DALAT UNIVERSITY JOURNAL OF SCIENCE Volume 12, Issue 1, 2022 52-68

INTEREST RATE FOR LOAN CONTRACT ACCORDING TO VIETNAMESE CIVIL LAW THROUGH PERIODS IN CONTACT WITH CREDIT LAWS

Le Thi Bich Chi[a*], Le Minh Bao Trung[a]

[a]The Faculty of Law, Dalat University, Lam Dong, Vietnam
[*]Corresponding author: Email: chiltb@dlu.edu.vn

Article history
Received: March 24th, 2020
Received in revised form: June 17th, 2020 | Accepted**:** October 14th, 2020
Available online: May 26th, 2021

Abstract

Interest rates are a financial tool to ensure the rights of lenders in loan contracts. Accordingly, the borrower is obliged to pay interest if so agreed or provided by law. Through the amendments of the Civil Code, interest rates are an item that has had many changes compared to other provisions in loan agreements. However, the interest rates prescribed in the current Civil Code still cause different interpretations, especially in relation to credit laws. This leads to inconsistent application of the law, especially when dealing with credit contract disputes. Therefore, based on the study of interest rate regulations on loan contracts under the laws of Vietnam over time, we analyze some problems about interest rates and credit law under the current Civil Code and make some specific recommendations to solve the problems.

Keywords: Civil Code; Credit agreement; Interest.

DOI: http://dx.doi.org/10.37569/DalatUniversity.12.1.682(2022)

Article type: (peer-reviewed) Full-length research article

1. INTRODUCTION

Loan contracts are one of the most common contracts in legal relationships; the loans may be for assistance, or purely business, depending on the relationships between the parties concerned as may be the agreements on interest payments. As for loan contracts that have interest, the interest is the equivalent of the borrowers' compensation to the lenders when the borrowers directly benefit from the lenders' possessions. The interest is determined according to the possessions, the loan duration, and the interest rate. The interest rate is regulated by law to balance not only the benefits to the economic sector but also the government's management to ensure equality and fairness and to protect the legal benefits of all parties in their civil lives.

The subjects of these contracts are valuables, money, or other possessions that are viable for transactions according to the provisions of Civil Law, but, in reality, money is the most common subject for transactions in loan contracts. It depends on whether or not the lenders are credit unions to determine if the contracts are only regulated by the provisions of the Civil Code or if they are also regulated by the provisions of the Law on Credit Institutions. Nowadays, there are many arguments regarding loan contracts for money that concern credit unions as the lending parties. These often revolve around the interest rate of 20% annually. In this article, we will only tackle legal issues concerning this matter and analyze some limits in the provisions of the laws as well as suggest some solutions.

2. INTEREST RATES AND RATE CALCULATIONS IN THE CIVIL CODE OVER TIME

Interest rates in loan contracts are calculated according to rules mutually agreed upon by all parties, but in order to have a legal framework for identifying the highest interest rate to resolve disputes, to act in situations where there is no legal foundation determining the interest rate agreed upon, or to consider taking legal actions for usury, every country has laws to limit the highest interest rate possible (interest rate limit). The interest rate limit is the legal limit such that parties cannot agree to a higher interest rate. In Vietnam over time, the Civil Code has regulated contracts to limit agreements on interest rates by calculating the interest rate limit as described below.

2.1. Interest rate and calculation of interest according to the Civil Code of 1995

Clause 1, Article 473 of the 1995 Civil Code says: "The interest rate is agreed upon by the parties but must not be over by 50% of the interest rate limit for the corresponding type of loans provided by the State Bank." The foundation for interest calculations in the 1995 Civil Code is that "the interest rate limit for the corresponding type of loans provided by the State Bank" and the highest interest rate possible "must not be over by 50% of the interest rate limit." As for this rate, "in the reality of law enforcement recently, this limit of 50% has always been understood and applied consistently: the agreed-upon rate must not exceed the interest rate limit by over 50%, which means the difference must be below or equal to 50% (and this is calculated with the formula: the highest possible interest rate agreed-upon = interest rate ceiling + interest

rate ceiling x 50%)" (Đỗ, 2006). We agree with this opinion because these are, in fact, the instructions for the interest rate calculation according to Point b, Clause 4, Chapter I, Joint Circular 01/TTLT of the People's Supreme Tribunal–People's Supreme Organ of Control–Ministry of Justice–Ministry of Finance on June 19, 1997, which instructs the judgment and execution in terms of possessions:

