THE LOAN CONTRACT IN THE NEW CIVIL CODE

LIVIA MOCANU*

Abstract

The new Civil Code maintains, mainly, the stipulations of the Civil Code of 1865 regarding loan contracts, in its both forms (the loan for use and the loan for consumption). As a variety of the loan for consumption, a few new specific stipulations were included, regarding the loan with interest.

This research is focused on the current regulation of the loan contract, including a series of changes, of which the most important refers to: the loan promise, the risk regarding the asset placed in a bailment, property transfer and the risk in the loan for consumption contract, loan return and the interest regime.

Also, what kept my attention is the significant changes brought to the interest regime by the Law for applying the Civil Code, included for now in Chapter I of the O.G. no. 13/2011, regarding the legal compensatory interest and the penalty interest for financial duties, as well as for the regulation of certain financial-fiscal measures in the banking department.

Keywords: *loan promise, loan for use, loan for consumption, compensatory interest, penalty interest.*

1. Introduction

In the present study we aim at analyzing the regulation of the loan contract in the New Civil code, entered into force on the 1st of October 2011, while emphasizing the new elements, which do not exist in the Civil Code of 1865.

Though the new regulation mainly maintains the dispositions of the Civil Code in 1865 in the matter of the loan contract, it also contains a series of important changes which give a new configuration to a contract with a large applicability in the day-to-day life. That is why we consider that the analysis of the loan contract in the light of the new civil regulation is particularly actual and useful; both for specialists and for all those who wish to know the features of the new Civil Code compared to the previous regulation.

Nowadays, multiple economic and social causes generate an extension of crediting, in which case, knowing the juridical rules in the matter became almost indispensable for the parties negotiating the terms of the contract.

As operations like credits have a major importance in doing several activities, and such operations can also be realized by entities, other than those performing crediting activities with professional character, without constituting the object of special regulations in the matter of crediting and financial activities, we think it is necessary to know the dispositions of the new Civil code in this matter and its correct application in the relations with the interested parties. As recipients of the new civil dispositions in this matter we cannot ignore the law courts and other partners of justice, such as lawyers, notary publics, theoreticians of law. Also, we consider the students of faculties of law for who we can ease the process of knowing the dispositions of the new Civil Code in the matter of the loan contract.

At the same time, convinced of the necessity to permanently perfect the juridical rules, we also hope to have a contribution in this direction.

In the present study, we aim at analyzing the juridical regime of the loan contract, while emphasizing the new elements, consisting of: the loan promise, the risk regarding the asset placed in a bailment, property transfer and the risk in the contract of loan for consumption, loan return and the interest regime.

* Professor, Ph. D. University „Valahia” from Târgoviște, Facultaty of Law and Social-Political Sciences (mocanulivia@yahoo. com).

Up to this moment, the loan contract constituted, mainly, the subject of academic manuals elaborated for the students' study, without exhausting the theoretical and practical issue of the loan contract.

The purpose of the present scientific approach is to emphasize the novelties of the current regulation, and we are sure that, in our turn, we can open other gates in this matter.

2. Content

2.1. The loan promise

In the first section of Chapter XIII of the new Civil Code[1] called *General dispositions*, the legislator regulates the types of loan and the loan promise.

According to art. 2144 of the new Civil Code, the loan is of two types: the loan for use (the bailment) and the loan for consumption[2].

If, in regard to the classification of the loan, the dispositions stipulated in the Civil Code in 1864 are kept, the novelty is represented by the loan promise regulated by the dispositions of art. 2145 in the new Civil Code, according to which: „When the asset is in the possession of the beneficiary and the promisor refuses to close the contract, the court, at the request of the other party, can pronounce a decision to the contract, if the requirements of the law for its validity are met". As a consequence, in these dispositions, one stipulates the possibility for the promise beneficiary to ask the court to pronounce a decision that can substitute the loan contract if the following conditions are fulfilled:

- the asset is in the beneficiary's possession, regardless of its nature;
- the promisor creditor refuses to sign the contract; and
- the other validity conditions for the loan contract are fulfilled.

