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THE EXPLANATION OF SOME DILEMMAS AND UNCERTAINTIES ABOUT THE ESTABLISHMENT OF MORTGAGE AND THE INTEREST SYSTEM

Abstract

In judicial practice in the judicial system of the Republic of Kosovo, difficulties and uncertainties are densely presented, and consequently there are dilemmas about the interpretation and implementation of legal provisions of LOR that refer to judicial effects of the contractual interests, defining or prediction of late interests or the so called penalty interest, qualification and treatment of usurious interests by approaching them in a critical and creative way from the aspect of coherency and correlation as with the provisions of LOR so as with other corresponding provisions especially those of LEP. Of special interest is also the explanation from the aspect of the sustainable judicial practice perspective of cumulative decision making or contracting of contractual contracts and delays.

Also the interpretation and implementation of lawfulness, righteousness and regularity of the constitution of mortgages is from the perspective of genuine judicial practice and consequently the imposition of absolute nullity clauses. The necessity of clarification and uncertainty of the provisions of article 198 and 199 of the LPRR-se is imposed, in relation to the assessment of the document as suitable for the execution in regards to the mortgage claim. Also the provisions of the article 24 of the LEP regarding the suitable document for execution are treated and explained from this point of view.

Key words: Constitution of mortgage, nullity clauses, contracting interest, penalty interest, usurious interest, qualification of the execution document in relation to the mortgage claim, the validity of the default interest implementation.

Dilemmas and uncertainties

While being entirely aware and accountable about the dilemmas, uncertainties and the difficulties that arise in the judiciary of the Republic of Kosovo in the interpretation and implementation regarding legal-execution issues:

Does the mortgage contract, respectively the decision on the registration of the mortgage in the cadaster office, present a suitable document for execution, for the sale of the premises – mortgage collateral in the procedure foreseen according to LEP, and related to it the clarification of some dilemmas and uncertainties of judicial rules of the interest system.

1. Explanation, clarification and interpretation of relevant juridical provisions has the aim of contributing to the creative and critical interpretation and

implementation of these obligatory, real-juridical and execution judicial cases, and consequently of the provisions:

- Article 7 of LOR (the principle of equivalence of prestations),³⁴ article 123 of LOR (usurious contract),³⁵ article 381 të LOR (assumption of usurious contracts), article 382 of LOR default interest, article 383 of LOR (contracted default interest) and article 385 of LOR (contractual interest),
 - Articles 198, 199 and 294 of the Law on Property and Other Real Rights ("LPRR"),
 - Articles 22 par.1 sub par.7 of the Law on Execution Procedure ("LEP"),³⁶
 - Articles 2, par. 1, sub paragraph 4 that is referred to the definition "**Execution of mortgage** ", articles 5, par. 1, sub paragraph) and article of the Law on Mortgages ("LM").
2. Interpretation, implementation and consequently the solution of dilemmas related to the defined law provisions are of crucial importance for the unification of legal and judicial practice that in the same cases to have the same standards applied and in this way to achieve the juridical security and social stability.
3. By the provision of article 22 of LEP it is explicitly foreseen which are the executive documents or executive titles, and that:
- Court execution decision and the judicial execution agreements (bargain);
 - Execution decision given in the administrative procedure and agreement (further as: bargain);
 - The unsettled notarial document in accordance with the law on notary;
 - The agreement concluded in the mediation procedure in accordance with the Law on mediation after the courts approval;
 - Decisions, acts and memorandums for judicial bargains of foreign courts as well as decisions of foreign courts of arbitration and bargains achieved before those courts in cases of arbitration, that are excepted for execution within the territory of the Republic of Kosovo;
 - Execution decisions and agreements of arbitration in the Republic of Kosovo proclaimed executable by the court;
 - Mortgage contract verified by the competent body and registered in the public register according to the law;

³⁴ In article 7 of LOR no. 04/L-077 it is foreseen: *"In creation of service contracts, participant start from the principle of equality value of"*.

³⁵ In article 123, par. 1 of LOR it is foreseen: *The contract is null when someone, by using the situation of need or difficult material situation of the other party, his inexperience or his addiction, contracts for himself or for another party the benefit that is obviously disproportionate to what he has given or done to the other, or was made to give or do.*

³⁶ In article 22, par. 1 of PPL, it is foreseen: *Mortgage contract verified by the competent body and registered in the public register according to the law.*

- Court decision verified as a European execution order;
 - Another document that was called the execution document by law;
 - Executive decision and court agreement;
 - Decision of the administration bodies that refer to the monetary obligation;
 - Executive notarial document; as well as
 - Another document which according to the law is called executive document.
4. From this it is concluded that other executive documents or executive titles that are foreseen with other relevant law provisions also can represent a suitable document for execution.
5. Since, with article 294, par. 1 of LPRR ³⁷ it is foreseen that for mortgages, which according to Law 2002/21 dated 20.12.2002 (LM) are valid, law provisions of this law continue to implement, if it is not foreseen differently in it. From this we can conclude that the law on mortgages is in force so far that it is not in contradiction with LPRR.

