UDK 336.64:658.14./.17(497.6 RS)
DOI: 10.7251/FIN2101047A

PREGLEDNI RAD

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# Zajam kao izvor finansiranja privrednog društva u poslovnoj praksi Republike Srpske

# A loan as a source for funding a company in business practice of the Republic of Srpska

## *Rezime*

*Na razvoj privrednog društva i rast njegovog poslovanja utiču mnogi faktori, među kojima je i pristup finansijama. Cilj istraživanja je da se ispitaju uslovi za zaključivanje ugovora o zajmu u poslovima sa inostranstvom, kako pravnog posla zaduženja domaćeg privrednog društva, tako i odobrenja u kojem je domaće privredno društvo zajmodavac. U istraživanju su korišćene sljedeće naučnoistraživačke metode: deduktivna metoda, metoda analize i metoda sinteze.*

*Rezultati analize upućuju na to da su za zaključivanje ugovora o zajmu u poslovima sa inostranstvom značajni mnogi propisi, kao što su zakoni koji uređuju obligacione odnose, devizno poslovanje, privredna društva, zateznu kamatu i poreze. U Republici Srpskoj je primijenjen pristup faznog procesa liberalizacije kretanja kapitala, te je rezidentu utvrđena zabrana odobravanja zajma nerezidentu sa rokom dospijeća kraćim od godinu dana i obaveza pribavljanja instrumenta obezbjeđenja naplate. Prije donošenja odluke o uzimanju ili davanju zajma, privredno društvo bi trebalo da izvrši analizu svog finansijskog položaja i moći, te kako bi takav pravni posao uticao na njegovu finansijsku stabilnost.*

***Ključne riječi:*** *privredno društvo, finansiranje, zajam.*

## *Abstract*

*The development of a company and the growth of its business are influenced by many factors, including access to finance. The aim of the research is to examine the conditions for concluding a loan contract in operations with abroad, both the legal transactions in which a domestic company takes a loan, and in which a domestic company grants a loan as a lender. The following scientific research methods were used in the research: deductive method, analysis method and synthesis method.*

*The results of the analysis indicate that many regulations are important for concluding a loan contract in operations with abroad, such as laws governing contract and torts, foreign exchange operations, companies, default interest and taxes. In the Republic of Srpska, the approach of a phased process of liberalization of capital movements was applied, and it is regulated that resident is prohibited to grant a loan to a non-resident with a maturity of less than one year and is obliged to obtain a surety instruments safeguarding security of the credit transaction. Before making a decision on taking or granting a loan, a company should perform an analysis of its financial position and power, and how that legal transaction would affect its financial stability.*

***Keywords****: company, funding, loan.*



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## UVOD

Postoje različiti izvori finansiranja privrednog društva. Najčešće se radi o sopstvenim izvorima sredstava i kreditnom zaduženju kod banaka, dok se od ostalih izvora finansiranja pojavljuju krediti mikrokreditnih organizacija, zajmovi fizičkih i pravnih lica, emisija hartija od vrijednosti na tržištu kapitala i drugo. Iznalaženje novih izvora finansiranja privrednih društava, posebno malih i srednjih preduzeća, koja čine okosnicu privrede Republike Srpske, predstavlja izazov u otežanim uslovima privređivanja prouzrokovanim posljedicama pandemije virusnog oboljenja COVID-19. Malim i srednjim preuzećima kojima su potrebna sredstva za finansiranje, posebno onima koji imaju relativno rizičan profil, kao što su inovativna preduzeća i start-up preduzeća, vjerovatno će biti teže da dođu do spoljnih izvora finansiranja. Potencijalni problemi mogu biti nedostatak sredstava kao podrška likvidnosti, u uslovima u kojima dolazi do smetnji u lancu snabdijevanja, i situacije u kojima mnoga preduzeća imaju niže prihode i neočekivane troškove.

U uslovima ograničnih izvora finansiranja, preduzeća se mogu okrenuti i izvorima finansiranja iz inostranstva. Za zaključivanje ugovora o zajmu, te obavljanje transakcija u vezi sa ovim ugovorom u poslovima sa inostranstvom, potrebno je voditi računa o propisima koji uređuju devizno poslovanje i drugim propisima. Donošenje odluke o uzimanju zajma iz inostranstva ili davanju zajma drugom pravnom licu u inostranstvu potrebno je sagledati kako sa ekonomske, tako i sa pravne strane, odnosno potrebno je sagledati sve uslove pod kojima se ovi poslovi mogu zaključiti i realizovati.

## 1. PREGLED LITERATURE

Privredna društva mogu se finansirati iz sopstvenih izvora i iz dugova, koji mogu biti kratkoročni i dugoročni. Sopstveni izvori su sredstva unesena u privredno društvo prilikom njegovog osnivanja, koja su upisana kao kapital. Tokom poslovanja, privredno društvo ostvarenu dobit raspoređuje na zakonske i statutarne rezerve, a dio za koji nije donesena odluka o raspodjeli vlasnicima ostaje privrednom društvu kao zadržana zarada, za potrebe poboljšanja likvidnosti, ulaganja u obrtna sredstva i investicije. Za ocjenjivanje finansijskog položaja i snage privrednog društva značajna je i struktura izvora finansiranja, s aspekta njihove ročnosti. Naime, privredna društva s većim iznosom dugoročnih izvora finansiranja trebalo bi da imaju veću kreditnu sposobnost, a samim tim i veće mogućnosti za pribavljanje sredstava iz kratkoročnih izvora finansiranja, posebno kredita i zajmova. Izvori finansiranja zavise i od faze životnog ciklusa privrednog društva. U kasnijim fazama životnog ciklusa, potrebe za kapitalom prevazilaze interne mogućnosti vlasnika, i on tada mora da razmotri korišćenje eksternih izvora finansiranja kako bi obezbijedio sredstva ze neophodne investicije i razvoj poslovanja (Erić, Beraha, Đuričin i drugi, 2012).

Upotreba duga u finansiranju (finansijski leveridž) ima znatne posljedice kako za vlasnike kapitala tako i za kreditore (Mikerević, 2005). Struktura izvora finansiranja privrednog društva više pomjerena ka sopstvenom kapitalu ukazuje na to da vlasnici privrednog društva imaju kontrolu nad privrednim društvom, što daje i sigurnost zajmodavcima da će njihovo potencijalno potraživanje biti izmireno u roku dospijeća. Dobit na sopstveni kapital preduzeća raste ukoliko je stopa neto prinosa na ukupan kapital veća od vladajuće kamatne stope na korišćene pozajmljene izvore (Mikerević, 2005).

Analizu izvora finansiranja putem zaduživanja, posebno kada su u pitanju zajmovi, potrebno je zasnivati na sagledavanju odnosa duga prema ukupnoj imovini, te odnosa dugoročnog duga prema ukupnoj imovini i sopstvenim izvorima (kapitalu). Privredna društva koja imaju veliki odnos duga prema ukupnoj imovini u uslovima smanjenja obima prodaje imaju tendenciju da budu u finansijskim poteškoćama, tj. da nemaju dovoljno sredstava da plate kamatu i/ili izmire glavnicu u roku dospijeća, te da nemaju mogućnost za dodatno zaduživanje. U takvim uslovima često se kao izvor finansiranja pojavljuje zajam, kao pravni posao u kojem je zajmodavac najčešće lice povezano sa zajmoprimcem putem vlasničke strukture, učešća u organu upravljanja ili nekim oblikom dugoročne poslovne saradnje.

Takođe, trebalo bi imati u vidu da su kratkoročni i dugoročni zajmovi, kao izvori finansiranja, različitog kvaliteta zbog njihove ročnosti, cijene, načina pribavljanja i uslova obezbjeđenja plaćanja. Po pravilu, kratkoročni zajmovi su zajmovi sa rokom dospijeća do godinu dana i uglavnom se koriste radi prevazilaženja određene privremene neusklađenosti u gotovinskim tokovima. S druge strane, dugoročni zajmovi koriste se za investicije, s ciljem razvoja poslovanja privrednog društva, te je cijena njihovog korišćenja često veća od kratkoročnih zajmova jer nose dodatan rizik zbog dužeg roka dospijeća. Visoki troškovi finansiranja predstavljaju jedan od najvećih problema sa kojim se tokom svog životnog vijeka suočavaju MSP u Republici Srpskoj (Spremo, 2017).

