DELIVERY OF GOOD IN THE LOAN AGREEMENT: CONDITION OF VALIDITY OR OBLIGATION OF THE LENDER?

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Abstract

In theory, the loan is generally defined as a contract whereby a person, called the lender, shall use or immovable property of another person, called the loan, which is obliged to repay in kind.

Based on the definition above national doctrine is unanimous in determining that the loan is a unilateral contract, because creates obligations only for the borrower. Similarly, the loan is a real contract because the manifestation of will must be accompanied by delivery of the good. Given the above, the question is obvious: delivery of the borrowed good is a condition of validity of the contract (specific for its formation) or an obligation of the borrower (operating in the execution phase) ?

Please note that determining the legal nature of the good delivery has great importance to the doctrine and practice. Thus, relative to the approach adopted: „delivery - a condition of validity" or „ delivery - obligation of the lender", legal consequences are totally different, with direct implications in defining the actual contract, the contract unilaterally rescinded the conditions in which they operate, etc.. In our approach we try to demonstrate that good delivery in the loan agreement can only be an obligation of the borrower (with all consequences arising from such qualification).

Key words: *free loan agreement, real agreement , delivery of good, sale, borrower*

a) Loan agreement in national doctrine.

Civil Code governing the two types of loan[1]: loan use and loan consummation.

The main legal regime difference[2] between the two contracts is translative of ownership (only) of loan consummation.Both loan use and loan consummation are separate, independent contracts [3].

Loan agreement, regardless of variety, is part of the real contracts

According to doctrine, the loan agreement (as for the deposit, too) is a real contract, because for the conclusion of the agreement it is necessary to achieve both will and good delivery, which is forming the contract object.[4] ".

As an exception, when at the time of the contract conclusion, the good is in the possession or detention of the tenant, the free loan agreement is valid only by the mere agreement between the parties, delivery being replaced by consent only [Art. 1593 par. (3) Civil Code]

For example, after concluding a sale, not followed by the good delivery, the parties agree that the good should be left temporary in the free use of former seller (currently tenant)

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[1] See C. Hamangiu, Balanescu I. Rosetti, Al. Baicoianu, *Romanian Civil Law Treaty*, vol II, Ed All Beck, Bucharest, 2002, p. 622.

[2] Doctrine points and other criteria of differentiation, such as the subject of the loan and its repayment. According to art. 1576 Civil Code, if there is an unexpected event and need it badly, the tenant is to return it before the deadline (not found in the college loan consummation); See J. Huet, *Traité de droit civil. Les principaux contrats spéciaux*, LGDJ, Paris, 2001, p. 921-922.

[3] Loan agreement is governed, in particular, the Civil Code, Book III, Title X "On loan" (art. 1560-1575) and Title XI "On loan" (art. 1576-1590). Other recent acts include provisions relevant to (eg, GEO. 97/2000, Government Ordinance no. 130/2000, Government Ordinance no. 85/2004 and Law no. 289/2004).

[4] See Fr. Deak, *Civil Law Treaty. Special Contracts*, Actami Publishing, Bucharest, 1999, p. 367.

The real nature of the loan, allows it, to be preceded by a pre-loan agreement, regarding the obligation to conclude a contract of loan in the future.

However, we note that the preliminary contract of free loan (or consumption) does not imply delivery of the good (being valid only with the will agreement between the parties)

The loan is a unilateral contract because obligations arises only the task of the tenant.

In this situation, the good delivery by the owner at the time of the closure, signifies the fulfillment of a validity condition of the contract (delivery) and is not a requirement (the result of a valid contract concluded)

Even if during the course of contract development (of producing effects), obligations may arise for the owner, the contract remains unilateral (because the obligation is extracontractual[5]).

Loan consummtion transfers the ownership of property „of fungible and consumable things", but free loan agreementl is translative of use only (so is not constitute a real right in the favor of the borrower).

The consequence of nontranslative character of free loan agreement is that, even after the conclusion of the contract, the owner remains the owner of the good (bearing the risk of fortuitous loss, according to the rule *res perit domino*), the tenant gaining *only good detention.* [6].

