary acts contain obligations on money that were not recognized as an executive title. This came as a result of amendment of the Code of Civil Procedure, which in its previous version had recognized "the notary act containing obligations for payment in cash" as an executive title. In fact, the notary banking loan contract was widely used as 'notary act'. This provision was used by banks to circumvent the long and costly dispute resolution with the incorrect borrowers. The second part of the sentence of Article 510/d of the Code of Civil Procedure goes contrary to Article 42 of the Constitution². Under this provision, Banking entities are entitled to require the issuance of a straightforward execution order on banking loan contracts pertaining to various commercial entities (physical, legal entities, citizens), without addressing first at the court the request with a regular fundamental lawsuit. Non-participation of borrowers in the judicial process exclude them of the opportunity to become familiar with the allegations and evidence of the applicant, to make objections, to present evidence and be able to argue on the basis of the principle of contradiction.

To none of borrowers being them citizens or commercial entities, cannot be assigned any obligation arising from a mutual legal action without being exhausted a regular legal process stipulated in Article 42 of the Constitution and Article 6 of ECHR³.

CHAPTER II.

2.1 Guarantee and assurance means on compliance of liabilities of a Banking Contract

To avoid the risk that can result from failure to return the loan and the respective

1 SPI Albania Project: Improving Auctions Procedures for Immovable Collateral under Foreclosure
Comparative Amendment options

2 Article 42 of the Constitution related to conduct of "A due process."

3 Article 6 of EUHR deals with the right to be heard, protected, be aware of evidences of the opposing party in a fair and public trial.

interest, the bank requires guarantee. If we provide a definition to bank guarantee, we should refer to the doctrine which gives this general sense, "materialization of the criteria stipulated by bank in agreement with the borrowing party, in order to ensure from maximum to absolute degree, the return of loan lended to its customers." The guarantees required by bank can be grouped into two groups⁴: **Personal guarantees, and Real guarantees.**

-As Personal Guarantees are accepted:Criminal Condition and Bail.

-While as real guarantees are recognized:Mortgages.Pawns, and privilege on machinery and plants.

Theory on banking legislation speaks about the presence of specialized institutions that "provide" ancillary guarantee to companies thus enabling and making loans easy in form. However besides the above-mentioned types, other instruments are also known, like:

Assignment, "Pro solved" it has to do with the assignment on loans of bank's borrower. This means within all restrictions and allowances stipulated by law.

Pledge on loans that attributes to the bank the lien on loan of the Bank's borrower.

Letters of patronage, which is a statement by which main company can assume various obligations, like: control on fulfillment of obligations by the company, to free prejudices on the financial situation, to minimize the loss suffered by banks in relation to the contracted company.

Article 1033 of the Civil Code stipulates that real or personal guarantee is not extinguished due to the fact that the borrower at the time this relationship is terminated ceases to be a debtor of the bank. This article in fact must be interpreted on basis of a logical interpretation due to the fact that when the borrower ceases to be a debtor then there is no need of guarantee because there is nothing to be guaranteed. This article is analogous to Article 1844 of the Italian Civil Code, this section of the provision refers only to the case when the lending of the loan is done in a current account, only in such a case the guarantee could not be terminated because even if the client has fully turned back the withdrawn amount, he can actually perform again new withdrawals, consequently the guarantee is therefore still necessary.

The law stipulates that when the guarantee becomes insufficient bank may require additional guarantees or may ask the replacement of guarantor. The purpose of such a concern is precisely to ensure in the most complete possible way the activity of the bank from any kind of negligence or insolvability on part of the borrower. The last paragraph of Article 1033 stipulates that if the borrower does not realize the above requirements, either to provide additional guarantees or to replace guarantor, the bank valuing the case may be faced with two alternatives, either to reduce the amount of loan in a proportional way, or to make the unilateral settlement of contract.

Nevertheless, we must keep in mind another important fact that refers to a large subdivision on lending a banking loan that is that of an open loan or guaranteed loan. While the latter was discussed above, the first subdivision we may say that it is lending a loan without a concrete guarantee and at the same time the risk is greater. But, if the bank

⁴ Nuni. A, Mustafaj. I, Vokshi. A. Law on Contracts II, Tirana, 2008, p. 223.

is allowed or is forced to risk as slight as possible, then these kinds of loans are rare, and at the same time these should be lent to the individuals who consists the group of clients with a very high degree of confidence.

CHAPTER III

3.1 Execution of the guarantee means and the role of Judicial Bailiffs

In case of failure to pay the obligation which the bank has provided the loan for, despite all procedures followed by the Creditor- the Bank, exhausting all the terms specified in the loan contract, the bank requires immediate execution of means pledged as guarantee, whether movable or immovable items, defined these as: Criminal condition, Bail, Mortgage, Pawn or Privilege. And to achieve this right, the bank realizes the compulsory execution under the executive title that is the notary act that contains the obligation in cash⁵. The execution-order is set in execution by a Judicial Bailiff at the request of the creditor.