> b) If the interest rate that the parties agree on exceeds by 50% the interest rate limit provided by the State bank for the corresponding type of loans at the time of the loan, the court will, based on Clause 1, Article 473 of the Civil Code, force the borrowing party to pay the interest of 150% of the interest rate limit provided by the State bank for the corresponding type of loans.
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> For example, A borrowed 10,000,000 VND from B on December 30, 1995, with a loan duration of 6 months and an interest rate of 4% a month. Every month, A had to pay B interest. In July 1996, A stopped paying B the interest. Due to many failed attempts to ask for the money, B initiated a lawsuit in November 1996 demanding A pay B the loan of 10,000,000 VND and the interest calculated as below.
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> The month A borrowed from B was December 1995. According to Decision No. 381/QĐ-NH1, the interest rate limit of medium-term and long-term loans on December 28, 1995, was 2.55% a month (1.7% + 1.7% x 50% = 2.55% a month).

2.2. Interest rate and calculation of interest according to the Civil Code of 2005

Clause 1, Article 476 of the Civil Code of 2005 states: "The lending interest rate shall be agreed upon by the parties, but must not exceed 150% of the basic interest rate announced by the State Bank for loans of the corresponding type." Compared to the Civil Code of 1995, the Civil Code of 2005 has two changes: the first is in the rate calculation (prime rate) and the second is in the highest interest rate possible (limited to 150% of the prime rate).

The change in the rate calculation in the Civil Code of 2005 is important because "these days, the State Bank does not announce the term saving interest rate, only the prime rate" (Đinh, 2005, p. 198). As a result of the codification of the State Bank Code of 1997 and Decision No. 241/2000/QĐ-NHNN, which was issued by the State Bank on August 2, 2000 and took effect from August 5, 2020, Clause 12, Article 9 of the State Bank Code of 1997 stipulates: "The prime rate is the interest rate that the State Bank announces to provide a basis for credit unions to set their business interest rates." Article 18 of the same law also states: "The State Bank calculates and announces the prime rate and the refinancing rate." In addition, according to Decision No. 241/2000/QĐ-NHNN, the State Bank implements the prime rate management mechanism for loans in VND instead of the lending rate ceiling management mechanism.

The highest interest rate possible still follows the rule that "it must not exceed" a certain percentage according to the rate calculation, but in the Civil Code of 2005 there is a change in the rate from 50% to 150%. This change leads to two different opinions:

- *The first opinion is*: "for example, if the prime rate is 1.0% a month, the interest rate agreed upon must not be over 1.5% a month" (Đinh, 2005, p. 198). This means, while the highest interest rates possible written in the two Civil Codes are shown as two different figures, in reality, they are the same.

- *The second opinion* is: "for example, if the prime rate is 1.0% a month, the highest interest rate agreed upon will be 2.5% (= 1.0% + 1.0% x 150%), in which the rate increase is 1.5%, equal to 150.0% of the prime rate of 1.0%. This means that the limit is calculated by the formula: the highest agreed-upon interest rate possible = prime rate + prime rate x 150%" (Đỗ, 2006).

We agree with the view that "the wording of Clause 1, Article 473 of the Civil Code of 1995 did not correctly convey the ideas of the lawmakers. They should have understood that instead of the value of the increase difference, the value compared between the two interest rates was the necessary value–this refers to 150% rather than 50%" (Đỗ, 2006). So, while Clause 1, Article 473 of the Civil Code of 1995 stipulates that the interest rate "must not be over by 50% of the interest rate limit," in reality, the rate is still calculated as 150% of the prime rate according to the formula. For example, the prime rate is 0.650% a month (7.8% a year), so the highest interest rate in the loan contract that parties can agree on is 0.975% a month (11.7% a year). However, we believe that the first opinion about the rate calculation in the Civil Code of 2005 is appropriate. Although the wording of the highest interest rate in the two codes is different (50% in that in 1995 and 150% in that in 2005), when the highest interest rate allowed in loan contracts is calculated, there is only one result, which is that it must not exceed the limit of 150% of the prime interest rate set by the State Bank. In other words, although the numbers in the two codes are different, this is only a difference in wording, not in the idea or intentions of the lawmakers.

For example, the prime rate set by the State Bank is 0.750% a month (9.0% a year), so the agreed-upon interest rate must not exceed 1.125% a month (13.5% a year).

