Artur Khabirov
Assistant at the Department of Civil Law,
Kazan (Volga Region) Federal University

LOAN AGREEMENT: URGENT QUESTIONS OF LEGAL REGULATION

DOI: 10.30729/2541-8823-2018-3-2-74-86

Abstract: The article discusses the question of a bilateral character of the loan agreement contract. It validates a conclusion about the existence in the loan agreement of the rights not only for the lessor (traditional approach), but also for the borrower. In educational and scientific literature in connection with the subjective rights and obligations of the loan agreement parties there prevails an opinion that the obligation under the contract of a monetary loan is unilaterally binding as the authorized party (the creditor) is always a lessor and the bound party (the debtor) is always a borrower. At the same time, it is necessary to differentiate a contract of a monetary loan and a contract of a commodity loan in connection with differences in a set of the bilateral rights and duties of the lessor and borrower. The article also studies the question of a weak party in the loan contract. A conclusion is drawn that not only the borrower is a weak party, but also the lessor in the presence of certain circumstances can be in a weak position. It establishes that the frame of the loan agreement uses a so-called "floating" model of the weak party when depending on certain conditions it is either the borrower or the lessor that are recognised as a weak party. On the basis of the analysis of the doctrine and jurisprudence, the author justifies the use of the term "weak party". Further, the article discusses which of the parties in the obligation – the debtor or the creditor – should be recognised as week. Various approaches to the issue under consideration are given. According to the traditional approach, the weak party of the loan agreement is a borrower. However, on the basis of the analysis of the current legislation, opinions expressed in educational and scientific literature and jurisprudence, the author finds it possible to recognise the lessor as weak party of the loan agreement as well. The statistical data and the bills submitted for consideration of the Parliament of the Russian Federation are provided to support this conclusion. On the basis of the conducted research it is proved that the legislator recognises the borrower as a weak party of the

loan agreement as a general rule, while in case of non-execution by the borrower of the obligation to return the loan, the lessor is considered to be a weak party.

Keywords: bilaterally binding, borrower, loan agreement, lessor, rights of the borrower, weak party.

At the current stage of the reform of the civil law and its implementation by the law enforcement agencies, the study of the legal protection of the rights of the parties comes to the forefront of the national civil science and practice. Among the most urgent issues is the question of civil law protection of the rights of the parties under the loan agreement. As noted by the Russian Federation President, Vladimir V. Putin, "the most pressing problem now is concentrated in the service sector, including the financial services. Thus many difficult questions arise among citizens-consumers in relation to so-called micro-loans."[1] According to statistics, every year an increasing number of disputes arise from loan contracts. If in 2013 more than 1.3 million (!) claims were filed for the recovery of amounts under the loan or credit agreement, in 2016 the number of claims increased by almost two-and-a-half times amounting to more than 3.2 million claims. The total amounts awarded to recover have significantly increased as well – from 359.7 billion roubles in 2013 to 840.7 billion roubles in 2016[2].

The past two decades in Russia are marked by substantial economic changes, providing a boost to rapid development of the market economy and, as a consequence, the rapid growth of the market of loans and credits. According to the statistics of the Bank of Russia, the amount of loans granted to individuals has considerably increased: if in 2009, the lending amounts equaled 2.6 trillion roubles, in 2017 they came to more than 8.1 trillion roubles. With the increase in crediting there inevitably grow the debt and social tension in society. While at the end of 2009, the debt on credits and loans granted to private individuals-residents stood at 3.5 trillion roubles, as of December 1, 2017 debt has risen to nearly 12 trillion roubles, including 2.7 trillion roubles in overdue accounts.

Vladimir Putin gave an example that on short-term loans for small amounts the maximum figures of the total cost of the loan exceed the reasonably acceptable level. For example, it is "800% on the loan of 30 thousand roubles for up to 1 month, which exceeds 600 roubles of citizens' expenses for daily servicing of such a loan, if the borrower, in the course of one year, does not fulfil its obligations. The famous old lady in Dostoevsky's novel is a very humble woman, compared with our present usurers."

---

[1] V.V. Putin, speech at the meeting of the State Council Presidium on development of the national system for the protection of consumer rights, 2017. [An electronic resource]. URL: http://kremlin.ru/events/president/news/54328 (date of the address: 13.04.2018).