Generally, is followed the rule of notification for voluntary execution. In this case, the judicial bailiff, when starting the execution, sends a notice to the debtor to execute in voluntary basis the obligation mentioned in the execution- order, setting on this purpose a 10 days period. Compulsory execution can not start before the expiration of the terms set above, except where there is a risk that as the time will pass, the execution will become impossible. In such a case the judicial bailiff can immediately begin the compulsory execution.

The execution- order against the debtor – tesotator is executed on the property of his heirs, but within the quantity of their wealth inherited from the decedent. The execution-order against the debtor can be put in execution against a third person who to ensure the obligation has put a lien on an object, according to the law, if the creditor seeks the execution on this object. If for a compulsory execution is necessary to open a dwelling or an other building of the debtor to look for his belongings in them, the judicial bailiff carries out these actions in the presence of a representative of the local government unit appointed by his governing body under the request of the bailiff. If necessary, the bailiff asks the assistance of the Police⁶.

When the execution of an obligation in cash is required, a judicial bailiff, on termination of the notification term of execution commences the compulsory execution on the debtor's credit or on movable and immovable property at the extent that would be necessary to meet the obligation.

At the request of the debtor, the sequestration can be put even on another property of him different from that which is available to the creditor, if the bailiff finds that it meets the demand of the creditor. If the seized items are secured, the sequestration covers also the rightful compensation arising from such insurance. From the moment of sequestration, the debtor has no right to dispose the movable or immovable item or the credit.

⁵ OPCOFICIAL PUBLICATION CENTER, Code of Civil Procedure, Article 510, paragraph (d, p. 184-185,

⁶ OPC OFICIAL PUBLICATION CENTER, Code of Civil Procedure, Article 523, p. 189-190,

Items of personal use and those of debtor's family like: clothing, bedding, furniture, drapes, foods and fuels which are necessary to the debtor and his family for a period up to three months, medals and souvenirs, letters, documents of family and professional books. Up to 3 acres of land, 2 land working animals, 1 cow, 6 sheep, the seed for the next planting and the animals feed for a period of 3 months, Assistance given to mothers with many children or lonely ones, the natural fruits, a month before they are harvested, are exempt from sequestration of debtor's property.

The judicial bailiff after setting the sequester, sends a notification to the debtor, informing that the seized items will be sold within five days if the object is movable and 10 days if the object is immovable, if he does not execute obligation. The Price of movable or immovable property is determined by judicial bailiff in cooperation with the creditor and the debtor. When there are contradictions between them, an expert is asked. The initial price in the first auction is 80% of the price fixed by the judicial bailiff. Judicial Bailiff arranges the sale of the object through auction when, due to its nature or condition, it is not accepted by shops on free price or it is deemed so by the judicial bailiff. The sale cannot be performed prior to the expiration of five days from the announcement concerning movable and 15 days for immovable property. If in the organized auction is not submitted any bid, then, five days after its end, the judicial bailiff summons the debtor, makes a new assessment and sets forth a second auction to sale the object. When, even in the second auction no bidder appears, the judicial bailiff makes a proposal to the creditor to take the object versus the loan at the price specified in the new auction and, if it is not accepted, the object is returned to the debtor.

3.2 The importance that Private Bailiff in the execution of banking guarantee means⁷[funds, collateral].

Performance of judicial bailiff's profession as a public profession bears a fundamental importance, because the effective result of the execution of different executive titles stipulated by the Code of Civil Procedure (Article 510 and the successive ones of the C.P.C Code of Civil Procedure) depends on a qualified service or not.

Today the quality of bailiff service consists one of the most important conditions to be observed in the context of a due hearing process. Judicial practice that has been created by ECHR for many years has already sanctioned such a fact that is expressed in a great number of court decisions that have considered a violation of a due legal process (Article 6 of the Convention), the lack of execution of final court decision and any other act that consists an executive title under the legislation of member states. The quality of execution of court decisions and any other act that constitutes an executive title, with respect to our country up to December 2008 has been a liability and exclusivity of state bailiff service, only.

The reality during these twenty years of democracy has shown that the efficiency of execution of executive titles by state bailiff service has not properly functioned in all cases (scrupulous observance of legal provisions protecting and respecting the interests of the parties in the execution process either creditor or debtor). Exactly this quality which

⁷ "Execution of Guarantee means in the Banking Contract " Tirana 2010

has not always served to an effective execution of a court decision and any other act which constitutes an executive title has served as a fundamental reason of legal alterations that were done in December 2008 by adding alongside to state bailiff service, the private one , too.