In short, compared to the Civil Code of 1995, there is a practical change in the rate calculation in the Civil Code of 2005 based on the prime rate provided by the State Bank for the corresponding type of loan. However, the similarity in the rate calculation at this time is that it is based on the interest rate provided by the State Bank (regardless of the prime rate or interest rate ceiling). In other words, the highest interest rates in loan contracts made before January 1, 2017, all depended on the State Bank's interest rate. Apart from that, the regulations about the interest rate in the civil codes of this time period do not mention exclusion or exception for credit contracts.[1]

[1] Article 51 of the Law on Credit Institutions of 1997 only provided the following requirements: "The lending must be established in a credit contract. The credit contract must contain the lending conditions, the loan use purpose, the form of loan, the loan amount, the interest rate, the loan duration, the security form, the value of the property as security, the mode of debt repayment, and other commitments agreed upon by the parties involved"; it did not provide for the maximum interest. Then, the Law on Credit Institutions of 2010, which took effect on January 01, 2011, replaced the Law on Credit Institutions of 1997

In fact, since 2009 the State Bank has not announced the prime rate, which is needed to calculate the highest interest rate as specified by the Civil Code of 2005. The dependence on the prime rate provided by the State Bank actually makes it difficult for the loan contractors because only people who understand the loan market would understand those rates correctly. This hinders the purpose of the Civil Code, which is building appropriate, easy-to-understand, and practical standards and regulations. This poses a mission to write regulations about interest in a way that fixes a specific and clear interest rate in the law articles so the loan contractors understand and proceed easily and appropriately. Then, the interest is not only fair between the contractors, but also meets the need to liberate the rate and help the economy to develop in line with international laws.

2.3. Interest rate and rate calculation in the Civil Code of 2015

To fix the above problems, the Civil Code of 2015 stipulates: "The rate of interest for a loan shall be as agreed by the parties. The rate of interest for a loan agreed by the parties may not exceed 20% per year, unless otherwise prescribed by law."

Therefore, besides keeping the rule of "agreeing on the interest rate," a new adjustment of the Civil Code of 2015 is the stipulation that the highest interest rate "must not exceed 20% a year of the loan money"; all parties must not agree on a rate which exceeds this limit. This means that the interest rate according to the Civil Code of 2015 is independent of the interest rate set by the State Bank, unlike before. At the same time, the new code also regulates clearly the punishments for breaking the rate limit: "If the agreed-upon interest rate exceeds the maximum interest rate prescribed in this Clause, the agreed-upon interest rate shall become invalid" (Clause 1, Article 468). It is apparent that the highest interest rate according to the provisions of the Civil Code of 2015 is very clear and easy to understand, so it will be very convenient for the contractors to calculate the suitable interest rate. This will also encourage courts to enforce laws consistently in judging cases involving loan contracts, especially those with rate disputes, with agreed-upon rates exceeding the limit or with unclear rates.

In addition, the Civil Code of 2015 also regulates that the exclusion rules and the application of the highest interest rate are only "unless otherwise prescribed by law." We completely agree with the idea that "exceptions are regulated only by laws, not by regulations of bylaw documents, and these laws may include the Law on Credit Institutions or other acts. The interest rate ceiling may be higher or lower than the rate of 20% a year mentioned above" (Đỗ, 2016, p. 438) because the wording of the legal documents in the Civil Code of 2015 that was used to exclude applicable cases of the

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and the Law Amending and Supplementing a Number of Articles of the Law on Credit Institutions of 2004. Clause 2 of Article 91 states "Credit institutions and their clients may agree on interest rates and credit extension charges to be applied to their banking operations according to law." This provision took effect on January 01, 2011, and was not amended or supplemented until now. How to understand or apply interest rates in credit contracts was unified before January 01, 2017. Rates must not exceed 150% of the highest interest rate announced by the State Bank. That means arguments only started when the Civil Code came into force.

highest interest rate in loan contracts is other "laws," not "regulations of state authorities."[2]

3. INTEREST RATE IN CREDIT CONTRACTS

A credit contract is a type of loan contract in which the lending parties must be credit unions and meet all the conditions specified in the Law on Credit Institutions. The highest interest rate according to Clause 1, Article 468 of the Civil Code of 2015 must be applied only to loan contracts in which the lending parties are not credit unions, but this does not provide enough foundation to state whether this applies to loan contracts in which the lending parties are credit unions or not.

