

# EVIDENCE ON LOAN REPAYMENT

## หลักฐานการชำระหนี้กู้ยืมเงิน

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### Abstract

Evidence on loan repayment under the Civil and Commercial Code, Section 653, paragraph two, is a problem which causes the injustice. Due to the strictness of the provisions of the said section, the proof of the loan repayment is allowed only by documentary evidence signed by the lender. If, without the witness of the document under paragraph two, the borrower will not be able to bring any other evidence including witnesses that will lead to proof of repayment of the loan to the court.

### บทคัดย่อ

หลักฐานการชำระหนี้กู้ยืมเงินตามประมวลกฎหมายแพ่งและพาณิชย์มาตรา 653 วรรคสอง ก่อให้เกิดปัญหาความไม่ยุติธรรม เนื่องจากความไม่ยืดหยุ่นแห่งบทบัญญัติดังกล่าวที่กำหนดให้การนำสืบถึงชำระหนี้กู้ยืมเงินนั้นกระทำได้โดยแต่เพียงหลักฐานเป็นหนังสืออย่างเดียวอย่างหนึ่งลงลายมือชื่อผู้ให้ยืมมาแสดง หรือเอกสารอันเป็นหลักฐานแห่งการกู้ยืมนั้นได้เวนคืนแล้ว หรือได้แทงเพิกถอนลงในเอกสารนั้นแล้วเท่านั้น หากปราศจากพยานหลักฐานดังกล่าว ผู้กู้ไม่สามารถที่จะนำพยานหลักฐานอื่นใดเพื่อนำสืบถึงการชำระหนี้กู้ยืมเงินนั้นในศาลได้

Keywords: Loan Repayment, Evidence on Loan Repayment

คำสำคัญ: กู้ยืมเงิน, การชำระหนี้กู้ยืมเงิน, หลักฐานการชำระหนี้กู้ยืมเงิน

### Introduction

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In Thailand, the law on loan is directly stated on the Civil and Commercial Code, Book III, which subject to the requirement of the act that shall be evidence in writing, with the borrower's signature. Moreover, the written evidence is also required by law on loan repayment in Thai law. The law requires the juristic act to be made in writing or evidenced in writing only because of the benefits of the trial. In addition, the Civil and Commercial Code had been prescribed that the specified juristic act shall be made in the form, otherwise such act shall be void, which have the revolution since the past.

Section 653 was firstly appeared in the Civil and Commercial Code B.E. 2467 (1924), and it has been amended in B.E. 2469 (1926).

Section 653 was amended as follows;

*“Section 653: A loan of money for a sum exceeding fifty baht in capital is not enforceable by action unless there be some written evidence of the loan signed by the borrower*

*No repayment of a loan of money evidenced by written may be proved unless there be some written evidences signed by the lender, or the document evidencing the loan has been surrendered to the borrower or cancelled.”*

The amendment of Section 653 of the Civil and Commercial Code B.E. 2471 (1928), paragraph two was added and stated on evidence for loan repayment which it did not mention the addition of the second paragraph in there.

Consequently, in case there is no such evidence, the borrower is not allowed to prove the repayment. It is clear that the evidence of loan repayment is a burden to the borrowers. It can cause them to lose the case as they cannot induce the evidence at trial and the court cannot allow the testimony of any witness even for the sake of justice<sup>2</sup>.

Considering the nature of the loan in Thailand, the law determined money lending as a loan for consumption. Loan for consumption stated in Book III of the Civil and Commercial Code. Section 653 requires documentary evidence for the proof of loan and proof of loan repayment. According to the Civil and Commercial Code, Section 653 shows that Thai law gives much importance to loan compared with foreign laws. This is because of different social and economic conditions. In foreign countries, the dispute over loans between the private sectors is less when compared to Thailand.

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<sup>2</sup> The Supreme Court judgement of Thailand No. 3337/2538

From the past to present, the implementation of Section 653 paragraph two of the Civil and Commercial Code by the Supreme Court is stricted, yet flexible enough to provide the borrowers the opportunity to attest the repayment of the loan.

There are plenty of cases that most borrowers lost the cases because they did not have any written evidence to prove loan repayment. For example, Supreme Court held that to prove loan payment, the defendant shall submit any evidence following Section 653, paragraph two<sup>3</sup>. Moreover, this Section gives the opportunity to the lenders to get double payment for the loaned amount.

### **Problems arising from Section 653 paragraph two**

It is found out that there are two problems arising from Section 653 paragraph two as discuss below;

#### **1. The Problems of Applying Section 653 paragraph two**

The evidence on loan repayment has been recognized only in Thailand, in other countries such as French and United Kingdom have no specific law determined on loan repayment. Moreover, being a money lender in Thailand is not difficult, as it has no specific law to cover on being a money lender.