[2] Statistics of the Judicial Department of the Supreme Court of the Russian Federation [An electronic resource]. URL:http://www.cdep.ru/index.php?id=79 (date of the address: 23.03.2018).

(Vladimir Vladimirovich Putin, speech at the meeting of the State Council Presidium on development of the national system for the protection of consumer rights, 2017).

Recent years have been marked by the adoption of special laws and amendments to the existing normative legal acts regulating legal relationship in the sphere of issuing loans and protection of the rights of the parties to the loan agreement. The quintessence of all the changes were the amendments to chapter 42 of the RUSSIAN CIVIL CODE, which came into effect on June 1, 2018. The need to protect the subjective rights of individuals and organizations in general and the rights of the parties to the loan agreement in particular remains one of the main objectives of the civil law and requires further theoretical understanding. One of the causes of the violation of human rights and freedoms in Russia is the absence of strict procedures and mechanisms for their protection. At the same time, the mechanism of civil rights protection remains to be one of the phenomena that has not been studied sufficiently enough by the legal science. Most often it is the implementation of the subjective right which is the object of the tort. In this regard, one should agree with D.A. Medvedev, who noted that the current system of civil law "requires not a reconstruction or radical change, ... but an improvement, disclosing its capacity, and development of implementation mechanisms[1].

In the science of civil law the traditional opinion adheres to the position that "the content of the loan agreement, proceeding from its unilateral nature, makes it the duty of the borrower to return the loan sum (Article 810 of the Civil Code) and correspondingly the right of the lessor to require it."[2] Therefore, the borrower has no rights under the contract in question, and the lesser is not charged with any duties apart from an all-creditor duty to accept appropriate execution[3]. Thus, for example, E.A. Sukhanov points out to the so-called creditor duties of the lessor (item 2 of Article 408 of the Civil Code) which appear in the majority of obligations and do not turn this contract into bilaterally binding. The lessor is obliged to issue the borrower with a note of receipt of the subject of the loan, or to return the relevant debt document (for example, the receipt of the borrower), or to make a record about return of the debt on the returned debt document, or, at least, to indicate in their note of receipt that the debt document issued by the borrower cannot be returned (in particular, if it was lost)[4]. K.A. Mikhalev and A.P. Sofronov emphasize that in loan legal relationship there are no counter duties, making a reservation that the lessor has the so-called creditor obligations to discharge they service (Article 406, item 2 of Article 408 of the Civil Code of the Russian

---

[1] D. A. Medvedev. New Civil Code of the Russian Federation: codification issues. Moscow, 2008. P. 32

[2] Civil law: course book, in 3 vols. / under the editorship of A. P. Sergeyev. Moscow: Prospectus, 2017. Vol. 2. P. 430.

[3] A.I. Habirov. To the question of abuse of the right of the lessor according to the loan agreement// Collection of postgraduate scientific works of law department of K(P)FU. Kazan, 2014. No. 15. P. 127-132.

[4] Russian civil law: course book, in 2 vols. / Editor E. A. Sukhanov. Moscow: Statute, 2011. Vol. 2: Liability law. P. 211.

Federation)[1]. O.V. Sgibiyeva also thinks that the loan agreement is unilaterally binding[2]. V.V. Vitryansky notes that the loan agreement is a unilaterally binding contract which "does not raise doubts and is accepted by all authors"[3]. Thus, in the science of civil law there prevails an opinion that the existence of counter duties of the creditor in the loan agreement, having a general character, does not influence the unilateral character of the contract. However, there is another position which is presented in this work.

D.I. Meyer pointed out that it is possible to sign a bilaterally binding loan agreement which will make the lessor to grant the subject of the loan[4]. A.G. Karapetov, A.I. Savelyev[5], P.N. Vishnevsky[6] and others also wrote about the possibility to sign the loan agreement based on consensual model[7]. A similar position also occurs in judicial practice (for example, The resolution of Arbitration court of the East Siberian Federal District of March 20, 2016, no. F02-833/16 on the case no. A33-6853/2015). One can draw the conclusion that is possible to impose the obligation for granting the subject of the loan on the lessor.

