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TOPIC

THE CONTRACT OF FINANCIAL LEASING IN ALBANIA LEGAL FRAMEWORK. IMPLEMENTATION OF THE STANDARDS FORESEEN IN THE UNIDROIT CONVENTION ON “INTERNATIONAL FINANCIAL LEASING”

1. Introduction

The contract of financial leasing, compared with other contracts regulating civil legal relations within the civil circulation, is relatively a new contract in the contract law of different countries.

As for its meaning, many authors have tried to give a definition to this contract. Francesco Galgano¹ has stated that the contract of financial leasing is an atypical contract concluded between the lessor and the lessee according to which:

“The lessor is obliged to allow the lessee the enjoyment of the item for a fixed term, which generally is smaller than the term of the economic life of the material good. In addition, in favour of the lessee is known the right to extend the term of the contract, or at the end of the term, the right to gain the ownership of the item. The lessee on the other hand assumes all the risks regarding the object and is obliged to pay to the lessor a periodic fee, the value of which tends to the duration of the contract, to comply with the capital value of the material good along with the relevant interest”

According to the Swiss doctrine, the contract of financial leasing is an agreement between the party that gives the leasing and the party that receives the leasing, according to which, the party that gives the leasing makes available to the party that receives the leasing a good/item bought by the former, according to the requirements or needs of the party that receives the leasing, by paying an amount of money/periodic incomes, determined, for a settled period of time, in exchange for which the party that receives the leasing, based on his choice, can either return the good/item to the party that gives the leasing, or can buy it for a fixed price or equal

¹ See Francesco Galgano “ E drejta Private” Luarasi, p. 639.

to the value of the item, or to sell it to a third party, or to request the renovation of the leasing contract with the same fixed terms.²

In the British Law the contract of financial leasing is defined as a relationship between the lessor in leasing and the lessee in leasing, where the latter is obliged to pay to the former the whole value of the item/good along with a financial gain (return on finance). The lessee in leasing in this case assumes all the risks of the item, the incomes of the item as the owner of the item, apart from the legal title of the ownership.³

On the international aspect there is a specific interest regarding this contract. Taking into consideration the fact that the contract of financial leasing is not only an important economic instrument, for “freeing the market”, but also an important legal instrument, as it preserves a balanced rapport of the interests of the involved parties. This contract has been elaborated also in an international dimension, realized within the International Institute for the Unification of the Private Law (UNIDROIT) through the Convention of International Financial Leasing in Ottawa 1988.

A definition more or less in the same line, is given within the Albanian legal framework, as in the context of the Civil Code⁴, also in the specific law regulating this contract⁵. With the contract of leasing according to the Civil Code⁶ will be intended an agreement between two parties, the lessor and the lessee, according to which, the former will make available to the latter, for a determined period of time, a movable or immovable item, against a settled payment in the agreement, that is paid with instalments, also stated in the agreement. With the full payment of the amount settled in the agreement (the last instalment), the lessor, owner of the item, transfers to the lessee, user of the item, the ownership of the item. This definition is given only for the direct financial leasing, stated also in the specific law “On Financial Leasing”⁷. While in the law “On financial leasing” is given a more accurate definition. This law⁸ provides that the financial leasing is an legal relationship according to which the lessor buys from the supplier an item selected from the lessee and makes it available to the lessee to use it for a settled period of time, against a price settled in the agreement, and at the end of the term of the contract, the lessee can buy the item, or can continue to rent it for another term, or to return it to the lessor. In addition, also according to this law, is defined the legal relationship created from the contract of financial leasing, a product of mutual will of the parties, the lessor, the lessee and the supplier.⁹

As for the above, since the Albanian law has integrated the contract of the financial leasing in the Civil Code and in a specific law; taking into consideration the aim towards an European

² Pierre Engel Contrats de droit Suisse, 2-e edition, Steampfli Editions SA, Berne 2000, p. 805.

³ Accounting for leases and hire purchasing contracts, statement of standard accounting practice no.21, 1984, p.15.

⁴ Article 849 the Civil Code of the Republic of Albania.

⁵ Article 1 point 9), 11) Law no. 9396 dated 12.05.2005 published in the Official Gazette no. 58, dated 15 june 2005, p. 1739

⁶ Article 849 the Civil Code of the Republic of Albania.