Explanation and decomposition of relevant articles of LM and LEP as well as LPRR

With article 2 of the Law on Mortgages³⁸, it is foreseen that the execution of the mortgage means the judicial procedure for the sale of the collateral of mortgage with the aim to fulfill the obligation that is insured by the mortgage, in case when the mortgage debtor does not fulfill obligations according to the mortgage document. Whereas, the mortgage implies the real right that consists on the immovable property of the debtor in order to realize the request of the creditor that from the sale of his immovable property, in case of a delay, to have his obligations fulfilled.

6. With the provision of article 5, par. 1 sub paragraph h) of LM³⁹, it is foreseen that the document of the mortgage has to include a declaration in black letters that shows that the execution of the mortgage document can result in the confiscation of the property and eviction of the mortgage debtor from the property.
7. At the end, with article 9 of LM, the chapter that refers to the judicial execution and the judicial procedure for execution of the mortgage foresees that the procedure and the terms for execution of the mortgage will be conducted according to the applicable law of the execution procedure, except cases when a valid trade authorization was given to a financial institution

³⁷ View Article 294 of the law for Property and Real Rights in the aspect of correlation of subsidiary application of the Law on Mortgage, no. 2002/4.

³⁸ View Article 2 of the Law on Mortgage, no. 2002/4.

³⁹ View Article 5 par. 1, sub paragraph h and Article 9, of the Law on Mortgage, no. 2002/4.

from a commercial association to sell the collateral of the mortgage in accordance with chapter 5 of this law.

8. As an exclusion of this rule for the execution in judicial execution procedure of the collateral object of the immovable property is when a valid commercial authorization was given to a financial institution by a commercial association in order to sell the collateral of the mortgage. These legal solutions are according to the standards and practices of the European countries. The legitimate purpose that is aimed to be achieved is the effective functionalization in conformity to the dynamics of the accelerated social economic development.
9. It is not disputable that, starting from article 199 to article 249 of LEP in an accurate, comprehensive, complete, clear and inclusive way the execution procedures for the immovable items are foreseen.
10. From all these quoted legal provisions and with their creative comprehensive interpretation, it can be concluded that the decision on the registration of legislators intent, as in provisions of the article 22 of LEP so as from articles 198, 199⁴⁰ of LPRR⁴¹, as well as relevant provisions of LM, which, according to articles 294 of LPRR which *mutatis mutandis* therefore implement accordingly, is that the execution procedure is more efficient, effective, fast, full of results and with as little expenses as possible, by insuring and guaranteeing efficient economic growth of Republic of Kosovo and consequently mortgage creditors, that with the sale of the property, through the execution court or business authorization, according to the proposal of the mortgage creditor fulfill their demand.
11. According to my view, the registered decision of the mortgage, except of what was indicated in the previous paragraph, will contribute with the rising and the strengthening of the expectation, satisfaction and the reliability of the local and foreign creditors. I consider that even with relevant provisions of LEP that refer to the sale of the immovable property in the execution procedure also the right and lawful interests of mortgage debtors are ensured and guaranteed. According to these provisions, in different phases of the execution procedure, mortgage debtor has authorizations to present five appeals including the rejection here as well.

⁴⁰ By the provision of the article 199 of LPDS it is foreseen:

1. *Fulfilling of the request of the mortgage creditor through obligatory enforcement.*

2. *In case of delay or some other violation of the contract from the debtor, mortgage creditor can gain the right through court claim to sell the immovability and to firstly fulfil the insured request from the resulting amount (gained from the sale).*

3. *Terms and procedures are supported on provisions of obligatory enforcement.*

⁴¹ By the provision of the article 198 of LPDS it is foreseen: *A violation of the contract from the debtor of the insured request exists if the debtor is late with payments. For these cases, accordingly are implemented relevant provisions of the law on obligations.*

12. Apart from this, by examining the judicial practice in interpretation and implementation of relevant legal provisions in cases of defining the execution according to the proposal for the execution on bases of the mortgage contract and the decision of the registration of the mortgage, the juridical conclusion results that, the court by official duty does not exclude clauses of *absolute nullity*. My recommendation is that the Chamber of Lawyers of the Republic of Kosovo as well as Kosovo Judicial Institute should organize adequate trainings for these laws especially on the law on trade justice.

