The delay of paying the leasing rates in the current Romanian regulation. Project adopted in 2018. Analysis of comparative law

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Abstract

This paper aims to demonstrate why the solution voted by the Romanian Senate regarding the limitation of the users responsibility in the leasing contract, by modifying the Government Ordinance no. 51/1997 concerning the leasing operations and the leasing societies, in March 2018, is not grounded enough legally, and why we do not recommended to be adopted, even if, de plano, we agree with the increased protection of the user. In this argumentation we use comparative law.

Keywords: *leasing, non-payment of the leasing rates, damages-interests owed by the user/tenant, delay of paying.*

JEL Classification: K22

1. Introduction

The Romanian legal doctrine regarding leasing is particularly abundant, which proves that the interest of the theorists for this special legal operation, taken from the Anglo-Saxon law. The utility it presents in practice for the contracted parties, and also for the third parties, explains the effort of adaptation made by the Romanian legislator to regulate this legal institution, seldom paying tribute to principles of civil law (continental).

Apart from the effort made by the doctrine for the "elucidation" of leasing enigmas, compared to other similar contracts, but not identical[2], the practice nowadays has imposed the formulation of a proposal to modify the text of Government Ordinance no. 51/1997 regarding leasing and leasing operations[3]. We refer to the legislative proposal which was adopted on March 26th this year by the

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[2] See in this regard T.R. Popescu, *Law of international commerce*, E.D.P., Bucharest, 1983, p. 255.

[3] The Romanian legislation of leasing is given by the Government Ordinance no. 51/1997 regarding leasing and leasing societies, republished in the Official Gazette no. 9 on January 12th 2000, approved and modified through Law no. 90/1998, published in the Official Gazette no. 170 on April 30th 1998; Law no. 533/2004 for modifying and completing the Government Ordinance no. 51/1997 regarding leasing and leasing societies published in the Official Gazette no. 1135 on December 1st 2004; Law no. 287/2006 for modifying and completing of the Government Ordinance no. 51/1997 regarding leasing and leasing societies, published in the Official Gazette no. 606 on July 13th 2006.

Romanian Senate[4], but which has not yet passed the Chamber of Deputies, which is why we will name this initiative with the title of "project", hoping that the following lines will be read by the people entitled to avoid the adoption of a regulation which seems insufficiently legal based.

2. Review of specialty literature

Leasing is a creation of the Anglo-American system[5]. In the common-law system, in the application of the relative principle of the contract (privacy of contract), it is not admitted the existence of an obligatory juridical report directly between the user and the provider[6].

While in the common law system the predominant thesis consists of considering leasing to be creating a temporary right to use the goods, having as a consequence the fact that the user of the good bears practically all the risks which usually lie upon the owner, thus being a part of the personal property domain, in civil law (of European countries) it is a part of the obligations law, the trend being to consider it as being a new contractual technique, complex, modern, and original. For this reason, in the civil juridical doctrine, leasing has been compared to tenancy, sale with installment payment, lending, mandate, credit with special warranties, reaching even the appreciation that through leasing, it has been proved that the general theory of obligations would be outpaced by the modern techniques of contracting.[7]

In the French doctrine, leasing operations are considered a complex juridical technique, which supposes the signing of a selling contract between provider and the leasing society (financier), and then a contract between the leasing society and the user, doubled by a promise of sale between the same parties at the moment of expiration of the leasing contract[8]. In other words, leasing is a purchase with the intent of a renting, followed by the renting with the intent of buying.[9]

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[4] See Law no. 435/2017 on website: https://www.senat.ro/legis/lista.aspx?nr_cls=L435&an_cls=2017, accessed on September 24th 2018.

[5] In this regard, see D. Clocotici and Gh. Gheorghiu, *Leasing operations*, 2nd edition, Lumina Lex Publishing House, Bucharest, 2000, p. 23.

