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On The Issue of the Place of a Loan Commitment in the System of the Russian Law of Obligations

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Abstract

In the current Russian civil law, the loan agreement is one of the central institutions of the Russian law of obligations, since if payment for the goods and its transfer are separated by a temporary interval, there is a loan from one party to another. The same applies to the payment deferment or advance payment for the works (services). A similar situation can arise in almost any contractual construction, when one participant in a commodity turnover transfers to another some goods, performs works, renders services with the condition of returning their equivalent and, as a rule, paying remuneration. Consequently, the scope of application of the norms of paragraph 1 of Chapter 42 of the Civil Code of the Russian Federation is much broader than just a loan agreement. Loan and credit agreements refer to the "credit" concept in the economic sense. In civil law, the “credit” category is used in the narrow sense as an obligation from a credit agreement and does not cover all the above relations. Thus, the “credit” concept cannot be considered as a general concept in relation to all cases of the value transfer from one subject to another. From the point of view of the law, the “loan” category corresponds to the “credit” category in the economic sense. In this regard, the clarification of the place of borrowed obligation in the system of the Russian law of obligations is of great theoretical and practical importance.

Keywords: Loan agreement; Loan obligation; Legal system.

1. Introduction

Financial institutions need financial resources to finance their activities. This financing is available in countries with advanced financial system through various institutions of the capital market, banks, mutual funds and other financial institutions. Studies show that funding issues for firms are the most important barriers and challenges. Among the many barriers to business growth, in most countries, the problem of financing is more than other problems. In some countries, high corporate finance costs have been observed more than other financial barriers, which has led to firms failing to access financial resources. In these cases, firms will think of borrowing from financial institutions or borrowing from private institutions or other individuals. This issue will lead to the emergence of a legal concept of a loan.

It is necessary to emphasize the need to distinguish the use of the term “loan” in the economic and legal terms. Thus, O.S. Ioffe has noted that the loan refers to a credit in the economic sense. If the loan is provided through the sale, barter, property rental and other transactions, the obligation it generates also contains a debt claim. Often, the parties give an independent meaning to the resulting debt claim, “tearing off” from the original obligation, and put it in the form of a loan obligation. This may be due to the desire of the parties to interrupt the limitation period, delay the debt payment, etc. The debt arising from other transactions and the loan is a credit in the economic sense and any debt can be cast in the form of a loan. Thus, any debt can be cast in the form of a loan, regardless of the grounds for its occurrence, whether that be in the form of the purchase and sale contract, lease contract, etc. Consequently, the loan and debt arising from other transactions are related to one-order phenomena - a credit in the economic sense.

2. Methods

The study is based on a method of analyzing current Russian legislation and law enforcement practice and existing European (global) standards for the purpose of legal unification (Gutteridge, 1946). 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 judicial practice (Sealy, 1978). Due to the use of modeling and forecasting methods, the consequences of such changes and adjustments can be established with a sufficient degree of reliability, It is also revealed the extent to which the Russian law enforcement practice will be close to the existing European (world) standards (Khabirov, 2018a). The legal sociological method allows the assessment of social problems from a legal position, from the position of the legislator and the law enforcer (Arslanov and Khabirov, 2017). The method of interpretation complements the comparative legal analysis in the study, making it possible to understand and compare the Russian and European (world) legal standards (Davies, 2016). The use of various methods allowed us

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formulating the main theoretical conclusions and make our own proposals on the studied field of public relations (Demiyeva and Arslanov, 2016).

3. Results and Discussion

The Civil Code of the Russian Federation attaches universal importance to a loan agreement, therefore, a wider category of "loan obligations" that arise as a result of two types of transactions can be distinguished. The first type is the traditional transactions related to the actual property transfer to the borrower's ownership, which are based on the loan agreement. The second type is the so-called atypical (derivative) transactions, when the contract conclusion is not preceded by the property transfer into the borrower's ownership. In this case, the loan obligation is based on a different civil law contract, the actual transfer of property does not occur, since this has already happened at the conclusion of the original contract (Arslanov and Khabirov, 2017).

Thus, the obligation of a commodity and commercial credit can be attributed to the loan. According to Z.F. Safin, the commodity credit is a type of consensual loan (Safin, 2005). E.A. Pavlodsky considers the commodity credit contract to be a kind of loan agreement (Pavlodsky, 2000). The obligation of a commercial credit is distinguished from borrowing obligations of an atypical type. Commercial crediting, in contrast to the loan provision, is made in fulfillment of the obligations for the sale of goods, performance of works, provision of services, that is, not under an independent contract, but within the framework of an existing legal relationship (Amineh and Kosach, 2006; Bennett, 1998; Khabirov, 2018b; Lapina, 2013).