## 2. REZULTATI ISTRAŽIVANJA I DISKUSIJA

### 2.1. Zajam kao pravni posao

Ugovorom o zajmu zajmodavac se obavezuje da preda u svojinu zajmoprimcu određenu količinu novca ili kojih drugih zamjenljivih stvari, a zajmoprimac se obavezuje da mu vrati poslije izvjesnog vremena istu količinu novca, odnosno istu količinu stvari iste vrste i istog kvaliteta (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Strane u obligacionom odnosima, koje mogu biti pravna i fizička lica, imaju autonomiju volje, tj. slobodne su da, u granicama prinudnih propisa, javnog poretka i dobrih običaja, urede odnose po svojoj volji. U zasnivanju bilo kojeg dvostranog ugovora, a time i ugovora o zajmu, polazi se od jednake vrijednosti uzajamnih davanja. Ugovor je zaključen onog časa kada ponudilac primi izjavu ponuđenog da prihvata ponudu, pri čemu je mjesto zaključenja ugovora u kome je ponudilac imao svoje sjedište, odnosno prebivalište u trenutku kada je učinio ponudu (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Zajmoprimac je dužan da zajmodavcu vrati u ugovorenom roku istu količinu stvari, iste vrste i kvaliteta. Ako rok za vraćanje zajma nije ugovoren niti se može odrediti iz okolnosti zajma, zajmoprimac je obavezan da vrati zajam po isteku primjerenog roka, a koji ne može biti kraći od dva mjeseca od dana kada je zajmodavac tražio da mu se zajam vrati.

Za sve vrste ugovora, osim ugovora u privredi, važi pravilo da se zajmoprimac može obavezati da uz glavnicu duguje i kamatu, dok se u ugovorima u privredi smatra da ju duguje i ako nije ugovorena. Ugovori u privredi, u smislu Zakona o obligacionim odnosima, su ugovori koje preduzeća i druga pravna lica koja obavljaju privrednu djelatnost, kao i imaoci radnji i drugi pojedinci koji u vidu registrovanog zanimanja obavljaju neku privrednu djelatnost, zaključuju među sobom u obavljanju djelatnosti koje sačinjavaju predmete njihovog poslovanja ili su u vezi sa tim djelatnostima (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004.). Navedene odredbe ukazuju na to da lica koja obavljaju privrednu djelatnost, u slučaju odobravanja zajma, bi trebalo da ugovore kamatnu stopu, s tim da se ona podrazumijeva i u slučaju da nije ugovorena, dok fizičko lice koje daje zajam, može, ali i ne mora da ugovori kamatu. Ukoliko kod fizičkih ili pravnih lica koja ne obavljaju privrednu djelatnost kamata nije ugovorena, ona se ne podrazumijeva. Ako se kamata ugovora, onda bi ona trebalo da bude ekvivalentna „razumnoj“ cijeni korišćenja tuđeg novca, kako

## INTRODUCTION

There are various sources of funding a company. Most often, these are own sources of funds and credit indebtedness with banks, while other sources of financing include loans from microcredit organizations, loans from individuals and legal entities, issues of securities on the capital market and others. Finding new source of funding for companies, especially small and medium enterprises, which are the backbone of the economy of the Republic of Srpska, is challenging in the difficult economic conditions caused by the consequences of the pandemic outbreak of COVID-19 disease. Small and medium enterprises that need funding, especially those with a relatively risky profile such as innovative companies and start-ups, are likely to find it more difficult to access external sources of funding. Potential problems may be a lack of funds to support liquidity, in conditions where supply chain disruptions occur, and in situations where many firms have lower revenues and unexpected costs.

In conditions of limited sources of funding, companies can also turn to sources of funding from abroad. In order to conclude a loan contract, and to perform transactions related to this contract with abroad, it is necessary to take into account the regulations governing foreign exchange operations and other regulations. Making a decision on taking a loan from abroad or giving a loan to another legal person abroad should be considered from both the economic and legal side, i.e. it is necessary to consider all the conditions under which these transactions can be concluded and conducted.

## 1. A LITERATURE REVIEW

Companies can be financed from their own sources and from debts, which can be short-term or long-term. Own sources are funds brought into a company in the process of its establishment, which are registered as a capital. During its operating period, the company distributes the gained profit to legal and statutory reserves, and the part for which decision on not distributing it to the owners has been made remains with the company as retained earnings, for the needs of improving liquidity, investments in working capital and investments. The structure of financing sources is also important for assessing the financial position and strength of a company, from the aspect of their maturity. Namely, companies with a larger amount of long-term sources of financing should have greater creditworthiness, and thus greater opportunities for obtaining funds from short-term sources of funding, especially bank loans and business loans. Sources of financing also depend on the phase of the life cycle of the company. In the later stages of the life cycle, the need for capital exceeds the internal capabilities of the owner, who must then consider using external sources of financing to provide funds for the necessary investments and business development (Erić, Beraha, Đuričin and others, 2012).

The use of debt in financing (financial leverage) has significant consequences for both capital owners and creditors (Mikerević, 2005). The structure of the company's financing sources, more shifted towards equity, indicates that the owners of the company have control over the company, which gives assurance to lenders that their potential receivables will be settled within the due date. The company's return on equity increases if the rate of return on total capital is higher than the prevailing interest rate on borrowed funds used (Mikerević, 2005).

The analysis of sources of funding through borrowing, especially when it comes to loans, should be based on the relationship of debt to total assets, and the ratio of long-term debt to total assets and own sources (capital). Companies that have a large ratio of debts to total assets in the conditions of reduced sales volume tend to be in financial difficulties, i.e. that they do not have sufficient funds to pay interest and / or settle the principal within the due date, and that they do not have the possibility for additional borrowing. In such conditions, a loan often appears as a source of funding, as a legal transaction in which a lender is most often connected to a borrower through an ownership structure, participation in a management body or some form of a long-term business cooperation.

Also, it should be borne in mind that short-term and long-term loans, as sources of funding, have different quality due to their maturity, price, method of obtaining and conditions of securing payment. As a rule, short-term loans are loans with a maturity of up to one year and are mainly used to overcome a certain temporary mismatch in cash flows. On the other hand, long-term loans are used for investments, with the aim of developing the company's business, and the price of using it is often higher than of short-term loans because they carry additional risk due to longer maturities. High funding costs are one of the biggest problems faced by SMEs in the Republic of Srpska during their lifetime (Spremo, 2017).

## 2. RESEARCH RESULTS AND DISCUSSION

### 2.1. Loan as a legal transaction

By a loan contract, the lender shall assume the obligation to transfer ownership to the borrower of a specific amount of money or other interchangeable objects, while the borrower shall assume the obligation to restitute after a certain time to him the same amount of money, or same quantity of objects of the same kind and quality (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). The parties in the obligatory relations, which can be legal and natural persons, have autonomy of choice, i.e. they are free, limited by compulsory legislation, public policy and good faith, to arrange their relations as they please. In establishing any kind of a bilateral contract, and thus a loan contract, parties begin with the principle of equality of mutual consideration. A contract enteres into at the moment the offerer acknowledges the statement of the offeree accepting the offer, where the place at which contract is concluded is considered to be the place at which the offerer had his seat of business, that is his residence, at the moment of making the offer (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). A borrower is obliged to restitute to the lender, within a stipulated time limit, the same quantity of objects of the same kind and quality. If the time limit for restituting the loan is not determined or it is impossible to determine it according to the circumstances of the loan, the borrower is bound to restitute the loan after the expiration of the reasonable time limit, not being shorter than two months, counting from the lender's demand that the loan is restituted to him.

For all types of contracts, except contracts in the economy, the rule applies that the borrower may be obliged to owe interest in addition to the principal, while in contracts in the economy it is considered that he owes it even if it is not contracted. Contracts in the economy, in the sense of the Law of Contracts and Torts, are contracts that companies and other legal entities that perform economic activity, as well as shop owners and other individuals who in the form of a registered occupation perform an economic activity, conclude among themselves in performing activities that make up cases of their business or are related to those activities (Law of Contracts and Torts, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). These provisions indicate that persons engaged in economic activity, in the case of granting a loan, should agree on the interest rate, provided that it is implied even in the event that it is not agreed upon, while a natural person who gives a loan may or may not contract interest. If interest is not agreed with natural or legal persons who

s aspekta zajmoprimca, tako i zajmodavca. Utvrđivanje takve cijene zahtijevalo bi ispitivanje visine kamatne stope po kojoj banke odobravaju kredite ili cijene korišćenja drugih izvora duga, te eventualno prosječne kamatne stope koje banke plaćaju na depozite. Prema tome, moglo bi se zaključiti da je dozvoljeno da se kamatna stopa na zajam, koji odobrava privredno društvo, kreće između prosječne kamatne stope koju banke plaćaju na novčane depozite (u zavisnosti od perioda zajma – po viđenju ili oročene) i prosječne kamatne stope koju banke naplaćuju po osnovu datih kredita (što takođe zavisi od perioda zajma). Međutim, ako se zajam nudi uz neuobičajeno visoku kamatu, potrebno je ispitati da li postoje uslovi za primjenu nekog drugog pravnog instituta koji zabranjuje takvo ugovaranje, odnosno da li bi se takav ugovor mogao kvalifikovati kao zelenaški ugovor. U slučaju ugovorene neuobičajene kamate na zajam, koja je viša od one koju banke naplaćuju ili čak viša od zatezne kamate, trebalo bi ispitati zašto je zajmoprimac prihvatio takvu nepovoljnu kamatu. Ako postoji neki od razloga zbog kojih bi se takav ugovor o zajmu mogao kvalifikovati kao zelenaški, onda bi trebalo imati u vidu i sve pravne posljedice koje proizlaze iz takvog ugovora.