[6] For details in this regard, see R. Munteanu, *Modern techniques of credit*. *The contract of credit-leasing*, in Institutions of international commercial law, Publishing House of the Academy, vol. II, Bucharest, 1982, p. 67.

[7] In this regard, see Daniele Cremieux-Israel, *Leasing and furniture leasing*, Dalloz Publishing House, Paris, 1975. As in leasing is an operation realized with the help of classic contracts, see the decision of the French Court, respectively V.CA. Paris 16 ch B.J.C.79.III8934, p.189, noted by E. Bey, cited by D. Clocotici and Gh. Gheorghiu, *op. cit.*, p. 23.

[8] In this regard, see C. Kessedjian, *Law of international commerce*, P.U.F., Paris, 2013, p.381-382, cited by C.T. Ungureanu, *Law of international commerce*, Hamangiu Publishing House., Bucharest, 2018, p. 284.

[9] For details, see O. Căpățînă and B. Ștefănescu, *Treaty of international commerce law*, vol II, Publishing House of the Academy, Bucharest, 1987, p. 244. In this regard, T.R. Popescu, *op.cit.*, pp. 255-256; R. Munteanu, *op. cit.*, p. 48-84; J. Calais-Auloy, *The contract of leasing*, in *Les nouvelles techniques contractuelles*, Montpellier Publishing House, 1971, p. 137 and the foll.; Daniele Cremieux-Israel, *op. cit.*, p. 37.

In Italy, leasing (*locazione financiaro*), is defined as "the renting of mobile and immobile goods which the financier acquires or makes, in relation to the indications given by the user, the latter assuming all the risks during the availability of the contract, having also the right to become owner of the leased good, with the condition of paying the price established at the time of the contract signing"[10] (according to article 17, line 2, Law no. 183/ from April 2nd 1986).

In the Romanian doctrine, before the entry into force of the Government Ordinance no. 51/1997, we remember the affirmation according to which "the leasing contract includes a sum of juridical acts, marked by the interdependence between them. It is not a juxtaposition, but a whole, independent, in which a sale, a mandate, a lease and a unilateral promise of sale are united"[11].

3. Research method

De lege lata, according to art. 15 from the Government Ordinance no. 51/1997[12], in the hypothesis where the user does not pay the leasing rate for 2 consecutive months, the landlord/financier has the right to request the dissolution of the contract, the refund of the good and he payment of owed amounts, until the date of the restoration. In other words, we are talking about the damage-interest the quantum of which is equivalent to the entire value of the contract; to put it differently, not only the owed leasing rates must be paid, but also the ones not yet due. These consequences appear, as long as the parties did not foresee otherwise, through an express contractual clause.

4. Research results

4.1 Opinions formulated in the Romanian juridical literature regarding the quantum of the damage-interests owed by the user/tenant

In the specialty Romanian juridical doctrine, there are outlined at least two opinions regarding the dispositions in art. 15 of the Government Ordinance no. 51/1997, which we will further present, being useful for the analyses and the conclusion that will follow, at the end of this article.

The first belongs to authors D. Clocotici and Gh. Gheorghiu, who believe that damages, as they are established in the Government Ordinance no. 51/1997, are big, putting the user in an inequitable position. At the same time, the two authors appreciate that, considering the fact that through the rates paid by the user it has already reimbursed a part of the good's value, and that usually, the market value of

[10] Definition taken from D. Clocotici and Gh. Gheorghiu, *op. cit.*, p. 13.
[11] See O. Căpățînă and B. Ștefănescu, *op. cit.*, p. 247.
[12] In the modified form of the ordinance by Law no. 287/2006. See footnote no 3.

the good at the moment of the refund is bigger than its residual value, with these damage-interests, the leasing society benefits of an undeserved enrichment.[13]

The second opinion belongs to Mrs. E. Turcu, who says that the said damage will be at the level of effective prejudice suffered by the financier, who cannot practically be smaller than the amount of the rates left to pay.[14]

In both the titles cited above, the authors invoke the French legislator model which limited the quantum of damage, establishing a reasonable form of calculating it too. Therefore, according to article 21 in the Law from January 10th 1978, the loss is given by the sum of the fees not paid yet, plus their residual value, out of which is subtracted the market value of the good[15]. The difference between the Romanian authors cited above is that the advocates of the first opinion plead for the inequitable character of the damage-interest quantum owed, while the formulation of the second supports the idea that the spreading of the damage-interest is situated at the level of effective prejudice endured by the financier (meaning equitable, o.u. S.L.C).

