

CONSIDERATIONS REGARDING THE LOAN AGREEMENT IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract

The loan contract is a legal contract by which a person, lender, transmits to another person, loanee, the use or the full legal rights regarding an object, with the obligation of returning, at a certain time, of the good or another good of the same quantity and quality

The loan contract has two forms, the loan for use and the loan for consumption.

The loan for use (Romanian: comodatul) is a free basis contract by which a party, lender (Romanian: comodant), hands in a movable or immovable good in order to be used by the other party, loanee with the obligation of returning, at a certain time, according to the contract.

The loan for consumption contract is an agreement by which a person, the lender, gives to another person, the loanee, a sum of money or any goods that are fungible and will be consumed by own nature and the loanee will return the same sum of money or the same quantity and quality of goods.

Keywords: loan contract, loan for use, loan for consumption, promise of a loan, interest.

1. The New Civil code richly regulates the loan agreement, with its two forms, the loan for use and the loan for consumption¹.

For the first time, the Civil Codes has provisions regarding the loan promise.

1.1. The loan contract is a legal contract by which a person, lender, transmits to another person, loanee, the use or the full legal rights regarding an object, with the obligation of returning, at a certain time, of the good or another good of the same quantity and quality².

The loan contract is part of the real-property contracts which means that for its validity the good that is loaned has to be given to the loanee (art. 1174 Civil Code). Handing in the good is the main condition for giving effects to the contract, and also its main effect.

1.2. The loan contract has two forms, the loan for use (Romanian: comodat) and the loan for consumption.

The main difference between the forms is the nature of the right that it is transmitted, in the case of the loan for use the lender transmits the loanee the right to use the good, as for the loan for consumption the lender transmits the loanee the full property right over the good.

The different nature of the right that is transmitted also gives birth to differences between the two forms of the contract.

1.3. The New Civil Code, for the first time, refers to the promise to contract, as the intention of a person to enter into an agreement in the future.

According to the law, the promise to contract must have all the conditions of the contract that is to

be agreed. Should some of them lack the parties cannot execute their promise.

If one party refuses to undertake its obligations, a Court of justice, at the request of the other party which has fulfilled its obligations, may rule a decision that gives effect to the promised contract, should the nature of the contract permit and all its legal conditions are validly fulfilled.

Art. 2145 of the Civil Code permits a promise to contract a loan, which because is a real-property contract, the simple assent of the parties is not enough and the handing in of the good is mandatory.

If the good is held by the beneficiary, and the other party refuses to bind the contract by not giving its consent, a Court of justice, at the request of the other party which has fulfilled its obligations, may rule a decision that gives effect to the promised contract should the nature of the contract permit and all its legal conditions are validly fulfilled.

Thus, for the closing of the loan contract, by means of a Courts ruling a decision that gives effect to the promised contract, the law requires a perfectly valid promise of contract, the good must be in the possession of the beneficiary and a refusal from the other party to adhere to the contract.

2. The loan for use can be found in the provisions of the New Civil Code, art. 2146-2157.³

2.1. The loan for use (Romanian: comodatul) is a free basis contract by which a party, lender (Romanian: comodant), hands in a movable or immovable good in order to be used by the other party, loanee (Romanian: comodatatar) with the obligation of

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¹ The legal provisions can be found in the New Civil Code, Book V, Title XI, Chapter XIII, art. 2144-2170.

² See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, Romanian Civil Law (Tratat de drept civil roman), vol. II, Ed. C.H. Beck, Bucharest, 2008, pag. 622.

³ See Fr. Deak, Romanian Civil Law. Special contracts (Tratat de drept civil. Contracte speciale), ed. Universul juridic, Bucharest, 2001, pag. 340 and next; L. Stănculescu, Civil law. Contracts (Curs de drept civil. Contracte), ed. Hamangiu, Bucharest, 2014, pag. 401 and next.

returning, at a certain time, according to the contract (art. 2146 Civil Code).