Clause 2, Article 91 of the Law on Credit Institutions of 2010, as amended in 2017, states that "credit unions and customers have the right to negotiate interest and credit extension fees in banking operations of credit unions according to the regulations of the law." This article obviously does not grant credit unions absolute free rights in negotiating interest; they have to follow "the regulations of the law," but which documents "the regulations of the law" means here is not clearly stated by the Law on Credit Institutions, thus leading to legal disputes about the highest interest rate in credit contracts: they "*must not exceed 20% a year*" or they need "*not apply the regulations on the interest rate limit, even the agreed-upon interest rate exceeding 20% a year*." By studying the law system related to interest in credit contracts as well as surveying the practice of judging disputes in credit contracts by the Court, we notice that there are many opposing points of view about the highest interest rate in credit contracts, and these viewpoints appeared more often after the Council of Justices of the Supreme People's Court passed Resolution No. 01/2019/NQ-HĐTP on January 11, 2019, which provides guidance on applications of legal regulations on interest, interest rates, and violation fines (which will take effect from March 15, 2019). Therefore, in this paper, we divide the interest rate in credit contracts into two periods, as discussed below.

3.1. Before January 11, 2019

Apart from the Civil Code of 2015 (Clause 1, Article 468), the Law on Credit Institutions of 2010 was amended in 2017 (Clause 2, Article 91) such that the interest rate in credit contracts is also regulated in Circular No. 39/2016/TT-NHNN on December 30,

[2] According to Article 2 of the Law on Promulgation of Legislative Documents of 2015, "Legislative documents are documents that contain legal regulations and the promulgation of which complies with regulations of law on authority, manner, and procedures provided for in this Law," but Article 5 of this law, the system of legislative documents arranged in order of legal value includes the Constitution, Codes and Laws, Resolutions of the National Assembly; Ordinances and Resolutions of the Standing Committee of the National Assembly; Joint Resolutions between the Standing Committee of the National Assembly and the Management Board of the Central Committee of the Vietnamese Fatherland Front; Orders and Decisions of the President; Decrees of the Government; Joint Resolutions between the Government and the Management Board of the Central Committee of the Vietnamese Fatherland Front; Decision of the Prime Minister; and Resolutions of the Judge Council of the People's Supreme Court. All of these are legislative documents, but laws only have Codes and Laws, therefore they cannot unify "laws" and "regulations of state authorities."

2016, by the State Bank of Vietnam, which regulates loan operations of credit unions and foreign bank branches for customers. Official Dispatch No. 1576/NHNN-CSTT on March 14, 2017, by the State Bank of Vietnam concerns answering questions related to regulations in Circular No. 39/2016/TT-NHNN, as follows:

- Clause 1, Article 13 of Circular No. 39/2016/TT-NHNN states: "A credit institution and its customers shall agree on the interest rate depending on capital demands and supplies in the market, loan demands and creditworthiness of customers, unless otherwise stipulated by the State Bank's regulations on the maximum interest rate set forth in Clause 2 of this Article."

- Article 15 (Question 14) Official Dispatch No. 1576/NHNN-CSTT answers:

  Pursuant to regulations in Clause 1, Article 468 of the Civil Code in 2015, the interest rate agreed on for a loan shall not exceed 20% per year, unless otherwise prescribed by law. Pursuant to regulations in Clauses 2 and 3, Article 91 of the Law on Credit Institutions of 2010, a credit institution and its customer may carry out an agreement on the loan interest rate under the effective regulations of the law. In cases where there is an unexpected development in bank operations, the State Bank has the right to stipulate the interest rates applied to business operations of credit institutions. Because the Law on Credit Institutions of 2010 and the Civil Code of 2015 contain different regulations on the loan interest rate, the loan interest rate shall be governed by regulations of the Law on Credit Institutions of 2010. Pursuant to Clause 3, Article 90, and Clause 2, Article 91 of the Law on Credit Institutions of 2010, Circular No. 39 has stipulated detailed regulations on the loan interest rate. Accordingly, the loan interest rate shall be agreed upon by the credit institution and its customers depending on capital demands and supplies in the market, loan demands and creditworthiness of customers, except for the cases where a customer applies for a loan to meet certain demands for borrowed funds and such customer meets all of eligibility requirements for a loan and is rated transparent and healthy in its financial status by the credit institution. In such cases, the loan interest rate shall be agreed upon by the credit institution and the customer provided that it must not exceed the maximum interest rate decided by the State Bank's governor for that period of time.

Though all are based on the legal basis mentioned, when it comes to whether the highest interest rate in credit contracts is limited by the regulation "must not exceed 20% a year" of the Civil Code of 2015, there are two opposing points of view:

- *The first*: "The interest rate in credit contracts is negotiated by all parties, though it must not exceed 20% of the loan per year" (Hương, 2017). This means that, although the Law on Credit Institutions does not have specific regulations to control interest rates as does the Civil Code, there are some

restraints on negotiating rights on interest rates in the banking operations of credit unions according to the law. Therefore, according to this opinion, "according to the law" in Clause 2, Article 91 of the Law on Credit Institutions of 2010, as amended in 2017, means including regulations in the Vietnamese legal system that are suitable for the effect of the Promulgating Laws of legal documents, including the Civil Code.