Zajmoprimac će u slučaju kašnjenja izmirenja novčane obaveze, pored glavnice i ugovorene kamate, biti dužan i zateznu kamatu po stopi utvrđenoj zakonom. U Republici Srpskoj zakonom je uređeno da se zatezna kamata obračunava na iznos duga do dana isplate po kamatnoj stopi od 0,03% dnevno (Zakon o zateznoj kamati Republike Srpske, 2018). Iznos obračunate zatezne kamate ne može biti veći od glavnog duga. Ako je stopa ugovorene kamate viša od stope zatezne kamate, ona teče i poslije docnje zajmoprimca, kao dužnika. Zajmodavac, kao povjerilac, ima pravo na zateznu kamatu, bez obzira na to da li je pretrpio neku štetu zbog dužnikove docnje. U slučaju nastale štete, koja je veća od zatezne kamate, povjerilac ima pravo da zahtijeva razliku do potpune naknade štete (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Zatezna kamata ne teče na dospjelu, a neisplaćenu ugovorenu ili zateznu kamatu, kao i na druga dospjela povremena novčana davanja, izuzev ako je to zakonom određeno. Na iznos neisplaćene kamate može se zahtijevati zatezna kamata samo od dana kada je sudu podnesen zahtjev za njenu isplatu. Isto tako, na povremena dospjela novčana davanja teče zatezna kamata od dana kad je sudu podnesen zahtjev za njihovu isplatu.

Opšti rok zastarijevanja potraživanja je deset godina, ako zakonom nije određen neki drugi rok. Međutim, potraživanja povremenih davanja koja dospijevaju godišnje ili u kraćim periodima, što uključuje i potraživanje kamata, zastarijevaju tri godine od dospjelosti svakog pojedinog davanja. Isto važi za anuitete kojima se u jednakim unaprijed određenim povremenim iznosima otplaćuju glavnica i kamata, ali ne važi za otplate u obrocima i druga djelimična ispunjenja (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Samo pravo iz kojeg proističu povremena potraživanja zastarijevaju za pet godina, računajući od dospjelosti najstarijeg neispunjenog potraživanja poslije koga dužnik nije vršio davanja. Kada zastari pravo iz kojeg proističu povremena davanja, povjerilac gubi pravo da zahtijeva buduća davanja i povremena davanja koja su dospjela prije ove zastare.

Prilikom odobravanja zajma, organi upravljanja privrednim društvom trebalo bi da vode računa ne samo o novčanim tokovima, likvidnosti i razvojnim ciljevima tog privrednog društva, već i o kreditnom bonitetu privrednog društva kojem se zajam odobrava. Privredno društvo zajam uglavnom odobrava svom zavisnom privrednom društvu ili na drugi način povezanom društvu, putem poslovne saradnje ili vlasničkog odnosa. Kreditni bonitet drugog privrednog društva, u smislu mogućnosti vraćanja odobrenog zajma, trebalo bi procijeniti na osnovu novčanih tokova u proteklom periodu i procjene budućih novčanih tokova, likvidnosti, profitabilnosti i imovinske snage, te drugih faktora značajnih u procjeni finansijske snage dužnika. Radi obezbjeđenja odobrenog zajma, zajmodavac bi trebalo da ugovori instrument obezbjeđenja zajma, koji svojim kvalitetom i vrijednošću može da bude dovoljan za izmirenje obaveza, u slučaju problema u vraćanju zajma.

### 2.2. Instrumenti obezbjeđenja zajma

Postoje različiti instrumenti obezbjeđenja zajma, među kojima su najčešći garancija, jemstvo, mjenica, hipoteka, drugi kolateral i akreditiv. Garancija je instrument obezbjeđenja u kojem banka garant po zahtjevu nalogodavca garantuje da će izvršiti plaćanje po garanciji ako dužnik po poslu iz garancije ne izvrši svoju ugovornu obavezu, u skladu sa uslovima garancije. Radi se o instrumentu obezbjeđenja, što znači da, ako dođe do garantnog slučaja, korisnik garancije upućuje banci pismeni poziv za naplatu iz garancije. Jemstvo je instrument obezbjeđenja kojim se jemac, na osnovu ugovora o jemstvu, obavezuje prema povjeriocu da će ispuniti punovažnu i dospjelu obavezu dužnika, ako to dužnik ne učini (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Obaveza jemca ne može biti veća od obaveze glavnog dužnika, te se svodi na mjeru dužnikove obaveze ako je ugovorena da bude veća. Prema tome, jemac odgovora za ispunjenje cijele obaveze za koju je jemčio, ako njegova obaveza nije ograničena na dio obaveze ili je na drugi način podvrgnuta lakšim uslovima. Takođe, jemac je dužan da naknadi potrebne troškove koje je povjerilac učinio u cilju naplate duga od glavnog dužnika.

Mjenica je razvojem međunarodnog platnog prometa izgubila na značaju kao instrument plaćanja, tako da se danas uglavnom koristi kao instrument obezbjeđenja kredita ili zajma. Radi se o strogo formalnoj hartiji od vrijednosti, čiji su oblik, sadržaj, prenos i način ostvarivanja uređeni zakonom. U Republici Srpskoj mjenica predstavlja sredstvo plaćanja i instrument obezbjeđenja plaćanja koji je uređen posebnim zakonom. Trasirana mjenica predstavlja bezuslovni nalog da se plati određeni iznos novca (Zakon o mjenici, 2001). Obavezni elementi trasirane mjenice jesu: 1) oznaka da je mjenica, napisano u samom slogu isprave na jeziku na kojem je sastavljena; 2) bezuslovni nalog da se plati određeni iznos novca; 3) ime onoga koji treba da plati (trasat); 4) označenje dospjelosti; 5) mjesto gdje bi plaćanje trebalo da se izvrši; 6) ime onoga kome se ili po čijoj naredbi se mora platiti (remitent); 7) označenje dana i mjesta izdavanja mjenice; i 8) potpis onog koji je izdao mjenicu (trasant) (Zakon o mjenici, 2001). Zakonom je utvrđeno pravo imaoca trasirane mjenice, kao i onoga koji je samo drži, da sve do dospjelosti može podnijeti na akceptiranje trasatu u mjestu njegovog prebivališta. U zavisnosti od dospijeća, mjenica se može izdati po viđenju, na određeno vrijeme po viđenju, na određeno vrijeme od dana izdavanja i na određeni dan. Svi mjeničnopravni zahtjevi protiv akceptanta zastarijevaju za tri godine, računajući od dospjelosti (Zakon o mjenici, 2001).

Hipoteka je založno pravo na nepokretnosti koje ovlašćuje hipotekarnog povjerioca da, ako hipotekarni dužnik ne isplati dug u roku dospijeća obaveze, zahtijeva naplatu potraživanja obezbijeđenog hipotekom iz vrijednosti založene nepokretnosti. Zakon o obligacionim odnosima uređuje zamjenu ispunjenja na način da obaveza prestaje ako povjerilac u sporazumu sa dužnikom primi nešto drugo umjesto onoga što mu se duguje (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Dalje, uređeno je da u tom slučaju dužnik odgovara isto kao prodavac za materijalne i pravne nedostatke stvari date umjesto onoga šta je dugovao. Međutim, povjerilac može, umjesto zahtjeva po osnovu odgovornosti dužnika za materijalne ili pravne nedostatke stvari, da zahtijeva od dužnika, ali ne više od jemaca, ispunjenje prvobitnog potraživanja i naknadu štete. Nekretnine privrednog društva koje bi

do not perform economic activity, it is not implied. If interest is contracted, then it should be equivalent to «reasonable». price of using someone else's money, both from the aspect of the borrower and the lender. Determining such a price would require examining the level of interest rates at which banks grant loans or the prices of using other sources of debt, and possibly the average interest rates that banks pay on deposits. Therefore, it could be concluded that the interest rate on a loan granted by a company is allowed to range between the average interest rate that banks pay on cash deposits (depending on the loan period - sight or term) and the average interest rate that banks charge on the basis of loans (also depending on the loan period). However, if the loan is offered at an unusually high interest rate, it is necessary to examine whether there are conditions for the application of another legal institute that prohibits such a contract, or whether such a contract could be qualified as a usury contract. In the case of an agreed unusual interest rate on a loan, which is higher than one charged by the banks or even higher than the default interest, it should be examined why the borrower has accepted such an unfavorable interest rate. If there are any of the reasons why such a loan agreement could be qualified as usury contract, then all the legal consequences arising from such an agreement should also be taken into account.

