Special Civil Control in Loan, Credit and Bank Account Agreements

Oleg V. Grabko[1, a,*]

[1]Peoples' Friendship University of Russia, Moscow, Russia

*Corresponding author

Keywords: Civil control, Loan agreement, Bank account, Loan agreement, Special control

Abstract: The paper considers the features of civil control in loan, credit and bank account agreements. The author considers the forms of implementation of such control in these contracts, their reflection in the current legislation and judicial enforcement. It is concluded that although the purpose of the loan has no special meaning for the legislator, the identification of the purpose in the contract of the target loan is an integral condition for the implementation of civil control within this type of contractual control, at the same time, without the right of control, the condition on the purpose of the loan loses its meaning. The author considers the limits of possible control in loan, credit and bank account agreements and analyzes the legal grounds of the bank to exercise control over the use of funds on the client's account.

1. Introduction

By virtue of paragraph 1 of article 814 of the Civil Code of the Russian Federation, if the loan agreement is concluded with the condition of the borrower's use of the funds received for certain purposes (target loan), the borrower is obliged to ensure that the lender can exercise control over the intended use of the loan. The adoption of the Federal law of July 26, 2017 No. 212-FZ "On amendments to parts one and two of the Civil code of the Russian Federation and certain legislative acts of the Russian Federation" from section 1 of article 814 of the Civil Code was deleted, the word "amount" and clause 2, article 814 of the Civil Code of the Russian Federation received a slightly different formulation: in the event of default by the borrower of the terms of the contract of a loan on target use of the loan, and also in case of infringement of the obligations stipulated in paragraph 1 of this article, the lender is entitled to refuse further execution of the loan agreement, to demand from the borrower early repayment of the loan granted and payment due at the time of payment of interest on the loan, unless otherwise provided by the contract.

First of all, it should be borne in mind that the purpose for which the borrower intends to receive funds under the target loan agreement does not have special significance for the legislator, since the purpose can be absolutely any, if it does not contradict the law and does not violate it. So, in the Resolution of Federal Arbitration Court (FAC) of the West Siberian district of September 21, 2006 No. F04-6128/2006 (26645-A03-11) in case No. A03-20594/05-12 the following is noted: the court proceeded from the fact that in itself the purpose for which the parties enter into a loan relationship, lies outside of the contract, but, being included in it as a condition, it acquires legal significance and generates for the borrower obligations, firstly, to target the use of the loan amount and, secondly, to provide the lender with the opportunity to control such use. The law does not establish the nature of the intended use of the funds received by the borrower, however, based on the General principles and meaning of civil legislation, it is assumed that it can be any purpose that does not contradict or violate it.

However, the fact of agreeing on the purpose and establishing it in the contract of the target loan is crucial for the possibility or impossibility to resort to the use of the rule of paragraph 2 of article 814 of the Civil Code. For example, the Resolution of FAC of the Moscow district on 30 November 2010 No. KG-A41/14404-10 in the case No. A41-10138/10 indicate the following: the agreement of a target loan provided that the loan is provided in development of production in the framework of the conduct of statutory activities. Arbitration courts proceeded from the fact

  DOI: 10.25236/icmeem.2019.069

that, as at the conclusion of the loan agreement and subsequently, upon signing an additional agreement parties had not set in any particular order the development of the production of the Respondent, its activities, the plaintiff granted a loan. In this regard, the ability to control the use of funds is not provided. Thus, the guarantee of the creditor's right to exercise special contractual civil control under the target loan agreement is the fact of agreeing on the purpose and establishing it in the target loan agreement.

Since the condition on the purpose of providing borrowed funds is not essential, i.e. mandatory for cash loan agreements, in the absence of this condition, the loan issued under the contract will be non-earmarked. So, Rosenberg, analyzing the practice of the International commercial arbitration court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation, gives an interesting example in this regard: the ICAC did not consider it possible to agree with the defendant's statement about the purpose of the loan provided under the agreement, agreeing with the plaintiff's position that in this case the loan was not issued with the condition of the borrower's use of the funds received for certain purposes (the target loan). The preamble of the agreement, interpreted by the Respondent as a condition of the purpose, does not contain the purpose defined by the parties, as required by the provision of paragraph 1 of art. 814 CC, trades abroad, and only expresses consent of the plaintiff to exert aid for defendant for development of financial investments in Europe, on the territory of post-Soviet space, i.e. to exert aid in implementing by defendant of his ordinary economic activities [1].