- *The second*: "Many institutes and experts believe that setting interest rates for loans as negotiated based only on the regulations in Clause 2, Article 91 of the Law on Credit Institutions is not enough. This means that interest rates for loans as negotiated must be regulated in other legal documents, such as references in Clause 2, Article 91 of the Law on Credit Institutions of 2010. Nowadays, all legal documents in the forms of codes and acts (except the Law on Credit Institutions) do not regulate the mechanism for the loan interest rate negotiated between credit unions and customers. All instructional documents from the State Bank of Vietnam (law documents) stipulate that credit unions and customers have the right to negotiate the loan interest rate" (Nguyễn, 2018).[3] We believe that the second opinion is not convincing because: *firstly*, the Civil Code of 2015 only regulates the exceptions to not applying the rate of 20% a year "unless otherwise prescribed by law," i.e., no regulations of exceptions for credit contracts; *secondly*, Clause 2, Article 91 of the Law on Credit Institutions forbids all parties to freely negotiate the absolute interest rate, which must be "according to the law"; *thirdly*, this second opinion also states that "all legal documents in the forms of codes and acts (except the Law on Credit Institutions) do not regulate the mechanism for loan interest rates as negotiated between credit unions and customers. All instructional documents from the State Bank of Vietnam (law documents) stipulate that credit unions and customers have the right to negotiate the loan interest rate," while according to Article 468 of the Civil Code of 2015, exceptions to the interest rate must be "unless otherwise prescribed by law."

"In reality, in recent years, loan interest rates of banks have generally not been over 20% a year. However, loan interest rates of credit cards commonly range from 20 to 35% a year. In particular, in the case of consumer loan interest rates of popular financial companies, the rates are from 20 to 40% a year, even up to 50 to 70%" (Trương, 2016). Therefore, by investigating the judgments during this time, we note that most courts

[3] The article *Vấn đề lãi suất và phạt vi phạm trong hợp đồng cho vay – Thực trạng và kiến nghị* was finished by Nguyễn Văn Phương in May 2018, before the Council of Justices of the Supreme People's Court passed Resolution No. 01/2019/NQ-HĐTP on January 11, 2019, that provides guidance on the application of certain regulations on interest, interest rates, and penalties.

accept interest rates according to requests from credit unions because these rates usually do not exceed 20% a year.

For example: Dispute of the credit contract number 902060000002378000 between international single shareholder limited financial company V and Ms. Ngo Thi Ut B (People's Court of Cho Gao, Tien Giang, 2018): on March 15, 2017, Ms. B borrowed 20,000,000 VND at an interest rate of 3.8% a month for personal purchases and unsecured loans without a mortgage. Ms. B was responsible for paying the amount of 30,988,207 VND including principle and interest within 24 months, in which she had to pay 1,285,015 VND a month for the first 23 months and 1,432,862 VND for the final month, with the first payment period beginning April 12, 2017. From April 19, 2017, to August 1, 2017, Ms. B paid the company 5,153,157 VND. From August 1, 2017, onwards, Ms. B did not pay any more money even though the company had reminded her many times. At present, Ms. B still owes the company a total of 21,785,083 VND (including the original debt of 17,772,371 VND, the interest of 2,512,712 VND, and an accelerated indebtedness fee of 1,500,000 VND). Therefore, the company initiated a lawsuit to request Ms. B to pay the above amount of money.

According to the Court, this contract is legal, voluntary, and properly executed; therefore, the Court applied Articles 91 and 95 of the Law on Credit Institutions of 2010 and Articles 463 and 466 of the Civil Code of 2015 to "accept the lawsuit initiation of the international single shareholder limited financial company V, and to force Ms. Ngô Thị Út B to be responsible for paying the international single shareholder limited financial company V a total of 21,785,083 VND." In this case, the agreed-upon interest rate is 3.8% a month (approximately 45.6% a year), and the Court accepted all.[4]

It is obvious that both the opposing points of view above relied on Clause 1, Article 468 of the Civil Code of 2015 and Clause 2, Article 91 of the Law on Credit Institutions of 2010, as amended in 2017. This proves that the confusion over regulations of the law leads to misunderstandings and, consequently, to inconsistent application. This reality poses a very important mission for relevant competent state authorities to issue appropriate documents to resolve these problems as well as to ensure consistent application of the law. However, these documents must meet the requirements below:

- *Firstly*, they are consistent with the content of the interest rate regulations in Clause 1, Article 468 of the Civil Code of 2015. According to it, only the National Assembly or the Standing Committee of the National Assembly of Vietnam can determine a different interest rate over 20% a year.