The loan for use contract has the following characteristics: it is a real-property contract, it is always free based, it is unilateral and it transfers only the use of an good.

2.2. The validity conditions of the loan for use contract are the same given by law for any other real contract: the legal capacity of the parties to enter an agreement, the consent of both parties, handing in the good, a legal and moral object and a legal and moral purpose.

2.2.1. The loan for use contract is a management legal act. Thus, for its legal closure both parties have to have the capacity required by law to enter a management contract.

Due to the fact that by means of loan the use of a good is transmitted, any person that was not forbidden by law or contract to use it may be a lender. Thus, the tenant or the holder of the real right of use may be a lender.

As for the loanee, he may not allow another to use the good without the express consent of the lender (art. 2148 par. 2 Civil Code).

2.2.2. The loan for use contract is closed, like any other real contract, by the agreement of both parties that sign it and when the good is handed in. The agreement of the parties not followed by the handing over of the good will only result in a promise of contract (precontract). Should the good be at the beneficiary, the other party refuses to acknowledge the contract, the Courts may rule a decision that gives effect to the promised contract (art. 2145 Civil Code).

2.2.3. The loan for use contract may refer to a movable or immovable good. Thus, the good that is given for use has to be returned in certain time, the good must only be not fungible and must keep its substance when used⁴.

2.3. As any other contract, the loan for consumption gives special obligations. Being an unilateral contract results in obligations only for the loanee, but after, during the execution of the contract, some extra contractual obligations may arise for the lender too.

2.3.1. The obligations of the loanee are:

a) He must use the good he loaned according to its destination, given by the contract, or given by the nature of the good (art. 2148 par. 2 Civil Code).

According to the provisions of the law, the loanee cannot be held liable for any damage to the good should he use the good in respect to its destination for which it was loaned to him. Should he use the good for any other purposes than the one it was loaned to him or keep the good after the maturity of the loan, the loanee can be held liable for any damage that the good may suffer of if it is lost, even if the cause may be beyond control or an act of God. It represents

an exception should the loanee prove that the good would have suffered a full or partial damage anyway due to the same cause beyond control. But still, the loanee will be held liable for the destruction of the good then the cause beyond control could not have been avoided by substituting a personal good or when he could not save both of two goods he chose to save his own.

The loanee can transmit the use of the good to a third party only with the express consent of the lender.

The misconduct regarding the use of the good as to its intended purpose gives the right to the lender to terminate the contract and claim damages (art. 1516 Civil Code).

b) The loanee must preserve the good given to him for use. In order to assure the use of the good for the duration of the contract and also to assure its return at the maturation of the loan, the loanee must preserve the good.

According to the law, the loanee must preserve and guard the good having the prudence and diligence of a good owner (art. 2148 Civil Code).

Due to the fact that by effect of the loan for use contract only a right of use is transferred, the risk of the contract falls to the lender as the owner of the good.

c) The loanee must pay all expenses arising from the use of the good. According to the law, any necessary expenses regarding the exploitation of the good fall to the loanee (art. 2151 Civil Code).

In some cases the loanee could ask for compensation from the lender, for any necessary improvements that the good might require and that could not have been foreseen when the contract was signed (art. 2151 par. 2 Civil Code).

d) The loanee must return the good. By effect of the loan for use contract, the loanee only receives a right to temporary use the good. Thus, the loanee must return the good at the specified term, or, should no specific time be stipulated, after he made use of the good according to the parties' agreement (art. 2155 Civil Code).

In the absence, from the contract, of any specific term or stipulation regarding the use the good or if the use of the good is on a permanent basis the loanee must return the good at the simple request of the lender.

The law also allows in advance return of the loaned good. The lender may ask for a return of his good before the specified term or before it was fully used according to the agreement, in the following situations: the lender has an immediate and unforeseen need for that good; the loanee does not respect his contractual obligations; the loanee deceases (art. 2156 Civil Code).

