# THE FINANCIAL LEASING MARKET FROM THE PERSPECTIVE OF CURRENT LEGAL REALITIES

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***Abstract***

*Leasing has established itself as one of the most profitable means of financing productive investments, bringing more security to those who do not have enough capital. The benefits that leasing operations bring to the parties involved are evidenced both by the practical results that they have had over time and by the rise that leasing has had in the capital markets of the world economy. The dynamics of social development, but also the specific expansion of a market economy in a continuous process of restructuring, amid economic, social and institutional changes, require a reform of national legislation, in line with current realities and the goal of achieving a European and international economic and monetary unit. The modeling of the current legislative framework, in accordance with the requirements of society, will have as its main interest, not only to provide adequate and immediate solutions to economic and social realities, but also to eliminate legal traditions that have destabilized this market segment in recent years. For this reason, I structured my study, presenting a series of imperfections of the law that have negatively influenced the evolution of leasing in recent years.*

***Keywords:*** *leasing operations, financier, lessor, use, lessee, contact.*

***JEL Classification:*** K22

## 1. Introduction

By no means a creation of contemporary society, capital investment has been and remains unanimously recognized as the main instrument of economic development. Therefore, the development of new, more efficient structures, in line with the most current strategies of a constantly developing market economy, required the transformation of traditional contracts. These considerations have led to the emergence and development worldwide of a new technique for capital investments, namely leasing operations.

Offering a viable and predictable alternative to the classic credit or lease agreements, leasing proved to be an ingenious solution, which responded perfectly to the demands of a perpetually changing economy. In fact, the analysis of leasing evolution trends is associated with the progress of industrial technologies, changes in fiscal and monetary policies, but also with the overall transformation of the world economy. All these factors have had a specific influence on the level of each state, as proof that the leasing market reflects certain particular features depending on continents, regions or countries. However, regardless of the upward or downward course of the world economy, both in times of economic boom and in times of economic recession, leasing operations have been a constant of the technical-scientific revolution.

## 2. Perspective of current legal realities

In most international legal systems, leasing is treated economically, being appreciated as a modern form of trade relations, which is characterized by an original financing system, followed by an agreement by which the lender transmits to the user, in exchange for a payments, the right to use an asset for an agreed period of time, provided that at the end of this period the financier/lessor respects the right of the user/lessee to opt for the extension of the contract, for the return of the asset or for its purchase[2].

In Romania, until 1989, it was not possible to talk about a leasing market, therefore the creation of a specific legislative framework for these operations was not justified. But after the events that marked the end of that year, the old legal system underwent essential changes, the new legislative

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[2] Graeme Baber, *Essays on International Law*, Cambridge Scholar Publishing, 2017, p. 42.

framework, trying to adapt the regulations regarding the functioning of economic activities, in accordance with the mechanism of the European market economy. The first leasing company in Romania was registered in 1994, and the first legislative regulations were drafted in 1995.

In 1997, as a consequence of the upward evolution of leasing activities, it was necessary to develop regulations specific to these operations, the first normative act being Government Ordinance (OG) no. 51/1997, an ordinance adopted a year later, in 1998[3].

With the aim of promoting leasing operations and the advantages they would present in the Romanian economy, in February 1996 was established by the three existing leasing companies on the market at that time, the National Union of Leasing Companies - UNSLR (currently it operates under the name of the Association of Leasing Companies in Romania).

Today in Romania operates the "Association of Financial Companies - ALB Romania", a non-profit organization, which has as its stated objective the improvement of the business environment and the creation of a professional framework on the Romanian financial services market. The association was established in March 2004, being open to all leasing companies, as well as to other non-banking financial services, as they are defined by the legislation in force. The main purpose of this organization is to harmonize national rules and legislation with European Union standards.

Although the original form of the ordinance has undergone a number of changes over the years, the implementation of this complex contract is still difficult. Under the imperatives of an insufficiently clear legislative norm, which sometimes loses touch with even the fundamental principles of law, leasing operations, instead of proving their usefulness, give rise to a perpetual source of controversy reflected in jurisprudence.

As practitioners or theorists, regarding the analytical effects on the effects that the ordinance has generated in the over 25 years in which it has been applied, we can observe that, categorically, a revision of the law would be required under some controversial aspects. The ordinance retains original elements, which constantly and obviously created not only difficulties, but also generated solutions of the courts that were clearly unfair, but perfectly justified from a legal point of view. All this did nothing but discredit the leasing operations (in 2017, according to ALB Leasing statistics, no real estate leasing contract was concluded in Romania).