According to the current legislation the following rights are distinguished: 1) the right of the borrower to return the sum of the interest-free loan ahead of schedule and the corresponding duty of the lessor to accept this sum from the borrower; 2) the right to challenge the loan agreement on lack of the monetary value of the contract and the duty of the lessor corresponding to this right to accept the objections of the borrower or to produce the evidence of the monetary value; 3) the right to demand the appropriate execution to be accepted; 4) the right to demand to have a note of receipt of the execution fully or in the corresponding part, the debt document, and when the return is not possible, to indicate this in the receipt.

In case the subject of the loan is not money, but other things determined by generic characteristics, there is a question of responsibility of the lessor for the quality of the transferred things. We can draw a conclusion that the provisions of Article 822 of the Civil Code of the Russian Federation on the quantity, range, contents, quality, about the container and/or packaging of the provided things apply to the loan agreement of things as well. We should agree with Y.V.Romanets who points out that in relation to

---

1 Civil law: course book, in 2 vols. / under the editorship of B. M. Gongalo. Moscow, 2017. Vol.2. P. 390, 393.

2 Civil law: course book / under the editorship of prof. O.N.Sadikov. Vol. 2. Moscow, "Contract", "INFRA-M", 2006. P. 273.

3 M.I. Braginsky. Contract law / M. I. Braginsky, V. V. Vitryansky. Book 5, vol. 1: Contracts on a loan, bank credit and factoring. Contracts aimed at creation of collective formations. Moscow: Statute, 2006. P. 116, 166.

4 D.I. Meyer. Russian civil law, in 2 vols. M.: Statute, 2003. 831 pages of [An electronic resource] URL: http://civil.consultant.ru/elib/books/45 (date of the address: 12.11.2015).

5 A.G. Karapetov. Freedom of contract and its limits. T. 2: Limits of freedom of definition of contract terms in foreign and Russian law / A.G. Karapetov, A. I. Savelyev. Moscow: Statute, 2012. P. 79.

6 P.N. Vishnevsky. Legal regulation of contract of the international loan: Law Sci. PhD Thesis / P.N. Vishnevsky. Moscow, 2015. P. 12-13.

7 A.I. Khabirov. On the value of historical development for formation of modern institute of loan // Civil law. 2017. No. 3. P. 38.

certain types of the loan agreement one can also apply other norms from chapter 30 of the Civil Code of the Russian Federation – Articles 455-457 – which do not contradict the nature of the consensual contract of the commodity credit. Article 459 on the transition of risk of casual destruction of goods, as well as Articles 460-462 could add to the regulation of relations of the real loan agreement of things[1].

A wide range of the rights is provided for the borrower by the Federal Law "On Consumer Loan" which can be classified according to several parameters. We join with the classification by E. V. Fedulina[2] who divides the rights of the borrower under consumer loan contract according to their character into *property rights* (the right for compensation for harm, caused to the borrower by the inadequate performance of obligations under the contract; the right for compensation of the size of the paid interest fee and other payments under consumer loan contract on the return of goods of inadequate quality, etc.) and *non-property rights* (the right for information, the right for the free choice of the services offered within the credit (loan) agreement (for example, insurance), etc.).

By analogy with consumer rights granted in a retail contract or contractor's agreement, it is possible to differentiate *precontract* and *contract rights* of the borrower. The first group of rights includes, first of all, the right for information. Works on civil law note the importance of those legislative provisions that regulate the precontractual relations, namely informing the borrower of the terms for crediting[3]. Often a precipitate conclusion of loan or credit agreements (including the consumer contract) on enslaving for the borrower terms is caused by the fact that the borrower does not have full and clear information about the terms of the contract and consequences of their violation[4].

The second group of rights of the borrower is connected with the execution and termination of the loan agreement. In particular, the set of rights related to the execution of consumer loan contract includes: the right to use the loan sum for particular purposes established in the contract, as well as at the discretion of the borrower if the loan agreement does not specify a particular purpose; the right of the borrower to forbid the creditor to concede the rights (requirements) to the third parties; right for stability of the contractual conditions.