The question of the relationship between the loan agreement and the credit agreement is still debatable. One group of scientists (S.A. Khokhlov, N.V. Karpova, E.A. Pavlodsky, E.A. Sukhanov) believes that loan and credit agreements are the independent types of loan obligation. According to another opinion, on the contrary, the credit agreement is a type of loan agreement (V.V. Vitryansky, L.G. Efimova, S.S. Zankovsky, D.A. Medvedev). In our opinion, a credit contract is an independent type of contract and, along with a loan contract, belongs to a group of loan obligations, and the distinction between loan and credit contracts is made by the subject composition, contract subject, and content of the legal relationship (Anisimov, 2009; Balayan, 2015).

A correct understanding of the qualifying features of a credit agreement is not only of theoretical, but also of practical importance. Often, one contractual construction includes the elements of several contracts - a mixed contract. Accordingly, the norms of different institutions of contract law are subject to cumulative application. In addition, different controversies arise with the development of property turnover, for example, the admissibility of the assignment of the bank's rights (claims) to a non-credit organization. For the correct answer to the question about the possibility assigning by the bank of its rights under a credit agreement to a third party - a non-credit organization (the so-called collectors), - we need to pay attention to the following. The literature correctly states that the specific nature of a loan agreement is primarily due to its consensual nature, and only a professional lender (which is a credit institution) may be required to issue a loan. Consequently, prior to granting a credit, the assignment of rights is not allowed. Once a credit is granted, the credit legal relations lose their specificity and are governed by the loan rules. From now, any person can take the place of the lender (creditor) (Opalko *et al.*, 2015).

If we talk about the place of the borrowed obligation in the system of contractual relations, then the classification of contracts given by Yu.V. Romanets, according to which it is necessary to allocate a group of contracts aimed at granting a delay in returning the same amount of property of the same kind and quality or at payment deferment. The author includes in this group of contracts the loan, credit, commodity and commercial credit, bank deposit and account contracts. It is indisputable that all these contracts (with the exception of the case when the object is cash - the rights of obligation) are aimed at providing property to the ownership. When transferring and returning things under a loan agreement, some rules of the institute of sale and purchase are applied, since in this part the borrowed legal relationship is similar to the obligation to transfer property to the ownership. However, if the property transfer to the ownership is the ultimate goal in the sale and purchase contract, then for a group of contracts aimed at granting a deferment, the property acquisition in the ownership will be an intermediate goal, and a deferment granting - a means for fulfilling the main goal. Thus, it is necessary to agree with the opinion that the main purpose of the loan is to provide a deferral of the counter-performance, in contrast to the sale and purchase contract, which is limited to one-time execution. In the Civil Code of the Russian Federation, a loan is formulated as a generic obligation, which allows extending its norms to those contracts in which there is a payment deferment or installment; advance payment (Bayev, 2008; Bystrova, 2009).

A credit may be provided not only at the conclusion of a loan agreement, credit agreement, but may be contained in other contractual structures that are not related to a loan obligation at the first glance. This kind of loan has different forms of its provision: payment deferment or installment for the goods, works, services, i.e. given to sellers, performer. Or the credit has the form of an advance payment, prepayment, i.e. the provision is on the part of the buyer, the customer. In all the examples given, there is a commercial lending, which can also be attributed to a loan obligation in a broad (economic) sense. However, commercial lending has its own specific nature, consisting primarily in the fact that it is based on a different civil law contract, that is, it arises a mixed contract (Article 421 of the Civil Code of the Russian Federation). Moreover, when regulating legal relations arising from such a mixed contract, the rules on loans and credits are of secondary importance, that is, they are applied in the part that does not contradict the essence of the basic obligation (for example, for buying and selling, renting, etc.). If the terms of commercial lending are not settled in the contract (interest, term, etc.), then there are additional rules in § 1 and 2 of Chapter 42 of the Civil Code of the Russian Federation, for example, Art. 809 of Civil Code of the Russian Federation on the procedure for establishing interest rates or on the interest-free nature of lending. In particular, this is presumed in relations between citizens, including individual entrepreneurs, when the amount does not exceed one

hundred thousand roubles. In this regard, there is a question of etymology, the lexical meaning of the phrase "commercial credit". The word “commercial” implies a professional activity for making profit. Then we can say that the scope of application of commercial lending relations is intentionally narrowed by the legislator (Gilmullin, 2017).