Lack of execution of hundreds of judicial decisions that now consists an executive title, reflects the legal and economic consequences, that the cost that they have paid either for civil or legal person compared with the non-realization of the right entitled to them pursuant to a final court decision is times greater than the rates of execution by private bailiff service. Certainly, the liberalization of bailiff service by creating free space to private bailiff service does not mean that this service will be perfect in any way. Even this free profession that is exercised by dozens of lawyers who meet the legal requirements, need a high professional preparation and a high moral integrity as one of the essential conditions that such a service to be the desired one. However, now, the establishment of private bailiff service does not preclude, perhaps for some several years more, the activity of state bailiff service, alongside with it, because the activity of the latter is a very good opportunity for all those citizens who cannot afford to pay. In this regard, the existence of both bailiff services is worthy not only for the further improvement of quality in each sector, but also for the effective implementation of the interests of citizens and legal entities, who are free to make their choice.

Finally we would like to emphasize the fact that the exercise of private bailiff service in a more qualitative way, as other profession like the notary public and the attorney at law, should constitute not only a free and independent profession, but also a profession that ought to be monitored and controlled by the respective institutions, where the licenses of those persons who are vested with the power of execution of our rights resulting under an executive title, is not bought but award.

CHAPTER IV

4.1 The statistical data on private bailiff service

First of all, we want to present the fact that the data published for the first period of operation of private bailiff in the market are positive and show a continuous increasing trend in the execution of court decisions. At the end of 2009 there were about 26,000 unexecute execution- orders. From September 2010 in Albania exists the opportunity to benefit state and private bailiff service. During 2010 was shown an increase of 14% of cases under execution as compared with 2009, and an increase of 8% of executed cases and 6% of the cases to which legal solutions have been given. To be more specific, during 2010, 887 bailiff cases were executed against state as debtor party.

In the framework of the study that we conducted on banking loan contracts, the execution-orders issued by the Courts of first instance, and their execution through the institute of Private Judicial Bailiff , we have choosen at random one of the five most outstanding offices of private bailiff that operate in the market.

From this office, we have collected and then assessed on its indicators about the execution of execution- orders issued on banking loans contracts. The data collected and that are shown below belong to a time-frame from 2010 until the end of 2012.

Private Bailiff office, "Bailiff Services Albania" Ltd., with its headquarters in Tirana.

Total number of files under execution: 912

Number of files that are currently under execution proceedings: 435

Number of files that are ceased / suspended at the request of the creditor: 209

Number of executed files: 268

Number of files with mortgage guarantee: 278

Number of files that has a financial institution (bank) as creditor party : 744

Number of files with legal issues in court process : 143

As we see, almost the 50% of the files have been executed, suspended or ceased, showing a big step forward to the court decision's execution.

As we see the major part of the files in bailiff procedures are not guaranteed with any mortgage as being individual loans without any guarantees or assurance means.

It is noticed a strong tendency of the debtor to dispute the case to the court, objecting the bailiff procedures, thereby gaining time after suspending the procedures.

Conclusions

We are of the opinion that the legal situation and the will of the parties for the execution of judicial decisions has a long way to do, still. The execution the court decisions is facing varied problems, whether these bureaucratic procedures and economic impossibilities. It remains, however, very important, the execution of obligations arising from credit contracts because it makes possible the continuation of the process of crediting by banks to borrowers parties. Such a thing is a very important factor for the welfare and socio-economic balance of the country. These are the reasons, why the Code of Civil Procedure often undergoes changes which make it possible to reduce the time and bureaucratic procedures for the issuance and execution of an execution order.

The difficult economic situation created by the non-execution of judicial decisions and not returned loans, obtained the the Bank sistem, seems to have finded solutions through the implementation of legal changes and the emergence on the market of private bailiff service as a quality element in this direction. Licensing and implementation of the private bailiff market is greatly facilitating the role of the state in the execution of court decisions and increasing the effectiveness of the enforcement of Court decision as more fair and accurate.

Albania's international commitments are becoming more concrete, especially in the area of human rights and European integration. These commitments are accompanied by the administrative and jurisdictional decisions which have already and will in the future be directly binding and executive titles in the Albanian legal system.

BIBLIOGRAPHY

1. The Constitution of the Republic of Albania
2. European Convention of Human Rights
3. Code of Civil Procedure of the Republic of Albania
4. Manual of judicial bailiff
5. Decisions of the Constitutional Court
6. Decisions of Human Rights Court, in Strasbourg
7. Recommendations of EURALIUS Mission
8. Rudina Sena "The role of Albanian Bailiff" Tirana 2012
9. Arsene Caci "Execution of Guarantee Means in the Banking Contracts" Tirana 2010
10. Nuni. A, Mustafaj,I, Vokshi. A, "Law on Contracts II", Tirana 2008

REFERENCES:

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