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Leasing Agreement under the Provisions of Current Insolvency Code

Raluca Antoanetta Tomescu[1]

Abstract: The reason for promulgating the current insolvency law, Law 85/2014, was clearly to create an effective and appropriate legal framework for the collective enforcement of debtors in insolvency in order to ensure the recovery of claims they owed and implicitly to protect the current economic environment by saving viable businesses and eliminating those that have no chance of recovery. The reorientation of legislative policies in the field of insolvency, which also formed the basis of the elaboration of the current law of insolvency, imposed as a main purpose the maximization of the debtor's wealth, permanently aiming at giving the insolvent debtor the chance to recover, thus succeeding in harmonizing the international norms with the national legislation. Through the institutional steps aimed at consolidating the doctrinal and jurisprudential opinions in the field, the status of the leasing agreement under the insolvency procedures was codified, legalizing the fate of the current agreement in progress at the date of opening of the insolvency procedure, as well as the recording of the debts resulting from it following the termination, when the user/lessee enters the insolvency proceedings, the situation of this contract being specifically dealt with by the current Law 85/2014.

Keywords: leasing; insolvency; debtor; creditor

According to the doctrine, the insolvency procedure establishes the set of legal norms, which seeks to obtain the necessary funds to pay the debts of the debtor in insolvency to its creditors, under the conditions established differently by categories of debtors, by judicial reorganization or by bankruptcy (Carpenaru, 2014, p. 725).

Described in an original but perfectly relevant way by a comparison where, *if the business is an adventure, then insolvency is the consequence of the adventure that ended badly* (Piperea, 2009, p. 177), we can still retain the definition given to it by law, whereby "*insolvency is that state of the debtor's patrimony which is characterized by insufficient funds available for the payment of certain, liquid and due debts*"[2]. *Jurisprudence has characterized insolvency as the state of the debtor's patrimony which is characterized by insufficient funds available for the payment of outstanding debts.*[3].

The notion of "insolvency" is the fundamental element around which the legal construction of the insolvency procedure was enacted. *The insolvency procedure is* therefore *the way the law and the courts organize the failure of the business* (Piperea, 2009, p. 177).

[1] PhD in progress, Nicolae Titulescu University, Romania, Address: 185 Calea Văcăreşti, Bucharest 040051, Romania, Tel.: +4073101.86.90, Romania, Corresponding author: ratomescu@gmail.com.
[2] Art. 5, pct. 29, Law no. 85/2014 on the procedures for preventing insolvency and insolvency was published in the Official Gazette, Part I, no. 466 of 25th June 2014.
[3] C.A. Constanta, Commercial, maritime and river department, tax and administrative due process, Decision no. 2037/COM/2007.

The state of insolvency differs as we have shown from bankruptcy, which is characterized by the superiority of debtors' liabilities to those of his assets. The notion of insolvency will therefore imply a difficult patrimonial situation of the professional, characterized by the imbalance through which the liability exceeds the asset, determining the impossibility of fulfilling the assumed payment obligations on time and in good conditions.

De *lege lata*, the state of difficulty differs from the state of insolvency by the fact that the holder of the undertaking in difficulty faces or is able to cope with the outstanding debts. The occurrence of this situation may lead to the opening of the insolvency procedure, which, as established by the current legal norm, aims at providing: "*the establishment of a collective procedure for covering the debtor's liabilities, with the granting, where possible, of a chance of redressing his activity*[1]".

The fundamental condition for the debtor to be declared in insolvency will be to cease the payment of certain, liquid and outstanding debts due to the insufficiency of cash funds, this cessation without being the result of the imbalance between the asset and the liability of its patrimony, which defines his state of insolvency.

In the previous form of the Insolvency Law (Law 85/2006, Article 86), a number of principles applied individually to certain categories of agreements which were in progress at the date of the opening of insolvency proceedings were also regulated.

Thus, the legislator has, both in the old and in the current regulation, perpetuated a special treatment for the credit, labor and lease agreement (in which the debtor is the lessee).[2] The current law on insolvency, however, proposes improved solutions in these matters, which are likely to contribute to the uniformity of interpretation and make it possible to apply uniformly and effectively the regulation of insolvency.

It is remarkable, as a novelty, that the importance granted by the legislator to the regime of registering the creditor's receivables resulting from the termination of the leasing agreements in the statement of affairs is stipulated in the present regulation in art. 123, **paragraph 11**, correlated with art. 105, the special regime of their termination being concomitantly introduced.

The new law on insolvency[3] brings among the main elements of novelty the individualization of regulations applicable to the leasing agreement, if the user/lessee is subject to insolvency proceedings.