Also the right of the borrower to observe conditions of interaction with the creditor belongs to the set of rights connected with the execution of loan agreement[5]. Respect

---

1 Y.V. Romanets. System of contracts in civil law of Russia. 2nd edition, revised and expanded. Moscow: Norm, Infra-M, 2013. P. 55-56.

2 E.V. Fedulina. Civil protection of rights of the borrower under the contract of consumer credit (loan): Law Sci. PhD Thesis. Moscow, 2015. P. 60.

3 N.A. Shvachko. Problem of recognition of the credit agreement with consumer's participation as a contract of adhesion // Lawyer of higher education institution. 2012. No. 6. P. 59.

4 Speech of the Russian President V. V. Putin at the meeting of Presidium of the State Council "On the National System of Consumer Protection" [An electronic resource]. URL: http://www.kremlin.ru/events/president/ news/54328/videos (date of the address: 23.04.2017).

5 E.V. Fedulina. Civil protection of rights of the borrower under consumer credit (loan) contract: Law Sci. PhD Thesis. Moscow, 2015. P. 69.

for this right has become very urgent which is connected, first of all, with unfair and sometimes illegal behavior of the persons who are engaged in the return of debt being the so-called "collectors". For a long time in court practice and in the doctrine,[1] there was no unanimity of opinions on the possibility of concession of the rights (requirements) under the loan agreement[2]. At the present moment these disputes have no foundation since Article 12 of law "On Consumer Credit (Loan)" directly allows such concession (see also Article 4 of the Federal Law "On protection of the rights and legitimate interests of natural persons performing the activities aiming at the return of arrears and on introduction of amendments to the Federal law 'On microfinancial activity and the microfinancial organizations' ").

Within the set of rights connected with performance of the contract, the borrower has a right for free execution of the monetary liability under consumer loan contract. This right is exercised by providing the borrower with at least one way of free repayment of debt (item 19 of Article 5 of the Federal Law "On Consumer Credit (Loan)"). Moreover, when opening a bank account provided by the contract, the operations have to be carried out free of charge (item 17 of Article 4 of the Federal Law "On Consumer Loan"). This right aims to protect the borrowers from the hidden payments and fees (see also subitem 5 of item 5 of Article 6 of the Federal Law "On Consumer Credit (Loan)").

The set of rights connected with the termination of consumer loan contract include the right of the borrower to return of the sum of consumer loan ahead of schedule within 14 days (30 days when receiving a loan for particular purposes). Works on civil law point out the importance of fixing these rights of the borrower[3]. Thus, the borrower, under the contract of monetary loan, especially under consumer loan contract, as well as under the contract of commodity loan, is granted with a large set of rights which allows us to draw the conclusion on the bilaterally binding character of the loan agreement.

Under the consumer loan agreement, the lessor (creditor) also has a certain set of the rights which can be classified according to several characteristics. Thus, by analogy with the above-stated classification of the rights of the borrower as property and non-property rights, it is possible to distinguish *property* and *non-property rights* of the lessor. The property rights of the lesser are the following: the right to receive a fee for use of a loan, the right to receive a fee in case of the enforced cancellation of the contract ahead of schedule due to violation on the part of the borrower; the right to demand to return the sum of the loan. The non-property rights include the right for information about the borrower and the right for free choice of the contractor under the contract.

---

1 A.A. Lupu, I.I. Oskina. Is the activity of collection agencies legitimate? // Economy and law. 2011. No. 3. P. 102.

2 A.I. Khabirov. Protection of interests of citizens-consumers in the obligation regarding return of a monetary debt // Collection of postgraduate scientific works of Law department. Kazan: KFU, 2013. No. 14. P. 535-539.

3 S.V. Rybakova. What new aspects the Civil code will introduce in regulation of credit relations? // Bank right. 2012. No. 5. P. 34.

The rights of the lessor can be also subdivided into *precontractual* and *contractual rights*. The precontractual rights comprise the right to receive reliable information about the borrower and the right for coordination of contractual conditions. According to item 3 of Article 7 of the Federal Law "On Consumer Credit (Loan)", the creditor handles the application and other documents of the borrower. Within the precontractual relations, the lessor (creditor) has the right to refuse to grant a consumer loan.