Free loan agreement may concern both movable and immovable goods, provided that beeing nefungibile (following to be returned in their individuality) and neconsumptibile (being necessary that the good do not consume at first substance use, to be returned in its nature.

Thus, the tenant must return the same thing (and not a similar one, whereas if he returns another car with the same value and quality, the contract will be exchange).

The object of a consummtion loan is gender, fungible and consumable goods, according to their nature (and the use given by the parties), which will be used (consumed) by the borrower .

Thus, the borrower will not return, at maturity, the same goods, but an equal amount of other things of same nature and quality (and we can thus say that finally is achived a so-called „ exchange" of things)

Proof of loan contract is made according to general rules, laid down by art. 1191 Civil Code, *ad probationem* is required in a single written document (if the value of the good exceeds 250 lei). The material delivery of the good can be proved by any evidence.

b) Particularities of good delivery in the sale agreement.

Valid conclusion of the sale produces a double effect: the transfer of ownership from seller to buyer (legal effect) and to create obligations on the parties (personal effects)[7].

Transmission of ownership as the main (crucial) effect of the sale, has a decisive role in fulfilling the obligations of seller and buyer[8]. Thus, transmission of ownership is not an obligation of the seller (whether is operating immediately or later) because once the contract has been perfected, the property is transferred without the intervention of the parties.

We can state that the obligations of delivery and reception of the good (due to the seller, respectively, to the buyer) are actually material expressions of alienation and acquisition of ownership[9].

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[5] See D. Chirica, *Civil Law. Special Contracts*, Lumina Lex Publishing, Bucharest, 1997, p. 219.

[6] See C. Toader, *Civil Law. Special Contracts*, All Beck Publishing, Bucharest, 2005, p. 64, D. Macon, IE Cadariu, *Civil Law. Contracts*, Junimea Publishing, Iasi, 2000, p. 203 - 204, TJ Timis, dec. no. 1573/1979, in R.R.D no. 5 / 1979, p. 54.

[7] See L. Stănciulescu, *Civil Law. Contracts and Inheritance*, Ed Hamangiu, Bucharest, 2008, p. 66 et seq ..

[8] Moreover, the French legal literature talks about the transfer of ownership as the only effect of the contract, in effect, see Ph. Malaurie, L. Aynčs, P.Y. Gautier, *Les contrats spéciaux*, Defrenois, Paris, 2003, p. 207.

[9] Civil Code does not specifically cover all the effects of the sale contract, referring only to the main obligations of the seller: "to teach him to work and be responsible for" (art. 1313 Civil Code) and the main obligation of the buyer "to pay the price at the date and place determined by the contract " (art. 1361 Civil Code).

The seller has two main legal obligations: to delivery the sold good and to guarantee the buyer for eviction and against vices (art. 1313 Civil Code).

According to art. 1314 Civil Code, " the delivery is the resettlement of the sold good in the possession and power.of buyer " "The relocation of sold good" does not mean the transfer of ownership, only detention[10].

In some cases, delivery involves a passive attitude of the seller (for example, when property is already in possession of the buyer).

In other cases, it is necessary to commit positive acts for that, the buyer enter into effective possession of the property purchased (eg, return of keys, issuing building etc..).

The delivery of the good, as a rule, is the place where it is located the object, and it is therefore portable (art. 1319 Civil Code).

If the object sold can not be located (at the time of the conclusion), the delivery must be made according to general rules (to the debtor's home seller), and in this case, Cherie.

The seller is obliged to hand over the individually-determined good "in the state it was at the time of the sale" (art. 1324 Civil Code) and " to the extent determined by the contract " (art. 1326 Civil Code), charged with fruits or not, the day of the sale, and all accessories.

In the case of generic goods (and in the absence of express clauses stipulated in the contract), the seller will be able to execute his obligation by delivering middle-quality of goods, but the size specified in the contract (art. 1326 Civil Code).

