

STATUTORY CANCELLATION OF THE LEASING CONTRACT - CONDITIONS AND EFFECTS

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Abstract

The leasing contract termination by cancellation may have both a conventional (commissoria lex) and a legal nature. The legislature has stipulated in the leasing operations governing rules a number of cases in which the parties are entitled to request the contract cancellation but, these not being limiting, in the contract can also be inserted other clauses, according to the parties' interests, which will result in the contractual relationship termination by cancellation. The contract cancellation will take effect only for the future (ex nunc), so the analysis of the conditions under which the cancellation can be declared and the effects this decision will produce, are of special importance in view of carrying out the leasing operations.

Keywords: *leasing contract, cancellation, sponsor, user.*

The business world's economic activities development and evolution have imposed the development of some techniques and concepts which led to the emergence of new commercial contracts. So we are witnessing a continuous multiplication and diversification of the commercial contracts that the individuals and/or entities conclude between them.

The leasing contract, along with the contractor/construction – assembly contract, franchise and factoring contract, international tourism contract, is part of the international complex contracts group. From the legal realities of the international trade, the leasing proved to be the most important means of financing investments in goods and services. Taken from the western practice and treated with the specific superficiality, the leasing contract still managed as in Romania during 2005-2010, to impose through an expansion worth taken into account, only as ambiguous, poorly substantiated and unclear law to leave room to countless abuses, which led in the coming years to the multiplication – otherwise justified – of the big number of lawsuits pending in courts.

In essence, through a leasing contract, an individual or an entity resorts to a specialized institution for full financing, for the procurement of a movable or immovable asset, afterwards though the payment of some royalties to benefit from his right to use it, with the option that, upon the termination of the leasing contract, subject to the compliance of all the contractual obligations, he will become the owner of the asset. Until the payment of

all the contractual obligations, the sponsor company will remain the owner of the asset.

The leasing contract is a bilateral legal act, for consideration, with patrimonial content, consensual, synallagmatic and commutative, with successive execution. By the Government Ordinance 51/1997, the leasing contract has become a typical contract (named).¹

The cancellation is the most drastic sanction that could arise in the synallagmatic contracts with successive performance, for the culpable noncompliance by one of the parties, with the obligations under the contract. This right rests only on party which has carried out its contractual obligations, subject to the enforcement² cancellation (article 1549 of the Civil Code) and will take effect only in the future (ex nunc), resulting in the contract dissolution from the date of its declaration.

By the legislation standards, (only) to the sponsor is being recognized, by the legislature, through an enumeration that wishes not to be exhaustive, the right to cancel the leasing contract, in the following cases:

a) **If the user refuses to receive the asset at the deadline agreed with the supplier or stipulated in the leasing contract** (article 14 paragraph 1)³.

Of course the sponsor will benefit from this right only if the refusal came from the user is not justified. The user has, therefore, by the arrangement with the supplier or by the terms of the leasing contract, the obligation to receive the asset on a determined date, if the asset meets quantitatively and qualitatively. If they fail to meet this obligation, the

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¹ Dorin Clocotic, Gheorghiu Ghe., Operatiunile de leasing, Publishing House Lumina Lex 2000, page 57.

² Article 1549 - Law to resolution or cancellation: "(1) *If not requiring the contractual obligations enforcement, the creditor is entitled to the contract rescission or, where appropriate, termination, as well as damages, if entitled*".

³ "ARTICLE 14 - (1) *If the tenant / user refuses to receive the asset at the deadline agreed with the supplier and/or in the leasing contract (...), the owner / sponsor has the right to cancel the leasing contract with damages*".

sponsor may, under the law, declare the cancellation of the leasing contract and also seek damages from them according to the common law⁴. The sponsor, however, can opt out of this right and can require the contract execution by the user, forcing him to the reimbursement of the costs incurred with the storage and upkeep of the asset over the period stipulated in the contract⁵.

