



THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
**EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES**

**The Leasing Contract. Harmonizing National Legislation with the Lease
Specific International Norms**

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Abstract: By elaborating the proposed work, we want to bring theoretical contributions and enter a scientific domain which may not be at the beginning of its course to Romanian society, but which we consider to be able to handle improvements under doctrinaire and practical aspects. Objectively, we intend to reinforce the “statute” of leasing operations on a national level, operations which are still searching for their own identity, lacking any “legacy” gained from experience or historical post-December accumulations, and what has been gained has been assumed in a rush, under the influence of the Romanian society’s processes of democratization and European integration and are mechanical accumulations/teachings which resulted from the enforcement and necessity of complying with certain treaties and agreements which have not been sufficiently analyzed. Because they were taken in fractions, a series of norms resulted, lacking the consistency and sufficiency needed to improve education in the leasing domain, which has often led to contractual imbalances and a considerable decrease of the leasing market in Romania.

Keywords: leasing; contract; convention; financier; user

Among the judicial realities of international commerce, the lease has proved to be the most important financing method of investing in assets and services. The lease along with the factoring, construction and fitting and the international tourism contract, are all part of complex international contracts group. Starting from the premise that the current society is quasi acquainted with the notion of leasing, I will not support the presentation of the judicial aspects of leasing contracts as the main purpose of this paper, however I consider it essentially necessary to stop over the elements which have been defined by international norms as defining for an ongoing leasing contract and which have been partially or not at all embedded in national norms losing their essence, as well as clear up some antagonistic legal aspects which have destabilized the Romanian leasing market.

We consider that the punctual explanation of legal aspects which leave room for personal interpretation and not judicial ones is our obligation, therefore we will not propose to solve and equation which has already been solved, but to compare national norms with international ones and thus answer the questions regarding leasing operations in Romania of recent years.

The benefits of this contract will become reality only within a firm legislative framework, clear and concise, which does not leave any room for personal interpretation, and this framework will be

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established only after an objective analysis of national norms in comparison with international norms under a judicial aspect, but also an economic one.

Due to its special judicial structure, as well as the alternative executory conditions of the leasing contract, it is positioned in a particular framework compared to other contracts, being considered individually from current international economic and financial application norms point of views. The main problem that leasing encounters in Romania is poor legislation. As a possible definition, from an economic point of view, the lease represents a investment funding method available to both judicial persons of public and private rights, as well as individuals. From a judicial point of view, the lease represents a complex contract which contains several judicial operations through which the person or entity gains the right of use over an individual asset, as well as the guarantee of purchasing this asset at a certain term, at a determined or determinable price at the date in which the contractual provisions are in effect. According to the doctrine, the lease is defined as a commercial operation through which a party named locator/financier transmits on a determined period the right of use of an asset whose owner is another party known as tenant/user, at its request for a period payment known as lease installment, and towards the end of the leasing the locator/financier obliges itself to respect the user's right of purchasing the asset, of extending the lease contract or of ceasing the contractual relation (Clocotici & Gheorghiu, 2000). We can observe that by definition, through its repeated use in nation legislation as well as in specialized literature of the specific terms locator and tenant and defining when it comes the rental contracts, the similarity of this contract with a rental contract is imposed. However, the leasing contract is not a rental contract – in our opinion the replacement of the terms locator/financier and tenant/user is imposed with the real parts of the leasing contract which are strictly the **financier** and the **user**.

The financier will always transmit the right of use over an asset it owns to the user, and the user will benefit from this right for a determined period for a periodic payment known as a leasing installment (not rent).

The international judicial and economic society, as a recognition of the importance and, of course, benefits the lease contract has developed over the years, has elaborated and adopted a series of specific norms dedicated exclusively to this complex operation, which often constituted not only a source of research and information, but also the source of controversial conflicts.

Thus in 1988 at the initiative of the International Institute for the unification of international private law¹, the UNIDROIT Convention was adopted at Ottawa regarding international financial leasing (Ottawa, May 28 1988), with the purpose of unifying the norms which govern this domain².

Also we retain as a reference the International Accounting Standard 17 elaborated by the International Accounting Standards Board (IASB) in the 1973 – 2001 period whose purpose was to standardize the accounting records referring to leasing operations, financial or operational. The objective of this standard, therefore, is to establish some proper accounting politics for this operation as well as to define some notions and specific and essential elements belonging to this transaction. All quoted commercial companies of the EU are obligated to keep records and to give statements in compliance to these standards.