Civil Code provides special rules for delivery of land[11]. Thus, if the property was sold "with the revelation of its contents and so far" (art. 1327 Civil Code) and on delivery day or later, it is found that extension does not correspond to that shown in the contract, the difference will be considered as follows:

- when the extent is less, the buyer may require to be supplemented or a price reduction (the contract can be rescinded only if the property is not required with the purpose for which it was purchased);

- when the extent is larger, the buyer is obliged to pay a premium price for surplus (he may request termination of the contract unless it proves that the surplus is 1 / 20 of total surface - art. 1328 Civil Code)[12].

Delivery costs (weighing, measuring, counting) are the seller's obligation, and the removal costs of the place of the delivery (loading, transport, unloading) to the buyer, unless there is stipulation to the contrary.

The seller is obliged to delivery, with the good sold, also the fruits charged by transferring ownership (art. 1324 Civil Code).

The buyer is entitled also to the good selling accessories and all that was intended for perpetuuu, for example, the destination property, warranty claim or action, and appropriate accessories (art. 1325 Civil Code).

If the case that the good, it is not delivered at the conclusion of the contract, the seller is obliged to preserve it, until delivery, because the good must be delivered in the same conditions it was, when concluding the contract (art. 1074 and 1324 Civil Code) .

If the buyer, became the owner from the conclusion of the contract, he must bear the costs of maintenance. (art. 1618 Civil Code).

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[10] See Fr. Deak, op. cit., p. 72. According to art. 1604 French Civil Code, subject to delivery include the transport of good sold and put into possession of the purchaser in this regard, see J. GATS, *Droit civil. Les contrats spéciaux*, Armand Colin, Paris, 1998 p. 41.

[11] For details, see Fr. Deak, op. cit., p. 72-76.

[12] If the sale is made "otherwise than so far", in a global price, the difference between declared and actual extent not taken into account (art. 1329 Civil Code).

In case of total or partial non-execution, of the delivery obligation of the good, due to fault of the seller, the buyer may invoke the exception for non-performance (*exceptio non adimpleti contractus*) or rescinded sale compensatory damages or enforcement in nature (not excluded any possibility things like purchasing from third parties on behalf of the seller, in accordance with art. 1077 Civil Code)[13].

c) Delivery of the borrowed good in the dispositions of 2009 Civil Code

According to art. 1174 (1 and 4) Civil Code 2009, "The contract may be consensual, affirmed or real. The contract is real when, for it's own validity, a good delivery is required of the debtor ".

From those mentioned above, it results that in the case of real contracts "the delivery of the good" is a new condition of validity (in addition to the substantive and formal conditions, required by law).

According to art. 2103 (1 and 2) Civil Code 2009, "Deposit is a contract whereby, the depositary receives a movable of the depositor, with the obligation to retain for a period of time and to repay in same kind. Remission of the good, is a condition for the valid conclusion of the deposit contract[14].

Corroborating the dispositions of art. 1174 and 2103 results, undoubtedly that the deposit is a real contract and therefore, the depositor does not have an obligation to delivery the good (object of contract) to the depositary. Thus, the depositor is only obliged to pay remuneration, expenses and damages (art. 2122 and 2123 Civil Code 2009).

Article 2144 Civil Code 2009 states that "the loan is in two ways: free loan agreement, called the loan, and a consummtion loan".

According to art. 2146 Civil Code 2009, "loan agreement for use is a free contract, whereby one part, called owner, submit a movable or immovable good to the other part, called tenant to use this asset, with the obligation to return it after a certain time" and "a consummtion loan is a contract in which the lender gives the borrower a sum of money or other such fungible and consumable goods, in nature, and the borrower undertakes to return after a certain period of time the same amount of money or quantity of goods of the same nature and quality "(sn art. 2158)[15].

We have to mention, that from the articles above, we can not establish whether :"the remission of the good" is a condition of validity or a obligation of the borrower? (in particular, because in this case there is no express disposition to qualify the remission of the good as a condition of validity, such as, those mentioned above for the deposit).

