

CONDITIONS AND EFFECTS OF THE COMMISSORIA LEX IN THE LEASING CONTRACT

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Abstract

The main problem with the execution of a leasing contract in Romania is that there are still shortcomings to the laws in force. The complexity of this contract which, at first sight, seems so commonplace, as well as the void in our ambiguous law are an inexhaustible source of research and exploration, but also the origin of controversial conflicts. With this paper I decided to elaborate I would like to contribute to consolidating the "status" of national leasing operations, which are still in search of their own identity. Aiming to place the leasing contract back in its rightful place, that of a contract from which nobody has anything to lose but everything to gain, I consider it appropriate to analyse the conditions and effects of the commissoria lex fragments inserted in the leasing contract. One of the most controversial aspect of these last years brought to the attention of the courts of law cases where the financier, once the leasing contract was cancelled, requests the foreclosure of the user. The cancellation we are taking into account is based on the commissoria lex inserted in the clauses of the leasing contract. We have therefore to analyse whether the foreclosure of the user can be carried on, based on the provisions of GO 51/1997 referring to leasing contracts.

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JEL Classification: K12, K22

1. Preliminary considerations

Given the atypical and extremely complex character of the leasing contract, while also taking into account the lack of unambiguous legislation in this area, the leasing contracts are subjected to numerous subjective interpretations, thus giving rise to a large number of litigations. It is generally well known (and if it isn't, it can be easily verified with a minimum of diligence) that the most common forms of litigation in judicial practice, as far as the area of leasing is concerned, are generated by the cancellation of the leasing contract for failure to make the payments. We thus saw it as appropriate to focus on this aspect, so controversial in recent times, in order to consolidate the concept of leasing and to elaborate a theoretical-methodological framework for becoming accustomed to and understanding leasing.

We consider that when we began studying judicial systems we accepted the responsibility of punctual clarification of the legal aspects which give way to subjective, not legal interpretations; therefore, we do not propose solving an already solved equation, but rather to compile the regulations of national norms and thus to answer the questions hovering over leasing operations in Romania during the last few years.

Essentially, a leasing contract allows a person or an entity to access funding in order to benefit from the use of a mobile or immobile good, and for this the person or entity will be obliged to pay leasing rates, having the option to become the owner of the goods upon the finalization of the leasing contract if all the contractual provisions have been met. Prior to the payment of all contractual provisions the owner of the goods is the leasing company.

It is possible that, for various reasons, the person or entity using the goods (the user) which belong to the leasing company may find themselves in the impossibility of honouring the leasing rates during the execution of the contract, in concordance with the payment schedule plan agreed upon when the contract has been signed. Under these conditions, we often encounter the sanction of cancelling the leasing contract, which has as immediate effect the coming into force of the financier's right to regain possession of the goods, and to act against the debtor in order to recover the due instalments which haven't been paid on time by the user.

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The cancellation is the most drastic of the sanctions which may appear in synallagmatic contracts with successive execution, in case of one of the parties' culpable failure to meet the contractual provisions. The cancellation has effects for the future (*ex nunc*) and results in the termination of the contract. The leasing contract does, of course, abide by these principles.

2. Conditions

The termination of the leasing contract may occur in the following situations:

- the contract comes to term, the good ownership being transferred to the buyer or returned to the supplier (if the user does not wish to buy it) or the leasing period is prolonged for a new duration and under the conditions agreed upon by both parties.
- by agreement of the parties (*mutuum dissensus*), under the conditions of art. 1270 paragraph (2) Civ. C.
- the anticipated termination by unilateral cancellation of the contract done generally by the financier, but the user also has the right to do it (this case is rarely found in practice).

As far as the cancellation clauses for the contract are concerned, as provided by the law, we must note that they are not limiting in their nature, therefore the cancellation may also be requested in the case of culpable failure of one of the parties to meet other contractual clauses.

By *lex lata*, the leasing contract can be cancelled in the following situations:

- when the user refuses to receive the goods at the time stipulated in the leasing contract (art. 14 paragraph (1)).
- or in the case when the user is in the process of either legal reorganization and/or bankruptcy (art. 14 paragraph (1) 2nd thesis).
- when the user does not comply with the obligation of paying the leasing rate for two consecutive months.
- when the financier does not respect the option right of the user.

The mechanism of cancellation/termination of the contract is irrevocably set in motion by transmitting a notification to this extent; it must be noted that, in case of rightful tardiness, the cancellation of the contract shall come into effect upon the date of the communication, whereas in other situations it comes into effect upon the expiration of the term granted by the creditor by giving formal notice (and no other prior formalities), if the debtor failed to honour the obligations.

The cancellation won't always operate "of right", but the parties will be able to stipulate in the leasing contract a commissoria lex, which usually occurs in the case of the majority of leasing contracts, with the purpose of simplifying formalities or in order to reduce or eliminate the court's role in pronouncing the termination of the contract. The advantage of the commissoria lex over the unilateral declaration of termination (art. 1552 Civ. C.) would be that the cancellation of the contract would occur "of right", that is automatically and immediately, without the need of any other formality (such as a formal notification or warning).

The commissoria lex being, in fact, contractual clauses inserted within the contracts themselves, stating the conditions under which the termination of contract can be invoked, they are part and parcel of almost every leasing contract, in order to sanction the culpable failure to meet the obligations by any of the contractual parties.

In the new Civil Code there is clear regulation regarding the conventional termination/cancellation under the form of: unilateral termination/cancellation of the commissoria lex, unlike in the previous civil legislation, where commissoria lex used to be consecrated only by way of doctrine and jurisprudence.