On this basis, we conclude that the loan agreement has a bilaterally binding character. First, both under loan agreement in general, and under consumer loan contract in particular, the borrower is given certain rights that allows to draw a conclusion on the bilaterally binding character of the loan agreement. The rights of the loan agreement parties can be classified as pre-contractual and contractual, as the rights connected with signing, execution or termination of the loan contract, and as property and non-property rights. A system of information rights of the borrower is separately distinguished; classification of information rights of the borrower is developed and proved.

Secondly, the set of legal powers of the parties under the contract of monetary and commodity loan differs, so does the scope of legal powers of the borrower under the consumer loan contract. Under the contract of commodity loan the borrower has the same rights, as the buyer under the contract of purchase and sale in the part relating to the characteristic of the transferred thing (goods) (owing to the corresponding application of Article 822 of the Civil Code of the Russian Federation).

Thirdly, it is necessary to differentiate the mechanism of protection of the rights of the parties under the contract of monetary loan and under the contract of commodity loan. In case of violation by the lessor the relevant duties under the contract of commodity loan, the borrower can protect the rights in non-jurisdictional form. Measures of operational impact are applied, such as refusal of a contract or refusal of acceptance of the inadequate execution. Such way of protection as the termination or change of legal relationship is used, as well as awarding specific performance of duties. Means of protection are a statement, claim. Under the contract of monetary loan the parties exercise protection of the rights in jurisdictional order by means of such security measures as a statement of claim. Therefore, depending on the subject of the loan agreement, there are differences in form, means and ways of protection.

The scientific results received during the conducted research allowed us to put forward a number of suggestions for improvement of the current legislation. First, a new edition of item 1 of Article 807 of the Civil Code of the Russian Federation: "According to the loan agreement one party (the creditor) transfers or undertakes to transfer into the ownership of the other party (borrower) money or other things determined by generic characteristics, and the borrower undertakes to return to the creditor the same sum of money (the loan sum) or equal quantity of other things of the same sort and quality. The loan agreement in which the creditor is a citizen and the subject is money is considered to be concluded at the moment of money transfer." Secondly, a new edition of the offer 2 of item 6 of Article 7 of the Federal Law "On Consumer Credit (Loan)":

"The consumer loan contract is considered to be concluded when parties of the contract reached an agreement on all individual terms of the contract specified in part 9 of article 5 of this Federal Law."

Further to the above considerations we would like to address the question of the weak party of the loan contract. On the 3rd of July, 2016, a new law came into force, i.e. Federal Law No. 230-FZ "On protection of rights and legitimate interests of natural persons repaying the arrears and on the introduction of amendments to the Federal law 'On Microfinancial Activity and Microfinancial Organizations' ". Adoption of law in this sphere was long overdue because of numerous violations committed by the so-called collectors during interaction with debtors when debtors are, in fact, deprived of an opportunity to protect themselves from collector's arbitrariness. In some cases the rights of the third parties, which are not a party of the loan obligation, are also violated. Indeed, debtors in such situations are a weak, unprotected party of legal relationship[1] which is also confirmed by conclusions of Review of Presidium of the Higher Court of the Russian Federation of 22.05.2013 on jurisprudence in civil cases connected with the 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 a weak party in the contract.

In this regard it is necessary to examine the question of protection of rights of the weak party in a loan agreement. The concept of a "weak party" of the obligation is a legal term used for convenience to characterize the distribution of rights and duties between parties of the obligation and to state the importance of indicating asymmetry and incomparability of the rights and duties of subjects. The term under consideration is mentioned neither in the Civil Code of the Russian Federation, nor in other regulations. However, the use of the term "weak party" has official legal and doctrinal (scientific) justification[2]. For example, the Constitutional Court of the Russian Federation uses the term "weak party" in its resolutions.

We should distinguish four meanings of the concept "weak party". The first meaning – the nominative meaning – assumes that out of two parties in the obligation the party responsible to take certain actions or to refrain from them is a weak party. It is the debtor who runs the risk of not fulfilling their duties and can face the adverse effects of measures of civil liability taken against them[3]. Thus, in case of violation by the borrower of the loan agreement (Article 811 of the Civil Code of the Russian Federation) for the sum of a loan, a penalty must be paid for illegal use of someone else's money (Article 395 of

---

[1] A.I. Habirov. Protection of interests of citizens-consumers in the obligation regarding return of a monetary debt // Collection of postgraduate scientific works of Law Department. Kazan: KFU, 2013. No. 14. P. 535-539.