Certainly, however, that a careful study of the legal norm regulating leasing operations in Romania will prove that the legal norm is not perfect, even that it is far from fair and precisely for these reasons, I proposed that in this study I will present some of the aspects that have affected and still affect the leasing market in Romania.

In the light of international regulations, leasing operations constitute a set of legal relationships that are established during their development, between the contractual partners involved, but essentially based on the two main operations, namely: financing (not to be confused with lending) the acquisition of a good chosen by the future user/lessee, followed by the leasing contract (not to be confused with the lease agreement), which is a means of dismantling the property right held by the financier/lessor and distinct exploitation of its attributes.

Unfortunately, however, in the vision of the Romanian legislator, as we can see in the definition of leasing operations inserted in art. 1 of OG 51/1997, they would be limited only to the transfer of the right of use, without any reference to financing[4]. From this perspective, the inevitable lease will be assimilated to the lease, both having the same legal characteristics. Both contracts have as their object the transfer of the right of use, for a determined period of time, against a payment, which in the case of the lease is called rent, and in the case of the lease, the leasing rate. The only difference between them, being the way of their termination, in the case of leasing the user having

[3] Government Ordinance no. 51/1997 was published in the Official Gazette of Romania, Part I, no. 224 of August 30, 1997 and was approved and amended by Law no. 90/1998, published in the Official Gazette of Romania, Part I, no. 170 of April 30, 1998.

[4] Art.1 of GO 51/1997 "This ordinance applies to leasing operations by which a party, called lessor/financier, transfers for a certain period the right of use over an asset, whose owner is, to the other party, called lessee/user , at its request, against a periodic payment, called the leasing rate, and at the end of the leasing period the lessor / financier undertakes to respect the right of the lessee/user to buy the property, to extend the lease without changing the nature leasing or terminating contractual relations. The lessee/user can choose to buy the property before the end of the leasing period, but not earlier than 12 months, if the parties so agree and if they pay all the obligations assumed by the contract".

the option to buy the good, to extend the lease without changing the nature of the lease or to terminate the contractual relations, while in the case of leases the good must be returned to the owner. Therefore, a lease, which will include a clause obliging the landlord to comply with the lessee's option to buy the property or to continue the lease at the end of the lease, would turn into a lease[5].

The statement, even if it is logical, being also supported by the text of the law, where the object of the contract and the object of the service are the same, is obviously absurd, the two contracts being fundamentally different.

Leasing, as a legal operation, obviously remains marked by its atypical character, these being located at the intersection of legal relationships specific to leases, sales and credit agreements, but "*in no case should be assimilated to them, but rather as a combination of them*"[6]

Leasing operations will permanently and primarily involve the financing of the investment necessary for the user, the property right remaining in the possession of the financier until the expiration of the determined period for which the transfer of the right of use has been established.

Although the definition of leasing does not refer to the financing operation, in the express case of financial leasing operations, the legislator changes its perspective by bringing lending to the forefront.

Considering that by the nature of the procedure, financial leasing is generally aimed at the acquisition by the user/lessee of the financed good, the transfer of ownership being assumed as an alternative since the conclusion of the contract, the competent authorities considered it appropriate to classify this activity as a professional lending activity. In the content of art. 143 of the Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, it is regulated that "*a company that carries out activities that represent a direct extension of the banking activity[7], such as leasing, factoring, management of investment funds*" will have to comply with the imperative conditions of art.32 of the same normative act, respectively "(1) *credit institutions[8], Romanian legal entities, may be established and may operate only on the basis of the authorization issued by the National Bank of Romania*", thus limiting the scope of legal entities that may have the quality of lessor/financier, only to credit institutions or non-bank financial institutions (NFIs).

Consequently, we can only hope that in the more or less near future, the legal financing operation will take its rightful place in the definition of the notion of leasing operation.

The practice of leasing companies to claim an advance is recognized, the value of which is generally a fixed amount, determined as a percentage of the input value of the property, which the lessee/user usually pays at the time of concluding the contract.

Although, in principle, the aim of the legislator is to create a clear and predictable rule of law, in order to avoid arbitrariness or misinterpretation, I personally consider that the payment of the advance by the user/lessee becomes a particularly sensitive issue, due to the effects it generates, as well as due to the fact that it contradicts the practical interest of leasing, namely that of ensuring the full financing through borrowed funds, of an investment, without the beneficiary constituting other precautionary measures[9].

