LEASING CONTRACT AND CONTRACTUAL INTERDEPENDENCE

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Abstract: *Leasing (credit-rent) is a complex, original and stand-alone legal operation as a financing technique for commercial companies.*

This transaction, as a whole, typically includes two distinct transactions: the leasing company enters into a sale-purchase agreement with a producer (supplier) through which it purchases the assets to be leased out with a unilateral sales promise, then the leasing company (the borrower) concludes a lease with the user (the borrower) to lease the asset for a certain period of time, with the option of ultimately buying it for a residual price.

In court practice, the question arises whether the lease should be cancelled or terminated for lack of cause if the sale / purchase contract concluded between the supplier and the leasing company was resolved for non-compliance with the user's requirements or for hidden vice that does not work for the intended use. The solution adopted in the French case-law was that the two types of contracts are their mutual cause (one with respect to each other) being in the face of contractual interdependence.

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JEL classification*:*K12, K19, K40

A separate legal situation illustrating contractual interdependence is the leasing contract. In the case of this contract, as in the case of a sale where the

payment of the price is financed by a loan contracted by the buyer, there is an obvious interdependence between the sales contract and the lease that serve each other as a cause. As such, if the sale of the asset by the supplier to the locating lender (the lender) is cancelled or rescinded, the lease of the property by the locating lender is no longer a cause. Indeed, the lessee's obligation to pay the rent no longer has counterparty and, consequently, the locator-financier is ordered to return the seller's work, but he cannot fulfil his obligation to make available the rented property to the user.

In the Romanian legal system, according to Government Ordinance no. 51/1997, in the framework of a leasing operation, participates as parties: the producer or the supplier, the locator-financier and the user.

The manufacturer is the natural or legal person who produces the asset he sells to a leasing company.

The supplier is a wider concept since it may be: the producer of the good, the manufacturer's representative in an area or a dealer (distributor) who has concluded a distribution contract with the manufacturer. The supplier may also be the constructor of a building, which can be made available to a user either directly by concluding a leasing contract between the constructor and the user (where the builder is a lender-sponsor) or indirectly by selling the property to a sponsor which in turn concludes a leasing contract with the user (where the manufacturer is the manufacturer, the lender is the leasing company, which concludes with the user a loan-lease agreement, the user being a lessee-borrower).

The lender is a leasing company, that is, the legal entity that interposes itself between the supplier and the user, i.e. he buys the goods from the vendor manufacturer to lease them to the user.

The lender may use its own funds to pay the value of the goods purchased from the producer or supplier, or he can obtain these funds by borrowing from a bank. The lender also has the locator, being the owner of the assets that will be leased to the user. According to art. 3 of the Government Ordinance no. 51/1997 the quality of the lender-lender can only be owned by a leasing company. However, we note that it may be a leasing company even if the manufacturer-supplier directly concludes leasing agreements with users, although the legal literature claims the opposite, in the sense that the

producers of the goods cannot be the financier.[1] The user is a natural or legal person who takes over the leased property from the locator-lender (Article 3 of Government Ordinance No. 51/1997, which uses, for the designation of the user, the names of the tenant or beneficiary).

The problem with the case law was to know whether the lease should be cancelled or resolved for lack of cause if the sales contract concluded by the leasing company with the manufacturer or the supplier was resolved for non-compliance of working with what its user (the borrower-borrower) was pursuing or of hidden vice that made improper use for which it was intended. It should be underlined that the resale of the sales contract (concluded between the leasing company and the manufacturer or distributor) for the seller's fault will be given at the request of the buyer (i.e. leasing company - lender-leaser), but at the request of the lessee. This is due to the fact that the user, although not a party to the sale contract, has almost always included in the lease that a clause is that all rights and actions of the lessee (the user) are transferred to the user who undertakes not to resort to an action against the leasing company-lender-leaser), for non-compliance of the work or its hidden vice.

The French Court of Cassation adopted two sets of solutions in that regard, the Chamber considered that the resolution of the sales contract between the manufacturer or the supplier and the leasing company led to the nullity of the leasing contract concluded between the leasing company and the user[2], on the grounds that since the sales contract is terminated, the lease is abolished retroactively as a result of this resolution, being null for lack of cause.

The Civil Chamber, in turn, considered that the rescission of the sale contract would also lead to the rescission of the lease, the rent not having the counterpart[3]. It is noted in the legal literature[4] that this differentiation between the solution of the commercial chamber and that of the civil chamber 1 is formal, the effects of nullity and resolution being the same. It is considered, however, that the solution

1 See D.A. P. Florescu, Monica Rotaru, Mihaela Olteanu, Gabriela Spataru, Adina Dorsecanu, *Leasing Contract*, Juridic Univers, Bucharest, 2013, p. 41.

2 See French Court of Cassation, Chamber of Commerce, decision of 4 February 1980 in "Bull. civ." 1980.4 no. 52.

3 See: French Court of Cassation, Civil Chamber 1, decision of 3 March 1982 in "Recueil Dalloz" 1982.IR.266; French Court of Cassation, Civil Chamber 1, decision of 11 December 1985 in the "Jurisclasseur périodique" 1986.IV.71.