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

[3] E.V. Vavilin. Mechanism of implementation of the civil rights and fulfilment of duties: Law PhD Thesis. Moscow, 2009. P. 425.

the Civil Code of the Russian Federation) irrespective of penalty payment according to Article 809 of the Civil Code of the Russian Federation are subject to payment. However, in our opinion, an exception to this rule should be made. And it follows from the second meaning of the term "weak party".

The second meaning of the concept "weak party" is "formal" or "statutory" as it is based on the analysis and systematic interpretation of civil legislation. In 1923, N.G. Vavin noted that to lend property is the most risky transaction[1]. The importance of referring to the doctrine and the legislation of the past is stressed by many scholars[2]. S.A. Khokhlov emphasizes that "strengthening the protection of the rights of creditors constitutes one of basic features of the second part of the Civil Code. Those who have right should be protected, not those who violate them. From this point of view, the debtor should not be protected by law at all"[3]. Therefore, in the loan agreement the lessor should be recognized as a weak party. Indeed, the situation in the sphere of repayment of debt leaves much to be desired today: according to the data of Central Bank of the Russian Federation on 01.01.2016, in general across the Russian Federation natural persons received credits totalling nearly 6 trillion rubles. Debt volume in the Russian Federation exceeds 10 trillion rubles, while the volume of arrears approached 1 trillion rubles[4]. Apart from that, according to the data of Federal Bailiff Service in the Republic of Tatarstan in 2015, the total number of enforcement proceedings exceeded 2 million, only 791 thousand (43,2%) of them were executed completely[5]. In the Russian Federation, the figure of enforcement proceedings executed completely in 2015 constituted 38,6%.

According to the third possible understanding of the term, a weak party is a party that has fewer resources (material, information, or other resources) in comparison with the counterparty. Comparing the opportunities available for the parties, one can distinguish "strong" and "weak" parties in a legal relationship. Considering the concept of a "weak party" from this point of view in relation to the loan agreement, we should recognize that in the case when the lessor is a professional participant of the corresponding market (for example, a credit institution that issued a consumer loan), it is the borrower who is generally a weak party. This conclusion is based on the analysis of offers of consumer credits (loans) in financial sector. Thus, there are general terms of the consumer loan contract (microloan, credit) developed by organizations unilaterally which corresponds

---

1 N.G. Vavin. The loan agreement under the Civil Code. A dogmatic sketch with the appendix of the corresponding legislative material. M.: Prod. Vserokompom, 1923. P. 34.

2 A.I. Habirov. On the value of historical development for formation of modem institute of loan // Civil law, 2017. No. 3. P. 36-39.

3 S.A. Khohlov. Selected work, edited by P.V.Krasheninnikov. Moscow: Statute, 2017. P.304.

4 Statistics of Russian Central Bank [An electronic resource]. URL:http://www.cbr.ru/statistics/UDStat.aspx? Month=01&Year=2016&TblID=302-02M (date of the address: 16.03.2018).

5 Office of the Federal Bailiff Service in the Republic of Tatarstan: performance indicators for December 2015 [An electronic resource]. URL: http://r16.fssprus.ru/2260123/ (date of the address: 16.03.2018).

to legislatively established regulation (Article 5 of the Federal Law "On Consumer Credit (Loan)"). Therefore, it is possible to draw a conclusion that the legislator considers the borrower to be a weak party in the consumer credit (loan) contract.

If a nonprofessional person acts as the lessor, then the borrower has more legal tools to conclude the contract on favourable terms. Nevertheless, we should recognize that natural and legal entities, as a rule, borrow money when they need it. And vice-versa usually a person acts as the lessor when they have money to spare. Therefore, we can state that the borrower has more interest in conclusion of the loan agreement, and so depends more on the will of the lessor.