In French Civil Code, there is no specific provision directly stated that loan for consumption shall be made or evidenced in writing. There is a specific provision in Article 1341<sup>4</sup> of the Civil Code says generally on evidence in all contracts. The French Civil Code provides the principles prescribed that the contracts shall be made in writing in certain types of contracts for the purposes of completion and proof<sup>5</sup>. Although, Article 1341 is the witness exclusionary rule in French Civil Code, there are many exceptions that appropriate and flexible for the cases in reality. For example, in a condition of dispute that occurs between commercial operators<sup>6</sup>, the contract will not be in force of the formality requirement.

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<sup>3</sup> The Supreme Court judgement of Thailand No. 1493/2540

<sup>4</sup> Article 1341 “An instrument before notaires or under private signature must be executed in all matters exceeding a sum or value fixed by decree1 , even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value.

All of which without prejudice to what is prescribed in the statutes relating to commerce.”

<sup>5</sup> Barry Nicolas, *The French Law of Contract*, (Oxford: Clarendon Press, 1992), p.59.

<sup>6</sup> Barry Nicolas, *The French Law of Contract*, pp.47-48.

In the United Kingdom, the law does not require that a loan agreement is made in writing or having written evidence. Additionally, there is no provision on having evidence on loan repayment. The parties, to the agreement, can agree verbally. Moreover, not only the law is not required the evidence on loan repayment, but the law also requires the license of lending money when someone wishes to give a loan to an individual. It is a criminal offense for an unlicensed person to carry on any activities which require a license.

According to the history, there is no evidence to identify that why Section 653 paragraph two exists. The amount of money loaned has to be set in order to prevent the unnecessary cases to the court. The enforcement of the provisions of Section 653, paragraph two, allows the court to shorten the process of the borrower to take the witness to the proceedings which the testimony and the testimony of each witness is a very time consuming process. If the court does not have to hold the witness testimony, the process of a trial may be more convenient and the process of making a judgment will be faster.

However, the faster procedures used in a way that restricts the right of one side must be very careful. In particular, the party who has is subordinate to another party in term of the economic status, business experiences and education. As a result, the provision of Section 653 paragraph two, is the tendency to limit the opportunity of a borrower to prove facts correctly. From the conditions of the law, in reality, the lender may take a loan agreement to request the second repayment from the borrower.

Adding paragraph two into the section is a consideration on given the equality of legal rights between lenders and borrowers. In order to be consistent with the first paragraph. Due to the fact that Section 653 paragraph one requires a written loan agreement with the signature of a borrower, consequently, the repayment of such loan shall be also made or evidenced in writing. Although it sounds reasonable, it is inconsideration to the prospect of equality in economic dimensions. In the part of the loan contract, one party may have more or lesser economic bargaining power than the other. This may lead to exploitation, which makes the party who has less power being taken the advantages.

In case of repayment under the loan contract, the higher bargaining power, which often to be lenders, apparently has more advantages in the proceedings when the dispute arises to the court. Additionally, not only the status of economic unequal, but it

also includes inequalities in other dimensions such as business experience, and illiteracy of people as well.

## **2. The Problems of Applying the Witness Exclusionary Rules in Civil Cases**

The witness exclusionary rule in the case of absence of documentary evidence is originally originated in the old legal system. However, when the time has changed, the legal concept has also changed dramatically. The contract law in modern world is developed and based on theoretical foundations which is private autonomy. Even though contracts that the law is required the formality or the written evidence, such formality or written evidence still have to be based on the legitimate intentional. Therefore, the document is only a formality, which is reflecting the actual intent of the parties.

The loan repayment is considered as one of the expresses of intentions. When the law requires the documentary evidence for the intentional expression, the proof of such intentional should not be limited to only documentary evidence. The witness is also important as such person is the one who acknowledged the situation. Therefore, when the provision on Section 94 does not allow the borrower to prove the intention by the witness, it does not justify the borrower under modern law.

In France, although there is the witness exclusionary rules in Article 1341 of the French Civil Code, in practice it is statutorily interpreted that it is not a law relating to the public order (*ordre publique*). Consequently, all parties may agree not to apply the provisions of Article 1341 in the proceedings<sup>7</sup>. In this case, both written evidence and witnesses are admissible in the proceedings as in the typical case in which all parties can adduce all types of evidence that they consider relevant to support their claims.

Moreover, the Civil Procedure of France gives the judges the authority to search for facts from the parties (*La comparution personnelle des parties*), deemed as

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<sup>7</sup> Alberto Luis Zuppi, *The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria*, *Georgia Journal of International and Comparative Law* 35 (2007): 29-260

one of the measures of instruction (mesures d'instruction) that the judiciary has the power to determine the adequacy of evidence for finding sufficient evidence for the determination of the case. When the instruction is completed, the report of the inquiry will be documentary evidence. For this reason, each party can be accompanied by a witness to support his plea.