The specificity of such a complex agreement, under the old legislation, has generated many doctrinaire controversies, but has also raised real practical difficulties. The old insolvency law no. 85/2006 did not contain special rules on leasing agreements or receivables arising from these agreements, which generated a non-unitary judicial practice.

By the institutional approaches aimed at consolidating the doctrinaire and jurisprudential opinions, they succeeded in codifying the status of the leasing agreement under the insolvency procedures, legalizing

[1] Art. 2 of Law no. 85/2014 on the procedures for preventing insolvency and insolvency was published in the Official Gazette, Part I, no. 466 of 25.06.2014.

[2] According to the text of the normative act in question, namely Law 85/2006 abrogated by the introduction of the new Insolvency Code, one can find particularities of the rental agreement in progress at art.91, nuances of the legal regime of the agreement for sale of a movable property, sold to the debtor, but not paid by him and still in transit at the date of the opening of the procedure, at art.87, the netting agreement at art. 88, commission at art. 89 and consignment at art. 9 0.

[3] Law 85/2014 – Procedures for preventing insolvency and insolvency, published in the Official Gazette no. 466 on 29th June 2014, abrogates: Law 85/2006 on the insolvency procedure, Law 381/2009 on the introduction of preventive legal settlement and ad-hoc mandate, OG 10/2004 on the bankruptcy of credit institutions, sections 1–3 of cap. III, cap. IV and art. 83 of Law 503/2004 on the financial recovery, bankruptcy, voluntary liquidation and dissolution in insurance activity, Law 637/2002 on the regulation of international private law relations in the field of insolvency, art. 175 of Law 187/2012 on the implementation of Law no. 286/2009 on criminal code, art. 81 of Law 255/2013 for the implementation of Law no. 135/2010 on the code of criminal procedure and for the amendment and addition of some pieces of legislation comprising criminal process provisions.

the fate of this agreement in progress at the date of the opening of insolvency procedure, as well as the recording of the debts resulting from it after termination when the user/lessee enters the insolvency proceedings, the situation of this contract being specifically dealt with by the new Law 85/2014.

Under the old regulations (Law 85/2006), two hypothetical situations were distinguished, as follows:

-the hypothesis of maintaining the agreement in progress by the legal administrator, in which case the leasing company was the holder of a non-due claim, which was registered with this qualification in the final table of debts and was to be paid by the debtor as the installments became due (Moțiu, 2014, p. 124);

-when the agreement was denounced by the court administrator, several opinions stand out from the doctrine about the application and enrollment in the claim table of the criminal clause estimating the damage to the total lease installments owed by the debtor from the termination to the completion of the agreement[1].

Opinions according to which the termination of the leasing agreement in progress at the date of declaring the opening of insolvency proceedings on a legal basis cannot be assimilated to a default of the debtor for non-fulfillment of the obligations, have been supported in the doctrine. Thus, in this situation, the installments unpaid at the date of the termination of the agreement and the damages set by the syndic judge should have been written in the debts table, at the request of the financing lender, who in any case benefited from the ordinance for the regulation of leasing operations, as well as under the right of ownership of the funded property, the right to re-enter into its possession.

In another perspective, it is argued that, on the contrary, when establishing the claim to be included in the table, the value of the criminal clause should also be included, this being an anticipated assessment of the prejudice suffered by the creditor, on which the parties have expressed their consent of will.

From the jurisprudence in this matter, however, we note that, in most cases, the financier/lessor filed an application for enrollment at the statement of affairs, claiming the equivalent of unpaid installments up to the date of the termination of the agreement[2], based on a commissary pact (generally grade IV) expressly included in the leasing agreement; late-payment penalties until the date of the opening of the procedure for each outstanding and unpaid installment[3]; damages representing the totality of the installments after the termination[4].

The financier/lessor under the legal regulations thus reverts to possession of the property, whose legal owner was, but, under the terms of the agreement, could also claim the payment of the installments for the entire period of the canceled contract, under the title of criminal clause[5]. He therefore had a double

[1] Although stated as abusive by some courts, on the basis of the provisions of Law no. 193/2000 on unfair terms in the agreements between professionals and consumers, it should be remembered that this rule does not, however, affect relations between professionals.

[2] Its legal ground is art.15 of OG 51/1997 which imperatively regulates that "Unless otherwise provided in the agreement, if the lessee/user does not execute the obligation to fully pay the leasing installment for two consecutive months, calculated from the due date of the leasing agreement, the lessor/financier has the right to terminate the leasing agreement and the lessee/user is obliged to return the property and pay all the amounts due until the date of restitution under the leasing agreement".

[3] These have conventional grounds, the value applicable as penalty being obviously inserted in agreements.

[4] These damages were claimed as a result of a criminal clause inserted in the general non-negotiable conditions of financial leasing agreement and which in many cases also contained the residual value.