And, at last, the fourth interpretation of the term is that a weak is a party that has a subjective right, however, forms and ways of its realization are insufficient in a particular civil legal relationship. An additional legal specification, i.e. legislative, judicial or administrative support, is required. In fact, court rulings often take into account interests of the weak party in civil legal relationship. Upon availability of special legal tools allowing in each case when one of the parties is a weak party to provide a fair ruling, E.V. Vavilin rightly points out the existence of a certain legal shortcoming – a lack of a universal legal basis. In 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 existing in domestic legal doctrine in the case when one of the parties is weak in relation to the other for clearly objective reasons. It is necessary to make an alignment of legal opportunities of the parties taking into account the principles of rationality and justice. One more reason indicated by E.V. Vavilin to enshrine in legislation the provisions about a weak party in civil law is that in some cases a financial situation or status of the weak party is not clearly shown. For example, in the loan agreement signed between citizens any of the parties can be recognized as weak depending on circumstances. In particular, the lessor can face a problem of not receiving back the money or other things determined by generic characteristics they lent. The borrower enters loan legal relationship, as a rule, being in need. Also as V.V. Vitryansky notes "... the opposition of "strong" and "weak" party when the latter needs at least a minimum level of assurance for protection of rights and legitimate interests quite often occurs also with contracts in business sector."[1] Thus, we should agree with E.V. Vavilin that chapter 2 of the Civil Code of the Russian Federation must stipulate a general, universal mechanism which will allow to exercise or protect the subjective right of the weak party.

The first meaning of the concept "weak party" allows us to realize the importance of and the need for protection of rights and interests of the debtor. In order to develop a balanced and effective civil circulation the debtor (borrower) has to be faced with a fair and rational mechanism to exercise their subjective civil obligations and be liable

[1] V.V. Vitryansky. 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. Moscow, 2013. P. 53-58.

for the failure to fulfil them. In particular, in our opinion, the size of the interest fee for use of the loan and the size of the penalty (fine) for violation of the terms of the loan agreement, including exceeding the time limit for repayment, in total cannot exceed the sum of the loan itself (the "loan body").

The second of the discussed meanings of the weak party in obligation rightly establishes that the main objective of civil norms is finding a source of money to compensate the losses of the creditor. The creditor who was deprived of certain material benefits acts as a central figure in the question of liability. Thus, in our opinion, in case when the borrower does not return the sum of the loan (credit) in time without reasonable excuse, the lessor (creditor) should be recognised as a weak party of the loan (credit) agreement. The lack of reasonable excuse can be testified, for example, when the debtor goes on holiday, especially abroad; or if the debtor uses the vehicle not for work purposes; or when the borrower carries out gratuitous transactions to give their own property to the third parties, etc. In order to prevent unfair actions, the Ministry of Justice of the Russian Federation suggests to include in the list of documents required for registration of legal persons and individual entrepreneurs, a certificate of lack of outstanding debt in enforcement proceedings. Apart from that, if the bank suspends the operations with the money available on the accounts of the debtor organization, according to the item 6 of Article 81 of the Federal Law "On enforcement proceedings" it is proposed to forbid the bank to open accounts, give loans or deposits, or to grant the right to use new corporate electronic instruments of payment for the debtor organization. We believe that the amendments proposed by Ministry of Justice of the Russian Federation are a logical continuation of already available restrictions of public law character and can be an effective way to protect the rights of the lessor.

From the third position, a weak party is not a particular party of the contract, but such a subject of legal relationship which owing to objective opportunities is weaker in a particular type of contract. The strong party, on the contrary, has an objective opportunity to impose their terms on the counterparty. Thus, the law stipulates that the consumer credit (loan) contract consists of the general conditions to which according to item 2 of Article 5 of the Federal Law "On Consumer Credit (Loan)" the provisions of Article 428 of the Civil Code of the Russian Federation are applied (the contract of accession). Such conditions are determined by one of the parties (in this case the creditor) in forms or other official lists and can be accepted by other party only by adding them to the proposed contract as a whole.

This research is one of the first scientific works to apply an integrated approach to lay down the rules about the definition of a weak party of the contract and it concludes by arguing that both the borrower and the lessor depending on particular conditions can be recognized as a weak party of the loan agreement. It is established that the design of the loan agreement incorporates the so-called "floating" model of a weak party when depending on particular conditions either the borrower or the lessor can be considered to be a weak party. The conducted research proves that as a general rule the legislator

recognizes the borrower as a weak party of the loan agreement, while in case when the borrower does not fulfil the obligations to return the subject of the loan, the lessor becomes a weak party.