In court practice, the loan is given for the following purposes: construction of the showroom, the construction of the center for labor and medico-social rehabilitation of the disabled, the construction of piers, design and construction of store construction materials, participation in the economic program for the construction of the building and the adjacent square, working capital, acquisition of fixed assets in the form of the functional complex (refrigerator), the acquisition cattle to create a mother herd, buying coffee, supplying meat, etc.

Thus, identification of the purpose in the contract of the target loan is an integral condition of implementation of civil control within this type of contractual control. In this regard, contractors under the target loan agreement should be encouraged to specify in the contract the purpose of the loan as much as possible. So, if the purpose is the acquisition of particular property, it is necessary to specify its name (including guided by the current classifiers, such as the All-Russia Classifier of Types of Economic Activity); if it is a question of acquisition of an individually-certain thing, it is necessary to specify its individual characteristics (for example, identification number (VIN), cadastral number of real estate object), etc.

Special contractual civil control under the contract of a target loan is regulated by section 1 of article 814 of the Civil Code of the Russian Federation, an analysis of the content which it follows that the right of the lender to exercise such control corresponds to the obligation of the borrower to provide the opportunity to implement this control. Thus, the legislator does not focus special attention on the forms and methods of civil control under the target loan agreement, leaving the solution of this issue at the mercy of the parties to the contract.

In judicial and arbitration practice, disputes often arise related to the refusal of the borrower to provide the lender with the information necessary to exercise control, citing inconsistency in the contract of the target loan conditions on specific forms and methods of such control. In this respect, we agree with the position of Karimullin that “the right to control the intended use of the transferred capital is a necessary prerequisite to preserve the ability to exercise all other rights arising from the loan agreement... Therefore, without the right of control, the condition of the purpose loses its meaning and turns into an empty Declaration” [2].

As a rule, depending on the nature of the target loan agreement forms and methods of implementation of civil control can be the following: checking of the documents confirming target use of funds; verification of the results of work paid for with borrowed funds, etc. the Main documents confirming intended use of loan, one should admit the settlement documents. In case of non-cash payments, such documents are a payment order, collection order, payment request, payment order, and in case of cash payments-an expense cash order or a receipt for a

cash receipt order. In addition, any other documents, including consignment notes, contracts concluded by the borrower with the sellers of goods, acts of work performed under the contract, etc., should be recognized as documents confirming the intended use of funds transferred under the contract of the target loan.

In this respect, the note made by Blinkovsky is very remarkable: "if the loan agreement implies the transfer of things by the creditor to the debtor in the property, can we expect the latter to use them only within certain limits? The right of ownership is by its nature the most complete property right, it is incompatible with any target restrictions. Otherwise, it will no longer be a right of ownership" [3].

Agreeing in general with Blinkovsky, we believe that the debtor, who received borrowed funds, can really use them for absolutely any purpose, which is explained by the very nature of money, which, being things with certain generic characteristics, if we are talking about cash, or mandatory claims to the Bank, if we are talking about non-cash funds, are mixed with similar things of the borrower. However, proceeding from the meaning of the civil obligation arising on the basis of the contract of the target loan, the need for its conclusion is caused, as a rule, by the fact that the borrower does not have the necessary amount of money, and therefore is forced to contact the lender. For the solution of the designated problem, Sarnakov offers the following algorithm: "achievement of the purpose in such cases can be provided if the creditor Bank provides movement of money not on the Bank account of the borrower-consumer, and on the account of the third person (trade organizations) that will correspond to execution of the credit obligation to the appropriate subject in the appropriate place" [4].