¹ UNIDROIT has 59 members, including all the states within the European Union.

² Although all these efforts to develop national legislations have the UNIDROIT Convention as a reference point, we retain the provisions of the Conventions were not elaborated specifically to answer the necessity of having an internal legislative frame. As was shown through the Swedish Parliament's Commission's report regarding leasing, the balanced judicial framework proposed by the Convention constitutes an authentic model which is the base that makes effort possible to reform the internal legislation in this domain.

1. Without wanting to be exhaustive, by a comparative analysis of leasing specific terms defined by the national legislation¹ with consecrated definitions from IAS17 it can be observed that some of these have been partly assumed or they are completely missing, thus:

a) **Fair value** is the sum for which an active can be traded or a debt recovered, willingly, between parties who are aware, within a transaction in which the price is objectively determined, term taken from GO 51/1997 as *input value* and representing the acquisition cost of the asset;

b) **The leasing term** represents the irrevocable period of time for which the tenant has contracted the leased asset [...], with or without any additional payment, the exertion of this option by the user is certain, within reason, at the beginning of the lease – this notion has been included in GO 51/1997 under the denomination of *leasing period*, but whose definition, although very important, cannot be found within the body of the Ordinance.

c) **Economic life duration** is the period in which it is estimated that an asset is used economically by one or more users; - term that cannot be found in the national leasing legislation, the legislator probably considers that this duration is solely the financier's concern.

d) **Useful life** is the estimated use period from the beginning of the leasing term, without being limited by it, on the course of which the economic benefits are expected to be consumed by entity; - term which cannot be found in the national leasing legislation, the legislator considering it opportunistic that this period is strictly the user's concern;

e) **Minimum leasing payments** are those payments along the lease term which the user must and can be obligated to make, excluding contingent rent, service costs and tax that the financier's will pay and which will be reimbursed for – term which we find similar with the *leasing installment*, defined by the OG 51/1997 as a “share of the value of the asset and the leasing interest, which is established based on the interest rate agreed on by both parties”- in the case of financial leasing.

f) **Rezidual value** is the estimated real value or the market value of the leased asset at the end of the contract; only that this notion had been included in the 287/2006 law as: “*the residual value is the value for which, after the user finishes all his payments established by the contract, as well as all the other sums owed according to the contract, the transfer of the ownership of the asset towards the user and is established by the parties of the contract.*”, this interpretation evidently raises and will raise some question marks to interested parties being an ambiguous and generic definition, which has nothing to do, from an economical or judicial point of view, with the definition that can be found in the international norms mentioned earlier. In article 2 letter c of OG 51/1997, with all the ulterior alterations, the residual value is considered as an aleatory value, which is established based on the two parties' agreement, a fact which is completely incorrect because from an economical point of view this value is imperatively established by specific norms of the domain².

g) In case the asset is returned at the end of the lease term, to protect itself from the various risks which hover over its activity and which can affect the value of the asset, at the financier's request, the

¹ Ordinance nr.51 of 28 august 1997 regarding leasing operations and leasing companies, published in the Official Monitor no. 224/30 Aug. 1997; approved and modified by law 90/1998 regarding the approval of the Government Ordinance no. 51/1997 referring to the leasing operations and the leasing companies, published in Romania's Official Monitor, Part I, no. 170 of April 30 1998.

² To calculate fiscal depreciation the fiscal value of the assets will be taking into account, at the date of their entry within the entity's possession, value represented by the acquisition cost, the production cost or the market value of the assets gained gratuitously or which constitute an added value in nature to the social capital. The normal functioning period is the use period in which, from a fiscal point of view, the entry value of the assets is recovered through depreciation. The normal functioning periods of depreciating corporeal assets are taken from the Catalogue approved through HG 2139/2004, published in the Official Monitor nr. 46 of 13 January 2005.

user will guarantee a rezidual value of the asset, up to a certain value, agreed upon with the financier, known as the **guaranteed rezidual value**. This guarantee of the rezidual value can be directly made by the user or indirectly through a party affiliated to the user. However, in our legislation this term, I have to add, was completely overlooked despite the fact that it is of major importance to the protection, from an economic point of view, of the financier. IAS 17 defines the **guaranteed rezidual value** as being: “*a) in the locator’s case, the part of the rezidual value which is guaranteed by the user or by a affiliated party (the value of the warranty representing the maximum value which becomes payable, in any situation); and b) in the financier’s case, that part of the rezidual value which is guaranteed by the user or a third party not affiliated to the financier which is capable, financially speaking, to honor the obligation taken on through the guarantee.*”