The witness exclusionary rules under Section 94 of the Code of Civil Procedure, is obstructed the borrower in proving of the loan repayment as well. The provisions of this section not only restricts the right of a borrower to the witness testimony, but it also represents that a barrier to justice for borrowers. Section 94 of the Civil Procedure Code is the witness exclusionary rule which is inappropriate in apply for the dispute of loan repayment as the researcher previously proposed. Moreover, the status of the law is another factor that undermines the strictness of the provision. As this provision is the law related to the public order, the law stated in Section 94 paragraph one that “Even though the other party will agree” the parties cannot agree not to apply this provision on the trial. As it shows by the Supreme Court ruled that Section 94 is a law of public order<sup>8</sup>.

Considering the provisions of this section, it shall apply only to disputes arising out of civil or commercial acts which the interested parties in this type of case are that the parties to the contract. It does not affect to any public interest.

## **Conclusion**

Within personal consideration under the problems of the existing Section 653 paragraph two of the Civil and Commercial Code, it can be seen that there are no specific provisions in foreign laws that require the loan to be in writing or must be signed by the borrower. Moreover, neither country has a provision on evidence on loan repayment in order to prove repayment or to be evidence to raise the offense against the lender in the court.

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<sup>8</sup> The Supreme Court Judgement of Thailand No. 1602/2551. Loan is the act where the law requires evidence in writing under the Civil and Commercial Code, Section 653, paragraph one. The proof of the appointment of a representative must be evidence in writing according to Section 798, paragraph two, the defendant cannot bring witnesses to prove the loan agreement. The issues of the prohibition of the examination of witness to add, cut or change the text in the document according to Section 94 (b) is a problem related to public order.

In Thailand, Section 653, paragraph two is the provision determined the standard of repayment of loans, which is based on the documentary evidence for the benefit of proof of repayment in the court. When a loan dispute arises, if the borrower wants to prove the repayment of the loan, there must be evidence in writing only as prescribed by law. In this case, if the borrower does not have such evidence, Section 94 shall be applied to restrict the right of the debtor to bring witnesses to prove the repayment of loan.

Considering the Supreme Court Judgements on loan cases, the court is trying to find a way by interpreting the law in favor to the borrowers. By judgments that the repayment of a loan by other methods instead of cash does not fall under the provisions of Section 653, paragraph two, in order to give a chance to the borrower to proof for such repayment. However, repayment with the actual money or cash is still the most well-received and widely used.

Moreover, the economic and social conditions of Thailand, in some rural provinces including the capital city, loan is a major business and people are relying on the personal loan as commercial banks loan is more difficult to reach. Besides, the law does not have serious control for individual lending as in the United Kingdom, where to lend to individuals have to acquire a license. It seems impossible that there will be equality between the parties in a loan business. As a result, it is possible that the borrower may have a chance not receive documentary evidence on loan repayment from the lender. This possibility is much higher than the lender will not have a loan agreement signed by a borrower.

The repayment of the loan is the act that different from the actual contract which the document in the contract may record the intentions of the parties. On the other hand, the repayment of the loan, the borrower has only one intention is that to make a loan to be suspended. In some situations, with different level of education and business experience, the borrower may not acknowledge that he or she has to receive any evidence after the loan has been paid. When the lender fails to deliver the document in accordance with Section 653 paragraph two, the borrower cannot perceive that it will affect to him or her in the future. Unlike the loan contract, the lender who has more business experience, surely will not be giving a loan without making legally documentary evidence.

Therefore, the existing of Section 653, paragraph two, which always leads to Section 94 of the Civil Procedure Code, is inconsistency with the present situation and

giving negative effect the benefits of justice. The borrower in loan cases who have no documentary evidence will be disadvantageous to the lender. Not only in term of inequality of economic status but also shuts the chance to win the case over the lender in term of the borrower does not allow to bring the witness who is aware of the loan repayment to the court.

### **Recommendations**

According to the facts, law and reasons provided above, I would like to propose that Section 653, paragraph two of the Civil and Commercial Code should be repealed.

As this section is an obstacle to the justice system. Although there are the Supreme Court Judgements on loan cases that the repayment of a loan by other methods instead of cash does not fall under the provisions of Section 653, paragraph two, however, the judgments are not the law because Thailand is a Civil Law country. The judgments can be overruled at any time. At the same time, the enforcement of the law has created obstacles to provide the justice.

Moreover, the repayment of the loan is the good intention which it is the borrower's duty to perform to the lender. This performance should not be distract by the law. Additionally, it is only an intentional and legal action between the parties which is a lender and a borrower. The testimony of a witness to the repayment of the loan is not the action which will affect any public interests. The repeal of paragraph two will allow the witness testimony to prove of loan repayment without applying the provisions of Section 94 of the Civil Procedure Code. It will enable the Court to decide a fact correctly and justify according to the truth. Therefore, the repeal of paragraph two of this section will assure the borrower that any methods of loan repayment can be proved in the court proceedings.

Although the repeal of Section 653, paragraph two would be another challenging approach toward the legal system in Thailand, the loan and the repayment of the loan will continue to be a part of the business and drive the economy for a long time. The repeal of Section 653 paragraph two will enable the proper way to provide justice to the borrower and the society as well as it will be one of the effective ways to solve the disparity among people and the illegal lending in Thailand.

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