Dilemmas and difficulties that occur in practice for articles 198 and 199 of LPRR

13. While with the article 198 of this law it is foreseen that when the mortgage debtor is late in fulfilling his obligations, then, the law on Obligations is implemented, by making a grammatical and logical interpretation, the realization of these subjective rights needs to be done by presenting the suit request to a dispute procedure. Whereas with article 199 par. 1 of LPRR, it is foreseen that the mortgage creditor, in case of delays according to the contract of the credit with a court claim sells the collateral by fulfilling his requests insured with collateral. So, even with this provision it is foreseen to have his right realized and it has to be done through the mortgage suit. With this same article, par. 2 terms and procedures are foreseen that are supported by obligatory execution provisions. Whereas with article 198 the implementation of the Law on Obligations is foreseen and there is no law with this title, whereas in article 199, par. 2 of the same law, obligatory execution provisions are mentioned without referring to any law.
14. With article 198 and 199 par. 1 of this law for the realization of subjective rights this is realized with a law suit according to the provisions of LLP, whereas with par.2 of article 199 obligatory execution provisions are mentioned, that implies taking a decision for the execution according to the decision for registration of the mortgage in the Cadastral Office.
15. On the basis of grammatical interpretation, it results that two options are possible and in this way to make the setting of the execution possible to any party according to the proposal for execution and in this case we favor a party and at the same time the position of the party can be made difficult, by forcing the party to realize his right with a regular suit or mortgage suit. These law provisions install dual standards and dual criteria by influencing in the juridical insecurity and social stability.
16. The provisions of article 198 and 199 of this Law, include bastardized formulations and not only technical and legal norms but also lexical, morphological and syntactical norms, so in this way successfully creating stagnation and uncertainty.

17. Truly by relying on the professional responsibility intertwined with consciousness and honesty, it can be said that not only these provisions but also a range of other provisions built as such come out unclear, ambiguous, inaccurate, and therefore inapplicable, so that is why their mandatory structural change is required.
18. For the fact that the understandable structure of the constitution of sentences not only with these law provisions that are incomplete, meaningless in contradiction with lexical structure of word formation, with a lot of ortographic and syntax mistakes, therefore it can result with subjective interpretation and implementation as well as consequently coming to juridical insecurity of not only the litigant parties but to also have impacts and reflections with unforeseen negative consequences for the security and the credibility of the judicial in the eye of the public, with a harmful performance. Matters especially predicted with these law provisions, are in contradiction with internationally accepted regulations, therefore even the legislative authorities have to adapt to them.
19. Therefore, exactly for this reason, laws represent a kind of half fabrication which gets profound by decisions and their execution, so, they are a imposed continuity of the process of creation from the overall sphere in the individual and concrete sphere. Therefore, the request and the need is imposed that in these concrete cases, by extensive interpretation and application of rules and standards as well as best practices of the European Union to propose confirmed solutions as to insure the stability, security and judicial social sustainability.
20. As it is well known, now the mortgage right according to LPRR is a real right of the creditor of the mortgage over the others real, so, *in iura re aliena*, with which the right of his claim is insured, realization of which is authorized to do from the value of the mortgage immovability with the sale in judicial execution procedure, if the debtor of the mortgage with achieving the claim of the creditor does not fulfill his obligations. Shortly, mortgage is an accessory judicial real right, because the main right is the right of claim that is a legal and binding relationship and that the right mortgage depends on precisely this right. With the mortgage as the accessory right only the right of the request is ensured.
21. With LPRR legal provisions are thoroughly and accurately foreseen that refer to extrajudicial execution of the business mortgage, starting from the provisions of article 201 up until the provisions of the article 217 of LEP⁴². With these legal provisions these legal criteria have been adjusted in order to build and enforce the business mortgage as follows: extrajudicial deposition of a “business mortgage”, conditions for the exercise of the authorization for sale, notification

⁴² View provisions of the articles 201-207 of PPL.

of non-fulfillment, distribution and publication of the notice of sale of immovable property, postponement sales, sale, sale through public auction, transfer of immovable property encumbered, distribution of the income from the sale, legal remedies of the owner of the immovable property encumbered, and the rights and duties of the agent for sale.

22. According to these legal provisions it results that unequivocally and safely that to the mortgage creditor and mortgage debtor's arise the rights and obligations in order to create and build commercial mortgages foreseen by provisions of the articles 201-217 of LPRR⁴³, by excluding traditional institutions of judicial protection not only to the so called mortgage lawsuits but also mortgage contracts as well as the decisions for determining the mortgage to present a suitable document for execution. By these lawful solutions, the substantiality of the dynamics of the economic development of the market is contributed.