Thus, so that the action grounded on the dispositions of art. 2145 in the new Civil Code is admitted, which lead to a forced closing of the contract, the court will always check for the existence of these special conditions. Besides, these special conditions, and especially the asset existence in the bailee's possession characterizes this exceptional regulation in the matter of the loan contract, compared to the dispositions of art. 1279 in the new Civil Code, which regulate the promise to sign a contract[3].

These dispositions reflect the parties' will, allowing them to sign the contract without entrusting (tradition) the asset[4]which is already in the beneficiary's possession. In such cases the parties' agreement is enough to validly sign the loan contract or, according to case, the decision that can be pronounced by the court when the promisor refuses to sign the contract.

[1] Law no. 287/2009 regarding the Civil Code, republished on grounds of the art. 218 of Law no. 71/2011 to apply the Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 on 10th June 2011.

[2] The contract by means of which the Romanians took the loan for consumption is designated by the term *mutui dațio* or by that of *mutuum*, words which suggested the fact that closing the contract meant the transmission of a thing from the creditor towards the his debtor. For details, see, Emil Molcuț, *Drept private roman,* Edition that was reviewed and completed, (Universul Juridic Publishing House, Bucharest, 2004), 269 and the foll.

[3] In accordance with paragraph 3 of art. 1279 in the new Civil Code: „In addition, if the promisor refuses to sign the promised contract, the court, at the request of the party which respected its own obligations, can pronounce a decision to substitute contract, when the nature of the contract allows this, and the requirements of the law for its validity are fulfilled. The stipulations of the present paragraph are not applicable in case of the promise to sign a real contract, unless the law stipulates otherwise."

[4] Both the bailment and the loan for consumption are real contracts, and to close them the parties' agreement has to be followed by handing in the good which is the object of the contract.

The loan promise can also be analyzed in relation to the dispositions of. art. 2193 in the new Civil Code where the credit facility is defined.[5] Regulated for the first time in the new Civil Code, the credit facility is a contract, whose defining element is the financer/creditor's obligation to make available an amount of money for the customer for a determined or an undetermined period of time.[6]

Practice remains to offer us the applications of the loan promise regulation.

2.2. The loan contract: enforceable title

In the legislator's current vision, both the loan contract for use and the loan contract for consumption are considered enforceable titles.

We are in the presence of relevant dispositions for the non-banking contracts that we meet in art. 2157 and 2165 in the new Civil Code, dispositions that accompany the main obligation of the loan beneficiary, which is the return obligation.

Thus, according to the dispositions of art. 2157 in the new Civil Code, „the bailment contract concluded in the authentic form or by a document under private signature with fixed date, constitutes enforceable title, in accordance to the law, in case of termination by the bailee's death or the term expiration". In the 2nd paragraph of art. 2157 in the new Civil Code one stipulated that „unless a term was stipulated for the restitution, the bailment contract constitutes enforceable title, on condition that the use for which the asset was given is not stipulated or the use has a permanent character."

Based on these dispositions, the bailer has the possibility to foreclose the bailee, unless the later executes his obligation to return the asset, based on the bailment contract and without going to court. In accordance to the law, the loan contract for use is considered enforceable title, if the following conditions are cumulatively fulfilled:

- the contract is signed in its authentic form or as a document under private signature with fixed date;
- the contract is terminated by the bailee's death or the term expiration. Bailment without a term is enforceable title only when, in its content, one has not specifically mentioned the use for which the asset was given or the use has a permanent character.

In its turn, art. 2165 of the new Civil Code stipulates, similarly to the bailment, the loaner's possibility to start foreclosure against the borrower if the loan is not returned, based on the contract considered enforceable title and which cumulatively fulfills the following conditions:

- it is signed in its authentic form or as a document under private signature with fixed date;
- it was terminated by the term expiry.

These dispositions keeps the creditor of the restitution obligation from going to court in order to set the debt against the debtor, even in the case of non-banking loans. As for the banking credit contracts, they remain enforceable titles, according to the stipulations of the special law[7]

2.3. The loan for use (bailment). Novelty elements

2.3.1. The capacity to loan

According to the dispositions of art. 2147 in the new Civil Code, „unless forbidden by law or by the contract, any person who has the right to use the asset can be a bailer". The text regulates the capacity to loan. On its grounds, the bailee (not owner) too can loan to third parties the asset subject of the contract, if this transmission was not forbidden by the contract.