4 See Ch. Larroumet, Civil Droit. Les obligations. Controversy, Volume III, *Economica*, Paris, 2003, p. 491, point 490, footnote 1.

of the Chamber of Commerce is more orthodox due to the fact that, as a result of the retroactive cancellation of the sale contract, the lease is without cause even from the origin, while the resolution sanctions the non-enforcement, imputable to one of the parties, which is not the case, since it is rather an impossibility of execution. However, by way of subsequent decisions, the Chamber of Commerce has made a reversal of the case-law. Indeed, by relying on the fact that, in contravention of the clause of not resorting to an action against the leasing company for non-compliance or hidden vices of the work, imposed against the user, the leasing company transferred to the user his rights and actions against seller, the commercial chamber considered that the obligations the user (the borrower) is not without cause if the sales contract was terminated[5].

It was considered, however, that this solution is not justified if, according to the dominant opinion, a sale followed by a lease is seen in the lease as a result of a unilateral sale promise. Indeed, the transfer of rights and shares of the leasing company against the seller to the user (the borrower) is not sufficient to be characterized as the rent counterparty if the user is deprived of the use of the work and the possibility to buy it at the end of the lease, according to the contract's economy[6]. The user does not achieve its purpose and there is only a white operation. The non-recourse against the leasing company (the borrower) by the user (the borrower) cannot change this situation because the purpose of the lender is not to impose obligations on the leasing company which normally push on such a clause, could not cover the nullity of the contract for lack of cause and consequently prohibit the user (the creditor-lessee) from acting against the leasing company (the borrower) in order to find the cancellation of the contract lease after the resolution of the sale contract. Since the sales contract is resolved and the work is returned to the seller and the price is returned to the buyer, that is, to the leasing company, the rent payment takes place without a counterpart, from which it follows that the cause of the user's obligation (the borrower) because the leasing contract is not economically justified unless the work has been made available to it.

The Mixed Chamber of the French Court of Cassation also argued that the resale of the sale contract would necessarily lead to the termination of the

5 See: French Court of Cassation, Chamber of Commerce, March 15, 1983, in "Bull. civ. "1983.4 no. 103; French Court of Cassation, Chamber of Commerce, decision of 9 January 1990 in "Recueil Dalloz" 1990.IR.46.

6 See Dijon Court of Appeal, judgment of 2 September 1986, in "Jurisclasseur périodique" 1987. II.20865.

lease (credit-rent), unless the contracting parties had arranged the termination themselves[7].

This solution appears to have been accepted in the French case-law[8], but it has been considered, however, that it would have been more logical to have a nullity in this case[9]. In other cases, it was felt that there should be a resolution that is retroactive[10], not one termination, but it was also appreciated that the termination by sanctioning, like the resolution, the non-fulfilment by a part of its obligations, the lease must be terminated when the exploitation of the property became impossible due to the supplier's deed, the cause of the leasing contract consisting of exploitation, both contracts being thus interdependent.[11] The term of termination allows it to be considered that, to the extent that the user (the lessee) has used the work for a certain period of time, it even corresponds to that use and, therefore, must not be returned to the locating lender[12].

The disappearance of the leasing contract implies, of course, that the sales contract is also abolished. If the consumer (the lessee) complains that the seller (the supplier) has not fulfilled the obligations without relying on the resolution of the sale, he will remain bound to the lender-lender (lender-leaser)[13].

7 See the French Court of Cassation, the Mixed Chamber, the decision of 23 November 1990 in the Recueil Dalloz 1991.121.

8 See, for example, the French Court of Cassation, the Chamber of Commerce, the decision of 22 May 1991 in the "Jurisclasseur périodique" 1991.IV.277; French Court of Cassation, Chamber of Commerce, decision of 15 March 1994 in the "Jurisclasseur périodique" 1994.II.22339; French Court of Cassation, Chamber of Commerce, decision of 25 April 2001 in the "Revue de jurisprudence de droit des affaires" 2001, no. 878.

9 See the Rennes Court of Appeal, judgment of 7 July 1992, in the "Jurisclasseur périodique" 1992.IV.1521.

10 See the Court of Appeal in Paris, judgment of 15 September 1994, in the 'Revue de jurisprudence de droit des affaires' 1995, no. 181.

11 See French Court of Cassation, Chamber of Commerce, judgment of 15 February 2000 in the Recueil Dalloz 2000, 364.

12 See French Court of Cassation, Chamber of Commerce, judgment of 6 April 1993, in the "Revue de jurisprudence de droit des affaires" 1993, nr. 420.

13 See the French Court of Cassation, the Chamber of Commerce, the decision of 7 December 1993 in the 'Revue de jurisprudence de droit des affaires' 1994, no. 550...

However, if the sale was not completed to allow the buyer to rent, the situation is different and it is not appropriate to accept the interdependence between the sales contract and the lease[14].

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14 See the French Court of Cassation, Civil Chamber 3, the decision of 30 October 2002, in the "Notarial Repertoire Défrenais" 2003.249 (in this case the resolution of a sale contract that did not involve the termination of the lease agreement with the buyer to rent the previously completed rental).

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