In case of delay in settling the monetary obligation, the borrower, in addition to the principal and the agreed interest, will be obliged to pay default interest at the rate determined by law. In the Republic of Srpska, the law stipulates that default interest is calculated on the amount of debt until the day of payment at an interest rate of 0.03% per day (Zakon o zateznoj kamati Republike Srpske, 2018). The amount of accrued default interest may not exceed the principal debt. If the agreed interest rate is higher than the default interest rate, it runs even after the borrower's delay as a debtor. The lender, as a creditor, is entitled to default interest, regardless of whether he has sustained loss due to the debtor's delay. In the event of loss, which is higher than the default interest, the creditor is entitled to request the difference up to the full redress (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). Default interest is forbidden to run on unpaid stipulated od default interest due, in addition to interest on other periodical payments falling due, unless otherwise provided by law. Default interest may be requested on the amount of unpaid interest only from the day of filing such request for its payment with the court.

The general time limit for claims to become unenforceable is ten years, unless otherwise provided by law. However, claims for periodical levies becoming due once a year or in specified shorter periods, including interest claims, expire after a three year period by statute of limitations, counting from the date each levy becomes due.The same applies to annuities effected in the form of equal advance installment payments of principal debt and interest, the exception being deferred installment payments and other part payments (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). Only right itself being a ground for periodical claims expires after a five year period, counting from the date of maturity of the oldest non-fulfilled claim, after which the debtor failed to effect the levy. When a right being a ground for periodical claims has expired due to the statute of limitations, the creditor will lose not only his right to claim future periodical levies, but also those becoming due prior to such expiration.

When approving a loan, the management bodies of the company should take into account not only the cash flows, liquidity and development goals of that company, but also the creditworthiness of the company to which the loan is granted. A company generally grants a loan to its subsidiary or otherwise company affiliated, through business cooperation or ownership. The creditworthiness of another company, in terms of the possibility of repayingt he granted loan, should be assessed on the basis of cash flows in the past period and assessment of future cash flows, liquidity, profitability and assets, and other factors important in assessing the financial strength of the debtor. In order to secure the granted loan, the lender should contract a loan security instrument, which with its quality and value may be sufficient to settle the obligations, in case of problems in repaying the loan.

### 2.2. Loan security instruments

There are various loan security instruments, among which the most common are a guarantee, warranty, bill of exchange, mortgage, other collateral and letter of credit. A guarantee is a security instrument in which the guarantor bank, at the request of the principal, guarantees that it will make payment under the guarantee if the debtor does not fulfill his contractual obligation under the guarantee, in accordance with the terms of the guarantee. It is a security instrument, which means that if a guarantee case occurs, the user of the guarantee sends a written invitation to the bank for payment from the guarantee. Warranty is a security instrument by which warrantor assumes, by a contract of warranty, an obligation to a creditor to fulfil a valid and due obligation of a debtor, should the latter fail to do so (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). A warrantor's obligation must not exceed the obligation of the principal debtor, and if it is stipulated that it will exceed this, it has to be reduced to the scope of debtor's obligation. Therefore, a warrantor is liable to fulfill the entire obligation he has warranted, if his liability is not limited to a part of it, or is not subjected in some other way to less strict conditions. Also, the warrantor is liable to reimburse the necessary expenses incurred by the creditor in order to collect the debt from the principal debtor.

With the development of international payment operations, the bill of exchange lost its importance as an instrument of payment, so that today it is mainly used as an instrument for securing a bank loan or business loan. It is a strictly formal security, with the form, the content, the transfer and the manner of realization regulated by law. In the Republic of Srpska, a bill of exchange is a means of payment and an instrument of securing payment, regulated by a special law. A drawn bill of exchange is an unconditional order to pay a certain amount of money (Zakon o mjenici, 2001). Mandatory elements of a drawn bill of exchange are: 1) an indication that the bill of exchange is written in the syllable of the document in the language in which it was drawn up, 2) an unconditional order to pay a certain amount of money, 3) the name of the drawer, 4) indication of maturity, 5) place where payment should be made, 6) name of the person to whom or by whose order the remitter must be paid, 7) indication of the day and place of issuance of the bill of exchange and 8) signature of the person who issued the bill of exchange (Zakon o mjenici, 2001). The law establishes the right of the drawn bill of exchange holder, as well as the one who only holds it, to submit for acceptance to the drawee in his place of residence until maturity. Depending on the maturity, a bill of exchange can be issued at sight, at a certain time at sight, at a certain time from the day of issue and on a certain day. All bill of exchange legal claims against the acceptor become statute-barred in three years, counting from maturity (Zakon o mjenici, 2001).

A mortgage is a lien on real estate that authorizes the mortgage creditor to, if the mortgage debtor does not pay the debt within the due date of the obligation, demand collection of the claim secured by the mortgage from the value of the pledged real estate. The Law on Contract and Torts regulates the obligation is terminated if the creditor, by agreement with the debtor, acepts something else instead of what was owed to him (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). Further, it is stipulated that in that case debtor is liable as a seller for substantive and legal defects in the object delivered instead of what was owed by him. However, a creditor, instead of claiming on the ground of the debtor's liability for substantive and legal defects in the object, may request from the debtor – but not more than a guarantor – the fulfilment of

se mogle smatrati prihvatljivim kolateralom, ako su ispunjeni uslovi prihvatljivosti, jesu poslovni prostor, skladišno-industrijski objekti (fabrike, skladišta, poljoprivredni objekti i slično), uslužni objekti (hoteli i slično), građevinsko zemljište i poljoprivredno zemljište. Prilikom prihvatanja nekretnine, kao prihvatljivog kolaterala, privredno društvo bi moglo da sagleda uslove prihvatljivosti koje cijeni banka prilikom odobravanja kredita. Nekretnina se može smatrati prihvatljivim kolateralom ako: 1) raspolaže cjelokupnom potrebnom dokumentacijom iz koje je vidljivo da je ta nekretnina efikasan i primjeren sekundarni izvor naplate, tj. ako postoje dokazi da je ta imovina utrživa; 2) izvršen je upis hipoteke prvog reda u zemljišnim knjigama i drugim registrima u korist zajmodavca ili postoji pari passu status prvog reda sa drugim hipotekarnim povjeriocima; 3) obezbijeđena je provjera valjanosti hipoteke nad predmetnom nekretninom; i 4) obezbijeđena je procjena tržišne vrijednosti nekretnine (Autor, po uzoru na Odluku o upravljanju kreditnim rizikom i utvrđivanju očekivanih kreditnih gubitaka, 2019).

Drugi kolateral može biti u vidu pokretne imovine i ostalog prihvatljivog kolaterala. Pokretnu imovinu, koja bi se mogla smatrati prihvatljivim kolateralom, čine građevinsko-proizvodne mašine koje se koriste za specifičnu namjenu, građevinsko-proizvodne mašine koje mogu imati širu namjenu, putnička vozila i teretna vozila. Ostalim prihvatljivim kolateralom mogle bi se smatrati dužničke hartije od vrijednosti koje su izdali Savjet ministara Bosne i Hercegovine, Vlada Republike Srpske, Vlada Federacije Bosne i Hercegovine i Vlada Brčko Distrikta Bosne i Hercegovine, akcije ili konvertibilne obveznice uključene u glavni berzanski indeks, te garancije i kontragarancije plative na prvi poziv koje daju subjekti čije su hartije od vrijednosti prihvatljive.

Akreditiv je takav instrument obezbjeđenja plaćanja u kojem se banka koja je prihvatila zahtjev nalogodavca za otvaranje akreditiva obavezuje da će korisniku akreditiva isplatiti određeni iznos novca ako do određenog vremena budu ispunjeni svi uslovi navedeni u nalogu za otvaranje akreditiva (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Obavezno se sačinjava u pisanoj formi i nezavisan je od pravnog posla povodom kojeg je otvoren. Pod dokumentarnim akreditivom podrazumijeva se obaveza banke da korisniku akreditiva isplati određeni novčani iznos pod uslovom da joj se podnesu dokumenti u skladu sa akreditivom. U zavisnosti od obaveze banke prema korisniku, akreditiv može biti opoziv ili neopoziv. Dokumentarni akreditiv je prenosiv ili djeljiv samo ako je banka koja otvara akreditiv u korist korisnika koga je označio nalogodavac ovlašćena u uputstvima prvog korisnika da plati u cjelini ili djelimično jednom ili većem broju trećih lica.