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[5] According to art. 2193 of the new Civil Code: „The credit facility is the contract by which a credit institution, a non-banking credit institution or any other entity, authorized by a special law binds itself to make available an amount of money at the customer's discretion for a determined or undetermined period of time".

[6] For details, see, Rada Postolache, *Credit Facility According To The New Civil Code*, in the Agora International Journal of Juridical Sciences (2/2011), 2.

[7] In accordance with art. 120 of the O.U.G. no. 99/2006 regarding credit institutions and credit suitability, approved with additional changed by Law no. 227/2007.

2.3.2. Non-observance of the obligations regarding the asset use or restitution by the bailee

According to the dispositions of art. 2149 in the new Civil Code, the bailee is not responsible for the asset loss or damage, if these are the result of asset use for the purpose which constitutes the object of the contract. But, in case the bailee violates the use or the restitution obligations, he is responsible for the asset loss, including for causes of force majeure, according to the 2nd paragraph of art. 2149. In such a case, according to the law, he will be exonerated of his responsibility, if he can prove that asset was lost or damaged as a consequence of force majeure. The novelty compared to the old regulation is that the bailee's responsibility is involved inclusively as a consequence of force majeure, and not just for acts of God (art. 1565 in the Civil Code of 1864).

2.3.3. The lien

As it is mainly a unilateral contract, the bailment does not create obligations for the bailer. Nevertheless, during contract execution, the bailer can have certain extra-contractual obligations, that the new Civil Code stipulates in the dispos. of art. 2151 and art. 2152. Thus, according to the dispos. of art. 2151, par. (2) of the new Civil Code, the expenses that are necessary and urgent, made for the asset maintenance, and which could not be stipulated at the end of the bailment contract will be paid by the bailer. Obviously, the origin of this restitution obligation for the asset maintenance expenses is represented by the business administration or by the enrichment without a right cause.[8] Another obligation of the bailer, this time of penal type[9], is that to repair the damages caused to the bailee by a *flaw* of the asset. Thus, according to the dispositions of art. 2151 in the new Civil Code, the bailer who, on the signing date of the contract, was aware of the borrowed asset hidden vices, but did not prevent the bailee regarding these vices, is bind to repair the damage suffered by the baillee as a result of this."

In relation to these obligations occurred as bailer's responsibility, the bailee does not have, in any circumstances a lien. The legislator states it expressly in art. 2153 of the new Civil Code, whose dispositions removes the bailee's lien, lien instituted by the dispositions of art. 1574 in the Civil Code of 1864[10].

2.3.4. The asset restitution

As we have already shown, the bailee's main obligation is to return the borrowed asset at due term in its specific nature. If in the system of the Civil Code of 1864 this obligation is a result of the contract definition[11], as novelty element, in art. 2156 of the new Civil Code this obligation is expressly stipulated. Thus, according to the law, the bailee must return the asset at due term or, if not, at the bailer's request. As a rule, the bailer cannot ask the asset restitution before the term set in the contract. Nevertheless, as an effect of the contract free character, and to provide the parties' equity, exceptionally, the legislator expressly regulates this right of the bailee in art. 2156 of the new Civil Code. As a result, according to the law, the bailer can ask for the asset restitution before due term, if:

- an urgent and unpredictable need for the asset has occurred;

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[8] Francisc Deak, *Tratat de drept civil. Contracte speciale,* (Actami Publishing House, Bucharest, 1998), 300; Florin Moțiu, *Contractele speciale,* 2nd edition reviewed and complated, (Universul Juridic Publishing House, Bucharest, 2011), 288; Dumitru C. Florescu, *Contractele civile* (Universul Juridic Publishing House, Bucharest, 2011), 257.

[9] Florin Moțiu, *op.cit.,* 288. D. Chirică, *Tratat de drept civil. Contracte speciale,* (C.H.Beck Publishing House, Bucharest, 2008), 212.