[5] In the case in question, the parties have regulated that in this situation (of the culpable termination) the objector's indemnity should be calculated by debiting the user "with the sum of the outstanding payments and the net leasing installments that would have matured until the end of the contractual period, as well as a possible calculated residual value of the leased asset, including capitalization costs, instead, the company will credit the user with the net income resulting from the capitalization of the leased asset up to the amount of the overdue receivable as well as the related interests. "It is therefore considered that this arrangement agreed between the parties (according to Article 11) - to which it is applicable in relation to the date of the conclusion of the

repayment because the creditor claimed to enroll the conventional penalties covering the total amount of the leasing agreement in the receivables table but at the same time he remained in the possession of the financed asset, as its owner, and under the Ordinance for the regulation of leasing operations, the user/lessee is obliged to return the property in the event of termination of the agreement. By recovering the asset, the financier/lessor could capitalize it, thus collecting its value either by selling the asset to a third party or by concluding a new leasing agreement.

The lack of explicit regulations of these situations not only led to a non-unitary judicial practice[1] but obviously, this behavior of creditors who invoked claims from leasing agreements was meant to frustrate every effort of the debtor and even the other creditors of the debtor in the prospect of a possible recovery and return to the economic circuit, leading inevitably to bankruptcy.

Starting from the different views expressed in the doctrine and from the examples provided by the non-unitary judicial practice, the new regulation addresses this issue in a legislative way, succeeding in the harmonious and balanced combination of the following principles: the avoidance of harmful destruction of the active assets by losing an essential asset in the continuation and eventual recovery of the insolvent debtor's activity, as well as the creation of a safety situation in favor of the financing creditor, which will continue to enjoy the prerogatives of ownership of the asset (Bufan, Motiu, & Diaconescu, 2014, p. 575).

As a *ratio legis* under the Principles of the World Bank, the UNCITRAL Legislative Guide, as well as the provisions of the Civil Code, the new rules regarding the management and registration of debts resulting from a leasing agreement in progress at the opening of insolvency proceedings have been laid down.

Because leasing generally represents an opportunity to finance the technological progress of industrial enterprises, the law of insolvency limits the application of the rule strictly to the categories of professionals as defined by the Civil Code, as well as to the autonomous administrations, excepting the professionals who exercise Liberal professions, pre-university and university education units and the entities listed in art. 7 of GO 57/2002 from its application.

To the extent that, at the maturity date, the debtor does not execute the undertaken obligation, that is, the leasing installment established by the agreement, then the creditor has several legal options to make use of and achieve its claim right.

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leasing agreement, the Civil Code of 1864, is a true criminal clause since the extent of the damage and the amount of the damages in case of culpable termination of the leasing agreements were determined in advance, so the parties established in advance the equivalent of the damage caused to the objector. (Decision no. 85/2014 pronounced by DÂMBOVIȚA High Court on the date of 31-01-2014 in the dossier no. 1906/120/2013/a30).

[1] Even if such a clause providing for the termination for the non-payment at least two installments is stipulated in the agreement and is in accordance with art. 15 from O.G. 51/1997, this clause may be invoked by the financier lessor solely until the opening of insolvency proceedings, irrespective of any notice of its opening, as the effects of the opening of proceedings are lawful. After the opening of the insolvency proceedings, the payment of the installments cannot be achieved because in most cases the administration right of the statutory administrators is suspended, the debtor's bank accounts are blocked, the liquidities must be handed over to the judicial administrator together with all the assets and accounting documents of the company. The Court of Appeal considers that the non-payment of the installments according to the agreement cannot be guilty in these circumstances, any termination is excluded and the fate of the agreement will be determined by the judicial administrator in the conditions of art. 86 par. 1 of Law 85/2006. For all these arguments, the solution of the syndic judge, which rejected the creditor's registration in the claim table with the amount of 9800 Ron + VAT with the title of damages, is fully legal and sound, based on art. 13 lit. C of the leasing agreement because this amount depends directly on the possibility of termination of the agreement. As stated above, after the opening of the insolvency proceedings, the intervention of the termination is excluded, and under these conditions the debtor does not owe any amount as damages. Based on the provisions of art. 312 par. 1 C.p.c., the lodged appeal will be rejected and the decision under appeal will be maintained as fully legal and sound. (Cluj Court of Appeal, Commercial and fiscal and administrative due process department, decision no. 2016 of 14th September 2010).

Of course, it is necessary to specify the exclusion from the scope of matured certain and liquid debts, the obligations of the debtor having a nature other than monetary debts, since the rules of the common law and not the insolvency procedure (Carpenaru S. , 2016, p. 632) shall apply to them.

