ABOUT THE WEAK PARTY OF THE LOAN CONTRACT

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Abstract: *In work the question about which parties of the loan agreement it is necessary to recognize weak is considered. A conclusion is drawn that not only the borrower is weakness, but also the lessorin the presence of certain circumstances can be recognized by weakness.It is established that in a design of the loan agreement the so-called "floating" model of weakness when depending on certain conditions by weakness it is necessary to recognize either the borrower or the lessor is used. On the basis of the analysis of the doctrine and jurisprudence authors prove a possibility of the use of the term "weakness". Further the question what of the parties in the obligation - the debtor or the creditor is investigated - it is necessary to recognize weak. Various approaches to the considered perspective are given. According to traditional approach by weakness of the loan agreement recognize the borrower. However on the basis of the analysis of the current legislation, opinions expressed in educational and scientific literature and jurisprudence authors find it possible to recognize as weakness of the loan agreement and the lessor. Statistical data, and also bills submitted for consideration of the State Duma of the Russian Federation are provided in confirmation of this conclusion. On the basis of the conducted research it is proved that the legislator recognizes as weakness of the loan agreement by the general rule of the borrower, and in case of non-execution by the borrower of the obligation for return of a subject of a loan weakness the lessor admits.*

Keywords: loan agreement, weakness, lessor, borrower, bilaterally binding character, rights of the borrower.

Introduction

03.07.2016 came into force of the Federal Law No. 230-FZ "About protection of the rights and legitimate interests of natural persons at implementation of activities for return of arrears and about introduction of amendments to the Federal law "About Microfinancial Activity and the Microfinancial Organizations". Adoption of law in this sphere was about to happen more than ever in connection with the numerous violations allowed by so-called collectors at interaction with debtors when debtors are actually deprived of an opportunity to be protected from a collector arbitrariness. Are in certain cases violated the rights and the third parties, not being the parties of the loan obligation. Actually debtors in similar situations are the weak, unprotected party of legal relationship[1] that is confirmed also by the conclusions which are

[1] Habirov A. I. Protection of interests of citizens consumers in the obligation for return of a monetary debt//Collection of postgraduate scientific works of law department /

contained in the Review of Presidium of Russian Armed Forces of 22.05.2013 about jurisprudence on the civil cases connected with settlement of disputes about execution of credit obligations: it is specified in subitems 3, 4.1 that in the relations with bank citizens investors and borrowers are economically weakness in the contract.

In this regard we consider necessary to consider a question of protection of the rights of weakness in the loan agreement. The concept of "weakness" of the obligation is the scientific term used for convenience of the characteristic of distribution of the rights and duties between the parties of the obligation, an explanation of importance of establishment of "asymmetry", incomparability of the rights and duties of subjects. The considered term is not mentioned neither in the Civil Code of the Russian Federation, nor in other regulations. However the use of the term "weakness" has the official legal and doctrinal (scientific) justification.[2] For example, the Constitutional Court of the Russian Federation in the resolutions uses the term "weakness".

Methods

At the heart of a research there is a method of the analysis of the existing Russian legislation and law-enforcement practice and the existing European (world) standards for legal unification.[3] Methods of legal modeling and forecasting allow defining need of introduction of amendments to the existing Russian regulations, and also needing of correction of jurisprudence.[4] Thanks to methods of modeling and forecasting can with sufficient degree of reliability be established a consequence of introduction of such changes and adjustments, and also it is revealed, how, finally, the Russian law-enforcement practice will be brought closer to the available European (world) standards. The right

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under the editorship of A. I. Abdullin. - Kazan: Cauldron of un-t, 2013. - Issue 14. - Page 535-539.

[2] Kobchikova E. V., Cheparina O. A. To a question of the legal nature of contracts on target training and of target reception//the Right and education. - 2015 - No. 2. - Page 4-10.

[3] Comparative Law. An Introduction to the Comparative Method of Legal Study and Research. By Gutteridge H. C., K.C., LL.D. (Cambridge Studies in International and Comparative Law, Vol. I.) London: Cambridge University Press. 1946. xvi and 208 pp. (12s. 6d.). (1947). The Cambridge Law Journal. 9(3) P. 386-387.

[4] Dale, William. Legislative Drafting: A New Approach: Comparative Study of Methods in France, Germany, Sweden and the United Kingdom. London: Butterworths, 1977. 341 p.

sociological method allows assessment of social problems from a legal position, from a position of the legislator and the law enforcement official.[5] The method of interpretation supplements the comparative and legal analysis in a research, allowing understanding and comparing the Russian and European (world) legal standards.[6]

Results

By the general rule the borrower admits weakness of the obligation. However contrary to the developed opinion actually weakness in loan agreements often is the lessor when the sum of a loan does not come back the debtor in time and it cannot also be returned on the basis of the judgment. Increase in quantity of not repaid debts is promoted by existence of the list of property on which it is impossible to turn collecting, types of income on which collecting, opportunities to declare it a bankrupt and as a result, to repay unsatisfied requirements of creditors cannot be turned.