References

Braginsky M.I. Contract law / Braginsky M.I., Vitryansky V.V. Book 5, vol. 1: Contracts on a loan, bank credit and factoring. Contracts aimed at creation of collective formations. Moscow: Statute, 2006. P. 116, 166.

Civil law: course book, in 2 vols. / under the editorship of Gongalo B.M. Moscow, 2017. Vol.2. P. 273, 390, 393.

Civil law: course book, in 3 vols. / under the editorship of Sergeyev A.P. Moscow: Prospectus, 2017. Vol. 2. P. 430.

Fedulina E.V. Civil protection of rights of the borrower under the contract of consumer credit (loan): Law Sci. PhD Thesis. Moscow, 2015. P. 60.

Fedulina E.V. Civil protection of rights of the borrower under consumer credit (loan) contract: Law Sci. PhD Thesis. Moscow, 2015. P. 69.

Karapetov A.G. Freedom of contract and its limits. T. 2: Limits of freedom of definition of contract terms in foreign and Russian law / Karapetov A.G., Savelyev A.I. Moscow: Statute, 2012. P. 79.

Khabirov A.I. Protection of interests of citizens-consumers in the obligation regarding return of a monetary debt // Collection of postgraduate scientific works of Law department. Kazan: KFU, 2013. No. 14. P. 535-539.

Khabirov A.I. To the question of abuse of the right of the lessor according to the loan agreement// Collection of postgraduate scientific works of law department of K(P)FU. Kazan, 2014. No. 15. P. 127-132.

Khabirov A.I. On the value of historical development for formation of modem institute of loan // Civil law, 2017. No. 3. P. 36-39.

Khohlov S.A. Selected work, edited by Krasheninnikov P.V. Moscow: Statute, 2017. P.304.

Kobchikova E.V., Cheparina O.A. On the question of legal nature of contracts on target training and target reception // Law and education. 2015. No. 2. P. 4-10.

Lupu A.A., Oskina I.I. Is the activity of collection agencies legitimate? // Economy and law. 2011. No. 3. P. 102.

Medvedev D.A. New Civil Code of the Russian Federation: codification issues. Moscow, 2008. P. 32

Meyer D.I. Russian civil law, in 2 vols. M.: Statute, 2003. 831 pages of [An electronic resource] URL: http://civil.consultant.ru/elib/books/45 (date of the address: 12.11.2015).

Russian civil law: course book, in 2 vols. / Editor Sukhanov E.A. Moscow: Statute, 2011. Vol. 2: Liability law. P. 211.

Romanets Y.V. System of contracts in civil law of Russia. 2nd edition, revised and expanded. Moscow: Norm, Infra-M, 2013. P. 55-56.

Rybakova S.V. What new aspects the Civil code will introduce in regulation of credit relations? // Bank right. 2012. No. 5. P. 34.

Shvachko N.A. Problem of recognition of the credit agreement with consumer's participation as a contract of adhesion // Lawyer of higher education institution. 2012. No. 6. P. 59.

Vavilin E.V. Mechanism of implementation of the civil rights and fulfilment of duties: Law PhD Thesis. Moscow, 2009. P. 425.

Vavin N.G. The loan agreement under the Civil Code. A dogmatic sketch with the appendix of the corresponding legislative material. M.: Prod. Vserokompom, 1923. P. 34.

Vishnevsky P.N. Legal regulation of contract of the international loan: Law Sci. PhD Thesis / Vishnevsky P.N. Moscow, 2015. P. 12-13.

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

Information about the author

Artur Khabirov (Kazan, Russia) – Assistant at the Department of Civil Law, Kazan (Volga Region) Federal University (69, building 46, Adel Kutui St., Kazan, 420073; e-mail: art.khabir@gmail.com).

Recommended Citation

Artur Khabirov. Loan agreement: urgent questions of legal regulation. *Kazan University Law Review*. 2018; 2 (3): 74–86. DOI: 10.30729/2541-8823-2018-3-2-74-86