### 2.3. Zajam u poslovima sa inostranstvom

Specifičnosti pravnog posla zajma u poslovima sa inostranstvom uređeni su Zakonom o deviznom poslovanju. Prema ovom zakonu, zajmovi predstavljaju kreditne poslove sa inostranstvom, kao pravne poslove između rezidenata i nerezidenata zaključene u devizama, kojima rezident uzima od nerezidenta ili daje nerezidentu zajam, u skladu sa odredbama ovog zakona i propisa kojim se uređuju obligacioni odnosi (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014. i 2018). Rezidenti koji nisu banka mogu zaključivati kreditne poslove sa inostranstvom samo u svoje ime i za svoj račun. Utvrđena je obaveza rezidenta da zajam od nerezidenta koristi i zajam nerezidentu odobrava preko računa kod banke. Plaćanje, naplaćivanje, prenos i isplata u Republici Srpskoj između rezidenata, između rezidenata i nerezidenata i između nerezidenata vrši se u domaćoj valuti, s tim da kreditiranje u domaćoj valuti između rezidenta i nerezidenta nije dozvoljeno.

Zakonom nije predviđena mogućnost da nerezident odobri rezidentu zajam u Republici Srpskoj, na način da sa svog nerezidentnog računa otvorenog kod ovlašćene organizacije za obavljanje poslova platnog prometa u Republici Srpskoj izvrši prenos sredstava po osnovu zajma na račun rezidenta. Naime, devizno kreditiranje unutar Republike Srpske može da vrši samo ovlašćena banka, i to rezidentu – pravnom licu i preduzetniku za plaćanje uvoza robe i usluga iz inostranstva, a koji se može otplaćivati u devizama. Prema navedenom, opisana transakcija ne bi bila dozvoljena s aspekta propisa koji uređuju devizno poslovanje, jer nije dozvoljeno kreditiranje u domaćoj valuti između rezidenta i nerezidenta, a devizno kreditiranje u Republici Srpskoj može da vrši samo banka. Problem u praksi koji se može pojaviti je utvrđivanje rezidentnosti zajmodavca – fizičkog lica u slučaju da isti posjeduje dvojno državljanstvo jer takvo fizičko lice bi moglo da na osnovu domaćeg identifikacionog dokumenta otvori rezidentni račun kod banke i u domaćoj valuti izvrši transfer sredstava po osnovu zajma domaćem privrednom društvu. Navedeno bi moglo da se desi i u slučaju da nakon što izvrši registraciju privrednog društva u Republici Srpskoj, fizičko lice – osnivač privrednog društva odluči da tom prilikom, dok boravi u Republici Srpskoj, sa svog računa koji otvori kod ovlašćene organizacije za obavljanje poslova platnog prometa u Republici Srpskoj izvrši transfer sredstava po osnovu zajma privrednom društvu koje je osnovao. Ovakva praksa dovela bi do situacije da osnivač prilikom osnivanja društva sa ograničenom odgovornošću uplaćuje zakonski utvrđen minimalni novčani dio kapitala u iznosu od 1 KM (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017. i 2019), a da preostala sredstva unosi u privredno društvo na osnovu ugovora o zajmu.

Rezident bi trebalo da povrat zajma izvrši putem banke, i to uplatom na jedan od računa koje nerezident ima otvorene kod banke u zemlji u kojoj ima sjedište, odnosno prebivalište. Naime, zakon koji uređuje obligacione odnose u Republici Srpskoj predvidio je da se novčane obaveze ispunjavaju u mjestu u kome povjerilac ima sjedište odnosno prebivalište, a u nedostatku prebivališta, boravište, a ako se plaćaju virmanom, da se ispunjavaju u sjedištu organizacije kod koje se vode povjerioča novčana sredstva (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003. i 2004). Potrebno je imati u vidu i primjenu fiskalnih propisa, kao i propisa koji uređuju sprečavanje pranja novca i finansiranja terorističkih aktivnosti. Banka je obavezna da u izvršavanju platnih transakcija utvrdi identitet rezidenata i nerezidenata i stalno prati račune i transkacije (domaće i međunarodne), s aspekta sprečavanja pranja novca i finansiranja terorističkih aktivnosti. Obavezna provjera transakcija, posebno u smislu porijekla novca, jeste kod transakcija koje iznose 30.000 KM ili više, s tim da se provjere vrše i u slučaju više povezanih transakcija manje vrijednosti.

U pravnom poslu u kojem rezident daje nerezidentu zajam, finansijski kredit ili subordinirani kredit, rezident je dužan da ugovori i od nerezidenta pribavi instrumente obezbjeđenja naplate kojima se postiže sigurnost kreditnog posla, a čija je vrijednost u očiglednoj srazmjeri sa vrijednosti zajma i kredita. Zabranjeno je odobravanje nerezidentima finansijskih kredita i zajmova sa rokom dospijeća kraćim od godinu dana, osim odobravanja kredita od banaka i kredita koje rezidenti odobravaju radi uspostavljanja trajnih ekonomskih odnosa (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014. i 2018). Dodatni uslovi i način odobravanja zajmova nerezidentima nisu propisani jer nije donesen propis Vlade Republike Srpske, čija je mogućnost donošenja predviđena zakonom. Prema tome, ne postoje ograničenja u pogledu broja ugovora o zajmu koje rezident može da zaključi, niti u pogledu vrijednosti takvih zajmova, a vrijeme povrata zajma i kamatna stopa utvrđuju se u skladu sa propisom koji uređuje obligacione odnose. S apekta fiskalnih propisa, domaće privredno društvo je dužno da na zajam koji je dobilo od nerezidenta plati porez po odbitku pri isplati prihoda nerezidentu, među kojima su

the original claim and the corresponding damages. Real estate of a company that could be considered acceptable collateral, if the eligibility conditions are met, are business premises, storage-industrial facilities (factories, warehouses, agricultural facilities, etc.), service facilities (hotels, etc.), construction land and agricultural land. When accepting real estate as acceptable collateral, the company could consider the eligibility conditions which the bank values when approving the loan. A property can be considered eligible collateral if: 1) it has all the necessary documentation from which it is evident that the property is an efficient and appropriate secondary source of payment, i.e. if there is evidence that the property is marketable, 2) the first-class mortgage has been entered in the land books and other registers in favor of the lender or there is pari passu first-class status with other mortgage creditors, 3) verification of the validity of the mortgage over the real estate in question is provided and 4) assessment of the market value of the real estate is provided (Author, modeled upon the "Odluka o upravljanju kreditnim rizikom i utvrđivanju očekivanih kreditnih gubitaka", 2019).

Other collateral may be in the form of movable property and other eligible collateral. Movable property, which could be considered as eligible collateral, consists of construction and production machinery used for a specific purpose, construction and production machinery that may have a wider purpose, passenger vehicles and trucks. Other collateral may be in the form of movable property and other eligible collateral. Movable property, which could be considered eligible collateral, consists of construction and production machinery used for a specific purpose, construction and production machinery that may have a wider purpose, passenger vehicles and trucks. Other eligible collateral could be debt securities issued by the Council of Ministers of Bosnia and Herzegovina, the Government of the Republic of Srpska, the Government of the Federation of Bosnia and Herzegovina and the Government of the Brcko District of Bosnia and Herzegovina, shares or convertible bonds included in the main stock exchange index, as well as counter-guarantees payable on first call by entities whose securities are eligible.

A letter of credit is such a payment security instrument in which the bank, by accepting the request of the orderer for opening a letter of credit, assumes the obligation to pay to the beneficiary of the letter of credit the specified amount of money upon compliance, within the time specified, with the terms and conditions specified in the order for opening the letter of credit (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). It must be made in written form and is independent of the from the legal transaction in relation to which it has been opened. Documentary letter of credit means the obligation of the bank to pay out to the beneficiary of the letter of credit the specific amount of money, on condition of being presented with documents specified by the terms of the letter of credit. Depending on the bank's obligation to the beneficiary, the letter of credit can be revocable or irrevocable. A documentary letter of credit is transferrable or divisible only if the bank opening the letter of credit for the beneficiary designated by the orderer, is authorized in the instructions of the first beneficiary entirely or partially one or several third persons.

### 2.3. Loan in operations with abroad

The specifics of the legal transacions regarding loan in operations with abroad are regulated by the Law on Foreign Exchange Operations. According to this law, loans are credit transactions with abroad, as legal transactions between residents and non-residents concluded in foreign currency by which the resident takes from the non-resident or grants a loan to the non-resident, in accordance with the provisions of this law and regulations governing contract and torts (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014 and 2018). Residents who are not banks can conclude credit transactions with abroad in their own name and for their own account. The resident is obliged to take the loan from the non-resident and to grant the loan to the non-resident through a bank account. Payments, collection, transfers and repayment and between residents and non-residents and between non-residents in the Republic of Srpska are carried on in domestic currency, but lending in local currency between residents and non-residents is not allowed.