- *Secondly*, they ensure that the purpose of the regulations on the highest interest rate is not only to prevent the lending parties "exploiting" the

[4] Until September 26, 2018, among the references we researched, this case is the only one we investigated (which proves the "rarity") when the Court accepted an interest rate over 20% a year. Therefore, we know that the comments on the practice during this time are mostly not convincing. However, we are adamant that our comments are reliable.

borrowing parties via the interest rate but also to provide a basis for identifying agreements violating the law about interest rates and for considering similar legal responsibilities.[5] In other words, the regulation of "not over 20% a year" is considered a prohibition of the law.

- *Thirdly*, they ensure that one of the basic rules of a civil transaction is "committed and in agreement not to violate the prohibition of the law." In the connection between the Civil Code (as the general rule) and the Law on Credit Institutions (as the other relevant law to civil relations in specific fields, also called Specialized Law), this rule must be followed: any relevant law may not be contrary to the basic principle of civil law. Instead, the regulations of the Civil Code shall apply (Clause 2, Article 3 and Clauses 2 and 3, Article 4 of the Civil Code of 2015).

- *Fourthly*, they ensure the promulgation jurisdictions of instructing regulations for credit banking operations. The State Bank of Vietnam instructs on banking operations and other business operations of credit unions. The Government regulates clearly and instructs the execution of Articles and Clauses provided in the Codes and instructs other important contents of the Codes to meet the requirements of national management (Clause 3, Article 90 and Article 163 of the Law on Credit Institutions).

3.2. After January 11, 2019

Due to the reality of the two opposing viewpoints on interest rates in credit contracts, on January 1, 2019, the Council of Justices of the Supreme People's Court passed Resolution No. 01/2019/NQ-HĐTP instructing the implementation of legal regulations on interest, interest rates, and violation fines in which Article 7 Resolution No. 01/2019/NQ-HĐTP stipulates the legal applications of interest and interest rates in credit contracts as below:

- 1. The interest and interest rates in credit agreements shall be agreed upon by the parties in accordance with the Law on Credit Institutions and legislative documents providing guidelines for the implementation of the Law on Credit Institutions applicable on the date of concluding the credit agreement and the interest calculation date.

- 2. The Court shall apply the Law on Credit Institutions and legislative documents by providing guidelines for implementation of the Law on Credit Institutions to the settlement of disputes over credit agreements, and shall not

[5] Clause 1, Article 468 of the Civil Code of 2015 stipulates "If the agreed-upon interest exceeds the maximum interest prescribed in this Clause, the agreed-upon interest shall become invalid." Clause 1, Article 201 of the Criminal Code of 2015, Amended and Supplemented in 2017 regulates usury in civil transactions.

apply regulations on interest rate limits laid down in the 2005 Civil Code and the 2015 Civil Code to the calculation of interest and interest rates.

By researching the practice of judging disputes of credit contracts dealt with by the courts from March 15, 2019, (the day Resolution No. 01/2019/NQ-HĐTP took effect) with the contracts established from January 1, 2017, most courts did not apply the regulations on the interest rate limit, even for agreed-upon rates of over 20% a year. This is illustrated in some of the following cases:

Case 01: Dispute of credit contract 48080000000620000 between Mr. Nguyen Van H and Company J (People's Court of Bac Lieu, Bac Lieu, 2019). On March 23, 2017, both parties signed a loan contract for an automobile purchase in the form of a mortgage paid by monthly instalments. According to the agreement in the contract, Mr. Nguyen Van H was responsible for paying off the principle and interest within 24 months, in which he had to pay 2,271,249 VND on the 22nd of every month until the end of the contract, with the first payment date on April 22, 2017. From April 22, 2017, to April 2, 2018, Mr. H paid Company J 25,026,389 VND (including the original debt of 14,907,478 VND, the interest of 10,059,186 VND, and a fine of 59,725 VND). After that, Mr. H violated his payment duty, and although Company J had reminded him many times, Mr. H did not fulfillhis payment duty, so Company J initiated a lawsuit to request Mr. H to pay 25,092,478 VND with interest according to the loan contract as signed until the full payment was made.