In this case, if the specific forms and methods of civil control in the contract of the target loan are not agreed, the borrower is obliged to provide the lender with the opportunity to conduct an audit in the form and manner specified by the lender. Thus, in the ruling of the Supreme Arbitration Court of the Russian Federation (SAC) of August 27, 2009 No. SAC-9514/09 in the case No. A73- 576/2008-47/8 noted the following: the applicant's argument that he has no obligation to provide financial documentation due to the fact that such a condition is not contained in the disputed loan agreements, contrary to the requirements of art. 814 of the Civil Code, which does not limit the types and forms of control of the lender over the intended use of borrowed funds.

In the legal literature, attention is drawn to the limits of civil control on the part of the borrower for the intended use of funds transferred under the target loan agreement. Thus, Khokhlov notes that the control of the lender should not go beyond obtaining information about what and in what terms the target loan was used. The intervention of the lender in the operational economic activities of the borrower, the imposition of specific methods and methods of work are unacceptable, contrary to the General principles of civil law, enshrined in article 1 of the Civil Code [5].

Note that according to the rule of paragraph 2 of article 814 of the Civil Code, the lender, who was not allowed to exercise civil control under the contract of a target loan granted the rights for a balance of interests of the parties of the obligation: the lender is entitled (1) to refuse further performance of the loan agreement, (2) to demand from the borrower early repayment of loan and (3) payment due at the time of payment of interest on the loan, unless otherwise provided by the contract.

We should add that in paragraph 16 of the Resolution of Plenum of the Supreme Court of the Russian Federation No. 13, Plenum of the SAC No. 14 dated 08 October 1998 "On practice of application of the provisions of the Civil Code of the Russian Federation on interest on third-party money" specifically clarified that in cases where on the basis of paragraph 2 of article 814 of Civil Code, the lender is entitled to demand early repayment of the loan or part thereof together with interest due, interest in accordance with the contract size may be recovered at the request of the lender to the day loan amount in accordance with the contract had to be returned [6].

2. Features of Civil Control in the Loan Agreement

As rightly emphasized in the scientific literature, "the expression" to ensure that the lender can exercise control over the intended use of the loan amount" for the purposes of the loan agreement has some other understanding than the loan agreement." However, we cannot agree with the conclusion that the Bank can exercise its control functions only at the stage of execution of the loan agreement.

Indeed, unlike the target loan agreement, which is a real contractual construction, the target loan agreement differs in consensual nature, which allows the lender in such a contract to exercise civil control at the stage of granting the loan.

So, on one of cases the court, satisfying the claim of Bank about early collecting from respondents of borrowed funds, agreed with arguments of Bank about existence of a contractual obligation of the borrower preliminary in writing to coordinate with it contracts which subject is purchase and sale of the area of the under construction object or the rights to them.

After the transfer of borrowed funds, the Bank also has the ability to control the use of credit by validation, such as the following documents: “copies of payment orders for payment of purchased inputs, certified by the borrower and the lending institution, copies of invoices, certified by the borrower, if necessary, insurance of the equipment – a copy of the insurance contract, certified by the borrower, copies of payment orders for payment of insurance contributions certified by the borrower and the credit organization” [7].

Thus, it can be concluded that the special civil control under the contract of the target loan can be both preliminary (before the loan) and subsequent (after the loan funds).

3. Civil Control in the Bank Account Agreement

Under the Bank account agreement, the Bank may exercise control over the client's use of the funds on the account. In accordance with paragraph 3 of article 845 of the Civil Code, the Bank shall not be entitled to determine and control the direction of use of the client's funds and to establish other restrictions not provided for by law or the Bank account agreement on its right to dispose of funds at its discretion. It is likely that the inclusion of the rule in civil law was due to political motives. So, Efimova notes the following: “at the time of adoption of part two of the Civil Code of the Russian Federation, this rule was to fix the changed position of banks in relations with the clientele compared to the position of Soviet banks, which carried out “rouble control” over the implementation of the clientele of national economic plans” [8]. However, today this rule has a different meaning, providing a regulatory framework for civil control.