Starting from the inequitable character of this disposition, it has got, nowadays, to the formulation of a legislative proposal according to which a two-month payment delay should be prolonged to three months, after which other alternatives should become possible: either give back the good to the financier, who will make use of it as they see fit, or the user gives back the good to the financier, and, in term of 30 days, they will sell/buy the good, proceeding to the retaining or payment of the difference to the financier.

This article intends to demonstrate why the solution voted in the Romanian Senate, from March 2018, is not sufficiently based from a juridical point of view, and why we do not recommend its adoption, even if, *de plano*, we agree with the increased protection of the user.

4.2 The quantum of damage-interests in the vision of the project adopted in Romania's Senate on March 26th 2018

According to article 15, line 1 in the Government Ordinance no. 51/1997, in the vision of the modifying project, for the situation of rates due for more than three consecutive months, only for the user who meets the quality of consumer, and only with the hypothesis where they give back the good at the deadline in the contract, the user can benefit of a reduction of the quantum of damage-interest owed[16].

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[13] See Clocotici and Gh. Gheorghiu, *op. cit.*, p. 102, as in the user may defend themselves by invoking the enrichment without right of the society, see Silvia Cristea, *Operations of leasing in Romanian Law*, „Juridical guide for commercial societies" no 7-8/1998, Tribuna Economica Publishing House, pp. 65-68.

[14] In this regard, see E. Turcu, *Contract of leasing*, Hamangiu Publishing House, Bucharest, 2008, p. 271.

[15] In this regard, see D. Clocotici and Gh. Gheorghiu, *op. cit.*, p. 103, and E. Turcu, *op. cit.*, p. 271, footnote no. 1.

[16] Therefore, according to article 15, line 1, Government Ordinance no. 51/1997, in the modified version of the law project adopted in the Romanian Senate on March 26th 2018: „in case the user, who has the quality of consumer, does not execute the obligation of paying the leasing rate in term of three

The remarks we make concern the disposition of the project which allows the sale of the good by the user. Therefore, we ask ourselves based on what does the user sell the good which is in the ownership of the landlord/financier, knowing that, on one hand, the financier transmits-during the validity of the contract, to the user all the prerogatives of the good, **except the disposition right** (o. u. S.L.C.)[17], and that, on the other hand, the user's option of purchase was not used, the contract not being finalized with the conditions initially established(in which case ,if the user opts for a purchase and payment of the residual value, they would become the owner of the good). In our opinion, neither the apparent mandate gives the user the right to sell the good, the limit of this empowerment being given in art. 9, letter c) in the Government Ordinance no. 51/1997, which excludes selling.

The alternative of the project's editors, according to which the value of the sale can be replaced with the value proposed by an authorized assessor, appears as damaged from an economical point of view, as the estimated value is not the same as the effective market value of the good, which is why, speaking of a hypothetical sum, would harm, this time, the financier.