The Court commented that "about the agreement between all parties which was 2.64% a month, according to Clause 2, Article 91 of the Law on Credit Institutions which regulates that '*credit unions and customers have the right to negotiate the interest rate and the cost of credit in banking operations of credit unions according to the law*,'" so the Court accepted all requests from Company J.

Case 02: Dispute of the credit contract between Mr. Nguyen Van Gi and TMCP Vietnam bank T (People's Court of Dong Hung, Thai Binh, 2019). On January 16, 2017, Mr. Nguyen Van Gi borrowed from the bank 105,000,000 VND according to the contract signed on January 11, 2017, with no collateral security. The loan duration was 48 months (interest paid monthly + principle paid once monthly). The original rate was 30% a year, adjusted every 3 months according to Vbank's regulations. The interest rate adjustment was 22% a year (adjusted rate of 22% a year + capital sale interest rate of Vbank for each time period). The overdue interest rate was calculated as 150% of the initial interest rate. Mr. Gi paid a total of 6 months, but from August 16, 2017, Mr. Gi violated the contract, not paying the principle and interest as agreed, so the bank initiated a lawsuit to request Mr. Gi to pay Vbank a total of 208,195,428 VND (calculated until October 19, 2019) including the principle of 97,548,365 VND, the overdue interest of 98,992,465 VND, and a fine of 11,654,598 VND.

When dealing with this case, the Court commented: "As for the loan interest rate, this is a loan contract between a credit union and an individual, so the interest rate is according to the credit contract signed by the two parties following the instructions in

Articles 7, 8, and 13, Resolution No. 01/2019/NQ-HĐTP on January 11, 2019, by the Council of Justices of the Supreme People's Court. Therefore, Mr. Gi should pay according to Vbank's request the interest debt calculated from the time Vbank switched to overdue debt, calculated by the overdue interest rate until the first-instance trial on October 29, 2019, with the total amount being 208,195,428 VND, which includes the principle of 97,548,365 VND, the overdue interest of 98,992,465 VND, and a fine of 11,654,598 VND. The fine for late interest payment is calculated by multiplying the number of overdue days with cumulative interest with 10% and dividing by 360, all of which is consistent with the regulations in Point b, Clause 4, Article 13, Circular No. 39/2016/TT-NHNN of December 30, 2016." Therefore, the Court accepted the lawsuit initiated by TMCP Vietnam bank T, forcing Mr. Nguyễn Văn Gi to pay TMCP Vietnam bank T the amount of money calculated until October 29, 2019.

According to the instructions in Article 7, Resolution No. 01/2019/NQ-HĐTP, all disputes of credit contracts dealt with at the Court where the contracts were established from January 1, 2017, are not implemented with regulations of the interest rate limit, even the agreed-upon interest rate of over 20% a year. Along with the above judgments, we believe that the instruction "not implemented with the regulations of the interest rate limit" of the Civil Code in credit contracts as well as the results from the Court based on Clause 2, Article 91 of the Law on Credit Institutions to accept all requests for rates calculated by credit unions (even in cases where the rates were over 20% a year) lack convincing legal basis because of the following reasons:

- *Firstly*, Clause 1, Article 468 of the Civil Code of 2015 only regulates exceptions to not applying the interest rate of 20% a year "unless otherwise prescribed by law." This means that the right to freely negotiate interest rates in credit contracts is not limited only if this right is regulated in "other laws" (also called other laws that involve adjusting civil relations in specific fields) or documents that have higher validity. However, Circular No. 39/2016/TT-NHNN, Official Dispatch No. 1576/NHNN-CSTT, and Resolution No. 01/2019/NQ-HĐTP are only bylaw documents in the legal document system and cannot have higher legal effect, so the regulations and instructions in these documents do not meet the requirements to be implemented with agreed-upon interest rates over 20% a year in credit contracts.

- *Secondly*, in our opinion, Article 7, Resolution No. 01/2019/NQ-HĐTP instructing the implementation of interest and interest rates in credit contracts lacks legal basis, violating Clause 1, Article 468 of the Civil Code of 2015, and thus does not serve as instructions because the Council of Justices of the Supreme People's Court does not have the authority to instruct on bank credit operations. According to the Law on Credit Institutions, this authority belongs to the Government and the State Bank. Thus, the instructions in Article 7, Resolution No. 01/2019/NQ-HĐTP do not have validity and effect.

- *Thirdly*, Clause 2, Article 91 of the Law on Credit Institutions of 2010, as amended in 2017, states that: "Credit unions and customers have the right to

negotiate interest rates and the cost of credit in banking operations of credit unions according to the law." Apart from this ruling announcement, the Law on Credit Institutions does not have any other articles more clearly regulating interest rates in credit contracts. Therefore, we believe that the highest interest rate in credit contracts must not exceed 20% a year.

