

Zhailina A.G.
**Legal characteristics
of bank loan contract**

Author in this article reveals the legal aspects of the bank loan contract, which regulates the relations between the bank and the borrower. The article deals with the concept and the subject of the contract of bank loan contract, its distinctive features within the loan contract, ways to ensure fulfillment of the obligations and basic conditions of the terms of contract of bank loan issued by banks of the second level.

Key words: banking law, bank loan contract, obligations, pledge, forfeit, bank, lender, borrower.

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**Банк қарыз келісім-шарттың
құқықтық ерекшелігі**

Бұл мақалада банк пен қарыз алушы арасындағы қатынастарды реттейтін кредиттік келісімнің құқықтық аспектілері ашылады. Мақалада банктік қарыздың түсінігі және пәні, оның қарыз келісімінен ерекшеліктері, сондай-ақ екінші деңгейдегі банктермен берілетін банктік қарыз келісімінің негізгі шарттары қарастырылған.

Түйін сөздер: банктік құқық, банк қарызшарты, міндеттемелері, кепілдік қамтамасыз ету, айыппұл, банк, кредитор, қарыз алушы.

Жайлина А.Ж.
**Правовые особенности
договора банковского займа**

Автором в данной статье раскрываются правовые аспекты договора банковского займа, который регулирует отношения, возникающие между банком и заемщиком. В статье рассмотрены понятие и предмет договора банковского займа, его отличительные черты от договора займа, способы обеспечения и основные условия договора банковского займа, выдаваемого в банках второго уровня.

Ключевые слова: банковское право, договор банковского займа, обязательства, залог, неустойка, банк, займодатель, заемщик.

LEGAL CHARACTERISTICS OF BANK LOAN CONTRACT

Bank loan contracts occupy a huge percentage of banking transactions. Loans use temporarily free funds, so their transience can have a huge impact on the liquidity of the banking assets, and the financial system as a whole –because the weakness of the banking system of any developing or developed country can threaten the financial stability in this country and in other countries.

Bank loan contracts are regulated by the norms of Civil law, because second-tier banks according to the legislation of the Republic of Kazakhstan are subjects of entrepreneurial activities. A prerequisite for the conclusion of the bank loan contract is the presence of a license to conduct banking operations of legal entity granting the loan. Other legal entities such as pawn shops do not have a license to conduct banking activities, may conclude a contract short-term loan secured by movable property.

The difference between the loan agreement on the subject, the subject may be any of the things defined by generic characteristics of the loan agreement, the subject of which can only be in cash. Lender in the loan contract can be any subject – individual or legal entity, in contradistinction to bank loan contract.

Second-tier banks as commercial organizations, within the framework of the entrepreneurial activity taking into account a situation on financial markets independently accept decision about the terms of grant of loans to both individuals and legal entities, methods of their return, hedging of the risks, necessary for this purposes criteria of solvency and categories of persons loans can be given.

Loan contract according to the article 715 of the Civil Code of the Republic of Kazakhstan is a agreement between two parties, in which one party (the lender) transfers the ownership of (economic management, operational management) another party (the borrower) money or things, with certain generic characteristics, and the borrower agrees to return the lender the same amount of money or an equal number of things of the same kind and quality.[1]

The subject of the bank loan contract are funds that are transferred to the account of the borrower on the terms of payment, repayment and urgency. Payment for bank loans is based on the one-sided nature of the services provided by banks in lending. For the provision of a bank loan charge a fee in the form of reward, which sets the terms of the loan agreement. Under the repayment obligation of the borrower meant to pay the principal amount subject to the

conditions stipulated in the contract. Under the urgency understands exactly on time repayment of borrowings, the violation of which entails the application of certain sanctions.

The borrower in the bank loan contract may be legal entities and individuals, and the lender shall be only bank operating under the license of the National Bank of the Republic of Kazakhstan, other legal entities and citizens are prohibited from engaging in a form of a loan of money from citizens as a business, and such contracts are considered invalid from the moment of their detention.

A prerequisite to conclude the bank loan contract is a written form of detention, failure to comply with this condition shall entail the invalidity of the contract in accordance with paragraph 4 of Article 728 of the Civil Code of the Republic of Kazakhstan.[1]

General provisions on the bank loan agreement enshrined in Art. 34 of the Law of the Republic of Kazakhstan «On banks and banking activity in the Republic of Kazakhstan» dated August 31, 1995 № 2444. [2]

Bank loan contract contains terms and conditions stipulated by the legislation of the Republic of Kazakhstan, the conditions determined by contract between the parties, as well as a list of mandatory conditions Resolution provided for the Financial Supervision Agency of Kazakhstan on February 23, 2007 № 49 «On Approval of Rules of documentation on credit.» [3]

In the article 3 of the Civil Code of the Republic of Kazakhstan priority of the norms of the Civil law over the Bank legislation is assigned. [1]

Bank loan contract may be issued at the same time as the contractual amount of the bank loan (non-renewable) and reusable (renewable) loan contract in the form of credit line. The credit line is a contract for the provision of targeted loans over a period of at least need of the borrower. The credit line granted by certain tranches with a predetermined amount. Refunds made to the account specified in the contract, etc.

In the case in which the lender Islamic bank the loan contract doesn't include fees according to the principles of Islamic banking, in which fees are under the strong prohibition. At the conclusion of loan agreement the Islamic Bank shall indicate the type margins (fixed or a percentage of the price of the product.).