The clause 3 of article 845 of the Civil Code is formulated dispositively, which implies the possibility of including in the Bank account agreement conditions that give the Bank the right to determine and control the direction of use of the client's funds. As the analysis of judicial and arbitration practice shows, such a formulation, which generally corresponds to the principle of freedom of contract, one of the imperatives of which is the independence of the parties in determining the terms of the contract, creates conditions for abuse of the right by banks. Thus, on the issue of validity of the terms of the loan agreement on the obligation to maintain a certain amount of turnover on the client's Bank accounts in the lender's Bank and sanctions for its non- performance, there are two positions of the courts.

According to the first position, the loan agreement may contain provisions on the obligation to maintain a certain amount of turnover on the client's Bank accounts with the lender's Bank and sanctions for its non-performance. So, in the Resolution of FAC of the West Siberian district of December 13, 2012 in case No. A27-5379/2012, the following is noted: between the Bank and the borrower, an agreement was concluded on the provision of a credit (revolving) line, in accordance with which the Bank undertook to provide the borrower with funds, and the borrower undertook to return the loan funds received in full, taking into account the term of tranches. According to the terms of the loan agreement, during the period of validity of the agreement, the

borrower is obliged to ensure that the Bank accounts of organizations belonging to the group of companies receive funds in the amount of not less than the amount determined in accordance with the terms of the loan agreement. The court, recognizing the above-mentioned conditions of the credit agreement corresponding to the law, motivated the decision that proceeding from dispositive provisions of Art. 421 of the Civil Code of the Russian Federation, the parties have the right to include in the contract by agreement among themselves any conditions not contradicting the law. A similar approach is found in other court decisions.

Another, opposite, position, according to which the condition of the loan agreement on the obligation to maintain a certain amount of turnover on the client's Bank accounts in the lender's Bank and sanctions for its non-performance is invalid, has been reflected in some court decisions. For example, in the Resolution of the FAC of the North Caucasus district of September 09, 2011 in case No. A53-26703/2010, attention is drawn to the following: the Bank and the borrower entered into a loan agreement under which the Bank undertook to provide the borrower with a loan, and the borrower undertook to repay the loan amount within the prescribed period and pay interest for the use of the loan. In paragraph 5.1.3 of the agreement, the parties provided for the obligation of the borrower to maintain on his (her) current account (s) with the Bank monthly credit turnover in the amount of not less than 90% of revenues to all current accounts. Believing that the specified condition of paragraph 5.1.3 of the loan agreement is void, the company appealed to the arbitration court with a claim. As a result, the claim for invalidation of points of the loan agreement, the application of the consequences of the invalidity of the transaction and interest for the use of other people's money is satisfied, since the terms of the disputed points do not relate to credit obligations and are void.

A similar conclusion came from FAC of the North Caucasus region, which in its Ruling of 22 February 2011 in the case № A32-20387/2009 noted the following: paragraph 9.1.8 of contracts involving the obligation of the borrower to maintain the credit turnover in the Bank in the amount determined in paragraph 3.10, for all accounts of the group companies on their current accounts at the Bank, restricts the defendant in carrying out financial transactions on their current accounts opened in other banks, and is aimed at limiting the freedom of the society in the selection of contractors for contracts of Bank accounts.

It is important to emphasize that in the above examples and some other court decisions; the considered condition of the contract is regarded as an abuse of law by banks.

In the end, after numerous discussions, the SAC took the first position on the admissibility of the terms of the credit agreement the obligation to maintain a certain amount of turnover on the Bank accounts of a customer, reflected in the Information letter of the Presidium of the SAC of the Russian Federation dated 13 September 2011 No. 147 “Review of court practice of dispute resolution connected with application of the provisions of the Civil Code of the Russian Federation on the loan agreement”. It is interesting that in the Ruling of the Constitutional Court of the Russian Federation of March 28, 2017 No. 673-O, in particular, it is noted that paragraph 3 of art. 845 of the Civil Code is aimed at ensuring the freedom of the contract and the balance of interests of its parties, so it cannot be regarded as violating the constitutional rights of the applicant specified in the complaint.