[10] Francisc Deak, *op.cit.,* 296; Mircea Mureșan, *Drept civil. Contracte speciale,* (Cordial Lex Publishing House, Cluj Napoca, 1999), 242.

[11] The bailment is a contract by which someone lends someone else a thing to use it, having the obligation to return it to the creditor (art. 1560).

- the bailee dies, or
- the bailee violates his obligations.

Furthermore, by the new legislative dispositions, one eliminated the possibility for the courts to decide regarding an anticipated restitution of the asset[12].

2.4. The loan for consumption.

2.4.1. Juridical features

The dispositions of the new Civil Code in the matter keeps unchanged the juridical features of the loan for consumption, and this is the contract by which one transfers ownership over certain amounts of money or other fungible and consumptible things, with the restitution obligation. In the matter of the loan for consumption, the law considers that the loan whose object is an amount of money is assumed to be for good and valuable consideration [art. 2159 par. (2)]. As it is a contract with property transfer, the borrower becomes owner and bears the risk of the borrowed asset loss, independent of what happens with the borrowed assets.

2.4.2. The restitution obligation

The siege of this matter is represented by article 2164 of the new Civil Code. In the matter of the loan for consumption too, the main obligation of the debtor is to return at due term, assets of the same type, quantity and quality, regardless of its price variation until the time of restitution. We are in the presence of dispositive rule that represents a reunion of the dispositions in the matter of the Civil Code in 1864. Therefore, the parties can derogate by contract, setting for instance, an adjustment with the inflation or with the evolution of a currency exchange[13]. As for the loan whose object is an amount of money, the debtor must return the nominal amount, and the parties can derogate this rule [art. 2164 par. (2)]. In the last paragraph of art. 2164, the new Civil Code considers the case when it is impossible to return assets of the same quality and quantity, setting that, in such a case, the debtor will return their value, established at the date and place where he will pay. This can be the case of some loans in lei, with due term on a date when Romania will adopt the EURO as official currency.

2.4.2. The restitution term

Here, one must consider an interpretation correlated with the general dispositions in the new Civil Code, regarding the term, namely art. 1411-1420. According to art. 2161 in the new Civil Code, in case of the loan for good and valuable consideration the restitution term is supposed to be stipulated in favor of both parties. As a result, one cannot give up its benefice except by the parties' agreement, and the payment can take place before the term, but only with the creditor's agreement. In the matter of banking contracts, in case of a banking credit at due term, the debtor can unilaterally give up the profit of the term within the conditions stipulated in the contract for anticipated restitution.

According to the dispos. of art. 1417 in the in the new Civil Code, the debtor loses the advantage of the term if:

- he is in insolvency. In the sense of the law, insolvency is a state that will be ascertained by the court, in which the value of the founding asset that can be subject to foreclosure is smaller than the total value of the demandable debts. Until the current regulation in the new Civil Code, the term insolvency could be met in the fiscal regulations;

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[12] In accordance with art. 1573 of the Civil Code Codul civil in 1864, if the bailer has an urgent and unpredicted need of the asset, the court could, according to case, force the bailee to return it.

[13] I. Urs, *Obligația de restituire a împrumutului de consumație oglindită în doctrina și practica judecătorească,* in the magazine Dreptul (3/2005), 127-135.

- he is in insolvency;[14]
- deliberately or due to a serious fault, it reduces the warranties given to his creditor or cannot give the promised warranties; or
- because of him, the debtor no longer fulfills an essential condition to sign the loan contract.

Loss of the term advantage triggers anticipated due term of the obligation, with the same effects as coming to due date (art. 1418).

In case a restitution term was not set in the contract, article 2162 of the new Civil Code regulates the possibility to have a term set by the court. Thus, according to the first paragraph of art. 2164, if the contracting parties did not stipulate a restitution term, the court will stipulate, sovereignly, considering the case features. The novelty is found in the dispositions of the 2nd paragraph of the same article, dispositions which limit the sovereignty of the court in setting the restitution term to 3 months only. The petition will be solved according to the procedure of the president's ordinance [art. 2162 par. (3)].

