

ON THE ISSUE OF THE CONSENSUAL CONSTRUCTION OF A LOAN AGREEMENT

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Abstract. As it was repeatedly noted in the literature, Russian law is still at the stage of its formation. A large-scale change in the provisions of Russian legislation on the legal regulation of financial transactions should be considered as one of the proofs of the given thesis. In the paper, the author analyzes the amendments that came into force on June 1, 2018 in parts one and two of the Civil Code of the Russian Federation, according to which a loan agreement can now be concluded using a consensual model. The reforming of this provision should be recognized as a revolution in the legal regulation of loan legal relations. For millennia, the loan agreement was considered exclusively as a real agreement. Nevertheless, the author paid attention to the fact that even before the adoption of the above-mentioned amendments, a loan agreement could be considered consensual under certain conditions. In connection with the above, the author analyzed the provisions of the legislation, including foreign ones, as well as the points of view expressed in the scientific literature, and he has concluded that it would be useful to introduce a consensual loan into Russian legislation. But, even despite the recent editing of the provisions contained in Chapter 42 of the Civil Code of the Russian Federation, the author proposes to review a number of articles and to state them in a new edition.

Keywords: loan agreement, consensual loan, amendments to the Civil Code of the Russian Federation.

INTRODUCTION. In modern practice, there are cases when the parties enter into a loan agreement on a consensual model. For example, according to the case file №A40-115170 / 12-133-902 Dyantos Trading Ltd. and LLC "SK MOST" had signed a loan agreement No. 200 805 291, according to which the lender agrees to provide a loan in foreign currency¹ [1]. Here, the execution of the loan agreement according to the consensual model raises several questions at once: first, does such an agreement comply with the legislation? Secondly, what is the legal nature of such legal relations, and can the parties change the imperative rule of law by their agreement? Thus, the Plenum of the Supreme Arbitration Court of the Russian Federation indicated in its Resolution that “the norm defining the rights and obligations of the parties to the agreement is imperative if it contains an explicit prohibition on establishing the terms of the agreement by agreement of the parties other than the rule provided for by this legal norm that such an agreement is void, prohibited or is not allowed, or it is indicated to the right of the parties to depart from the rule contained in the legal norm only to one side or another, or the said prohibition is otherwise explicitly expressed in the text of the legal norm)². According to par. 2, item 1 of Article 807 of the Civil Code of the Russian Federation as amended on 01.06.2018, the loan agreement was considered concluded from the moment of transfer of money. Thus, a correct understanding of the possibility of concluding a loan agreement on a consensual model is of great theoretical and practical significance.

2. METHODS. The study is based on the method of analyzing current Russian legislation and law enforcement practice and existing European (global) standards for the purpose of legal unification [1, 386]. The methods of legal modeling and forecasting make it possible to determine the need for changes in the current Russian regulatory acts, as well as the need to adjust court practice [2]. Thanks to the use of modeling and forecasting methods, the consequences of such changes and adjustments can be established with a sufficient degree of reliability, and it is also revealed how, in the end, Russian law enforcement practice will become close to the existing European (world) standards [3, 324–325]. The legal sociological method permits the assessment of social problems from a legal position, from the position of the legislator and the law enforcer [4, 651]. The interpretation method complements the comparative legal analysis in the study, making it possible to understand and compare Russian and European (world) legal standards [5, 62]. The use of various methods allowed us to formulate the main theoretical conclusions and make our own proposals on the studied field of public relations [6, 2475; 7, 99–100].

3. RESULTS AND DISCUSSION. The views of prominent Russian pre-revolutionary civilists D.I. Meyer and G.F. Shershenevich on the concept of a loan agreement deserve attention. G.F. Shershenevich adhered to the classical views on the concept of a loan agreement defining it as “an agreement by virtue of which one person undertakes to return replaceable things taken from another person to the property in the same quantity and quality” [8]. D.I. Meyer believed that “a loan is such an agreement of the will of two persons, according to which one, the creditor or lender, is obligated to donate or, for a certain reward, to provide to the other person, to own another item, determined not individually, but by measure, weight or bill; and another person, a debtor or a borrower, in a certain period of time, return the same object to the first person, and not the same, but of the same quality and quantity” [9]. Thus, a loan

¹ Resolution of the Federal Arbitration Court of the Moscow District of July 22, 2013 on case No. A40-115170 / 12-133-902 [Digital source].URL:

http://komanduju.ru/arbitrazh/delo_pravootnosheniye_sudoustrojstvo_polnomochiye_otvetchik_sudoproizvodstvovo_poshlina (access date: 06/16/2018)

² Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of March 14, 2014 No. 16 “On freedom of contract and its limits” // Bulletin of Supreme Court of Arbitration of the Russian Federation. 2015 No. 5

agreement was qualified by him as consensual and bilateral, although the legislation in force at that time³ considered the loan agreement as a real and generating a unilateral obligation. D.I. Meyer calls as a moment of conclusion of the agreement, not the fact of transfer of property, but the fact of agreement of the parties on the subject. D.I. Meyer emphasized that, as a rule, after the conclusion of a loan agreement, its execution by the lender follows immediately, as a result of which a loan agreement was defined in legislation as a real agreement. However, D.I. Meyer believed that it was possible to conclude an agreement according to a consensual model, since according to essence of the loan it does not require its execution by the lender immediately after the conclusion of the agreement, which, however, in his opinion, did not exclude the possibility of concluding a preliminary loan agreement. In this case, the lender would also have the obligation to issue a loan and the agreement would be considered as having concluded after an agreement was reached between the parties on its terms, what gives the loan agreement a bilateral nature. Meanwhile, the Article 898 of Draft Civil Code allowed for the possibility of entering into a preliminary agreement establishing the obligation to lend. The Draft Civil Code provided for a written form only for conclusion of a preliminary loan agreement. In addition, Article 1898 of the Draft Code contained a rule which is now enshrined in Article 821 of the Civil Code of the Russian Federation: the obligation to lend established in the preliminary agreement become ineffective if circumstances subsequently came or became known for the first time to the person who pledged to give a loan, that so much significantly worsen the property situation of the party, that there is a danger of losing all or part of the amount intended to return under the loan agreement by another party" [10, 520].

The statement in the loan agreement of the obligation of the lender to provide money cannot change the imperative rule established by the Civil Code of the Russian Federation on the moment from which the agreement is considered concluded. V.V. Vitryansky also emphasizes that if the parties enter into an agreement under which one party, which is not a credit institution, undertakes to give a certain amount of money to the borrower, such an agreement should be recognized as a loan agreement. Being real, such an agreement takes legal effect from the moment of actual provision of the sum of money to the borrower [11, 114].

However, the definition by D.I. Meier is important today. Firstly, the fact of the transfer of the loan subject is divided from the moment of the conclusion of the agreement. Thus, according to some scientists, when concluding a preliminary agreement on the transfer of a loan in the future, the lender is obliged to conclude a loan agreement on agreed terms. Thus, the conclusion of a loan agreement will be divided into two stages: the first stage is reaching an agreement; the second stage is the transfer of things. Thus, the legal connection of the parties will arise even before the transfer of the thing [12, 5]. V.V. Vitryansky believes that the obligation of the lender to conclude in the future an agreement on terms previously agreed upon follows from the preliminary loan agreement.

We consider the opinion of Yu.V. Romanets that only a professional lender may be obliged to issue a loan [13, 8–18]. Thus, when concluding a preliminary agreement by a professional lender (which is a credit microfinance organization, as well as a lender engaged in the systematic issuance of loans), the borrower has the right to demand a coercion to enter into the main agreement.

Analyzing the rule of paragraph 1, Article 807 of the Civil Code of the Russian Federation as amended before 01.06.2018, A.G. Karapetov and A.I. Savelyev conclude that the answer to the question about the fate of a loan agreement built on a consensual model, but otherwise fully complying with the norms of chapter 42 from the Civil Code of the Russian Federation and the consequences of a contradiction of the agreement to the provision of paragraph 1, article 807 of the Civil Code of the Russian Federation, directly depends on the nature of the legislation in question. If this rule is recognized as imperative and establishing formal requirements for the process of concluding this agreement, then the disputed agreement will not be considered concluded until the loan is granted, despite the presence in the agreement of a direct reference to the lender's obligation to provide loan. If this legal norm is considered implicitly dispositive and, accordingly, allows the parties to agree on a consensual loan, then the terms of the consensual loan will be valid, and the agreement will be considered as just a kind of loan agreement. And, if to recognize the legal norm of p. 1, Article 807 of the Civil Code of the Russian Federation as another qualifying and determining framework of the relevant contractual model, the condition on the consensuality of the loan will be valid, but the agreement will be unnamed.

Further A.G. Karapetov and A.I. Savelyev indicate that a loan agreement built on a consensual model of the parties according to its economic and legal nature is very close to the statutory real loan agreement and "... there is no any good cause for refusing to recognize such an agreement in force with the date of the agreement obliging the first lender to provide loan". The exception to this rule, in their opinion, can affect only a lender being an individual, but not "commercial loans" [14, p.79, 81]. Also, the real nature of a monetary loan agreement is a tribute to the historical tradition, which "is gradually rejected by many developed legal orders both at the level of national legislation and at the level of acts of international unification of agreement law" [15, 141; 16, 77, 78], since the reality of an agreement is an anomaly and has the right to exist only for very valid political and legal reasons. It should be noted that earlier in Germany, loan agreements were considered real, but at the present time the German legislator accepted the consensual model of the loan agreement (para. 1 of § 488 of the Germany Civil Code).