The unilateral termination/cancellation is regulated by art. 1552 of the Civil Code and occurs when the parties have agreed upon it by convention, and the debtor is, of right, late or does not abide with the remediation term established by means of the formal notification.

The commissoria lex is regulated by art. 1553 of the Civil Code and attracts the of right termination/cancellation of the contract, without any other prior formalities, when the parties have clearly stated what are the obligations for which the failure to observe them brings such measures,

as well as the conditions under which the contract may be terminated, and if the debtor is late. If the debtor is not late, of right, then the commissoria lex only operates after the formal notice.

Unlike the unilateral termination, the commissoria lex attracts the of right termination of the contract without needing any supplementary manifestation of will on the part of the creditor to this respect, but only if the parties have clearly stated in the contract the obligations which attract the termination of the contract in case of failure to meet them, as well as the fact that the debtor is late, of right, if it fails to perform said obligations.

The parties involved in the leasing contract may, of course, negotiate any clauses they want, as long as these don't go against the law and against good morals, as is the case of negotiating the obligations which attract the termination of the contract by commissoria lex.

The condition under which the commissoria lex is mainly operated is, of course, the failure to meet the obligation of paying due rates. As per art. 15 of the law, should the user not meet the obligation of paying the leasing rate for two consecutive months, the user is obliged to return the goods and to pay the due rates, unless otherwise stipulated by contract.

3. Effects

If the termination of the contract due to failure to pay or due to any other clearly stipulated obligation from the conditions of operation of the commissoria lex is obtained, it will have major effects.

As provided by OG51/2006: "*Art. 15. - If there is no other provision in the contract, in case the tenant/user fails to meet the payment of the leasing rate for two consecutive months since the term provided in the leasing contract, the financier has the right to annul the leasing contract, and the tenant/user is obliged to return the goods and to pay the entirety of the due sums, before the return, according to the leasing contract.*"

We therefore retain that as a consequence of the termination of the leasing contract for failure to pay, the parties will have the following duties:

- the user will be obliged to return the goods, on fair grounds, since they are not the owner of the leased goods, but only the user, the ownership rights belonging to the supplier;
- moreover, the user is obliged to pay **due rates**, which are in fact the counter value of using the goods and which the user owes to the financier before the termination of the contract, as well as the counter value of the rights of use, by virtue of terminating the leasing contract.

This is therefore a debt that is uncontested, liquid and enforceable against the company.

The regulation does not in any case refer to the financier's right to enforce, after this date, by power of enforceability of the leasing, the return of the goods or the recovery of the debt. The confusion appears, willingly or not, from the extensive and erroneous interpretation of the text of law, because the ordinance strictly refers to the due sums, up to the date of termination of the contract which has as effect the obligation of restitution, sums which have been negotiated and inserted in the contract drafted by the parties and which represents a usage the user benefited from up to the date of termination.

By means of what we consider a questionable interpretation, the financier makes use, upon termination of the contract, of the benefits granted to the leasing contract by article 8 of GO51/2006, i.e. of the enforcement: "*Art. 8. - The leasing contracts, as well as real and personal guarantees, constituted in order to guarantee the obligations undertaken by means of the leasing contract, are enforcements.*" Surely this state of affairs, though often encountered in legal practice, is virtually impossible, since by termination the creditor loses the benefits conferred by the enforcement of the leasing contract, since this practically ceased to exist, by termination the contract no longer produces effects for the future, starting with the date of its declaration.

Therefore, should the user refuse to wilfully return the good or to pay the due and unpaid rates, accumulated until the date of termination, the financier will only have common law on hand.

The financier however may renounce the right to request the termination of the contract; they can request the fulfillment of the contract by the user, forcing the latter, at the same time, to

pay damages for the tardy execution of the due payments, exceeding the term stipulated in the contract, taking into advantage the enforcement conferred by law to the leasing contract.

Therefore, should the financier opt for maintaining the contract, it will benefit from its enforcement, the good will stay with the user, and the financier will be able to execute, by virtue of the enforcement, the entire value of the leasing contract, minus the residual value, we reckon, since before its payment the user has an opting right over the finality of the leasing contract.

The user, before the end of the leasing contract, can opt for:

- the return of the goods and, in this case, they will no longer be obliged to pay for the residual value, since, according to art.2 letter c) of GO51/2006: *"the residual value represents the value for which, after the user has paid all the leasing rates stipulated by contract, as well as all other sums due according to the contract, there is the transfer of the ownership right over the goods by the tenant/user and is established by the contractual parties"*, and the leasing rates stipulated by contract will be considered as paid because they have been executed by the supplier by abiding with the enforcement that it benefited from.
- the user may opt for the purchase of the goods, paying the residual value and other costs related to the transfer of the ownership right (customs tax, compensatory interests, other taxes and fees);
- prolongation of the leasing period and execution of the leasing contract under the conditions stipulated in the negotiated contract or under the new conditions, established by the parties.

4. Conclusions

In support of the statements of this article, we can also consider the regulations brought forth by the new Civil Code, respectively art. 1.755 "Title retention and risks", art. 1.756 "Failure to pay a single rate of the price", art. 1.757 "Termination of contract", the law maker thus granting the instance all prerogatives meant to reestablish, where the case may require it, the contractual equilibrium of the counter-value of the services and the avoidance of clearly excessive abuse.

Based on all this, although there are major inconsistencies between theory and practice, sometimes daunting ones, we nevertheless consider that the option of leasing, whether financial or operational, grants the user a variety of undeniable advantages, as compared with other purchasing or renting methods.

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