Discussion

It is necessary to mark out 4 values when the party has to be considered weak. The first value - nominative - assumes that from two parties in the obligation the party to which duties to make certain actions are assigned or to refrain from commission of actions, is weakness. The debtor bears risk of impossibility of execution of the duty lying on it, and he can test risk of adverse effects in connection with application of measures of civil responsibility [7]. So, in case of violation by the borrower of the loan agreement (Art. 811 of the Civil Code of the Russian Federation) for the sum of a loan percent for illegal use of someone else's money (Art. 395 of the Civil Code of the Russian Federation) irrespective of payment of percent on article 809 Civil Code of the Russian Federation are subject to payment. However from this general rule, in our opinion, it is necessary to provide an exception. And it follows from the second value of the term "weakness".

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[5] Siems, M., & Mac Síthigh, D. Mapping legal research. The Cambridge Law Journal. 2012. 71(3).P.651-676.

[6] Davies, P. Rectification versus interpretation: nature and scope of the equitable jurisdiction. The Cambridge Law Journal. 2016. 75(1). P.62-85.

[7] VavilinE.V. Mechanism of implementation of the civil rights and fulfillment of duties: Law PhD Thesis. - M, 2009. - 425 pages.

It is conditionally possible to call the second value of the concept "weakness" "formal, standard" as it is based on the analysis and systematic interpretation of the civil legislation. In 1923 N. G. Vavin noted that transfer of property in a loan is the most risky transaction.[8] Importance of the addressing the doctrine and the legislation of last periods is noted by K. M. Arslanov, O. N. Nizamiyeva, etc.[9] S. A. Khokhlov emphasizes that "strengthening of protection of the rights of creditors makes one of basic features of a part of the second group of companies. The having rights are subject to protection, but not those who broke them. From this point of view the debtor should not be protected at all by the right".[10] Therefore, in the loan agreement by weakness it is necessary to recognize the lessor. Really, the situation in the sphere of return of debts leaves much to be desired today: according to data of the Central Bank of the Russian Federation for 01.01.2016 in general across the Russian Federation it was provided to natural persons of the credits for total amount nearly 6 trillion rubles. Debt volume in the Russian Federation exceeds 10 trillion rub, including the volume of arrears approached 1 trillion rubles. Besides, according to data UFSSP of the Russian Federation on RT, for 2015 the total of executive productions exceeded 2 million, from them is ended by the actual execution - 791 thousand (43,2%). In the Russian Federation the share of the executive productions ended by the actual execution following the results of 2015 made 38,6%.

According to the third possible understanding weakness is that which has smaller quantity of resources, including material, information, and others in comparison with the contractor. By comparison of the opportunities which are available for the parties the "strong" and "weak" parties in legal relationship come to light. Considering the concept "weakness" from this point of view in relation to the loan agreement it is

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[8] Vavin N. G. The loan agreement under the Civil code. A dogmatic sketch with the appendix of the corresponding legislative material. - M. Prod. Vserokompom's section, 1923. - 34 pages.

[9] Arslanov K., Nizamieva O. Surrogacy: Legal and Moral Dimension of the Problem from the Perspective of Russian, Foreign and International Experience//Research Journal of Applied Sciences. 2015. No. 10. P.841.Arslanov K. M. About communication of the Russian civil law and foreign legal experience during the period since the 19th century till present//the XI All-Russian scientific and practical conference "Derzhavinsky Readings": the Art. - M., 2016. - Page 188-191.Habirov A. I. About value of historical development for formation of modern institute of a loan//Civil law. - 2017. - No. 3. - Page 36-39.

[10] Ukrainians S. A. Favourites / Intro.: P.V.Krasheninnikov. M.: Statute, 2017. - 304 pages.

necessary to recognize that in that case when the professional participant of the corresponding market acts as the lessor (for example, the credit institution which issued a consumer loan (loan)), the borrower by the general rule is weakness. This conclusion is based on the analysis of offers in the market of financial services in delivery of consumer loans (loans). So, there are general terms of the contract of a consumer loan (a microloan, the credit) developed by the organizations unilaterally that is reflection of legislatively established regulation (Art. 5 of the Federal Law "About a Consumer Loan (Loan)"). Thus, it is possible to draw a conclusion that the legislator recognizes the borrower by weakness in the contract of a consumer loan (loan).

If the nonprofessional person acts as the lessor, then the borrower has *bigger* legal tools for the conclusion of the contract on the conditions arranging it. Nevertheless it is necessary to recognize that natural and legal entities, as a rule, take money in a loan when need them. And, on the contrary, usually the person acts as the lessor in the presence of spare cash. Therefore, it is possible to recognize that the borrower has *big* interest in the conclusion of the loan agreement, and, so more depends on will of the lessor.