When deciding on the legal basis of the Bank to exercise control over the use of funds held in the client's account, it is necessary to take into account the following. The General prohibition on the exercise of such control, established in paragraph 3 of article 845 of the Civil Code, is relevant for all civil contracts, including credit. It is allowed to establish the right of the Bank to control the use of funds exclusively in the law or the Bank account agreement. So, in decision No. 303-AD15- 14824 of December 22, 2015 (case No. A24-1484/2015) the Supreme Court confirmed that the inclusion in a credit agreement (the guarantee agreement) the terms providing for the right of lender (Bank) to debit the amount of the loan, accrued interest and penalties from any account of the borrower without any prior approval (indisputable) order without prior notice to borrower or guarantor violates the client's right to freely dispose of these funds and allows the Bank to determine and control directions of use of funds of the client.

It should also be noted that it is inappropriate to distinguish between the Bank's right to determine the use of funds and the right to control their use. The definition of use is actually the issuance of mandatory instructions to the client about the choice of the subject of the direction of its funds, which is also a form of civil control.

Without establishing in the Bank account agreement the right of the Bank to control the use of the client's funds, the Bank, in particular, has no right to decide "whether monetary payments from the debtor's account to its employees and attracted authors are permissible in the conditions when they arrived at the Bank after the direction of the claimant's claims, especially if the total amount stated in the settlement documents does not correlate with the usually paid amounts in the form of earnings and royalties", to carry out control measures "to establish the authenticity of the card, it does not provide for its obligation to control unauthorized access to the client's account" [9], in General "to delve into the essence of the relationship between the payer and the recipient of funds" [10].

In addition, it is important to distinguish between public-law banking control and civil-law control over the use of customer funds [11–13]. The first is provided by law and is carried out not in favor of the Bank, but in public interest. For example, public banking control is established in the Federal law of 07.08.2001 No. 115-FZ "On combating the legalization (laundering) of proceeds from crime and the financing of terrorism", in the Federal law of 10.12.2003 No. 173-FZ "On currency regulation and currency control". Control over the legality and priority of write-off of funds is assigned to banks by the legislation on bankruptcy. The obligation to exercise public legal control over banks may be imposed by the regulatory acts of the subjects of the Russian Federation. So, in the Ruling No. 7-G11-12 of November 30, 2011 the Supreme Court agreed with the conclusion of the lower court on the legality of imposing on banks the functions of control over the expenditure of budgetary funds in the provision of subsidies to citizens to purchase housing under the decree of the government of the region.

It should also be noted that there is a draft law that excludes civil control of the Bank over the use of funds. This approach cannot be considered justified, since it limits the free expression of will to establish private law control. At the same time, it is impossible to proceed from the presumption of bad faith of banks. Civil and legal control by the Bank is established in the interests of the client, especially in terms of the Bank's powers to restrict transactions in the presentation of suspicious, contradictory payment documents, in the absence of certainty about the person authorized to sign payment documents, in the presence of a corporate conflict with the client, in the identification of obvious fraudulent actions of third parties [14–22].

4. Conclusion

The guarantee of the creditor's right to exercise special contractual control under the target loan agreement is the condition of agreeing on the purpose and establishing it in the target loan agreement. If the specific forms and methods of civil control under the target loan agreement are not agreed, the borrower is obliged to provide the lender with the opportunity to conduct an inspection in the form and manner specified by the lender, since the latter is a subject authorized to exercise control. Taking into account the consensual nature of the loan agreement, civil control over the intended use of credit funds can be both preliminary and subsequent.

The Bank's civil control over the client's use of funds held in the account under the Bank account agreement must be distinguished from the Bank control imperatively established by law and carried out in the public interest (budget, tax, criminological, etc.). The Bank under the Bank account agreement can control, in particular, the intended use of funds, recipients and their priority, the amount of funds, the account balance. Determining the direction of use of funds is one of the forms of civil control under the Bank account agreement. The legislative proposal to ban the civil control of the Bank over the use of the client's funds should be recognized as unfounded, as it does not take into account not only the principle of freedom of contract, but also the implementation of such control, including in the interests of the client.