- *Fourthly*, the Civil Code of 2015 is said to be "the general law adjusting civil relations" (Article 4) and the Law on Credit Institutions is considered one of the other relevant laws to adjust civil relations in specific fields. Cases involving problems the Law on Credit Institutions does not regulate, or regulates against the five basic rules of civil law, are implemented by the regulations from the Civil Code.

- *Fifthly*, when establishing and executing credit contracts, contractors (including credit unions) have to be granted the right to "freely and voluntarily negotiate and agree. All agreements and negotiations not violating prohibitions of the law and not going against social morality have effect for all parties and have to be respected by others" (Clause 2, Article 3, Civil Code of 2015). According to the rule of freely negotiating when establishing and executing loan contracts with credit unions, all parties have the right to negotiate the content of the loan contracts, even the interest rate, but must not "violate the prohibitions of the law or go against social morality." The interest rate "must not exceed 20% a year of the loan amount" is like a legal prohibition, so credit contracts must not violate the prohibition.

- *Sixthly*, stating that credit contracts do not apply the regulations of the interest rate limit of the Civil Code of 2015 indirectly creates unfairness between economic sectors. Furthermore, it may nullify the positive meaning of interest rate regulations while usury in civil transactions is violating the criminal laws.[6]

[6] In reality nowadays, many financial companies pose as credit unions to provide loans with interest rates of 40% or higher on credit card transactions, consumer loan assistance, etc., but are not constrained with the interest rate limit of "not exceeding 20% per year" when there are disputes regarding contracts for opening credit cards or consumer loan assistance because one of the contractors is a credit union. Meanwhile, Clause 1, Article 201 of the Criminal Code of 2015, Amended and Supplemented in 2017, defines usury in civil transactions: "Any person who offers loans at an interest rate that is five times higher than the maximum interest rate specified in the Civil Code and earns an illegal profit of from VNĐ 30,000,000 to under VNĐ 100,000,000 or recommits this offence, despite the fact that he/she has incurred an administrative penalty, or has an unspent conviction for the same offence, shall be liable to a fine of from VNĐ 50,000,000 to VNĐ 200,000,000 or face a penalty of up to 3 years community sentence."

4. SUGGESTIONS

Based on research into the regulations on interest rates in loan contracts in the Vietnamese legal system over time, and the analysis of some problems and limits on interest rates in credit contracts, we believe that to deal effectively and thoroughly with the problems discussed above and to ensure consistent application of the law as well as to bring justice and equality between economic sectors, there should be some universal and joint solutions for cooperating between state agencies with the relevant authority, as below:

- *Firstly*, Clause 2, Article 91 of the Law on Credit Institutions of 2010, as amended in 2017, should be modified as "credit unions and customers have the right to negotiate the interest, interest rate, and the cost of credit in banking operations of credit unions according to the Civil Code, except for agreements in contracts for opening credit cards."[7]

- *Secondly*, the Council of Justices of the Supreme People's Court should issue a Resolution to abolish or amend Article 7, Resolution No. 01/2019/NQ-HĐTP to be consistent with its purposes and missions.

- *Thirdly*, agencies and individuals with authority in banking financial operations should soon issue documents to replace and amend inappropriate instructions about interest rates in credit contracts in Circular No. 39/2016/TT-NHNN and Official Dispatch No. 1576/NHNN-CSTT.

- *Fourthly*, as we have analyzed, the content of Article 7, Resolution No. 01/2019/NQ-HĐTP is not consistent with the regulations on interest rates according to Article 468 of the Civil Code of 2015, but while the Council of Justices of the Supreme People's Court has not issued a Resolution to abolish or amend Article 7, Resolution No. 01/2019/NQ-HĐTP, People's Courts at all levels, when dealing with disputes of credit contracts, should practice and utilize effectively the right to petition and request for state agencies with authority to consider, amend, add, or abolish the content of amended Article 7, Resolution No. 01/2019/NQ-HĐTP because it seems to go against the Civil Code of 2015 (according to regulations in Articles 48, 215, and 221 of the Civil Procedure Code of 2015).

[7] We believe that the interest rate in contracts for opening a credit card is a financial tool with the ability to control and limit unnecessary consumption of the credit cardholder, which thereby helps develop Vietnamese per capita income. Therefore, it is totally possible to use interest rates as a tool to control and limit consumption from credit card services and consumer loan assistance.

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