Some explanations of the Canon of Lekë Dukagjini and Albanian civil code regarding the right of the mortgage

23. Mortgage as a legal institution is also regulated by paragraph 501 of the Canon of Lekë Dukagjini⁴⁴. With this paragraph it is foreseen that "to recover the loan in order to clear any trust doubts about the given loan, mortgage can be taken". So the mortgage is something like an instrument for security of the credit requests or loaners. As in Canon of Lekë Dukagjini so as in the Albanian custom right, as a tool in real judicial movability, so as the immovability's the judicial institution the right of the mortgage was known. So, giving of the mortgage had implied a real movability as well as immovability. From this judicial formulation that sets that taking or giving of guaranties implies juridical insurance of the debt, so in case of failure to comply to the reached agreement, than the return of the debt is fattened from the collateral of the mortgage, as it was contracted.
24. Even the Civil Code of Albania that as a model had the Civil Code of Italy, regulates the institute of executive titles for obligatory execution. By the article 510 of this Code⁴⁵, explicitly are foreseen titles or executive documents. In paragraph 1 sub paragraph **d** of this article, it is foreseen that in the capacity of an executive title are also the notarial acts containing liabilities in cash, as well as acts for granting bank loans. So it is not disputed that this Code gives executive power or treats as executive titles acts for granting of bank loans. Standards and practices of advanced countries of the European community, depart from traditional prolonged traditional solutions, complicated and costly with traditionalism, the so-called mortgage lawsuits. Even realization of credits by today's solutions with the LPRR.

⁴³ View provisions of the articles from 201 to 217 of the Law No.03/L-154 on Property and Real Rights.

⁴⁴ View paragraph 501 of the Canon of Lekë Dukagjini.

⁴⁵ View article 510 of the Civil Code of Albania.

Contracting of null clauses in mortgage contracts

25. It is very actual but it creates dilemmas, uncertainty, confusion and difficulties in the interpretation and implementation by the factual situation as well as by the legal position, in the cases when the banking system, by using the difficult position of the trading societies in the economy of the Republic of Kosovo, insufficient experience of the trading societies and individual businesses, sometimes even the frivolity with distinguished addiction, contract for themselves the clauses of prestations in disproportion to the imperative legal provisions, such as the high interest rates like contractual as well as default interests. So, in most of the cases those contracts were in the contradiction to the current article 277 of LOR⁴⁶. According to these law provisions, it is foreseen that the default interests or penalties are determined by an annual rate as the citizen's deposits in commercial banks over a year with no special destination. Whereas with article 382 of the current LOR⁴⁷, it is foreseen that the height of default interest is 8% per year, except if it is differently foreseen by this law.
26. According to the current LOR, the height of default interest is 8% per year. Meanwhile, the banking system imposed clauses with default interest rates in contradiction to this legal provision of over 20% per year, and which could have been considered as an interest with usury. Similarly, the banking system contracted clauses in contradiction to article 399 of LOR⁴⁸. By this legal provision it is foreseen that the contracting interest rate is not limited but if it is not contracted by a contract, then it is 8%. This legal provision is completely equivalent and equally valued with the provision of the article 358 par. 2 of the LOR⁴⁹ currently in force, except the interest rate that is already 6% per year.
27. The banking system imposed extremely high interest rates that in most of the cases were qualified by the District Economy Court of Pristina, as usury interests and as such those contracting clauses were proclaimed *null* of the absolute nullity. Penalty interest as lawful interest, for monetary claims, cannot be contracted; respectively it cannot be a contracting object. This precisely because of the reason that its rate of interest is determined by the imperative provisions. Any contracting clauses in contrary to these legal provisions are of the absolute nullity. Therefore based on these legal bases, no judicial protection is offered to *null* contracts.

⁴⁶ View Article 277 of the old LOR.

⁴⁷ View Article 382 of LOR in force.

⁴⁸ View Article 399 of LOR in force.

⁴⁹ With the provision of the article 388 of LOR in force is foreseen:

1. The debtor who delays the fulfillment of the obligation in cash debits, except the main debt, the interest as well.
2. The level of penalty interest rate is eight percent (8%) annually, unless otherwise foreseen by a special law.

