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COMPARATIVE LEGAL ANALYSIS OF LOAN AGREEMENTS AND GRATUITOUS USE – LOANS

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Abstract:

The development of the institution of loans and borrowings from the times of the Roman Empire and the present is analyzed. The main features of the agreement, characteristic of Roman law and modern national legislation of Uzbekistan, are considered, that is, the signs of a loan agreement under the Civil Code of the republic.

Keywords: Loan agreement, gratuitousness, loan, lender, borrower, user.

Building a legal civil society in Uzbekistan is considered the main goal. At the same time, this procedure determines the attention to gratuitous relations on the part of benefactors, patrons and sponsors, and the state. Gratuitous use of property is also named in the Civil Code of the Republic of Uzbekistan as a loan agreement. As one of the types of agreements, the loan agreement has been known since the time of the Roman Empire. Analyzing the historical development and features of the system of Roman law treaties, we can conclude that this treaty has significantly adopted amendments and changes. So, according to Roman law, a loan agreement (commodatum) is a contract according to which one party (the lender) transfers to the other party (the borrower) an individually defined thing for temporary free use with the obligation of the other party to return the same thing intact and safekeeping.[1]

Here questions arise about the similarity of the agreement between the courts and the loan agreement. Because, like a loan, the loan agreement was also a real contract, i.e. the obligation from this agreement arose only when the transfer of the thing to the borrower (user) took place. But nevertheless, the subject of a loan agreement is money or other things determined by generic characteristics (measure, number, weight), only an individual thing can serve as the subject of a loan agreement, because only such a thing can be returned at the end of use without replacing another

For example, the subject is a certain measure of fuel for cars, then, as soon as the fuel is used, the return of that same fuel becomes impossible, and we can only talk about the return of the same amount of the same kind of things (that is, it will be a loan agreement).

In other words, the subject of the loan agreement could only be individually defined, non-consumable and irreplaceable things (movable or immovable), but property rights could not be. The return of the thing to the merchant was carried out within the period established by the contract. If the term was not specified in the contract, it was established, in fairness.

In turn, the loan agreement has the purpose of providing the thing for free use, i.e. only the borrower receives economic benefits from the loan agreement (utilitas). This point was taken into account in Roman law when deciding on the limits of the borrower's liability for the safety of the thing, since the contract was concluded in his own interests, strict liability was imposed on it, namely, the borrower was responsible for omnis culpa (any guilt), that is, not only for intentional harm to the lender (dolus) and not only for gross negligence (culpa lata), but even for minor negligence (culpa levis).

And here it is important to take into account the fact that the lender enters into a loan agreement not out of economic necessity, but in good faith, exercising only a moral duty and courtesy towards the other party. Therefore, he himself, showing such a courtesy, determines its form and limits.

From here, in case of violation of the contract in Roman law, the lender is responsible only for dolus and culpa lata, but not for culpa levis, since entering into a contract without personal benefit, the lender, according to the principles of Roman law, cannot be considered obliged to take particularly careful measures to protect the interests of the borrower, and if the thing is not of first-class qualities, the borrower does not have the right to make a claim to the lender on this basis, the same principles apply here that are applied to the donation agreement in the rule of folk wisdom: "They do not look a gift horse in the mouth".[2]

[1]Новицкий И.Б. Римское право. Учебник для вузов. – М.: ИКД Зерцало –М,2018г.
[2]Новицкий И.Б. Римское право. Учебник для вузов. – М.: ИКД Зерцало –М,2018г.

In general, the contract for the gratuitous use of property can be considered one of the few gratuitous contracts used in the national civil circulation at the present time. In accordance with paragraph 1 of Article 617 of the Civil Code of the Republic of Uzbekistan (hereinafter referred to as the Civil Code of the Republic of Uzbekistan). the same thing in the condition in which it received it, taking into account normal wear and tear, or in the condition stipulated by the contract.

The contract for the gratuitous use of property in everyday life is actually used more often than the contract of purchase and sale. So, on a daily basis, individuals take from each other any property for temporary use, mainly on a gratuitous basis. The current Civil Code of the Republic of Uzbekistan, like other similar civil codes of post-Soviet and foreign countries (for example, the Civil Code of Germany), the contract of gratuitous use is also called a "loan".

In general, it should be noted that the agreement for the gratuitous use of property and the loan agreement have common characteristics. So, under both agreements, the party that received the property is obliged to return it in a timely manner in the same quantity and quality in accordance with the terms of the concluded agreement. The contract for the gratuitous use of property and the loan contract are gratuitous, although the latter can also be compensated. At the same time, the legal nature of these types of contracts is different. If under a contract of gratuitous use of an item can be any property transferred for temporary use and possession (although this is not said in the Civil Code of the Republic of Uzbekistan), then under a loan contract, one party (the lender) transfers money or other things to the ownership of the other party (the borrower), certain generic characteristics, and the borrower undertakes to return to the lender at a time or in installments the same amount of money or an amount equal to the borrowed amount of things of the same kind and quality (loan amount).