In our opinion, the right of preference for selling, established in article 15, line 2[18] from the legislative project represents "a pale" resumption of the exclusive preference established in art 1, letter e) point 3 in the Government Ordinance no. 51/1997, *de lege lata*, according to which the purchasing price will represent at most 50% of the input value (market) which the good has at the time when the option of purchasing is formulated. Moreover, if the scope is the purchase of the good, we ask

consecutive months, calculated by the deadline in the leasing contract, the landlord/financier has the right to cancel the contract, and the user is obligated to pay the owed amounts. In case the user does not give back the good and pay the debt established in the contract, any compensation would only contain the difference between the total of the amount owed established in the contract and the value obtained through the reevaluation, excluding the VAT, or, depending on the case, through an evaluation report emitted by a licensed assessor according to law. The owed sums established in the leasing contract consist of bills which were issued but not paid, the input value left to be paid until the end of the leasing contract, including the residual value, the costs for good insurance, represented by the mandatory insurance policy and/or the optional insurance policy, driving fines or fines for non-payment of the vignette, or other fines concerning the good, in addition to the taxes for the good".

[17] According to article 9 from the Government Ordinance no. 51/1997, unmodified by the legislative process.

[18] According to article 15, line 2 introduced in the project: „Exclusively for situations where the good has been refunded in the time period established in the contract, the user consumer or the third party buyer proposed by them in a maximum of 5 days since the completion of their refund obligation, benefits from an ownership right at the moment of the purchase, available for 30 days from the moment of the handing of the good, in this time having the possibility to emit a firm and irreversible acceptance of buying for a good price at least equal to the counter value of all the amounts owed, according to the leasing contract, including the residual value to which the VAT is added. In case the acceptance of purchase emitted by the third buyer is inferior to the quantum of the owed sums, the user consumer has the obligation to credit the financier's account with the difference necessary until the competition of the sums owed established in the contract, the latest at the date of cashing by the financier of the price afferent to transfer of ownership rights respecting the term of 30 days mentioned above. The transfer of the ownership right for the good will operate at the date of full collection of the owed sums established in the contract, which cannot be after the date of the ownership right's expiration".

ourselves why should it be given to the financier? (line 2 begins with the wording:" exclusively for situations where the good was given back"). Is it really normal to give back a good just to buy it afterwards?

We are wondering what would the user give up at the purchase of the good in favor of a third party, especially when the project provides, for the hypothesis where the third party pays a price inferior to the amounts owed to the financier, three limitations: first consists of when the user pays the difference to the financier (even if the good does not become their property); the transfer of the right of propriety and the payment of the difference (second and third limitations) is to be made preferably in a period of 30 days. Moreover, if either the third buyer, or the user does not respect the dispositions of line 2 from article 15 proposed in the project, as penalty, only the user will have to pay the owed amounts according to the contract (in conformity with the dispositions of line 3, newly introduced). Also as penalty, version b formulated in section 4.1 above, if the user does not give back the good, they will owe, in addition to the amounts due from the contract and the expenses made for the taking into possession of the goof (according to line 4, newly introduced).

5. Instead of conclusions. Is really the status established for the user through the legislative project from 2018 more favorable?

We believe that the dispositions established by the project through the modification of article 15 in the Government Ordinance no. 51/1997 not only do not represent a real improvement for the user's status, but it actually worsens it.

After the French model which supports the limitation of the user's responsibility, and, at the same time, extending for the matter of leasing as well the procedure of giving in to pay, applicable only in the banking domain, we propose a different method of resolving the problem. Therefore, if a user proposes the financier as guarantee for the fulfillment of the obligations from the contract of leasing a pledge contract or mortgage, the financier's damage in the case of the non-payment of the leasing rates must be summarized to the value of the pledged/mortgaged goods. In other words, by taking over these goods by the financier, they must give up the sums owed established in the contract.

We consider that this solution represents a happy combination between the dispositions applicable *de lege lata* in the American law and those in the continental/civil law. The result can be the following: as the user who does not respect their contractual obligations cannot, according to American leasing[19], emit any claim over the sums submitted in the guarantee and appropriated by the financier, just as well, this time following the civil model, the good submitted in the guarantee by the user found in delay at the payment of the leasing rates cannot be recovered by them, being considered as given in to pay.

[19] In this regard, analyze the clauses of the leasing contract-American model, presented by D. Clocotici and Gh. Gheorghiu, *op. cit*., pp. 173-177.

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