28. By observing the judicial practice especially of the basic courts but also of the Court of Appeal, which while acting according to the proposal for determining the execution on bases of mortgage contracts or to the decision for registering of the mortgage in the Municipal Cadastral office, as an execution document, without the examination of the clauses of absolute nullity, how much are they related to contracting of contractual and penalty interests in contradiction to the provisions of articles 277 and 399 of current LOR, have put relevant stamps which the execution is determined with. There are frequent cases when despite of the fact that these clauses are of absolute nullity, the parties because of not knowing the law, insufficient experience, frivolity and in most of the cases the imposing of the null clauses from the banking system can have unforeseen harmful consequences.
29. In addition, there are cases in judicial practice when the execution is assigned on the basis of the mortgage contract or Decision on the registration of collateral, taken of the value of that collateral specified in that contract. So the court does not assign the value of that collateral with the conclusion, by assigning financial experts according to the provision of the article 203, par. 4 of the LEP⁵⁰, which as a consequences has the disbalance of the peer prestations of contracting parties and in this phase of the execution of debtor – trading association on one side and the banking system on the other which in these cases is an *eldorado* of their own.
30. Such decisions in most of the cases, due to the failure to submit regular legal remedies, but even the extraordinary ones, especially by the debtors, the same become final and endless according to provisions of article 22 of the LEP.

Decomposition and explanation of some positive provisions of LOR related to the interest system

31. With provisions of article 378 up to 386 of LOR currently in force, the interest system such as the contracted, the default interest and that of the usuary one are completely and precisely rated. With these legal provisions new levelings have been conducted. At the default interest, although the law has determined the annual interest rate of 8% according to the articles 381 of LOR⁵¹, but with the possibility of change according to the parties related to the contractual obligations. According to this same law provision of LOR, it is foreseen that every interest be it contracted or default, cannot pass the threshold of more than 50% of the default interest. Beyond this percentage, it would be treated as usurious interest. This rule is excluded when we have to deal with the financial banking system. This exclusion is also contrary to the practices and standards not only with the countries that our state is bordered with, but also with those of the European community countries.

⁵⁰ View Article 203, par. 4 of PPL.

⁵¹ View provision of the article 381 of LOR.

32. The banking system, will abuse with this regulation opportunity, by implying clauses that are in contradiction with the corpus of the judicial rate of the article 7 of LOR⁵², which foresees equivalent prestations in obligatory contracting relations that refer to the default interest rated in this way. Surely that the banking system in commercial contracts in cases when the level of the interest for which the parties have agreed upon is for 50% higher, which according to the legal solutions does not have the obligation to verify, moreover, the unfavorable situation of the debtor has been used, his situation of financial difficulties, indiscretion or the addiction developed from it. For the verification of these claims the burden of the accountability does not fall on him. I consider that with this legal provision, not only that a suitable environment for business is not created, but the unfavorable position of the trading associations is even hardened. The banking system with these legal clauses will continually create monopolist positions for creating enormous benefits and impoverish the trading associations even more.
33. Corpus of the judicial rate from article 381 of LOR (a supposed usurious contract), where the burden of proof of the creditor is foreseen even though the interest rate was 50% higher than the lawful default interest, but he was only obliged to prove that he has not used the unfavorable situation of the debtor, the difficulties of his financial situation, indiscretion or the addiction developed from it. Since the banking system even implies clauses of the model of the loan contracts previously formulated and unfavorable also because of the fact that it is the party on the position of the strong one, then, the burden of the proof that he has not used the unfavorable situation of the debtor, the difficulties of his financial situation, indiscretion or the addiction developed from it, are the legal provisions of the decorative and spectacular nature without any real legal effect for the loan recipient. So, from this point of view, it can be concluded that the loan recipient does not approach with this corpus of this legal rate of real effective juridical protection.
34. By observing the equivalence of the legal provision from the previous paragraph, in the ratio to the legal provision 123 of LOR, where the usurious interest is rated, it undoubtedly results that there are contradictory elements and therefore exclusionary terms of the content of the substantive criteria of internal coherence and general correlation.
35. It cannot be explained therefore it is cleared that as far as with article 123⁵³, of LOR, it is foreseen that the usurious contract is null, then when someone is

⁵² View provision of the article 7 of LOR.

⁵³ By the provisions of the article 123 of LOR it is foreseen:

1. *The contract is null when someone, by using the situation of need or difficult material situation of the other party, his inexperience or his addiction, contracts for himself or for another party the benefit that is obviously disproportionate to what he has given or done to the other, or was made to give or do.*
2. *The meaning of the provisions of this law on the consequences of invalidity and for the partial invalidity of the contracts is applied accordingly on the contracts with usuary.*

using the situation of need or the difficult material situation of another, his insufficient experience, indiscretion or addiction, contracts for himself or for another third party the benefit that is openly in disproportion with what he gave or did for the other, or was made to give or do. Whereas, with the provision of article 381 of LOR⁵⁴, not only does it relativise but also disables the construction of juridical criteria to verify precisely and completely from the judicial of the Republic of Kosovo with usurious interests. Even the legal criteria that determine the substantial criteria between the provisions of article 381 and 123 of LOR, are not obviously compatible and exactly because of these reasons and the reason of non-standardization of these juridical technical terms, there will be a fundamental impact in unifying of the judicial practice and consequently in the promotion of the unique implementation of these provisions of LOR that refers to the interest system and especially to the default interests.