According to well-known civil scientists, the term "loan" can only be the name of a contract for the gratuitous use of an individually defined thing, which implies the return of the same thing. In the same cases, when the legislation by inertia uses the word "loan" in the meaning of a loan, the rules on the loan agreement should be applied to such relations, and not the loan.[3] Considering the above and the higher legal force of the Civil Code of the Republic of Uzbekistan, rather than other laws and by-laws, the term "loan" should be used only in relation to an agreement for the gratuitous use of property.

An analysis of international experience in this area suggests that a gratuitous use agreement is considered in national legislative acts as an independent type of civil law agreement or as a kind of loan agreement. So, in the German Civil Code, the contract of gratuitous use (loan) is considered in a separate chapter. Despite the fact that this agreement is enshrined as an independent civil law agreement, its substantive characteristics fully comply with the provisions of the FGK.[4] And according to the Civil Code of the Republic of Uzbekistan, the rules of the lease agreement are applied to the contract for the gratuitous use of property, in terms of defining the object (Article 537), the term of the contract (Article 540), the use of the property received (Article 545), as well as its improvement (Article 555)[5].

So, according to the Civil Code, the subject of a loan agreement can be land plots, subsoil plots and other isolated natural objects, enterprises and other property complexes, buildings, structures, equipment, vehicles and other things that do not lose their natural properties in the process of their use (non-consumable things).

The lender is responsible for the defects of the thing, which he, intentionally or through gross negligence, did not stipulate when concluding the contract for gratuitous use.

If such defects are discovered, the borrower has the right, at his choice, to demand from the lender the gratuitous elimination of the defects of the thing or reimbursement of expenses for eliminating the defects of the thing or early termination of the contract for gratuitous use and compensation for real damage. But the lender is not responsible for the defects of the thing that were agreed upon when concluding the contract for gratuitous use or were known in advance to the borrower or should have been discovered by the borrower during the examination of the thing or checking its serviceability when concluding the contract or when transferring the thing.

As already mentioned, for the economic purpose, the loan agreement is related to the loan agreement, although there is and there is a significant difference between them:

loan	gratuitous use agreement
a) the subject of the contract is money, other things defined by generic characteristics. b) things are transferred on the basis of ownership. c) the borrower is obliged to return the same amount of money or an amount equal to the borrowed amount of things of the same kind and quality (loan amount).	a) the subject of the contract - non-consumable things individually determined. b) things are transferred for temporary use. c) the recipient is obliged to return exactly the received item. d) obligation - bilateral, i.e. lies on both sides.

[3]Гражданское право : учеб. : в 3 т. Т. 2. — 4-е изд., перераб. и доп. / Е. Ю. Валявина, И. В. Елисеев [и др.] ; отв. ред. А. П. Сергеев, Ю.К.Толстой. — М.: ТК Велби, Изд-во Проспект, 2005. - 848 с., стр. 342.

[4]Гражданское уложение Германии : Вводный закон к Гражданскому уложению = Bürgerliches Gesetzbuch Deutschlandsmit Einführungsgesetz; пер. с нем. / [В. Бергманн, введ., сост.]; науч. ред. Т.Ф. Яковлева. – 4-е изд

[55] Гражданский кодекс Республики Узбекистан. Введен в действие с 01.03.1997г. Постановлением ОлийМажлиса Республики Узбекистан от 29.08.1996г. № 257-1

d) the obligation is strictly unilateral	

From the above studies and analyzes, it can be concluded that the contract of gratuitous use as one of the types of contracts in the civil sector is used more often in everyday life, but the forms of concluding the contract are not respected, which leads to conflicts between the parties. Therefore, it is recommended to use the right to conclude this type of contract, which is very relevant today. At the same time, it is necessary to remember the norms and not be confused with other types of contracts. For example, when concluding a contract of gratuitous use for the personal benefit of the borrower and making a profit as a result of using the subject of the loan, this would be a violation of the rights of the lender, since the subject of the contract was transferred for temporary use only out of good human intentions. As for the legislative aspect, it is necessary to reflect in more detail the nuances of each type of agreement for the review of citizens and their use in everyday life in accordance with the law.

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2. Новицкий И.Б. Римское право. Учебник для вузов. – М.: ИКД Зерцало –М, 2018г.
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