2. In GO 51/1997, article 6, point (2), letter c, it is imperatively specified that the value of the advance payment needs to be inserted in the body of the leasing contract, which implicitly admits the collection of a sum of money as advance payment. International norms (IAS17 or UNIDROIT Convention) do not make any reference to registering within the financier’s accounting of any sums cashed as advanced payment and which they can demand at the beginning of the ongoing leasing contract. *Unlike credits, the essence of leasing is to assure the complete financing of an investment, therefore of the entire acquisition cost of the asset which makes the object of the contract.*

All leasing companies in Romania demand from their clients, in virtue of the ordinance’s specifications, a payment with the role of an advance payment, and this previous to the acquisition of the asset which makes the object of the contract. Under these circumstances, the financed value becomes inferior to the acquisition cost of the asset, being reduced by the client’s advanced payment, with which he practically self-finances.

It is my opinion that through the financier’s demand of advance payment, as well as through the payment of the rezidual value simultaneously with the leasing installments – the leasing contract receives the form of a purchase agreement paid in installments starting from the cashing in of the advance payment, the financier losing its financing quality and becoming a promisor seller, while the user by accepting the advance payment as well as the rezidual value simultaneously with the leasing installment receives the statute of promisor buyer, thus the essential and defining characteristic of the contract is eliminated, that of temporary transfer of the right of use, with the right of opting between buying or returning the asset which makes the object of the contract, because the payment in advance offers the user not only a precarious right of possession but also an effective right of ownership.

Supposing a user, after accepting the conditions of a contract regarding the payment of the advance and the partial or total inclusion of rezidual value within the leasing installment, due to certain factors dependent of independent of their will, renounces their option of buying the asset or of continuing the leasing contract while it is still ongoing, in this case the sums representing the advance, as well as the rezidual value collected by the financier simultaneously with the leasing installment, can constitute an unjust enrichment, these being outside the object of a *stricto sensu* leasing contract.

3. Within GO 51/1997, article 14 paragraph 2¹ mentions that the financier will be exonerated of responsibility if the asset is not delivered by the supplier technically adequate or on term to the user. However, the UNIDROIT Convention, on article 8, paragraph 1 derogates the following cases from this rule (Tita-Niculescu, 2006, p. 254):

¹ Party responsibility; Article 14. – (1) in case the user/tenant refuses to receive the asset at the agreed term with the supplier and/or the leasing contract or if he is in the middle of judicial reorganizing and/or bankruptcy, the locator/financier has the right to rescind the leasing contract with damages. (2) The locator/financier is not responsible for the delayed of inadequate delivery of the assets to the tenant/user by the supplier.

- In the case the user suffered a prejudice caused by the financier's intervention in choosing the assets, of their characteristics or of the supplier;
- In case the leasing contract specifically states that the financier will answer for the asset's vices.

Moreover, article 12, paragraph 1 letter "a" of the UNIDROIT convention states the user's right of ending the leasing contract or refusing the assets which do not comply with his requests. This way, the user will be returned all his leasing installments which were paid in advance up to that date, and if the delivery of the asset is made with delayed or inadequate and the financier is responsible for it, then the user can invoke other claims as well. This is a regulation which also has not been included in our national legislation regarding leasing operations, which also proved opportune when it came to clearing up the expansion of the effects of the contract over the parties.

We also need to keep in mind the following obligations which are imposed to the financier and from which he cannot derogate when the parties belong to member states of the Convention:

Per article 13.2, letter b and 13.3, the financier cannot capitalize a contractual clause which permits him to claim anticipated payments of the leasing installments from the user, in case the contract was terminated, however he has the right to claim this value under the form of damages, which will evidently need to be proven. Although in the ordinance we cannot clearly find this provision, we consider that through the corroboration article 15¹ of OG 51/1997 with article 1549² of the Civil Code, the same judicial effects can be obtained.