The good must be, in principal, physically returned as it was (art. 2146 Civil Code). Restitution by money equivalent will be possible should only the agreement stipulate such permission or the lender

⁴ Exceptionally, it has been admitted that goods that are consumed when used can be considered, by will of the parties, not fungible, and thus may become the object of a loan for use contract. See F. Deak, reference above, pag. 342.

waivers the physically return of the good as not necessary⁵.

Taking into effect the obligation to return the good is facilitated by the law recognizing the loan for use contract as executors title. According to the law, should the contract be terminated due to expiration or death of the loanee, the loan for use contract that is conducted in an authentic form or under private signature is therefor an executors title (art. 2157 Civil Code)

In the absence from the contract of a specific term for returning the good the contract is an executors title only in the case when the scope for using the good is not mentioned or the use for which it was loaned is permanent.

A point must be made, that the loanee cannot hold the good as retention right for any obligations that he might have against the lender (art. 2153 Civil Code).

Should the loanee refuse to hand over the good, the lender can stake out a claim in requisition, as the owner of the good, which is unlimited, or can stake out a personal claim based on the loan contract, which is subject to limitation.

2.3.2. During the execution of the contract of loan for use some extra contractual obligations may arise for the lender:

a) The obligation to return all expanses made for conservation of the loaned good. As mentioned before, the expenses regarding the administration and conservation of the loaned good fall to the loanee. But during the execution of the contract there could be a necessity for adjusts to the loaned good, unforeseen at the signing of the contract. These expenses are to be paid by the lender, if he was notified in advance and did not oppose to adjusts being made by the loanee, or because of the urgency that the adjust required there was no time to notify him (art. 2151 par. 2 Civil Code).

The obligation of the lender to return the expenses mentioned has as basis business inventory (art. 1330 Civil Code).

b) The obligation to repair any damages of the loanee. The lender is obliged to pay any damages for any injury or prejudice caused to the loanee by his own fault. According to the law, the lender who, at the date of closing the contract, knew about hidden defects of the loaned good and failed to report them to the loanee must repair any damages suffered by the latter (art. 2152 Civil Code).

The obligation of the lender to pay all damages suffered by the loanee has as basis the delinquency responsibility of the lender (art. 1357 Civil Code).

2.4. The loan for use contract ceases according to the general rules: when the contract has been executed; the severance of the contract; the death of parties etc. in the application of the general rules the particularities of the loan for use will be taken into account.

2.4.1. According to the law, the loanee is entitled to use the good until the given term or until the good has been used according to the agreement of parties. Once executed, the contract is fulfilled and the loanee must return the good to the lender (art. 2155 Civil Code).

In the absence from the contract of the elements required to determine when the contract has been fulfilled, also in the case when the use of the good is permanent, the contract is considered to end upon request of the lender.

2.4.2. Any misconduct by the loanee gives the lender the possibility to server the contract, claim the return of the loaned good and also damages (art. 2156 Civil Code).

2.4.3. In general, after the death of a contracting party all rights are transferred to their inheritors by effect of the law. In the case of the loan for use contract, should the loanee decease, the contract will be terminated only at the request of the lender for the return of the good (art. 2156 Civil Code).

3. The loan for consumption contract has its legal provision in art. 2158-2170 Civil Code.

The Civil Code has general provisions regarding the loan for consumption and special provisions regarding the loan with interest.

Should any person close up loan for consumption contracts on a professional basis, the special provisions regarding credit institutions⁶ or financial institutions⁷ will be applicable.

3.1. The general provisions of the Civil Code regard the closing and content, validity conditions and effects of the loan for consumption contract.

The loan for consumption contract is an agreement by which a person, the lender, gives to another person, the loanee, a sum of money or any goods that are fungible and will be consumed by own nature and the loanee will return the same sum of money or the same quantity and quality of goods (art. 2158 Civil Code).