Banking legislation establishes strict rules regarding the structure and design of a bank loan. The text of the agreement is printed in A4 format, font «Times New Roman» size not less than 12. It shall be written in the General terms contain information

about the date of the contract; purpose of bank loan; the total amount and currency of the loan; term and interest rate (fixed or floating), the procedure for calculating of floating rate, if it is provided by the contract; method of repayment (cash or non-cash); the method of repayment of the loan: the annuity (repayment in equal installments) or differential (repayment of principal in equal installments), or in any other manner provided by the internal rules, the order of debt repayment on the loan, the procedure of calculation and the amount of penalty (fine for late repayment of principal and payment of a fee; the complete list of the commissions and their sizes to be charged in connection with the issuance of the loan; procedure and frequency of repayment of the loan; ways to ensure fulfillment of the obligations; measures taken by the bank on default or improper performance of the Borrower's obligations under the contract; contract time; indication of an indication of the presence of the borrower's consent to the provision of information about him to credit bureaus, as well as information on postal and electronic addresses of the bank.

Paragraph of bank loan contract containing general provisions on the rights of the borrower under the bank loan contract shall include the following provisions: 14 days from the date of the borrower has the right to return the money with accrued during this period reward and if the date of payment of principal falls on a holiday or day – to pay the next day, without penalty, and other types of penalties for repayment of the loan; on the application within 3 days to obtain information about the distribution of funds received in repayment of debt under the contract; on an application for partial or full early repayment of the bank provided under the contract money – donated 3 days to get information about the amount owed to Return amount, broken down by principal, interest, fees, penalties, fines and other payable sums indicating late payments; to prepay the loan within one year from the date of receipt of the loan without paying penalties in the event of dispute in writing apply to the bank.

Points of contract concerning to the rights and obligations of the bank, also contain some restrictions, as the bank acts in a stronger position than the borrower. To protect the rights of borrowers legislation set limits on change points of the contract, limit or impair the position of the borrower.

The rights of the bank in the contract contain a short list of the right to unilaterally change the conditions of the contract in the direction of improvement for the borrower, and the right to demand early repayment of the loan and fees in the event of another violation of terms of payment more than 40 days.

Responsibilities of the bank corresponds to the rights of the borrower, and the bank is obliged to notify the borrower of the late performance of obligations, and the need for payments under the contract, and in the case of assignment of rights (claims) to notify the borrower within three days of the methods provided for by the contract, of delay in fulfillment of the obligation and the need to make payments under the contract. when assignment of rights (claims) under the contract to third parties (if the right assignment stipulated in the contract) within three working days written notice to the debtor (his authorized representative) with the full amount of transferred rights of claim, the remainder of the current and overdue debt, broken down by principal remuneration, fees, penalties and other types of amounts due as well as the appointment of further payments to repay the loan – the bank or the person to whom the right to claim.

If the contract provides the opportunity to assignment of claims (factoring) and the arbitration clause, they should be specified in the contract as a separate item. If such a clause is not provided by the contract may be entered into an additional agreement to the basic contract of bank loan.

Bank loan contract may not establish a mandatory condition of the life insurance and health of the borrower, and the contract can not limit the right to choose the insurance company.

According to the law «On Banks and Banking Activity» annual effective rate should not exceed fifty-six percent. In advertising and other materials should be listed not only the nominal rate, and annual effective rate comprising a total of all payments stipulated under the bank loan.

Second-tier banks independently determine their policy to identify the borrower's solvency, by the investigation of the credit history and obtaining the required information through a survey of the borrower, the analysis of documented data about the borrower's income for the previous periods, to ensure the repayment of the bank loan to reduce the credit risk. Fact of the existence of a credit history in a credit bureau gives a distinct advantage for banks in assessing the solvency and integrity of the borrower, that allows to take more informed decisions and to

prevent the conclusion of unprofitable transactions with malicious defaulters.

Ways to ensure fulfillment of the obligations are fixed in Chapter 18 of Civil Code. Civil Code of the Republic of Kazakhstan recognize methods following of securing the execution of an obligation: forfeit, pledge, other forms.

Forfeit (fine, penalty) shall be recognized as a monetary amount defined by legislation or agreement, which must be paid by a debtor to the creditor in the case of failure to execute, or improper execution of an obligation, in particular, in the case of a delay in execution. Upon the claim to pay the damages, the creditor shall not be obliged to prove losses caused to him. The amount of forfeit shall be determined in a fixed monetary amount or in a percentage of the amount in default or the amount of the improperly executed obligation.

Pledge shall be recognized as a method of securing the execution of an obligation, by which a creditor (pledge holder) has the right, in the case of failure by the debtor to execute the obligation secured with the pledge, to receive satisfaction from the value of the pledged property, in a priority procedure before the other creditors of the person to whom that property belongs (pledger), with the exceptions established by the Civil Code. Pledge can be any movable or immovable property, which covers the cost of the loan. In the event that a loan to buy a car or an apartment (mortgages) they are owned by the bank until full payment of the bank loan contract amounts.

Guarantee and Surety are specified in the Paragraph 4 of The Civil Code of the Republic of Kazakhstan. Guarantee gives a right to demand performance from both borrowers, in the case if the borrower violates basic obligations of the debtor, because the guarantor shall become liable to the creditor of another person (debtor) severally in full or in part for the execution of obligations of that person, except for the cases provided for by legislative acts. In the case, when parties used surety the creditor must first take all steps to recover from the debtor, and only then, with the impossibility of collecting the entire amount of the debt from the debtor may use the execution of that person's obligation in full or in part.

References

- 1 Civil Code of the Republic of Kazakhstan (dated December 27, 1994).
- 2 Law of the Republic of Kazakhstan «On banks and banking activity in the Republic of Kazakhstan» dated August 31, 1995 № 2444.
- 3 Resolution provided by the Financial Supervision Agency of Kazakhstan on February 23, 2007 № 49 «On Approval of Rules of documentation on credit.»