In the above, we mention also, the previous dispositions (contradictory) of art. 1483 (1) and 1485 Civil Code 2009 that the "obligation to move the property that encompasses the obligation of delivery and to preserve it until the good is delivered" and "The obligation to deliver an individual determined good it contains also, the obligation to preserve it until the good is delivered".

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[13] In case of delay in execution of the teaching obligation, the buyer is entitled to damages, but only from the date of notice of the seller under Art. 1081 and 1079 Civil Code, you will see the Fr. Deak, op. cit., p. 76.

[14] According to art. 2105 (1 and 2) Civil Code 2009, "When money or other funds are also remitted fungible and consumable in nature, they become property of the recipient and must not be surrendered their individuality. In this situation applies, as appropriate, the rules of a consumer loan, unless the main intention of the parties was that the assets are held in the interests of the teaching (?).

[15] By the conclusion of a valid contract, the borrower becomes the owner of the asset and bear the risk of its destruction (art. 2160 Civil Code 2009).

Thus, the legislature recognizes explicitly that the transfer of property can not be separated from delivery of good (and possibly also from its conservation). Note also the "inconsistency" of the legislature of 2009, that although in the art. 4 Civil Code section 1174, refers to delivery as a condition for its validity "(a real contract, sn), he can not find it necessary to remind it as one of the conditions of validity of the contract (in general) specifically provided for in art. 1179 Civil Code.

d) The loan, real and unilaterally agreement?

We recall that the important institution of civil law, which is a contract, has the general meaning of an agreement (agreement) between two people, ended in the law to achieve their interests.

Consequently, the loan, the lender and borrower agree to transfer ownership or possession and use of things, or sharing an interest free.

Please note that it is a widely accepted principle according to which the will is the basis of the law (wills of the parties to the contract). Thus, the borrower wants to use the good for a period of time, and the lender wants to do an free act or get money (interest).

Consequently, the agreement of wills made under the law, ending the loan agreement, which takes effect (the parties wills materializes). In this case, the main effects of the loan means the transfer of ownership or the use of temporary work (including their component materials: teaching work) and price (interest).

In the above context, that the transfer law is a legal obligation (derived directly from the contract) and teaching (delivery) work can only be an obligation of the borrower.

Per a contrario, it would have to admit that teaching a given amount borrowed money could be made during training contract, so the above agreement of wills (and the end of contact) and not afterwards, which is logically untenable.

Please note that the issue in question was examined in the European doctrine, the conclusion of the authorized views are that: the real teaching contract, may not have the legal nature of a condition of validity, at least on the grounds that returning the (material) the work is a "matter of fact" which involves the action of a party in the execution of the contract (eg free loan agreement "delivery is not a condition of contract formation, it is the first act of execution[16]").

Of course, the above means accepting reality and accept the necessary consequences that are important, for example, contracts such as loan, deposit, pledge: there are unilateral, but reciprocal obligations are contracts (subject to termination).

Furthermore, we underline that the European doctrine institution "real contract" (the Romanian origin) is considered obsolete, supporting that for abandoning the "real contracts category" (the only notable exception that could materialize ... real contract hand is the gift[17]. "

Similarly, French law has already decided that the loan of money agreed by a professional credit is no longer considered real contract, but consensual[18].

Our opinion is in favor of maintaining the of 'real' character of free loan agreement, deposit, gift, manually, because the term expresses their special nature, since their conclusion can only be designed together.

In conclusion, we may say so, that the term "real contract" has the meaning of a "contract of work accomplished by effective delivery".

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[16] See J. Four, JL, Aubert, E. Savaux, *Droit civil. Les Obligations*, 1. L acts juridique, Sirey, Paris, 2006, p. 242.

[17] See L. Pop, *The Treaty of Civil Law. Obligations*. Volume II. Contract, Publishing House, Bucharest, 2009, p. 118-121.

[18] See C. Larroumet, *Droit civil. Les Obligations. Le contrat*, Ecomomica, Paris, 2009 p. 197-198.

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