³ The code of laws of the Russian Empire [Digital source]: the first collection. SPb ., 1832.V. 10, P. 1. URL: <http://civil.consultant.ru/reprint/books/211/146.html#img147> (access date : 15/06/2018).

We would like also to draw attention to the legal nature of a commodity loan agreement. Z.F. Safin draws attention to the fact that a commodity loan agreement is a consensual model of an inventory (non-cash) loan agreement [17, 189]. The only type-forming feature of a commodity loan agreement is its consensual nature, which allows it to be distinguished as a separate type of loan agreements. This fact predetermines the subsidiary application to it of the rules about the loan agreement. First of all, according to V.V. Vitryanskiy, those provisions are subject to application, which concern the lender's right to refuse to provide the borrower with the amount of things specified in the agreement, that are determined by the generic characteristics, in the presence of circumstances that clearly indicate that the specified things will not be returned by the borrower within the prescribed time limit, and also the provisions on the borrower's right to refuse of receiving the things upon warning about this before the loan term provided for in the agreement (article 821 of the Civil Code of the Russian Federation) [18, 9–10]. However, in our opinion, the literal interpretation of Article 822 from the Civil Code of the Russian Federation allows to conclude that only a bank or other credit organization can be a lender (creditor) in a commodity loan agreement, what is considered by us as incorrect. So, E.A. Pavlodsky, considering a commodity loan agreement as a kind of loan agreement, nevertheless notes that the subject composition of these agreements differs, since a commodity loan can be provided by any person [12, 17]. Also E.N. Abramova points to that a commodity credit can be issued not only by a credit institution, but also by any subject of civil law [19, 553]. In connection with the foregoing, we believe that the regulation of a commodity (inventory) loan both in paragraph 1 of Chapter 42, and in paragraph 3 of Chapter 42 is redundant. Since June 1, 2018, the possibility to conclude of a consensual commodity loan agreement is without in doubt.

4. SUMMARY

We consider it possible to propose the following changes in Ch. 42 of the Civil Code of the Russian Federation as amended by Federal law dated 21.07.2017 No. 212-FZ which entered into force on June 1, 2018⁴:

1. Paragraph 2, item 1 of Article 807 from the Civil Code of the Russian Federation shall be amended as follows: "A loan agreement where the lender (creditor) is a citizen of the Russian Federation who is not an individual entrepreneur and which subject is money, is considered concluded from the moment of transfer of money".

2. The second sentence of item 6, Article 7 of the Federal Law "On Consumer Credit (Loan)" shall be amended as follows: "A consumer loan agreement shall be considered concluded if agreement between the parties to the agreement is reached on all individual terms of the agreement specified in paragraph 9, article 5 of this Federal Law."

3. To exclude article 822 of the Civil Code of the Russian Federation.

4. To add clause 8 to Article 807 of the Civil Code of the Russian Federation: "The conditions on quantity, assortment, completeness, quality, packaging and (or) on the packaging of provided things must be fulfilled in accordance with the rules on the agreement of sale of goods (Articles 465 - 485), unless otherwise is provided by the loan agreement".

5. CONCLUSIONS

Based on the above, we can draw the following conclusions. First, one of the fundamental features of the loan changes depending on the subject composition of the agreement. If the lender is a person engaged in professional and / or systematic lending activities, such an agreement may be consensual in nature and be considered as concluded from the moment the parties reach an agreement on all essential terms of the agreement. Otherwise, the loan agreement must remain real. Consequently, in loan commitments, a differentiated approach should be applied to a professional, systematically lending and non-professional lender.

Secondly, it is necessary to apply a differentiated approach to the legal regulation of the agreement in money and commodity loan. In particular, it was proved that an agreement of a commodity (inventory) loan can be concluded according to a consensual model, regardless of the subject composition of the agreement. The terms on quantity, assortment, completeness, quality, containers and (or) on the packaging of the items provided must be fulfilled in accordance with the rules on the agreement of sale of goods (article 466-485 of the Civil Code of the Russian Federation).

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⁴Federal Law dated 26.07.2017 No. 212-FZ "On Amendments to the First and Second Part of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" // Collected Legislation of the Russian Federation. 2017 No. 31. Art. 4761

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