36. I think that there will occur different kinds of challenges related to the interpretation and implementation of these legal provisions where in the same cases, different standards get constructed which will be of substantial influence in juridical security of the parties and consequently to the judicial order in the Constitution of the Republic of Kosovo. Moreover, these incorrect, unclear and non-consistent provisions, not only create dilemmas and uncertainties in interpretation and implementation but with a non-unified application, it will lose the trust, the expectation and the satisfaction of the citizens in courts.
37. The contract is null according to the provision of article 123 of LOR, when someone, by using the situation of need or difficult material situation of the other party, his inexperience or his addiction, contracts for himself or for another party the benefit that is obviously disproportionate to what he has given or done to the other, or was made to give or do.
38. By the provision of the article 381 of LOR, it is foreseen that it is not a usurious contract even it is 50% higher than the default interest with the obligation of the creditor so that he proves that he has not used the debtors unfavorable condition, difficulty of his financial situation, discretion or addiction developed from it. Whereas, according to paragraph 2 of this legal provision, the supposition of the burden of proving for this element belong to the creditor but, they do not apply for commercial contracts. This legal

⁵⁴ By the provisions of the article 381 of LOR it is foreseen:

1. *In case the level of the interest for which the parties have agreed upon is for 50% higher than the level of the default interest, calculated according to the following article, such agreement is considered usurious contract, except when the creditor proves that he has not used unfavorable situation of the debtor, difficulties of his financial situation, indiscretion or addiction created from it, or that the reserved benefits for the creditor or the third person are not in disproportion with what the creditor has offered or has started to offer or do.*
2. *Precise supposition in the previous paragraph does not apply in commercial contracts.*

provision of article 381, makes it greatly difficult or even makes impossible the provision for the implementon of article 123 of LOR.

39. With the provision of article 12 of LOR⁵⁵, it is generally defined that the commercial contracts are those contracts that are signed between commercial entities that perform beneficial activities. Although, these technical juridical terms are not compatible with the organizational and functional structure of article 4 of the Law on Business Organizations⁵⁶, and since this law is special, then, this law is implemented. With this legal provision, it is foreseen that the trading associations are the associations of persons as follows: individual businesses, general partnerships and limited partnerships. Whereas, capital companies are: limited liability companies and joint stock companies.
40. Since according to the provision of article 381 par. 1 of LOR, loan providing trading companies, although they bind commercial contracts, they can contract interests for 50% higher than the legal default interest, then those contracts are not going to be considered as usurious contracts and consequently according to the provision of article 123 of LOR, the possibility of the court proclaiming them contracts of absolute nullity is excluded.
41. Commercial contracts that bind trading companies represent 95% of trading entities. The participation of physical persons in the circulation of goods and the offering of services in the economic-trading life is minimal or insignificant.
42. By conducting the critical, creative, substantial therefore judicial, unequivocally and in the safe manner interpretation, it results that they cannot be considered as null contracts although they can be called usurious even though by the provision of article 381 LOR, commercial contracts are contracted by trading companies over 50% of legal default interest. Corpus of the legal provision of article 381 of LOR, not only that limits but also excludes the provision of article 123 of LOR, stating that the usurious interests are of absolute nullity. Legal provisions that regulate the default interest are in contradiction to the constitutional provisions which foresee that the state authorities are obliged to create a favorable setting for doing business, as for inner business organizations, especially for foreign e business organizations for investments in Kosovo.
43. One of the effective novelties is the legal provision of article 383⁵⁷, with which it is foreseen that parties can agree in the contract in advance, that the rate of the interest will be higher in case the debtor does not pay interest rates

⁵⁵ View provision of the article 12 of LOR.

⁵⁶ In article 4 of the Law on Business Organizations it is foreseen:

A business organization may be established in Kosovo as a personal business enterprise, a general partnership, a limited partnership, a limited liability company or a joint stock company.

⁵⁷ With the provision of the paragraph 383 of LOR is foreseen:

Although, parties can agree ahead of time in the contract that the rate of the interest will be higher in case the debtor does not pay the interest flow in timely manner.

in timely manner. In this juridical situation, the opportunity of verification of the accuracy of the judicial criteria of legal provision of article 123 of LOR, as long as it has to do with absolute nullity of the usurious contracts.