The law does not provide for the possibility for a non-resident to grant a loan to a resident in the Republic of Srpska, by transferring loan funds to a resident's account from his non-resident account opened with an authorized organization for performing payment operations in the Republic of Srpska. Namely, foreign currency lending within the Republic of Srpska can be performed only by an authorized bank to a resident - a legal entity and an entrepreneur for the payment of imports of goods and services from abroad, which can be repaid in foreign currency. According to the above, the described transaction would not be allowed from the aspect of regulations governing foreign exchange operations, because lending in domestic currency between residents and non-residents is not allowed, and foreign currency lending in the Republic of Srpska can only be performed by a bank. A problem that may arise in practice is determining the residency of the lender - a natural person in case he has dual citizenship because this natural person could open a resident account with a bank using domestic identification documents and transfer to a domestic company loan funds in local currency. This could also happen in case when, after registering a company in the Republic of Srpska, a natural person - the founder of the company decides on that occasion, while staying in the Republic of Srpska, to authorize the transfer of loan funds, from his account opened with an authorized organization for payment transactions in the Republika Srpska, to the account of the company he founded. This could lead to the situation that the founder, when founding a limited liability company, pays the legally determined minimum monetary part of the capital in the amount of BAM 1 (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017 and 2019), and other funds enteres into the company based upon a loan contract.

The resident should repay the loan through a bank, by paying into one of the accounts that the non-resident has opened with the bank in the country in which he has his seat or residence. Namely, the law governing contract and torts in the Republic of Srpska stipulates that monetary obligation has to be fulfilled at creditor's seat of business or his domicile, and if there is no such domicile than at his residence, and in the case of a transfer order it has to be discharged at the registered office of the organisation keeping account of the creditor's monetary means (Zakon o obligacionim odnosima, 1978, 1985, 1989, 1993, 1996, 2003 and 2004). It is necessary to keep in mind the application of fiscal regulations, as well as regulations governing the prevention of money laundering and terrorist financing. The bank is obliged to establish the identity of residents and non-residents in the execution of payment transactions and to constantly monitor accounts and transactions (domestic and international), from the aspect of preventing money laundering and financing terrorist activities. Mandatory verification of transactions, especially in terms of the origin of money, is for transactions amounting to BAM 30,000 or more, but also checks are performed in the case of several related transactions of lesser value.

In a legal transaction in which a resident grants a loan, financial credit or subordinated credit to a non-resident, the resident is obliged to draw into contract and obtain from the non-resident collection security instruments which provide security of credit operation, and whose value is obviously proportional to the loan and the credit value. Granting financial credits and loans to non-residents with a maturity of less than one year is prohibited, except loans by banks and loans granted by residents to establish permanent economic relations (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014 and 2018). Additional conditions and the manner of granting loans to non-re-

i kamate, primjenom stope od 10% na iznos prihoda nerezidenta, ukoliko ugovorom o izbjegavanju dvostrukog oporezivanja nije drugačije uređeno (Zakon o porezu na dobit, 2015, 2017. i 2019). Međutim, porez po odbitku ne plaća se na kamate po zajmovima korišćenim od pravnog lica iz Republike Srpske i stalnog mjesta poslovanja nerezidenta u Republici Srpskoj za ulaganje u opremu, postrojenja i nepokretnosti (Zakon o porezu na dobit, 2015, 2017. i 2019), koji služe obavljanju privredne djelatnosti.

Ipak, potrebno je imati u vidu i odredbe Zakona o privrednim društvima koje uređuju specifičnosti slučaja davanja zajma umjesto povećanja kapitala društva sa ograničenom odgovornošću (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017. i 2019), koje su značajne u pravnim poslovima u kojima je rezident zajmoprimac. Prema ovom zakonu, član društva sa ograničenom odgovornošću koji tom društvu u vrijeme poslovne krize ne poveća sopstveni kapital kao dobar privrednik, već mu da zajam, može u stečajnom postupku ostvariti zahtjev za vraćanje zajma samo kao stečajni povjerilac sa neobezbjeđenim potraživanjem u skladu sa zakonom koji uređuje stečajni postupak. Na ovaj način obezbijeđeno je da pravo prvenstva u naplati iz stečajnog postupka ima treće lice koje je dalo zajam tom društvu, a ne vlasnik tog društva koji je ujedno i zajmodavac. Ako u ovakvim okolnostima treće lice odobri zajam društvu, a član tog društva pruži obezbjeđenje za taj zajam, zajmodavac koji se nije namirio iz dobijenog obezbjeđenja može u stečajnom postupku protiv društva ostvarivati zahtjev za povrat zajma u iznosu koji nije uspio da namiri, kao stečajni povjerilac sa neobezbijeđenim potraživanjem. Prema tome, takvo treće lice i dalje ima mogućnost da namiri svoje potraživanje, ako bude dovoljno stečajne mase. Ovakav način namirenja primjenjuje se i na druge pravne poslove društava sa ograničenom odgovornošću i trećih lica koji odgovaraju davanju zajma.

Izuzetak od primjene pravila u vezi sa davanjem zajma umjesto povećanja kapitala je u slučaju da je zajmodavac član privrednog društva čiji udio ne prelazi 10% osnovnog kapitala i koji nije direktor ili član upravnog odbora društva. U tom slučaju, takva lica smatraju se licima koja nemaju značajan uticaj na upravljanje privrednim društvom, te stoga imaju isti tretman kao ostala treća lica u pravnom poslu odobravanja zajma. Međutim, ako društvo sa ograničenom odgovornošću u posljednjoj godini prije podnošenja prijedloga za otvaranje stečajnog postupka nad društvom ili nakon podnošenja tog prijedloga, vrati zajam članu društva ili trećem licu kome je član društva dao obezbjeđenje za zajam, član društva koji je dao obezbjeđenje za vraćanje zajma dužan je da tako isplaćen iznos zajma vrati društvu. Član društva oslobađa se ove obaveze ako predmet datog obezbjeđenja povjeriocu stavi na raspolaganje društvu. Slična pravila vrijede i u slučaju akcionarskog društva (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017. i 2019), te se može zaključiti da se radi o opštim pravilima, bez obzira na pravnu formu privrednog društva. Prilikom uzimanja zajma, bez obzira na to da li je zajmodavac rezident ili nerezident, predstavnik ili zastupnik privrednog društva trebalo bi da vodi računa o tome da ne zaključi ugovor za koji zna da je štetan za to privredno društvo, te da ne zaključi ugovor suprotno svojim ovlašćenjima, čime bi nanio štetu tom privrednom društvu. Naime, propisano je da se takvo postupanje smatra krivičnim djelom, koje se kažnjava kaznom zatvora do tri godine i novčanom kaznom (Krivični zakonik Republike Srpske, 2017, 2018. i 2021). Ako je takvim djelom nastupila velika šteta za privredno društvo, propisano je da se učinilac kažnjava kaznom zatvora od jedne do deset godina i novčanom kaznom.

### 2.4. Obaveza prijavljivanja kreditnih poslova sa inostranstvom

Rezidenti – pravna lica imaju obavezu da Ministarstvo finansija Republike Srpske izvijeste o kreditnim poslovima sa inostranstvom. Obaveza izvještavanja postoji od 2010. godine, s tim da je 2014. godine ova obaveza svedena na godišnje umjesto mjesečno izvještavanje, te je sužen obuhvat kreditnih poslova o kojima se izvještava. Podzakonskim aktom donesenim 2014. godine, uređeno je da se obveznicima izvještavanja o kreditnim poslovima smatraju pravna lica koja su registrovana u Republici Srpskoj, osim predstavništava ovih lica koja se nalaze izvan Bosne i Hercegovine, ogranci – filijale stranih pravnih lica upisani u registar kod nadležnog organa i preduzetnici – pojedinci, koji samostalno obavljaju djelatnost radi sticanja dobiti i registrovani su kod nadležnog organa (Pravilnik o izvještavanju o kreditnim poslovima sa inostranstvom, 2014. i 2018). Obveznikom izvještavanja smatra se i banka, kao pravno lice u finansijskom sistemu, koje ima dozvolu za rad Agencije za bankarstvo Republike Srpske, koja je nadzorni organ bankarskog sistema Republike Srpske. Sužavanjem obuhvata kreditnih poslova o kojima se izvještava na finansijske kredite i zajmove u poslovima sa inostranstvom, u odnosu na prethodnu obavezu izvještavanja o svim kreditnim poslovima sa inostranstvom, značajno su rasterećeni privredni subjekti po pitanju izvještavanja, kako u pogledu dinamike, tako i broja kreditnih poslova sa inostranstvom o kojima bi trebalo da izvijeste. Obaveza izvještavanja je 2018. godine proširena na subordinirane kredite, imajući u vidu da se radi o specifičnom obliku kredita kojim se uspostavlja trajni ekonomski odnos, sa rokom od pet godina ili dužim, a ima karakter podređenog potraživanja (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014. i 2018).