Through a doubtful interpretation, in our opinion, there have often been encountered in jurisprudence cases in which the financier prevails, after the termination of the contract, over the benefit offered to the leasing contract by article 8 of OG 51/1997, respectively the executory title³. Obviously, this fact, although often encountered in jurisprudence, is practically impossible, because by termination the creditor loses the benefit offered by the power of the executory title of the leasing contract, because it practically ceases to exist (by declaring dissolution the executory title is disbanded), through dissolution the contract no longer produces future effects, starting from the date the dissolution was declared⁴. Thus, if the user refuses to willingly surrender the asset or to pay the due and unpaid installments accumulated up to the date of the dissolution, after it was declared, the financier will only

¹ Article 15- "If the contract does not say otherwise, in case the tenant/user does not execute the entire payment obligation of the leasing installment for two consecutive months, calculated from the due date provided by the leasing contract, the locator/financier has the right to rescind the leasing contract, and the tenant/user is forced to return the asset and to pay all owed sums up to the due date compliant with the leasing contract."

² Article 1549, paragraph 1 – The right to dissolution of termination specifies: "If he does not request the foreclosure of the contractual obligations, the creditor has the right to dissolve or rescind the contract as well as the right to damages, if he is entitled to them."

³ "The contract being terminated the issue that rises is if the debtor still owes the creditor any unpaid monthly installments up to the date of the termination, as the creditor claims. The court considers that she does not because such a claim from the creditor equals with an execution of the contract when the creditor itself opted for its termination. According to article 1021 of the Civil Code, the party which has fulfilled its contractual obligations is given the choice of forcing the other party to execute the convention is possible or to request the termination of the convention with damages. Thus, if the creditor opted for the termination of the convention she can no longer request from the debtor anything else but damages, damages that will have to be proved evidently. The court appreciates that the debtor's foreclosure for contractual obligation which are not executed considering the contract was terminated, is illegal reason for which the foreclosure has been dismissed". Civil Sentence no. 83 or 07.04.2010. Execution Contestation. The possibility of contractual obligation foreclosure, after the contract's termination.

⁴ The same solution has been retained in judicial specialty literature. Thus in the paper Industrial, Commercial and Realty leasing, elaborated within the Center for Company Law of the University of Lausanne, it is considered that in case of non-payment of the leasing installments by the user, the financier can opt for one of the following possibilities: 1) to request the execution of the contract, requesting the payment of the owed leasing installments; 2) of keeping the ongoing contract, renouncing all future demands and requesting damages; in this situation he takes the asset and sells it, requesting the value of unpaid installments from the user, with penalties plus any yet due installments, out of which he subtracts the net value obtained from the selling of the asset; 3) Termination of the contract with damages. (Tita-Niculescu, 2006, p. 208)

be able to use common law. The financier however, can surrender its right of requesting the dissolution of the contract, and can request the execution of the contract by the user, obligating the user to pay damages for the delayed execution of the payments he owed, over the contract's term, taking advantage of the executory title enforced by the law to the leasing contract. Therefore if, the financier will opt to keep the ongoing contract, the asset will stay in the user's possession, and the financier will be able to enforce in virtue of this title, the entire value of the leasing contract, minus the residual value, in my opinion, because up to the payment of this value the user has the right to choose the finality of the leasing contract (Tomescu, 2015).

- The financier, however, per article 13.5 from the UNIDROIT convention has the right to claim an anticipated payment of the leasing installments from the user and the dissolution of the contract, only if he can prove, without a doubt, that he offered the debtor the possibility of taking remedial actions for this situation;
- The supplier will not be able to terminate the supplying contract, without the financier's consent (art 10.2);
- The user has the right to retain the payment of the installments until the financier will execute his obligation of delivering the assets which are the object of the leasing contract under the condition that the user's does not lose the right of refusing the asset (art 12.3);
- Without bringing any damage to the user's rights to turn against the supplier (art. 10.1), in case of failed or inadequate delivery, he can turn against the financier as well, but only if it is shown that this resulted from the financier's action or omission (art. 12.5);

Thus, hoping towards a revitalization of the Romanian leasing market, we consider opportune to revise the current legislation and to complete it according to international norms, a starting point for this would be the provisions of the current Civil Code, which has already started to produce effects.

Taken from the occidental practice, the leasing contract has gained in the years 2005-2010 an expansion worthy of taking into consideration, save the fact that the legislation, being at the beginning of its road, has left room for various interpretations which, in the years after that, has led to the – justified – propagation of the already high number of trial cases in our country as well as to a considerable decrease of leasing operations according to the Financial Societies Association's published statistics – ALB Romania¹.

Considering all of the above, although between theory and practice major inconsistencies appear, sometimes even discouraging, I continue to believe that the leasing option, financial or operational, offers the user a series of incontestable advantages, in comparison to other methods of purchase of rental.

¹ <http://www.alb-leasing.ro>

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