44. Dilemmas and uncertainties are going to occur in cases when the contracted interest or the default interest are paid or come due after the entry into force of the LOR for the main obligations – that happened or where created before the entry into force of the positive provisions. According to my point of view, article 1057 of LOR⁵⁸ which determines that for the debts that were created before the entry into force, present provisions are applied and it refers only to the main debt but not to the relevant interests. Since interest are created annually according to a set rate and consequently they have been created after the entry of legal provisions of the new law, then legal provisions of this law are implemented.
45. By doing critical, creative, substantive and therefore coherent interpretation as well as in correlation with other legal provisions LOR, results that the creation and fulfillment of legal binding reports for the main debt as well as for the interest system, legal provisions of LOR are implemented in the time of their creation and of the effects of individual fulfilment. The legal view that mechanically absorbs these two legal bases of creation and consequently the fulfilment of mutual legal contracted obligations is unacceptable, groundless and consequently illegal.

This is because according to article 28 of LEP⁵⁹, that determines when the penalty interest has changed after issuing of the execution document, the execution authority by official duty will apply the interest according to the changed rate during time in accordance with the LOR. Contemplating this legal provision from the critic, creative, undoubted and secure point of view, it results that also for relations of contractual obligations created according to interest system of present LOR, for more according to official duty interest rates of new LOR will be applied. Juridical practices that interest rates apply when the obligation is created by obligations of present LOR, even though the interest period is also laid out according to the new LOR, it is in contradiction with these legal provisions. It has changed after the issuance of the execution document, the execution authority by official duty will apply the interest according to the changed rate during the time in accordance with the LOR. Contemplating this legal provision from the critic, creative, undoubtedly and in the secure manner, it results that also for the relations of contractual obligations created according to interest system of present LOR, for more

⁵⁸ In article 1057 of LOR it is foreseen:

Provisions of this law do not apply in relations of obligations that have been created before entrance in force of this law.

⁵⁹ In article 28 të PPL is foreseen:

If the height of interest-delay has changed after issuing the enforcement document, the enforcement agent body, ex officio, shall assign the scale changed over time in line with provisions of the Law on obligational relationships enforcement agent.

according to official duty interest rates of new LOR will be applied. Juridical practices that interest rates apply when the obligation is created by obligations of present LOR, even though the interest period is also laid out according to the new LOR, it is in contradiction with these legal provisions.

Obligational effects of the contractual interests

46. Novelty of the LOR is the article 386 of LOR⁶⁰ that refers to the definition of the interest in non-monetary obligations. With this legal provision it is determined that contractual interests are also applied by customization for other relations of type distinguished obligations, respectively obligations that as a subject have replaceable items and distinguished by type.
47. As far as legal limitation about prohibiting interest on interest, when interest stops flowing, defining of the interest rate of 6% annually, when the level of the interest and the time for achieving payment is not determined, are totally and accurately identical with the solutions foreseen in present LOR. Regarding these legal cases, a proper judicial practice is consolidated by including legal opinions and positions that refer to promoting unique implementation of contracted interest rates.
48. Challenges with which the judicial of the Republic of Kosovo inevitably is going to face are going to be cases when business organizations from banking sphere contract with commercial contracts clauses as contracting interest so as the penalty interests in cumulative manner. Being that judicial situations like this are not defined accurately, then the judicial of Republic of Kosovo has to do critic and creative interpretation of these legal provisions, by giving solutions by the analogy method *argumentum a contrario* and in the end, on bases of special general regulations of the contractual right. By approaching it through this aspect, my juridical view in this case is subsiding such situations of the case, in cases when the set contractual interest is higher than the penalty interest, then the contractual interest flows even when the debtor falls late in payments. From these concrete juridical situation, can be concluded that the procedural contractual interest is valid after the debtor falls late in payments.
49. Shortly as a conclusion, my juridical view is that cumulatively to the contractual and penalty interest court protection cannot be offered. So, in this concrete judicial situation of the contractual right court protection can be offered only one of these interests, depending on definition of the depending on the determination of the available authorization of the creditor, or by the well-known Roman principle of *non ultra petita*.

⁶⁰ With the provision of the article 386 of LOR is foreseen:

Legal provisions for contracted interest also implement accordingly for other relations of defined obligations by type, respectively obligations that for a subject have replaceable and defined by type.