2.4.3. The interest loan

According to the law, the loan for consumption can only be a gratuitous loan, but also a loan for good and valuable consideration. In case of a loan for good and valuable consideration, the creditor pretends from the debtor, besides the obligation to return the loan, another amount of money or other goods of this kind, called interest[15]. For this reason, the loan for good and valuable consideration is called a loan with interest, for which – either by derogation or by fulfilling the rules stipulated for the loan for consumption – the special rules stipulated in the new Civil Code apply (art. 2167 – 2170) or those stipulated in other normative documents[16].

In art. 1 par. (1) of the GO no. 13/2011, one stipulates that the parties are free to set the interest rate by contract. The interest must be set in a written document, otherwise the legal interest is due (art. 6 of the O.G. no. 13/2011).

According to the law, the interests can be[17]:

- compensatory: due by the debtor for the amount of money borrowed, previous to the due date;
- penalizing: due by the debtor for not fulfilling the obligation at due date.

If the law or the contract stipulates that the obligation triggers compensatory and/or penalizing interests, according to case, and the parties did not expressly set their level, the legal interest is due. The legal interest is set at the level of the set at the level of the NBR interest level.

In the civil matter, except for the relations connected to enterprise exploitation[18], the legal interest is set at the level of the NBR reference interest diminished by 20%. In the same matter, the

[14] The main element of insolvency, in all its forms, is the lack of finances to pay the eligible debts. For more details, see, Stanciu D. Cărpenaru, Vasile Nemeș, Mihai Adrian Hotca, *Noua lege a insolvenței. Law no. 85/2006. Comentarii pe articole,* (Hamangiu Publishing House, Bucharest, 2006), 13 and the foll.

[15] According to art. 2168 in the new Civil Code, the interest can be set in money or other performances under any title or name for which the borrower binds himself as equivalent of the asset use.

[16] G.O. no. 13/2011 regarding the legal compensatory or penalizing interest for money obligations, as well as for the regulation of some financial – fiscal measures in the banking field, published in Romania's Official Gazette no. 607 on 29th August 2011. When the GO no. 13/2011 entered into force it abolished the G.O. no. 9/2000 regarding the value of the legal interest for financial obligations.

[17] The new regulation in the matter of interests for financial obligations reflects the opinions expressed in the doctrine regarding the legal definition given to the interest by the G.O. no. 9/2000 considered to be more economic than juridical. For details, see, Gheorghe Piperea, *Introducere în Dreptul contractelor profesionale* (C.H.Beck Publishing House, Bucharest, 2011), 210 and the foll.

[18] According to art. 3 in the new Civil Code, exploitation of an enterprise means to systematical run an organized activity, by one person or several people consisting in producing, administrating or transferring goods or performing services, regardless of this having or not a profitable purpose.

law limits the value of the rate set by the parties, which is the interest cannot exceed more than 50% of the legal interest level (art. 5 of the G.O. no. 13/2011). According to the law, the clauses which violate this limitation are null and void and the creditor loses his right to pretend legal interest. In all cases, the validity of the conventional interest level is determined by relation to the legal interest in force the on the contract signing date [art. 5 par. (3) of the G.O. no. 13/2011].

In the juridical relations with an alien status element, if the Romanian law is applied and the pay was stipulated in foreign currency, the legal interest is of 6% per year.

The interest is calculated starting with the day of remitting the interest (art. 2169 in the new Civil Code). According to art. 7 of the G.O. no. 13/2011, the anticipated pay of the compensatory interest is allowed, but for no more than 6 months. The interest thus received is not subject to restitution, regardless of the reference indices variation. The new Civil Code states as well, in art. 2170 that the anticipated pay of the interest cannot be made for more than 6 months. But in the vision of the common law, if one can determine the interest rate, the possible excesses or deficits are subject to compensation form one rate to another, for the entire period of the credit. The last rate is an exception, as it is always entirely won by the creditor. Thus, one can notice a lack of correlation between the dispositions of art. 7 of the G.O. no. 13/2011 and the stipulations of art. 2170 in the new Civil Code. Therefore, we suggest to the legislator to reformulate this regulation thus as to balance the legal dispositions in the matter.