References

[1] Rosenberg, M. (2012). From the practice of the International commercial arbitration court at the Chamber of Commerce of the Russian Federation in 2009–2011. Business and Law, No. 11, Annex.

[2] Karimullin, R. I. (2000). The Agreement of the target loan. Journal of Russian law, No. 10, pp. 113–124.

[3] Blinkovsky, K. A. (2011). Transfer of things defined by generic characteristics and the transition of property rights. In M. A. Rozhkova (Ed.), Real right: statement of the problem and its solution: Collection of articles (pp. 336– 368). Moscow: Statut, 2011.

[4] Sarnakov, I. V. (2010). Consumer crediting in Russia: theory, practice, legislation. Moscow: Jurisprudence.

[5] Kozyr, O. M., Makovskiy, A. L., Khokhlov, S. A. (Eds.). (1996). Commentary on the Civil Code of the Russian Federation (Part Two). Moscow: MCFER.

[6] Solomin, S. K. (2009). Bank credit: problems of theory and practice. Moscow: Justicinform.

[7] Kosyakova T. P. (2013). On the Issue of Control by the Bank of Purposeoriented Use of Loan Proceeds. Banking law, No. 2, pp. 41–44.

[8] Efimova, L. G. (2011). Comment to article 845 of the Civil Code of the Russian Federation. In P. V. Krasheninnikov (Ed.), Article-by-Article comment to the Civil Code of the Russian Federation: in 3 vols. Vol. 2, p. 319. Moscow: Statut.

[9] Bychkov, A. I. (2016). Settlement operations: methods, specifics and risks. Moscow: Infotropic Media.

[10] Kurbatov, A. Y. (2010). Legal Personality of credit institutions: theoretical foundations of formation, content and problems of implementation. Moscow: Jurisprudence.

[11] Sidorova, A. V., and Karchevskaya, I. A. (2017). Interrelation of the bank law with civil law. Science of the XXI century: actual directions of development, No. 1-1, pp. 326–329.

[12] Shibaeva, M. A., and Sokolova, V. K. (2019). Improving methods of banking supervision in lending capital investment. Economy in the investment and construction complex and housing, No 1, pp. 28–31.

[13] Zaitsev, V. B. (2019). On the development of the function of banking control. Banking, No. 10, pp. 66–72.

[14] Borovykh, L. V., and Korepanova E. A. (2016). The orientation of deception in the fraudulent use of payment cards. Perm University Herald. Juridical sciences, No. 1, pp. 98–104.

[15] Frolova, E. E. (2011). State financial control in the sphere of money circulation. Thesis for the degree of doctor of law. Peoples' friendship University of Russia.

[16] Dudin, M. N., Frolova, E. E., Lubenets N. A., et al. (2016). Methodology of analysis and assessment of risks of the operation and development of industrial enterprises. Quality – Access to Success, vol. 17, No. 153, pp. 53–59.

[17] Genkin, A. S. (2013). Questions of General legal and judicial qualification of unauthorized operations on Bank accounts as a result of cybercrime. Banking law, No. 1, pp. 42–46.

[18] Filimonov, S. A. (2016). Problems of fight against the crimes connected with production for the purpose of use and sale of counterfeit credit and settlement plastic cards, and also other means of payment. Modern law, No. 6, pp. 84–89.

[19] Filimonov, S. A. (2015). Problems of fight against the cybercrime committed with use of Bank cards. Modern law, No. 3, pp. 119–124.

[20] Mallaeva, A. A. (2019). Development of operations with Bank cards and fraud prevention in

the banking sector. In Financial instruments of regulation of socio-economic development of regions: collection of materials (pp. 106–112). Makhachkala.

[21] Zavyalova, I. V., Zainullina, M. I. (2019). Tendencies of development of the market of Bank cards in Russia. Innovative science, No. 2, pp. 74–78.

[22] Dudin, M. N., Sekerin, V. D., Smirnova, O. O., et al. (2014). State anti-crisis management of banking sector: looking for optimization ways and contemporary development trends. Journal of Advanced Research in Law and Economics, vol. 5, No. 2, pp. 74–81.