50. In juridical court practice, cases are presented when the contractual interest is not paid, then the court can offer judicial protection, creditors request that the penalty interest over the unpaid amount is paid, from the time of the presented request to the court.
51. From the above mentioned and by relying on the existing court practice, there are frequent cases when the loan recipient in the quality of the debtor has received loans from the banking system in amounts that are disproportionately larger than the object of collateral and due to the payment delay of an installment, with the proposition of determination of execution by asking of contractual interests and for the delay in contradiction to the provisions of the article 282, 283 and 385 of LOR, interests which in some cases exceed the main item, execution is determined and this way the object of collateral is sold that has the trade value of many times higher than the credit itself by putting the debtor in a very inconvenient position, and not only did the credit not influence the development of the business, but he also lost the roof over his head for which he worked for all his life. In fact, such credits where unjustified and illegal punishment with such clauses of absolute nullity.

Conclusion

1. From the above mentioned, a conclusion can be achieved that contracting parties depending on the concrete judicial situation in cases of contracting of clauses with interest rates, in contradiction with the provisions of LOR, they have the right and the authorization to request through judicial ways, protection of their subjective rights but in most cases they don't use them, whether due to insufficient knowledge of legal provisions or negligence as well as the imposing of such clauses from the provider of the credit. Since the constitution of the mortgage established by decision at the cadastral registration is the real legal accessory right, because the main right is the right of request from the base of contract of the legal-obligational relationship, therefore, the right of the mortgage depends on the credit contract or loan. In cases of invalidity of this main judicial base, the contract of the mortgage is also invalid that insured that the main obligational right.
2. On the basis of critical and creative interpretation of the provisions of the article 381, 382 and article 385 of LOR, we consider that in judicial and factual situations of contracting of contracting interests and those of delay in cumulative manner, then if the penalty interest is higher than the contracted one, only the penalty one follows after the delays of payments from the debtor. So in this case the judicial of the Republic of Kosovo should not offer judicial protection to these interests in a cumulative manner. By these legal provisions it should have made clear and concise refusal of offering of judicial protection to the creation of obligations and completions in cumulative manner of the contracted interests and the delays.

3. Also, we consider since the creation of obligation in mutual contracted report was done before entry in to force of the present LOR and according to the article 1057 the old law is implemented, but since interests are created every year, then the law in force is applied.
4. Observing the relation between the provisions of the 123 and 381 of LOR that refers to legal criteria of usurious interests and supposition of usurious contract, it results that undoubtedly and surely though we need the approach of critic, creative, coherent interpretation and in correlation to the basic judicial principles of the provision of the article 7 of LOR (principles of equality and prestations). We consider that the juridical criteria of the provision of the article 123 of LOR, should be basic criteria in case of review and assessment to call it or classify it as usurious interest. Whereas the corpus of the article 381 of LOR, is a fluid juridical normative with a lot of uncertainties and dilemmas that belong to Latin juridical principle “*probatio diabolika*” the base of proving of the supposition of usurious interest is very dubious.
5. By doing grammatical and substantive interpretation and finding of the purpose of the formulated legislator with the provision of article 199 of LPRR, opposed to citations of the relevant provisions of LEP, Law on Mortgages especially in the context of the chapter that refers to judicial execution of the mortgages, refers to the sale of the collateral of the mortgage according to the relevant provisions of LEP.
6. Having in mind the abovementioned, by looking at the entirety of the context of the correlation of fulfilling each other of these provisions and their internal coherence of results undoubtedly, reasonable conclusion, that the decision on registration of the mortgage represents appropriate document execution for fulfillment of the obligation of the mortgage creditor in the case of delay from the mortgage debtor to fulfill the obligation foreseen by legally binding contract or simply put, the credit contract.

Consequently, from what was said above, according to the state of such interpretation of legal provisions, legal conclusion can be derived that the decision on registration of the mortgage based on the mortgage contract, mandatory as a real-judicial contract ensures and meets all requirements in the execution procedure of the mortgage creditor on the basis of the legal-binding contract. As part of this conclusion, in my view, imposes the immediate need that by doing the interpretation and implementation of these provisions, even according to official duty by the case of determining by a decision of execution on the basis of the mortgage contract and thus of the decision on registration of mortgage collateral, in the cadastral office, to not incorporate clauses of absolute nullity and in such manner the decisions would be fair regular and lawful. Similarly, after the entry into force of the Law on Obligations under article 28 of LEP, to be applied according to official duty by the execution authorities of the delay interest

according to article 381 of LOR with an annual rate of 8%, in cases where the same is not done by the instancional courts.

Consulted laws:

1. Law on Obligational Relations.
2. Law on Property and Real Rights.
3. Law on Contested Procedure.
4. Law on Execution Procedure.
5. Law on Mortgages.
6. Civil Code of the Republic of Albania.
7. Law on Business Organizations.