⁷ See Article 2 point 2 and article 41 Law no. 9396 dated 12.05.2005 « On Financial Leasing ».

⁸ Idem, article 1/11 Law no. 9396 dated 12.05.2005 « On Financial Leasing ».

⁹ Bidem, article 3 of the Law.

Private Law within the European Union, as sources of its law are also the international acts in the area of the private law, hence also the acts of the UNIDROIT¹⁰; furthermore taking into consideration the fact that adopting the legislation is an obligation for the Albanian State as within the Acquis Communautaire and ASA; rises the question whether this national legal framework conforms with the international standards regulating this contract settles in the Convention on International Financial Leasing in 1988 Ottawa. With the below analysis we will elaborate in a comprehensive prospective the legal standards of these two legal frameworks regulating the contract of financial leasing.

2. The nature of the contract of financial leasing

Etymologically, the term of the contract of financial leasing, known as “leasing financier” comes from the English word meaning “giving in financial leasing”. Even though the term “financial” may create the wrong idea on the subject of this contract, this contract has as its subject and extends its consequences not on consumable items, generally defined (such as money), but on inconsumable items and individually defined, either movable or immovable, through the investment technique.¹¹

The contract of financial leasing, based on the typology of the contract law of different countries, in some cases is considered as a typical contract, and while in some other cases is considered as an atypical contract. Hence, the Swiss doctrine¹² considers the contract of financial leasing as an atypical contract, while the French doctrine¹³ treats it as a typical contract categorized in the group of the contracts that aim to administer an item.

As above stated, the contract of financial leasing can appear with both characteristics on the economic and legal level, where both these plans intertwine and complete each other in a perfect way. In other words, in the case of financial leasing relationship, the economic solution for “freeing the market and the development of civil movement”, has dictated the need for an appropriate legal framework for this contract. In relation to the economic and legal aspect, this contract is subject to mutual rules. From the economic prospective, the financial leasing is subject to two main rules:¹⁴

- Leadership not ownership (user not owner): for the lessee in leasing, is important the use and management of the item subject to the leasing contract; the ownership has not a core and immediate relevance, as for the time when the contract is concluded. The lessee in leasing, is satisfied with the opportunity to use the item (either a machine, or a car, or an industrial premises), an opportunity that allows him to benefit from the item¹⁵.
- Pay as you earn: the obligations coming out from the leasing are the same as all the obligations from the use-gain relation, hence, from which you gain profit (such as

¹⁰ This text is published in UNIDROIT, Principles of International Commercial Contracts, Rome 1994.

¹¹ Pierre Engel, Contrats de Droit Suisse, 2 éditions, Staempfli Editions SA, Berne, 2000, p. 805.

¹² Pierre Engel, Contrats de Droit Suisse, 2 éditions, Staempfli Edition SA Berne, 2000, p.733 e 807

¹³ E Drejta Civile, Kontratit, Pjesa e Posaçme, papirus, Tirane 2008, f.160-161 (perkthim) George VERMELLE, Les Contrats spéciaux, 5 é édition, Dalloz 2006.

¹⁴ Pierre Engel, Contrats de Droit Suisse, 2 éditions, Staempfli Edition SA Berne, 2000, p. 807.

¹⁵ Idem, p. 807.

salaries within the employment agreement, social obligations in the aspect of periodic contributions in order to obtain the pension and so on) , which are paid by taking an settled amount of money from the account of the lessor in leasing. The rule is that at the end the investment should be financed from the lessor himself.¹⁶

From the legal prospective, for the contract of financial leasing there are two different opinions in the legal doctrine: firstly , it is a contract that aims to pass the right to use the item sui generis, or secondly it is a contract that aims also to transfer the ownership sui generis through the payment with instalments of the price of the item¹⁷. The contract of financial leasing has both these aims, hence we have the idea, that its legal nature should not be sharply categorized, either one or the other. We believe that its legal nature is not uniform and is in conformity with the needs of the market. In the leasing contract the freedom of the will allows the parties to adopt and regulate according to their wishes a legal figure (the leasing contract), according to their economic needs, but always within the law. Generally when speaking of the leasing contract:

- We speak for a contract, baptized with the term “leasing” which is a product of the freedom of the will of the contracting parties. The contractual freedom is limited by the norms of this contract, that derive and aim those stated in several other contracts such as; the contract of sale with the reservation of the ownership¹⁸.
- On the prospective of the real rights is important to mention that the ownership of the item subject to leasing, remain to the lessor of the credit, party in this contract. In fact this right of ownership is the core guarantee for the leasing contract. The lessor of the credit gives in leasing an item, for which he has gained the ownership since at the beginning, hence he is and remains the owner of the item for the whole duration of the leasing contract. If the lessee does not execute the contact, the lessor can recover the item, meaning that he never stops to be the owner of the item.¹⁹

3. Characteristics of the contract of financial leasing according to the actual Albanian legislation

We believe that in the Albanian legal framework the contract of financial leasing has an ambiguous situation. It is foreseen in the Civil Code²⁰ in one article, as one of the form of the leasing contract, but its thoroughly regulation comes through the specific law²¹. Regarding the positioning of the contract of financial leasing in the Civil Code, as one of the form of the leasing contract, we believe that this solution in the Civil Code is a wrong one, since referring also to the characteristics of its legal nature, the contract of financial leasing is an entirely specific contract, which has both the characteristic of a leasing

¹⁶ W. LUEM, *La pratique du leasing en Suisse : Le leasing industriel, commercial et immobilier*, Lausanne 1985, p. 14.

¹⁷ Pierre Engel, *Contrats de Droit Suisse*, 2 éditions, Staempfli Edition SA Berne, 2000, p. 8102-813.

¹⁸ *Idem*, p. 806.

¹⁹ See Article 849 §2 the Civil Code.

²⁰ Article 849 the Civil Code.

²¹ Law no. 9396 dated 12.05.2005 “On financial leasing” published in the Official Gazette no. 58, dated 15 June 2005, p. 1739.

contract and the selling with reservation, differing steadily from both. Such an approach can be found also in the law ‘on financial leasing’ where for a full regulation of this relationship the law itself refers to the general rules of contracts foreseen in part V, Chapter I of the Civic Code²².

In the contract of financial leasing, according to the Albanian legislation, there are three parties interacting with each-other, leading to the idea that the contract of financial leasing is structured as a trilateral activity²³. As a party in the contract of financial leasing, a part from the lessor and lessee, we have also the supplier²⁴. The supplier is a person (natural or legal) who has in ownership, produces or constructs an item upon the requests of the lessor and afterwards sells it to the lessee against the payment of the price from the lessor. The supplier performs this under a supply agreement, concluded between him and the lessor, for an item not selected from the lessor or upon his definitions, who buys the item, but selected from the lessee.²⁵

To support this idea we can refer to the law “On financial leasing” article 3 named “Parties to the financial leasing”, where it is provided as a party of the contract of financial leasing, lessor, lessee and the supplier. In a broader interpretation of the law as for the legal profile of the supplier in the contract of financial leasing, the latter is connected with a contractual relation with the lessor, to whom he transfers the ownership of the item ordered or selected from the lessee. The lessee may claim his reservation towards the supplier, in relation to the quality, quantity, defects of the item taken in use, by using the agreement between the lessor and the supplier, since he has a legal interest in these requests²⁶, together or a part from the lessor²⁷.

A characteristic of this contract is the periodic payment from the lessee towards the lessor. This amount may be consider as the price of the leasing for the use of the item, but also it can be consider as instalments for buying the item. In the latter case the price of the leasing payment has an important value since upon it one can calculate the amount that the lessee has to pay in case he decides to use the right to buy the item. The amount of the periodic payments is settled depending on the circumstances which should be fulfilled cumulatively such as: 1) the general value of the item; 2) the term of the leasing contract; 3) and other elements foreseen by the parties in their agreement²⁸.

Referring to the content of the law “On financial leasing” regarding the form, the contract of financial leasing appears in a variety of forms, such as a notary act, for its validity, in written for its certainty. As for the above mention law, the contract of financial leasing

²² Article 5 Law no. 9396 dated 12.05.2005 “On financial leasing”.

²³ Irena Plaku, Teza « Kontrata e qirase », ne kuader te marrjes se titullit « Magjistrat », Tirane 2010.