The advance paid by the lessee/user is at the disposal of the financier/lessor, serving him, why not, when purchasing the good. However, this good will remain in his property until the end of the contract, when, eventually, the user will opt for the purchase by paying the residual value. We are therefore witnessing the subsidy by the user/lessee of the purchase of a good that will enter the patrimony of the financier/lessor, which leads to the creation of an absurd situation in which the roles

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[5] Art. 1777 Civil Code/Notion: The lease is the contract by which a party, called lessor, undertakes to ensure to the other party, called lessee, the use of a good for a certain period, in exchange for a price, called rent. (+ and at the end during the lease period, the lessor undertakes to respect the lessee's right of option to purchase the property, to extend the lease without changing the nature of the lease or to terminate the contractual relationship).

[6] M.V. Achim, *Leasing - o afacere de succes*, Economic Publishing House, Bucharest, 2005, p. 70.

[7] Banking activity - attracting deposits or other repayable funds from the public and granting loans on own account (art. 7, paragraph 1 of GEO 99/2006).

[8]Credit institution means (art. 7, paragraph 10 of GEO 99/2006): a) an entity whose activity consists in attracting deposits or other repayable funds from the public and in granting loans on its own account; an entity, other than the one provided in let. a), which issues means of payment in the form of electronic money, hereinafter referred to as electronic money issuing institution.

[9] D. Clocotici, Gh. Gheorghiu, *Operațiunile de leasing*, Lumina Lex Publishing House, 2000, p. 121.

of the parties are invested, respectively the financing by the user of a good property of the financier. Internationally established practice, in the case of leases, unanimously supports the principle that the investment is entirely of the financier/lessor, who having the necessary funds, acquires movable or immovable property, at the request of the user/lessee, which then gives for use to the latter, against amounts payable in consecutive installments, as a leasing rate, for a predetermined period[10].

The full financing of the investment is also supported in a Decision of the Court of Paris, of October 10, 1979, which clearly stated that leasing involves a lease, but its essential character is the full financing by the lessor/financier of the lessee's investment/user (ref. CA Paris 6ch10.10.1979, *Charbif v. BailInvesissment*-unpublished).

As the advance remains at the disposal of the lender, when the user/lessee waives the option to purchase the property or in case of early termination of the lease, he returns the property, he loses the advance paid. Therefore, although the leasing rate, representing the use of the property, has been paid, we are witnessing an enrichment of the financier/lessor, with the value of the advance. I consider that in such situations the conditions of an unjust enrichment are confirmed, the advance not being the object of the consideration of the specific right of use of a leasing contract and no advance assessment of the damages.

Leasing companies in the U.S. require a deposit at the end of the contract to protect against possible damages, but this should not be confused with the advance-share of the value of the property because the legal effects are marked by differences.

Moreover, the United States Supreme Court has ruled in the case of Commissioner v. Indianapolis Power & Light Co.[11] (1990) that a deposit differs from an advance payment because the legal effects are different. The purpose of creating a deposit at the conclusion of the contract is to protect the creditor in case the debtor does not fulfill the obligation assumed (such as, for example, in our study, the leasing rate), and at the end of the contract, when the client has paid full obligations, he has the right to request full refund of the deposit. Instead, when making an advance payment, we have another legal relationship, because it is presumed the purchase of the property and the transfer of ownership over it. In this case, the seller will have the right, as long as he fulfills his contractual obligation, to withhold the amounts paid in advance.

Since in the case of leasing operations, the lessee/user has the opportunity to choose between the end of the contract between buying the property, extending the lease without changing the nature of the lease or terminating the contractual relationship, obviously it cannot be a payment. in advance, but maybe just a deposit. In accordance with the international rules governing leasing operations (IAS17 and UNIDROIT), in order to insure against the risk of non-performance of the contract, the lender/lessor may also conclude an insurance policy on the risk of non-payment of leasing rates by the lessee/user or ensure the risk of non-payment of the residual value (see definition of terms: minimum guaranteed payments, guaranteed residual value).

But the notion of deposit can also be misleading as long as the obligation to insure the good comes back, as it appears from art.5 and art.9, let. f) of Government Ordinance 51/1997, to the financier/lessor, who has the freedom to choose the insurer, only that the payments related to the insurance costs fall on the user/lessee.

By concluding the insurance contract, the insurer undertakes, in case of insured risk, to indemnify the financier/lessor as insured, or the lessee/user, as a beneficiary designated by the financier/lessor, of the insurance policy[12], which will subsequently be obliged to repair the damage caused to the property of the leasing company, on the basis of civil liability. Therefore, as long as the damages caused to the property will be covered by the insurer, regardless of who will receive the compensation, the role of the deposit will become uncertain.