Therefore, in the case of the leasing agreement under execution at the date of the opening of the insolvency proceedings, by way of exception to the rule established by art. 123, par. 1, thesis 1, in his case, if the financier does not express surely its consent for the maintenance of the agreement, within 3 months from the date of the opening of the procedure, it shall be considered terminated from the expiration date of the term (art.123, par. 12, L85/2014) (Carpenaru S. , 2014, p. 65).

The present regulations also provide for the situation in which the financier/lessor, however, will transmit a notice of his express intention to terminate the agreement[1] within the prescribed time limit of 3 months from the opening of the procedure. In this case, the agreement is deemed to be terminated after the expiration of a legal term of 30 days from the date of receipt of the financier's notification by the legal administrator.

The insolvent practitioner will also be able to request the denunciation of any financial leasing agreement in order to maximize the debtor's assets.

The date of denunciation of the agreement shall be deemed to be the date of notice of the denunciation from the judicial administrator/judicial liquidator. Therefore, we note that, in accordance with the provisions of par. 12 of art. 123, the leasing agreement may be denounced:

- by law, upon expiration of 3 months from the date of the opening of the procedure - unless an express agreement has been obtained from the financier;
- by law, at the request of the financier before the expiration of the 3-month period - the financier sends a notification to the judicial administrator requesting him to denounce the agreement, and it shall be deemed denounced upon expiration of 30 days from the date of receipt of the notification;
- by the judicial administrator/liquidator of the agreement, under the prerogative of denunciation of any ongoing agreement (Godîncă-Herlea, 2015, pp. 79-94).

According to the doctrine, however, one must underline the difference between the situation of the denunciation of the leasing agreement and the termination of the leasing agreement.

Thus, in the case of denunciation, there will be no incidence of the rules for writing the claim in the statement of affairs, expressly stipulated for the case of the termination of the agreement (situation where there must be *de plano* or a fault of the debtor, arisen after the opening of the procedure). In the event of denunciation, the financier is entitled to lodge a judicial action, which will return to the jurisdiction of the syndic judge (art. 123, par. 4) (Bufan, Motiu, & Diaconescu, 2014, p. 576).

However, when the leasing agreement is terminated, under L85/2014, we note from legal regulations that the financier/lessor is given the option of choosing between:

The transfer of ownership of the asset subject to the leasing agreement. In this case, the financier/lessor will acquire a legal mortgage on that asset, having a rank equal to that of the leasing operation, being registered in the statement of affairs in accordance with the order established by art.159, par. 1, point 3 of the law. The amount of the receivable to be included in the receivables table is the equivalent of the

[1] "The notice of denunciation referred by the co-contractor to the judicial administrator must be unambiguous in the sense of requesting the denunciation of the agreement, without being able to give the extinguishing effect provided for by the law for such notification only on the grounds that the content of the denunciation denotes the intention of the co-contractor to terminate the agreement" (Bucharest Court of Appeal, Civil Department VI, Civil decision no. 1657/11.09. 2012).

outstanding installments and accessories invoiced and unpaid at the date of the opening of the proceedings plus the remaining amounts owed by the insolvent debtor on the basis of the leasing agreement, without exceeding the market value of the asset, which will be determined by an independent evaluator. In this situation, the debtor continues to make regular payments until the full value of the leasing agreement is paid.

The recovery of the assets subject to the leasing agreement, in this case the creditor was given the opportunity to register at the creditor's table according to art.161, item 8 of the insolvency code, with the equivalent of the installments and accessories invoiced and unpaid at the opening date of the procedure, to which the remaining amounts due by the debtor under the leasing agreement will be added, the cumulative amount decreasing with the market value of the recovered asset, determined by an independent evaluator.

We therefore bear in mind the overthrow of the roles in adopting the decision on the fate of the terminated leasing agreement, subject to the imperative condition of a debtor's fault, arisen after the opening of the procedure, the financier having the right to choose between the two options that the legislator has limitedly regulated in the legal norm.

If the agreement is maintained after the date of the opening of the insolvency proceedings and the insolvent debtor in the position of the user/lessee will pay the debts arisen from the ongoing leasing agreement on the maturity dates, then the completion of the agreement will be considered successful and will be subordinated to the provisions of GO 51/1997, respectively it will be completed by the user's option to transfer the ownership right, to return the asset or to continue the leasing agreement.

For receivables acquired prior to the date of declaring the institution of insolvency proceedings, and entered in the receivables table, they will follow the legal regime of the guaranteed receivables.

It is therefore worth considering the initiative of the legislator, which, through the reorientation of the legislative policies in the field of insolvency, which also stood at the basis of the elaboration of the current law of insolvency, succeeded in harmonizing the international norms with the national legislation and imposed the main purpose of maximizing the debtor's wealth, aiming permanently at giving the insolvent debtor the chance of redressing.

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