²⁴ **Note :** The contract of Financial leasing can be either a normal contract of financial leasing or a direct contract of financial leasing. In this case the lessor is the owner of the item or the producer, there is no third party involved, such as the supplier.

²⁵ Article 1 point 6 and 8 Law no. 9396 dated 12.05.2005 “On financial leasing”. Irena Plaku, Teza « Kontrata e qirase », ne kuader te marrjes se titullit « Magjistrat », Tirana 2010.

²⁶ See article 32 letter a) the Code of Civil Procedure.

²⁷ Article 19 Law no. 9396 dated 12.05.2005 “On financial leasing”

²⁸ See Irena Plaku, Teza « Kontrata e qirase », ne kuader te marrjes se titullit « Magjistrat », Tirana 2010.

should be in a notary act when the agreement contains conditions for extra-judicial repossession of the object, if the agreement is cancelled before due for default of the lessee.²⁹ The parties may include as part of the contract, or as an annex of the contract of financial leasing also the act for recovering the item³⁰. According to some legal scholars who have dealt with the legal analysis of the contract of financial leasing, this form is required for the effect of validity, since the leasing contract is an executive title by the bailiff after the issuing of enforcement order from the competent court³¹, as well as the procedure of the recovery of the item is pursued according to the conditions specified in the leasing contract.³² Furthermore, based on the law nr.33/2012 “For the registration of immovable properties” for the effect of the registration of the contracts upon which one can gain real rights or the registration of the leasing contracts for immovable properties for a period over 9 years, it is mandatory the form with the notary act.³³ In the absence of these conditions the contact of financial leasing can be compiled in any form. Nevertheless, we agree with the opinion stated by the magistrate I.Plaku that despite the articulation in the legislation, it is better for this contract to have a written form, as for its specification, as well as for the fact that the leasing contract should contain some necessary elements, which can be proven when the contract is in a written form.³⁴

The law “on financial leasing” provides also the duration of the contact of financial leasing, which leads us to think that this is a temporary contract. The law foresees some minimal terms for the duration of this contract, depending on the item, movable or immovable, and its depreciation (consumption is not the right word)³⁵. The maximum term of the contact of financial leasing depends upon the will of the parties. Based on the Civil Code, the norms that regulate the leasing contract, we can deduced that the maximum term of the contact of financial leasing, is foreseen by article 803 of the Civil Code.

The contact of financial leasing, as a general rule, is a commercial contract. In the way that it is stated in article 5 of the law “On financial leasing”, we assess that its transformation into a private contract in the case when the lessee is not a subject to the commercial law, relates to his exclusion from the obligation foreseen in the law “On commercial companies” and the law on the organization of the “National Registration Centre”, as can be the case of the capitalization and registration of the assets of commercial subject, limiting the capacity to act and so on.

Failure to return the “rent paid” and taking back the item in case of the termination of the contract prior to its term. This is one of the characteristic of this contract that makes it different from the contract of selling the item with reservation, in which is applied the principle of returning the item in its former condition in case of failure to fulfil the

²⁹ Article 11 with article 31 Law no. 9396 dated 12.05.2005 “On financial leasing”

³⁰ Idem, article 31

³¹ Ibidem, article 32.

³² Irena Plaku, Teza « Kontrata e qirase », ne kuader te marrjes se titullit « Magjistrat », Tirana 2010.

³³ See article 51 Law no. 9396 dated 12.05.2005 “On financial leasing”

³⁴ Irena Plaku, Teza « Kontrata e qirase », ne kuader te marrjes se titullit « Magjistrat », Tirana 2010.

³⁵ Articles 6 and 7 Law no. 9396 dated 12.05.2005 “On financial leasing”.

obligation. In the case of the contract of financial leasing, when it is ended prior to its term for the lessee's fault, the lessor has the right not only to take the item, a right that derives from being the owner of the item, but also to keep the instalments paid from the lessee³⁶.