Rezidenti su dužni da dostave izvještaje o kreditnim zaduženjima i kreditnim odobrenjima u poslovima sa inostranstvom do 31. januara tekuće godine sa stanjem na 31. decembar prethodne godine, na propisanim obrascima u pisanoj i elektronskoj formi (internet stranica Ministarstva finansija Republike Srpske, 2021). Ovi izvještaji sadrže samo one podatke koji su neophodni za statističko praćenje stanja duga i potraživanja po kreditnim poslovima sa inostranstvom, a u cilju praćenja stanja ukupnog spoljnog duga Republike Srpske. Imajući u vidu da se radi o podacima koji predstavljaju poslovnu tajnu privrednih društava, propisano je da se zaprimljeni izvještaji i podaci ne mogu dostavljati trećim licima, osim ako posebnim propisom nije drugačije uređeno. Zaprimljeni podaci mogu se učiniti dostupnim javnosti samo u agregatnom obliku, što bi značilo da iz takvih podataka nisu vidljivi podaci o pojedinačnim ili ukupnim kreditnim zaduženjima i odobrenjima bilo kojeg privrednog društva. Agregatni podaci trebalo bi samo da prikazuju podatke o ukupnoj vrijednosti kreditnih poslova, strukturi kreditnih zaduženja i odobrenja s aspekta vrste kreditnih poslova, te njihovoj geografskoj disperziji prema zemlji porijekla zajmodavca, odnosno zajmoprimca.

Izvještavanje se vrši putem dva obrasca, u zavisnosti od toga da li se radi o pravnom poslu kreditnog zaduženja ili kreditnog odobrenja. U obrazac se unose podaci o domaćem privrednom društvu, kao i podaci o kreditnom poslu koji su značajni za praćenje posla sa inostranstvom i ispunjenosti zakonskih uslova u pogledu trajanja i instrumenta obezbjeđenja, u slučaju kreditnih odobrenja. Podaci o kreditnom poslu sa inostranstvom odnose se na podatke o nerezidentu (naziv, sjedište i jedinstveni identifikcioni broj), te vlasničkom odnosu rezidenta i nerezidenta. Iz podataka o vlasničkom odnosu može se utvrditi da li se radi o povezanim pravnim licima, te da li takav odnos utiče i na uslove pod kojima se rezident zadužuje, odnosno odobrava zajam. Podaci o trajanju kredita u mjesecima i instrumentu obezbjeđenja naplate posebno su važni u slučaju kreditnog odobrenja, za koje je zakonom uređeno da se ne smiju odobravati na rok kraći od godinu dana, te da mora biti ugovoren adekvatan instrument obezbjeđenja naplate. Ovi uslovi su jednaki bez obzira na povezanost putem vlasništva zajmodavca i zajmoprimca, jer se na taj način štite interesi domaćeg privrednog društva. Unose se i podaci o kamatnoj stopi, na osnovu kojih se mogu pratiti i troškovi po osnovu plaćene, ali i dospjele neplaćene kamate stariji od tri mjeseca. U kolonu koja se odnosi na iznos zaduženja odnosno odobrenja unosi se podatak

sidents are not prescribed because a regulation of the Government of the Republic of Srpska has not been adopted, the possibility of which is provided under law. Therefore, there are no restrictions on the number of loan contracts that a resident can enter into, nor on the value of such loans, and the loan maturity and interest rate are determined in accordance with the regulation governing contract and torts. From the pont of fiscal regulations, a domestic company is obliged to pay a withholding tax on a loan received from a non-resident when paying income to a non-resident, including interest, by applying a rate of 10% to the amount of non-resident's income, unless otherwise agreed by the double taxation agreement (Zakon o porezu na dobit, 2015, 2017 and 2019). However, withholding tax is not paid on interest on loans used by a legal entity from the Republic of Srpska, and by a permanent place of business of a non-resident in the Republic of Srpska, for investment in equipment, plant and real estate (Zakon o porezu na dobit, 2015, 2017 and 2019), which serve to perform economic activity.

However, it is necessary to keep in mind the provisions of the Law on Companies that regulate the specifics of the case of granting loan instead of increasing the capital in a limited liability company (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017 and 2019), which are significant in legal transactions in which the borrower is a resident. According to this law, a member of a limited liability company who does not increase the company's equity as a good businessman during the business crisis, but gives him a loan, can file a request for loan restitution only as a bankruptcy creditor with unsecured claim in accordance with the law that regulates bankruptcy proceedings. In this way, it is ensured that the right of priority in the collection from the bankruptcy procedure has a third party who granted a loan to that company, and not the owner of that company, which is also the lender. If in such circumstances a third party grants a loan to the company, and a member of that company provides security for that loan, the lender who has not settled from the obtained security may in bankruptcy proceedings against the company request a loan restitution in the amount failed with unsecured claim. Therefore, such a third party still has the opportunity to settle its claim, if there is enough bankruptcy estate. This method of settlement also applies to other legal transactions in case of limited liability company and third parties that correspond to the granting of the loan.

An exception to the rule on granting a loan instead of increasing a capital is applied in case that the lender is a member of a company whose share does not exceed 10% of the share capital and who is not a director or board member of that company. In that case, such persons are considered to be persons who do not have a significant influence on the management of the company, and therefore have the same treatment as other third parties in the legal business of granting a loan. However, if a limited liability company in the last year before the submitting the proposal for opening bankruptcy proceedings against the company or after its submission, repays the loan to a member of the company or a third party to whom the member of the company has provided loan security, the member of the company is obliged to return to the company the amount of the loan thus paid. A member of the company is released from this obligation if he makes the object of the given security available to the creditor to the company. Similar rules apply in the case of a joint stock company (Zakon o privrednim društvima, 2008, 2009, 2011, 2013, 2017 and 2019), so it can be concluded that these are general rules, regardless of the legal form of the company. When taking a loan, regardless of whether the lender is a resident or a non-resident, the representative or agent of the company should pay attention to not to conclude a contract that he knows is harmful to that company, and not to conclude a contract contrary to his powers, which would harm that company. Namely, it is stipulated that such conduct is considered a criminal offense, which is punishable by imprisonment for up to three years and a fine (Krivični zakonik Republike Srpske, 2017, 2018 and 2021). If such an act has caused great damage to the company, it is prescribed that the perpetrator is to be punished by imprisonment for a term between one and ten years and a fine.

### 2.4. Obligation to report credit operations with abroad

Residents - legal entities are obliged to report to the Ministry of Finance of the Republic of Srpska on credit operations with abroad. The reporting obligation has existed since 2010, but in 2014 this obligation was reduced to annual reporting instead of monthly reporting, and the coverage of reported credit operations was narrowed. By-law passed in 2014 stipulates that legal entities registered in the Republic of Srpska are obliged to report on credit operations, except for the representative offices of these persons located outside Bosnia and Herzegovina, branches – business units of foreign legal entities registered with the competent authority and entrepreneurs - individuals, who independently perform activities for profit and are registered with the competent authority (Pravilnik o izvještavanju o kreditnim poslovima sa inostranstvom, 2014 and 2018). The bank, as a legal entity in the financial system with the banking license issued by the Banking Agency of the Republic of Srpska, as the supervisory body of the banking system of the Republic of Srpska, is also considered as s reporting entity. By narrowing the coverage of credit operations which should be reported to financial credits and loans in foreign transactions, compared to the previous obligation to report on all foreign credit transactions, economic entities were significantly relieved in terms of reporting, both in terms of dynamics and number of credit transactions which should be reported on. The reporting obligation was extended to subordinated credits in 2018, bearing in mind that this is a specific form of loan that establishes a permanent economic relationship, with a term of five years or longer, and has the character of a subordinated claim (Zakon o deviznom poslovanju, 2003, 2006, 2009, 2014 and 2018).

Residents are required to submit reports on credit indebtedness and credit grantings with abroad by January 31 of the current year as of December 31 of the previous year, on the prescribed forms in written and electronic form (Website of the Ministry of Finance of the Republic of Srpska, 2021). These reports contain only data necessary for a statistical monitoring the balance of debt and receivables from credit operations with abroad, in order to keep the track of the total external debt of the Republic of Srpska. Having in mind that these data represent a business secrecy, it is stipulated that submitted reports and data cannot be forwarded to third parties, unless otherwise regulated by a special regulation. The submitted data can be made available to the public only in aggregate form, meaning that such data do not provide details on individual or total credit indebtedness and grantings made by any company. Aggregate data should only show data on the total value of credit operations, the structure of credit indebtedness and approvals from the aspect of the type of credit operations, and their geographical dispersion according to the country of origin of the lender, or the borrower.