According to the law, the compensatory interests can be capitalized and can make interests. The current account contract is an exception.[19]

The credit institutions and the non-banking financial institutions are subject to special regulations.

3. Conclusions

From the analysis made in this study, concerning the novelty aspects comprised in the loan contract in the light of the new Civil Code dispositions and of some special regulations, one can obviously notice a reconfiguration of this especially useful tool for civil relations.

Over the time and within the conditions imposed by the new economic and social conditions, the specialty doctrine and practice in the field stated some observations and proposals, now under the form of the juridical rule.

The new Civil Code mainly keeps the previous regulation, but also brings important changes that we aimed at emphasizing in the present study.

As a consequence, concerning the current juridical regime of the loan contract, we emphasize the following novelty aspects in Law no. 287/2009:

- the express regulation of the loan promise;
- within the conditions stipulated by the law, the loan contract, in both its forms, acquires the feature of enforceable title;
- the baille too can borrow the borrowed asset to third parties;
- for non-observance of the obligations concerning the use or the restitution, the bailee is responsible for the asset loss, including as a result of force majeure;
- the bailee lien is removed until all necessary and urgent payments generated by the asset maintenance;
- the court's right to decide an anticipated restitution of the asset is eliminated;
- local entities can make operations like crediting, other entities than those making such operations as a profession, without constituting the object of the special regulations existing in the field of credit and financial activities;

[19] Art. 2171 of the new Civil Code defines the current account contract as the contract by which the parties, called current account operators, bind themselves to register in an account the debts resulting from mutual remittances, considering them non-exigible and unavailable until the account is closed .

- the court's sovereignty is limited when setting the restitution term for the loan for consumption, term set by the law at 3 months only. The petition is solved urgently;
- new regulations in the matter of interest. The interests can be: compensatory and/or penalizing;
- the compensatory interest can be paid anticipatively, it can be capitalized and it can produce interests. Exception: the current account contract.

All these aspects are, in our opinion, advantages of the new regulation in the matter of the loan contract.

Besides the virtues of the new regulation, one can notice a lack of correlation between the dispositions of art. 7 of the O.G. no. 13/2011 and the dispositions of art. 2170 of the new Civil Code, and we suggest the legislator to restate this regulation in order to provide the balance of the legal dispositions in the matter.

Mainly, the new Civil Code, provides a proper regulation of the loan contract, managing to correlate the dispositions regarding this contract and the regulations of the general theory in the matter of obligations.

Thus, we conclude that the current regulation of the loan contract reflects the modernism of the new Civil Code, engaged on the road of juridical institutions reformation, in harmony with the realities and demands of the current Romanian society.

4. References:

Books:

- Cărpenaru, Stanciu , Nemeş,Vasile, Hotca, Mihai, Adrian, *Noua lege a insolvenţei. Legea nr. 85/2006. Comentarii pe articole,* Hamangiu Publishing House, Bucharest, 2006.
- Chirică, D., *Tratat de drept civil. Contracte speciale,* C.H.Beck Publishing House, Bucharest, 2008.
- Deak,, Francisc, *Tratat de drept civil. Contracte speciale,* Actami Publishing House, Bucharest, 1998.
- Florescu, Dumitru, *Contractele civile* Universul Juridic Publishing House, Bucharest, 2011.
- Molcuț, Emil, *Drept privat roman,* Edition that was reviewed and completed, Universul Juridic Publishing House, Bucharest, 2004.
- Moțiu, Florin, *Contractele speciale,* 2nd edition reviewed and complated, Universul Juridic Publishing House, Bucharest, 2011.
- Mureşan, Mircea, *Drept civil. Contracte speciale,* Cordial Lex Publishing House, Cluj Napoca, 1999.
- Piperea,Gheorghe, *Introducere în Dreptul contractelor profesionale,* C.H.Beck Publishing House, Bucharest, 2011.

Articles:

- Rada Postolache, *Credit Facility According To The New Civil Code*, in the Agora International Journal of Juridical Sciences (2/2011)..
- Urs, I., *Obligația de restituire a împrumutului de consumație oglindită în doctrina şi practica judecătorească,* in the magazine Dreptul (3/2005), 127-135.