4. Characteristics of the contract of financial leasing according to the UNIDROIT Convention

The international financial leasing contract, from the convention prospective differs from the same contract on the national level, for the integration of the foreign element in the international financial leasing contract. Meaning that, in the international financial leasing contract the parties involved, supplier, lessor and lessee, have their businesses located in different countries.³⁷

According to the content of the UNIDROIT Convention, even though it is accepted the trilateral agreement in the international financial leasing contract, to consider such a contract as international it is necessary to evidence different countries where the parties have their economic activity, mainly the lessor and the lessee, despite the fact where the supplier has his economic activity.³⁸

A characteristic of the international financial leasing contract is the fact that as its subject cannot be any item or good in the civil circulation, which can be taken in leasing for the sole purpose of domestic use and not for business (such as a car). As a material subject of the international financial leasing contract can be goods of technical importance, for commercial use only (such as the pipes in a Power Station).

Another characteristic of the international financial leasing contract is also its term, which based on the foreign element, requires a much longer period as for the conclusion of the contract, as well as for its fulfilment. Hence the term of the international financial leasing contract is much longer than the national financial leasing contract.

The convention of the international financial leasing contract has considered this contract as a financial transaction that the lessor performs on behalf of the lessee. As a general rule, the lessor does not interfere with the selection of the item from the lessee, or in the possession and use of the item during the period of leasing contract. Hence, for the convention purpose, the lessor, as a general rule, has fulfilled his obligations under the contract by paying the price of the item to the supplier. After the fulfilment of this obligation the lessor has no further obligation that may arise for the item which now is in the hand of the lessee.³⁹

In the international financial leasing contract, there are three parties involved, the lessor, the lessee and the supplier. The rights and obligations of the parties in the international

³⁶ Article 9 point 2 Law no. 9396 dated 12.05.2005 "On financial leasing".

³⁷ Article 3 UNIDROIT Convention « On international Financial leasing ».

³⁸ *Idem*.

³⁹ Article 8 point 1 UNIDROIT Convention « On international Financial leasing ».

financial leasing contract are specified in specific way for each of them⁴⁰. On the convention prospective, the legal relationship of the international financial leasing contract is a product of two contracts; the first and the most important the one stipulated between the lessor and the lessee with the aim to regulate the leasing relationship, the second is the one stipulated between the lessor and the supplier with the aim to transfer the ownership of the item.

The lessor at the moment when the ownership is transferred from the supplier gains this title and holds it during the period of the contact, by gaining also the rent settled with the lessee. Meanwhile, the lessee in the international financial leasing contract has the right to possess and use the item subject of the leasing with the obligation to pay the rent within the period specified and to preserve the item⁴¹

5. Conclusions

The contract of financial leasing, as a smart legal solution, helps the market by facilitating the circulation of the goods. In addition, on the legal aspect, it is in conformity with the interest of the operators in the market (contracting parties), performing in an optimal way the contiguity of the will of each party. The Albanian legal framework, taking into consideration the undisputable importance of the contract of financial leasing has foreseen this contract first in the Civil Code in 1994. Since the regulation of this contract in the Civil Code was not only too poor, but also defective, the legal framework was completed with a specific law “On the financial leasing”. With this law the contract of financial leasing acquired not only of full legal regulation, but also a modern legal regulation by integrating in the actual law European and international standards, an obligation for the Albanian State deriving from its commitments towards the European integration.

For the above, one can conclude that the Albanian legal framework regulating the contract of financial leasing, generally respects the international standards offered by the UNIDROIT Convention. Nevertheless, there is still room for improvement namely in the determination of the maximum term for this contract, which should differ from the maximum term foreseen for the leasing contract. In addition, we believe that as for the form, the written form should be necessary not only for its certainty, but also for its validity. The national legal framework that regulates the leasing contract should be clearer regarding the contracting parties, avoiding ambiguities regarding the fact whether it is a bilateral or trilateral contract, since at the beginning the legislation “accepts in general terms the trilateral aspects” and in the part of the obligations of the contracting parties implies only two contracting parties.

To conclude, we can say that despite the fact that there may be some inadequacies or ambiguities within the legal framework, we should value the involvement and regulation of this contract within the Albanian legal framework. We reach this conclusion taking

⁴⁰ Idem, article 7-13

⁴¹ Ibidem, article 9

into consideration the Albanian legal heritage, the efforts and time that was necessary for the Albanian legal framework to build the legislation in conformity with the principles of free market economy and European and international standards which, on the other hand, have maturity and are consolidated in this area.

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