Reporting is done through two forms, depending on whether it is a legal transaction of credit indebtedness or credit granting. These reports include data on the domestic company, as well as data on credit operation that are important for keeping the track of the operations with abroad and fulfillment of legal requirements regarding the duration and security instrument, in the case of granting credits and loans. Data on foreign credit operations refer to data on non-residents (name, registered office and unique identification number), and ownership relations between residents and non-residents. From the ownership relationship data it can be determined if the legal entities are involved, and whether such a relationship also affects the conditions under which the resident is borrowing, or granting the loan. Data on the loan maturity in months and the surety instrument provided are especially important in the case of credit granting, for which the law stipulates that it's maturity is not less than one year and that a surety instrument safeguarding security of the credit transaction is provided. These conditions are equal regardless of the lender's and

iz ugovora o zajmu, dok se u koloni o iznosu koji je rezident odnosno nerezident iskoristio unose podaci o stvarno povučenim sredstvima. U koloni o iznosu koji je rezident otplatio odnosno naplatio unosi se kumulativni podatak, znači ne iznos koji je plaćen odnosno naplaćen tokom godine koja je predmet izvještavanja, već ukupni iznos od kada je zajam uzet odnosno odobren. Samo na taj način dolazi se do ispravnog podatka o stanju duga odnosno potraživanja na kraju godine koja je predmet izvještavanja.

S obzirom na to da se ovi izvještaji dostavljaju jednom godišnje odnosno do kraja januara tekuće godine sa stanjem na 31. decembar prethodne godine, banka bi transakcije prenosa sredstava u inostranstvo trebalo da vrši na osnovu predočenog ugovora o zajmu, koji bi trebalo da sadrži elemente utvrđene zakonom, a dokaz o podnesenom izvještaju Ministarstvu finansija mogla bi da traži u slučaju da je ugovor zaključen tokom jedne godine, a sredstva zajma rezident doznačava nerezidentu tek naredne godine. Prilikom povrata sredstava po osnovu zajma iz inostranstva, banka bi mogla od rezidenta, pored ugovora o zajmu, tražiti da predoči i dokaz o dostavljanju Ministarstvu finansija izvještaja o kreditnom zaduženju u poslovima sa inostranstvom. Na taj način banka bi i edukovala stranku o primjeni zakona, te bi doprinijela tome da prikupljeni podaci o kreditnim poslovima sa inostranstvom budu tačni i ažurni.

## ZAKLJUČAK

Prije donošenja odluke o uzimanju ili davanju zajma, privredno društvo trebalo bi da izvrši analizu svog finansijskog položaja i moći, te da utvrdi kako bi takav pravni posao uticao na njegovu finansijsku stabilnost. Za razliku od kredita, čije odobravanje zahtijeva kvalitetnije instrumente obezbjeđenja naplate i detaljnu procjenu kreditnog boniteta privrednog društva, odobravanje zajma je jednostavniji pravni posao. Često se osnivači privrednog duštva radije odlučuju da svom privrednom društvu daju zajam umjesto da taj novac unesu u privredno društvo putem povećanja osnovnog kapitala, jer na taj način ostvaruju dodatan povrat sredstava po osnovu kamate. S obzirom na zakonom utvrđen minimalni osnovni kapital društva sa ograničenom odgovornošću u iznosu od 1 KM, te nepostojanje obaveze povećanja osnovnog kapitala u zavisnosti od rasta obima poslovanja privrednog društva, stvoren je ambijent u kojem manja društva sa ograničenom odgovornošću svoje izvore finansiranja zasnivaju prije svega na zajmovima koje im odobravaju osnivači ili druga povezana lica.

Ugovorom o zajmu trebalo bi da budu definisani iznos koji se odobrava, period na koji se odobrava, cijena korišćenja zajma, način obračuna kamate, instrument obezbjeđenja naplate, te rokovi i način izmirenja kamate i glavnice duga. Manja privredna društva često nemaju zaposlenog pravnika, tako da ove i druge ugovore sačinjavaju lica koja su druge struke i koja ne poznaju osnove uređenja obligacionih odnosa. Potencijalni propusti u sačinjavanju ovih ugovora mogli bi biti to da nisu određeni rok dospijeća, način plaćanja kamate i glavnice i instrument obezbjeđenja. Prilikom uzimanja zajma privredno društvo bi trebalo da izvrši finansijsku analizu u smislu troškova korišćenja tog zajma u poređenju sa projektovanim prinosom u periodu na koji se zajam uzima.

Transakcije po osnovu zajma trebalo bi da se odvijaju putem bankarskih računa. U pravnom poslu zajma u kojem je jedna ugovorna strana nerezident potrebno je, pored Zakona o obligacionim odnosima, voditi računa i o primjeni Zakona o deviznom poslovanju. Materijalni propis koji uređuje devizno poslovanje donesen je 2003. godine, a naknadno je u više navrata mijenjan, između ostalog i u dijelu koji uređuje pravni posao zajma u poslovima sa inostranstvom. Korišćen je pristup faznog procesa liberalizacije kretanja kapitala, te je rezidentu utvrđena zabrana odobravanja zajma nerezidentu sa rokom dospijeća kraćim od godinu dana i obaveza pribavljanja adekvatnog instrumenta obezbjeđenja naplate. Za izvršenje ovih transakcija putem banke nije potrebno pribaviti neko odobrenje nadležnog organa, već se sprovode slobodno na osnovu zaključenog ugovora o zajmu. Međutim, pravni poslovi zajmova u poslovima sa inostranstvom, kao i finansijski krediti i subordinirani krediti predmet su izvještavanja Ministarstva finansija na godišnjem nivou. Prema tome, prilikom zaključenja pravnog posla zajma potrebno je voditi računa o primjeni propisa koji uređuju obligacione odnose, devizno poslovanje, privredna društva i drugo, te izvršiti neophodne analize uticaja zajma na finansijski položaj privrednog društva.

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the borrower's mutual connection through the ownership, in order to protect interests of the domestic company. Data on the interest rate are also entered, upon which track of costs of paid interest, and overdue unpaid interest older than three months, can be kept. In the column related to the amount of indebtedness, or approval, the data from the loan contract is entered, while in the column on the amount used by the resident or non-resident, the data on the actually withdrawn funds are entered. In the column on the amount repaid or collected by the resident, the cumulative data is entered, i.e. not the amount paid or collected during the reporting year, but the total amount since the loan was taken or granted. Only in this way is the correct data on the balance of debt or receivables, at the end of the year that is the subject of reporting, are provided.

Given that these reports are submitted on a year basis, i.e. by the end of January of the current year as of December 31 of the previous year, the bank should perform transactions of transfer of funds abroad on the basis of the presented loan contract, which should contain elements stipulated by the law, and evidence that report is submitted to the Ministry of Finance could be requested in case that the contract is concluded during one year, and the loan funds are transefered to the non-resident by the resident only the following year. When repaying the loan funds received from abroad, the bank could ask the resident, in addition to the loan contract, to present evidence of submitting to the Ministry of Finance the report on credit indebtedness with abroad. In this way, the bank would educate the party on the application of the law, and would contribute to the collected data on credit transactions with abroad to be accurate and up-to-date.

## CONCLUSION

Before making a decision on taking or granting a loan, a company should perform an analysis of its financial position and power, and how such a legal transaction would affect its financial stability. Unlike a bank loan, which approval requires better quality security instruments and a detailed assessment of the company's creditworthiness, granting a loan is a simpler legal transaction. Often, the company founders prefer to give a loan to their company instead of bringing that money into the company by increasing the share capital, because in that way they achieve an additional return of funds on the basis of interest. The statutory minimum share capital of a limited liability company in the amount of BAM 1, and the lack of obligation to increase share capital depending on the growth of the company's business, have created an environment in which smaller limited liability companies base their funding sources primarily on loans granted to them by the founders or other related parties.

The loan contract should state the amount which is to be approved, the period for which it is approved, the price of using the loan, the method of calculating interest, the surety instrument for securing loan, time limit and method for restituting interest and debt principal. Smaller companies often do not have a jurist employed, so these and other contracts are drawn up by persons who are of other professions and who do not know have a basic knowledge of regulating obligations. Potential oversights in drawing up these contracts could be that the maturity date, the method of paying interest and principal and the type of surety instrument are not specified. When taking a loan, the company should perform a financial analysis in terms of the cost of using that loan compared to the projected yield in the period for which the loan is taken.

Loan transactions should take place through bank accounts. In the legal transactions of a loan in which one contracting party is a non-resident, it is necessary, in addition to the Law of Contract and Torts, to take into account the application of the Law on Foreign Exchange Operations. The material regulation governing foreign exchange operations was adopted in 2003, and was subsequently amended several times, among other things in the part regulating the legal transactions with loan abroad. The approach of the phased process of liberalization of capital movements was applied, and the resident is prohibited to grant a loan to a non-resident with a maturity of less than one year and is obliged to obtain a surety instruments safeguarding security of the credit transaction. For the execution of these transactions through the bank, it is not necessary to obtain any approval of the competent authority, and they are carried out freely on the basis of a concluded loan contract. However, legal transactions of loans abroad, as well as financial credits and subordinated credits, are subject to annual reporting to the Ministry of Finance. Therefore, when concluding the legal transaction of the loan, it is necessary to take into account the application of regulations governing contract and torts, foreign exchange operations, companies and others, and perform the necessary analysis of the impact of the loan on the financial position of the company.

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