And, at last, from the fourth position weak that party which has the subjective right can appear, however forms and ways of its realization are insufficient in concrete civil legal relationship. The additional legal specification, which is legislative, judicial or administrative support is required. Actually, jurisprudence often develops taking into account interests of weakness in civil legal relationship. In the presence of the special legal tools allowing in each case when one of the parties is weak to provide fair permission of business, E. V. Vavilin truly notes existence of a certain legal shortcoming - lack of a universal legal basis. In the civil legislation there is no general provision which would bring to official level the concept of derogation from the fundamental civil principle of legal equality of the parties in that case existing in the domestic legal doctrine when one of the parties is weak in relation to another for the unconditional objective reasons. It is necessary to make alignment of legal opportunities of the parties taking into account the principles of rationality and justice. One more reason allocated by E. V. Vavilin for which establishment in the law of rules about weakness in civil law is expedient it is possible to call that in any cases financial or status position of weakness is obviously not shown. So, for example, in the loan agreement signed between citizens depending on concrete circumstances any of the parties can be recognized as weak. In particular, the lessor can

face a problem of a non-return of the money transferred as a loan or other things determined by patrimonial signs. The borrower enters loan legal relationship, as a rule, feeling material poverty. Or, for example, V. V. Vitryansky notes that "... and opposition of the "strong" and "weak" party when the last needs at least the minimum level of guarantees of protection of the rights and legitimate interests"[11] quite often occurs in the contracts signed in the sphere of business activity. Thus, we consider necessary to agree with E. V. Vavilin that in chapter 2 of the Civil Code of the Russian Federation the general, universal mechanism by means of which will become possible has to be formulated to realize or protect the subjective right of weakness.

Summary

The first value of the concept "weakness" gives an opportunity to realize importance, need of protection of the rights and interests of the debtor. For development of the balanced and effective civil circulation the debtor (borrower) has to have the fair and rational mechanism of realization of subjective civil duties and responsibility for non-execution of duties. In particular, in our opinion, the size of percent for use of a loan and the size of a penalty fee (penalties) for violation of provisions of the loan agreement, including for delay of return of the sum of a loan in total cannot exceed the sum of the loan (loan "body").

The second of the presented values of weakness in the obligation reasonably establishes that the main objective of civil norms is finding of a source of the benefits for compensation of losses of the creditor. The creditor who was deprived of certain material benefits acts as the central figure in a question of responsibility. Thus, in our opinion, in that case when the borrower does not return the sum of a loan (credit) in time, without having on that good reasons, by weakness of the loan agreement (credit) it is necessary to recognize the lessor (creditor). The debtor's trips in the recreational purposes, including abroad, in particular, can testify to lack of good reasons; use by the debtor of the vehicle not in the professional purposes; commission by the borrower of gratuitous transactions on alienation of own property to the third parties, etc. For prevention of unfair actions, the Ministry of Justice of the Russian

[11] Vitryansky V. V. Special contractual designs in the conditions of reforming of the civil legislation//Civil law and the present: M. I. Braginsky's memories / Under the editorship of V. N. Litovkin, K. B. Yaroshenko. - M, 2013. - Page 53-58.

Federation suggests to include in the list of the documents necessary for registration of legal persons and individual entrepreneurs, the certificate of lack of outstanding debt on executive productions. Besides, in case of suspension by bank of operations with the available money on accounts of the debtor organization according to the p. 6 of Art. 81 of the Federal Law "About executive production" it is supposed to forbid banks to open for the debtor organization accounts, deposits, deposits and to grant it the right to use new corporate electronic instruments of payment. We believe that the amendments proposed by Ministry of Justice of the Russian Federation are logical continuation of already available restrictions of public character and can be an effective way of protection of the rights of lessors.

Weakness can be read out from the third position not the concrete party of the contract, but such subject of legal relationship which owing to objectively caused opportunities is weaker in a certain type of the contract. The strong party, on the contrary, has an objective opportunity to impose the conditions to contractors. So, in the law it is established that the contract of a consumer loan (loan) consists, including, of the general conditions to which according to item 2 of Art. 5 of the Federal Law "About a Consumer Loan (Loan)" rules of article 428 Civil Code of the Russian Federation (the contract of accession) are applied, that is such conditions are determined by one of the parties (in this case the creditor) in forms or other standard forms and can be accepted by other party precisely by accession to the offered contract in general.

Conclusion

This research is one of the first scientific works in which an integrated approach is applied to formation of rules about definition of weakness of the contract and it is established that both the borrower, and the lessor depending on certain conditions can be recognized by weakness of the loan agreement. It is established that in a design of the loan agreement the so-called "floating" model of weakness when depending on certain conditions by weakness it is necessary to recognize either the borrower, or the lessor is used. On the basis of the conducted research it is proved that the legislator recognizes as weakness of the loan agreement by the general rule of the borrower, and in case of non-execution by the borrower of the obligation for return of a subject of a loan weakness the lessor admits.