We also consider it necessary to consider the legal nature of the bank deposit agreement, since in fact this agreement falls under the features of a loan agreement, namely: 1) the investor, actually acting in the role of lender, transfers cash to the ownership to the bank (borrower); 2) as well as in the loan agreement, there is a provision for deferral of counter-performance; 3) the contract object is property determined by generic attributes (monetary funds); 4) the funds deposited are transferred to the free disposal of the bank, which uses them in its own interests and on its own behalf; 5) the bank undertakes to return not the same property, but of the same kind; 6) direct reference to the application of the rules on the loan agreement in Art. 838 of the Civil Code of the Russian Federation. There are the following distinctive features of a bank deposit agreement from a loan agreement: 1) absolute retribution of the contract; 2) a special subject on the borrower's side is a bank that systematically attracts other people's money on a professional basis. Moreover, such activity is subject to licensing. If there is no license, certain legal consequences will occur, depending on the type of lender. If it is a legal entity, the bank deposit agreement is invalid. If a citizen acts as the lender, then the contract depends maintenance on the depositor' will, who is entitled to receive the deposit amount immediately; on the interest payment accrued in accordance with Article 395 of the Civil Code of the Russian Federation, that is, it is applied a measure of liability, as well as compensation for all damages incurred in excess of the interest amount (clause 2 of Article 835 of the Civil Code of the Russian Federation). Thus, the licensing of activities to attract funds to the deposit is not a qualifying sign, since even in the absence of a license, an agreement with such a subject composition does not automatically entail invalidity. The third distinguishing feature is the obligation to comply with the written form on the basis of nullity (Article 836 of the Civil Code of the Russian Federation) as opposed to the requirements for a loan agreement form (Article 808 of the Civil Code of the Russian Federation). In the literature, many researchers attribute the bank deposits to loan relations. Thus, the relations of the parties under a bank deposit agreement in cases not regulated by legislation should be regulated by the rules on the loan agreement (Vel’yaminov, 2014).

In conclusion, we should turn to the relationship of the loan agreement with the bank account agreement. The scientific community also does not have a unified approach to the legal nature of this agreement. Some researchers consider it to be a mixed undertaking containing the elements of loan, fee and instruction. Other scientists talk about the independent nature of the bank account agreement (Gracheva, 2014).

It can be said that the bank account agreement contains some elements of the loan agreement (money transfer to the account and money delivery to the customer upon its request), storage (contract term), instructions (execution of the customer’s instructions by the bank). But it should be noted that the bank account agreement does not lose its effect even when there is no money in the account at all (clause 1.1 of Art. 859 of the Civil Code of the Russian Federation), that is, there is an independence element of the bank account agreement. Here there are the services, transactions of a special kind - banking, so the rules on a loan agreement, storage, instructions can be applied only in the case when it does not contradict the essence of legal relationships. The main purpose of a bank account is to conduct transactions, and not to accrue the interests on the deposited amount or its return (Gaidamakin, 2013).

In addition, the loan agreement is similar to the relationship of transferring things for impersonal storage, provided for by Art. 890 of the Civil Code of the Russian Federation, because in both cases, the property determined by generic features is to be returned. The first difference between these agreements lies in a different target orientation, namely: the purpose of the storage agreement with anonymity is to provide the services to the transferor (the owner), and the purpose of the loan agreement is to provide the services to a person who takes the property (the borrower). The second difference is that the keeper does not have the right to dispose of things deposited. Legal regulation of storage with granting to the warehouse the right to dispose of them deserves attention. A contract concluded on such terms and conditions is mixed and combines storage and loan. By virtue of the direct indication of the law, the provisions of Chapter 42 on the loan shall be applied. The rules on storage apply only to determine the place and time of goods return (Dmitriyev, 2013; Madayev, 2012).

4. Summary

It appears that clause 3 of Art. 834 of the Civil Code of the Russian Federation should be amended stating that “The relations between the bank and the depositor on the account to which the deposit has been made should be regulated by the rules on the loan and credit agreement (Chapter 42), unless otherwise provided by the rules of this chapter or follows from the essence of the bank deposit agreement".

When regulating legal relations arising from the bank deposit agreement or an account, a differentiated approach should be introduced. In the first case, the rules on the loan agreement are directly applicable. In the second case, the rules of Chapter 42 of the Civil Code may be applied in the case of crediting the account (Article 850 of the Civil Code of the Russian Federation).

Clause 3 of Art. 809 of the Civil Code of the Russian Federation is not applicable to commercial lending relations, as well as other rules governing loan relations between citizens.

We propose to exclude Article 822 of the Civil Code of the Russian Federation, and to add Article 807 of the Civil Code of the Russian Federation with clause 8: “The conditions on quantity, range, completeness, quality, packaging of the goods provided should be fulfilled in accordance with the rules on the goods sale and purchase contract (Articles 465 - 485), unless otherwise provided by the loan agreement” .

5. Conclusions

In order to distinguish the externally similar contractual structures, it is necessary to identify the essence and purpose of legal relations. The loan agreement refers to the number of contracts for the property transfer to the ownership. But this is not its ultimate goal, since there is a deferral of counter equivalent compensation. That is, loan, credit, and bank deposit agreements occupy a special place in the system of law of obligations and refer to a loan in the economic sense by their nature.

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