Usually, the loan for consumption is a free basis contract. In respect, art. 2159 Civil Code presumes that if the parties did not otherwise agree, the loan for consumption will be free basis. Should the loan for consumption refers to a sum of money, it will be presumed that the contract is by onerous title.

The use for consumption contract is a real contract, is unilateral and transmits the property.

3.1.2. The validity conditions for the loan for consumption are as any other contracts: the legal capacity of the parties to enter an agreement, the consent of both parties, handing in the good, a legal and moral object and a legal and moral purpose.

3.1.2.1. Because the use for consumption is a property transmitting contract, for its closing, both

⁵ See F. Deak, reference above, pag. 346. See L. Stănciulescu, reference above, pag. 406.

⁶ See Government Urgency Ordinance no. 99/2006 regarding institutions for credit and capital adequacy.

⁷ See Government Urgency Ordinance no. 93/2009 regarding nonbanking financial institutions.

parties must have legal capacity to make disposition acts.

The lender must be the owner of the good and must fulfill the legal provisions regarding the disposition of that good.

The loanee must fulfill the legal provisions regarding his capacity to take property of the good and also to return it.

3.1.2.2. The loan for consumption contract will be realized, like any other real contract, by consent of both parties and giving out the loaned good. Giving out the loaned good is a condition for the legal closing of the contract and not an effect of it.

3.1.2.3. The object of the loan for consumption contract is a sum of money or any goods that are fungible and will be consumed by own nature (art. 2158 Civil Code). So, the object a general goods, fungible and that consume their substance.

Fungible goods are those that can be substituted with another alike in the execution of an obligation (art. 453 Civil Code).

The goods that consume their substance are movable goods which when normally used they must either be alienated or their substance is consumed (art. 544 Civil Code).

A point that must be made is that the object of the loan for consumption must be only goods that consume their substance by own nature.

3.1.3. Being a unilateral contract, the loan for consumption gives obligations only to the loanee. During the execution of the contract some extra contract obligation may arise for the lender too.

3.1.3.1. By the valid closing of the loan for consumption contract the loanee becomes the owner of the loaned goods and thus may dispose of them. As owner he will bear the risk of the contract (art. 2160 Civil Code).

After a specific period of time the loanee must give back to the lender the same sum of money or the same quantity and quality of goods. In lack of another agreement of the parties, the loanee must return the same quantity and quality of the goods that he received at the signing of the contract, regardless of the change in price.

If the object of the loan for consumption is a sum of money, should the parties not agree otherwise, the loanee must return the same sum, regardless of any fluctuation of its value.

In the case that giving back the same quantity and quality is not possible the loanee is obliged to pay the full value of the good from the date and place when the restitution was supposed to be done (art. 2164 Civil Code).

The return of the goods must be done at the specified term stipulated in the contract. According to the law, the term for restitution is presumed to have been fixed in favor of both parties. Should the contract

be on free basis, the term is considered to be fixed only in favor of the loanee (art. 2161 Civil Code).

When the contract lacks to specify any return term for the loan, it will be fixed by the Court of Justice, according to the procedure provided by the law for presiding judge's interim order (art. 2162 Civil Code).

When ruling over the return term, the Court must take into consideration the purpose of the loan, the nature of the obligation and of the loaned goods, the conditions of the parties and any other relevant facts.

In the case that the contract allows the loanee to return the goods only when he has the means to do so, the Court should it observe that the loanee has them or could have had them cannot give a retuning term of more than 3 month.

In the case of the return term fixed by the Court the claim is subject to limitation, which begins at the date of closing the contract (art. 2163 Civil Code).

As in the case of the loan for use contract, regarding the obligation of retuning the loan, the loan for consumption contract is conducted in an authentic form or under private signature and is therefore an executors title, by law, in the cases of the death of the loanee and the expiration of the contract (art. 2165 Civil Code).