Another problem still unresolved, however, remains my opinion, the role of insurance in the circumstance in which the good that is the object of the leasing contract is lost, destroyed or damaged

[10] R. Ruozi, *Il leasing*, Ed. Giufre, Milano, 1981.
[11] United States Supreme Court, *Commissioner v. Indianapolis Power & Light Co*. (1990), no. 88-1319, Argued: October 31, 1989. Decided: January 9, 1990.
[12] M. N. Costin, D. Tataru, *Contractul de asigurare. Concept. Elemente*, Revista de Drept Comercial (RDC) no. 6/2000, p. 23-33.

due to fortuitous causes.

According to art.10, let. F) states that in the absence of a contrary stipulation, the user/lessee undertakes, by concluding the leasing contract, to assume for the entire term of the contract, the risk of loss, destruction or damage to the used property, due to fortuitous causes, and continuity of payments. leasing rate until full payment of the value of the leasing contract.

In principle, when the beneficiary/insurer is the user/lessee, in case of insured risk, he will receive the insurance indemnity, and from the amounts collected, under the provisions of the ordinance, he could continue to make payments to the financier/lessor until the end of the contract. leasing.

In general and perfectly justified, the beneficiary of the insurance premium is the financier/ lessor, who in the event of the risk of loss, destruction or damage to the property given for use, due to fortuitous causes, will collect the insured value, as owner. However, pursuant to art.10, letter f), it will require the user/tenant to continue making payments until the end of the leasing contract.

Therefore, the financier/lessor will be clearly advantaged, benefiting from the collection of the value of the good twice, once from the insurer and the second time from the user, according to the ordinance, by paying in full the leasing contract.

In my opinion, I consider that this aspect, although clearly unfair, is perfectly covered from a legal point of view, the claims of the financier being supported by the current legislative framework, and the user not having any grounds to challenge his claims.

The regulations of art.10, letter f, however, do not have an imperative character, obviously unfavourable to the user/lessee, because the legislator expressly mentions that the obligation incumbent on the user/lessee, will exist only if there is no contrary stipulation. Therefore, in this respect, the user must pay more attention when concluding the leasing contract.

The law of the United Kingdom stipulates that the insurance indemnity is the responsibility of the owner, the user/tenant being obliged to cover only any differences, when the insured amount does not cover the damage, common law also stipulating that the loss of the object of the contract will have the effect payment of due installments, subsequent to this state of affairs[13].

Not only in the lease, but in principle, in any contract, on the basis of good faith, fairness and contractual solidarity, the parties would have a moral obligation, first and foremost, to adapt their interests so that they are in a some balance, "*the concept of contractual balance is of paramount importance in long-term contracts and in contracts with successive services, typical of commercial legal relationships, characterized by continuity, trust and risk-taking*."[14] But no matter how much goodwill the parties show in creating a fair deal, when the rule of law itself does not defend these values, the game becomes impossible.

The issues presented are, unfortunately, not exhaustive, and their list can go on, with reference, for example, to the application of the residual value sometimes included in the leasing rate, to the tax facilities that characterize this operation in the economic systems of other states. or other aspects that not only do not encourage the development of a leasing market, but rather discredit it.

## 3. Conclusions

The dynamics of social development, but also the specific expansion of a market economy in a continuous process of restructuring, require a reform of national legislation, in line not only with current realities, but also with the stated goal of achieving European economic and monetary unity. international. In order to meet the demands of a society in which legal systems are increasingly interfering, and living conditions are becoming increasingly complicated, the perpetual upgrading of legal traditions is becoming a defining reality of contemporary life.

Certainly, the law will not develop in the abstract, but it will be shaped by society, precisely with the purpose of responding to immediate needs and providing adequate and immediate solutions

[13] Popovici S., *Contractul de leasing*, Universul Juridic Publishing House, Bucharest, 2010, p.137.
[14] Gheorghe Piperea, *Echilibrul contractual* (I), 02.04.2017, https://www.juridice.ro (1.06.2021).

to economic and social realities. Given the impact that leasing has on economic and social life, a re-examination of leasing regulations would prove to be of undeniable utility in ensuring a fair and equitable application.

In conclusion, I am convinced that leasing operations will be able to consolidate, discovering their own identity, only by creating a firm and concise legislative framework, which does not allow the suspicion of establishing privileges or discrimination and will not leave room for personal interpretations.

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