3.1.3.2. According to the law, the lender must repair any damages caused to the loanee because of the hidden defects of the goods (art. 2166 Civil Code).

In case of the loan for consumption which is by onerous title, the lender who, at the closing of the contract, knew of the existence of hidden defects and failed to notify the loanee must offer reparation should the loanee suffer any damages. The liability of the lender will be ascertained under art. 1707 Civil Code regarding the general warranty obligation of the seller for hidden defects of the sold goods.

3.2. The provisions of the Civil Code regarding the loan with interest contract regulate the field of application, the notion of loan with interest, different forms of interest, how interest flows and the anticipated payment of interest⁸.

3.2.1. The provisions of the Civil Code regarding the loan with interest are applicable every time, on a contract basis, an obligation is born regarding a sum of money and that has a term for execution or regarding general replaceable goods, should no special rules exist regarding the validity and execution of such obligation (art. 2167 Civil Code).

Crediting on a professional basis can be done only by financial or credit institutions or other institutions given such right by law.

3.2.2. The loan with interest is the loan for consumption contract by onerous title, in which the loanee must return not only the sum he had loaned but also pay interest.

By effect of the law, the loan for consumption that has a sum of money as an object is presumed to be

⁸ See Florin Moțiu, *Special contracts in the new Civil Code (Contracte speciale în noul Cod civil)*, ed. Wolters Kluwer, Bucharest, 2010, pag. 297-299.

by onerous title which equals to a loan with interest (art. 2159 Civil Code).

3.2.3. Interest represents an equivalent of the use of capital (usage interest). Interest may be stipulated in currency or any other performers under any title or designation that the loanee must pay (art. 2168 Civil Code).

3.2.4. In case of a loan of a sum of money, interest will be added from the first day that the sum was given to the loanee. He must pay interest at the maturity of the loan contract.

Paying interest in advance can be made for only 6 month in advance (art. 2170 Civil Code).

If the rate of interest is only determinable any likely overpayments or deficits will be subject to compensation from one rate to another, for the entire duration of the contract, with the exception of the last rate which is always in favor of the lender.

3.2.5. The legal frame of the legal interest is given by Government Ordinance 13/2011 regarding the legal usage and penalty interests for money obligations and for certain financial and fiscal measures in banking sector⁹.

The usage interest is the interest due by the debtor of an obligation regarding a sum of money at a certain term, calculated for the period previous to the expiration of that obligation. This interest is the price for using that money.

The penalty interests is owned by the debtor of a money obligation that was not restituted at due date. This interest represents compensation for sanctioning and repair the damage caused to the creditor by the late payment over the due date.

In the absence of an express agreement of the parties, regarding the interests' sum, the legally stated interests will be paid, as for either the usage or penalty interest.

The rate of the legally stated usage interest is set at the level of the reference interest given by the National Bank of Romania, which is the rate of interest for monetary policy, set by decision of the Council of administration of the National Bank.

The rate of the legally stated penalty interest is set at the rate of interest for monetary policy plus 4 percent points. In contracts between nonprofessional parties the rate of penalty interest will be at the rate of interest for monetary policy diminished by 20%.

In contracts between professionals and in those between professional and public contracting authorities the interest will be at the rate of interest for monetary policy plus 8 percent points¹⁰.

In contracts that have an international element, when the Romanian law is applicable and when the payment is in a foreign currency, the legally stated usage and penalty interest is 6% per year (art. 4 G.O. no. 13/2011).

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⁹ Published in Official Journal 607/29.08.2011. The Ordinance has been modified by Law no.72/2013 (OJ 182/2/04/2013). See also Stanciu Cărpenaru, Romanian Commercial Law treaty (Tratat de drept comercial român), ed. Universul Juridic, Bucharest, 2014, pag. 446-448.

¹⁰ This provision is showed in art. 20 of Law no. 72/2013 modified by Government Ordinance no. 13/2011.