I believe that the user too should have benefited from the cancellation right with damages if the asset is not delivered in the period agreed upon or does not correspond ethnically or qualitatively. The user thus', even if he does not enter into possession of the asset in the period agreed upon, by the convention concluded with the sponsor, will be required to pay leasing rates for an asset not in his possession. Moreover, according to the ordinance, by the advance payment, which generally is not negligible, he will block an amount of money in the sponsor's account. Of course this would be more difficult to achieve in practice, because the cancellation may be declared in relation to the sponsor, and the damages payment in report to the supplier. Precisely for these reasons the legislator, notwithstanding the principle of contracts' relativity, has provided the user's right of direct action on the supplier (article 12 of the Government Ordinance 51/1997), the sponsor being expressly exonerated from any liability (article 14, paragraph 2 of the Government Ordinance 51/1997);

b) If the user fails to fulfill its leasing rate payment obligation for two consecutive months. (article 15 of the Government Ordinance 51/1997)⁶.

It is possible that, for various reasons, the one that uses the asset (the user), property of the leasing company, during the contract, cannot pay the leasing installments, according to the planned staging determined at the time of signing the contract. In these circumstances, most often the sanction of the leasing contract cancelling occurs, which has an immediate effect the sponsor's right to repossess the asset, and to head against the debtor for the damages' recovery. Only the fulfillment of the pecuniary obligations, to which the user was obliged by the leasing contract, in the amount negotiated and on the set deadlines, will allow him to benefit from the use of the asset. If the user does not respect this obligation, the law allows the sponsor to declare the cancellation of the leasing contract (article 15,

Government Ordinance 51/1997). The declaration of the leasing contract cancellation by the sponsor, for non-payment of the due installments by the user, will oblige the debtor to the return of the asset and the payment of the due installments. The legislature, to defend the interests of the creditor, granted to the leasing contract the enforceable benefit (article 8, Government Ordinance 51/1997).

Therefore, we retain that upon the leasing contract cancellation for non-payment, the parties will have the following duties:

- The user will have to return the asset, naturally because he is not the owner of the leased asset, but only a regulator of the right to use, the asset will have to be returned to its rightful owner;
- The user is required to pay the amounts due until the cancellation date, amounts actually representing the asset's use value and that the user owes to the sponsor until the contract termination, by default the termination of the right to use, by virtue of the leasing contract cancellation. This fact represents a certain, liquid and due claim.

I think that, clearly, the Ordinance text does not refer in any case to the sponsor's right to enforce, after the cancellation statement date, through the enforceability power of the leasing contract, the return of the asset or recovery of the claim, as we commonly find in the leasing companies' practice. The confusion appears, willingly or not, from the broad and erroneous interpretation of the law text, because the ordinance makes strict reference to the amounts owed, until the date of cancellation, which also results in the obligation of the asset's restitution, amounts that were negotiated and inserted in the contract signed by the parties and representing a use the user benefited from until the contract cancellation date. Through a dubious interpretation, in my opinion, the sponsor shall prevail, after the contract cancellation, of the benefit conferred to the leasing contract by article 8 of the Government Ordinance 51/2006, that of writ of execution⁸.

Although in the law we meet countless cases where the courts have declared enforceable cancelled leasing contracts, I believe that in legal terms it is virtually impossible. By cancellation, the creditor waives the benefit conferred by the leasing contract enforceability power, since it practically does not exist anymore, by cancellation of the contract, not producing effects for the future

⁴ Stanciu Carpenaru, *Tratat de Drept Comercial Român*, Publishing House Universul Juridic 2014, page 598.

⁵ Gabriel Tita-Nicolescu, *Leasing*, Publishing House C. H. Beck, Bucharest 2006, page 229.

⁶ ARTICLE 15 - *If the contract provides otherwise, if the tenant / user does not perform the obligation to pay the full the leasing rate for two consecutive months, calculated from the due date specified in the leasing contract, the owner / sponsor has the right to cancel the leasing contract, and the tenant / user is obliged to return the asset and pay all the amounts due, until the return date under the leasing contract.*

⁷ "Article 8. - *The leasing contracts, as well as the real and personal guarantees, set up to guarantee the obligations under the leasing contract, are writs of execution.*"

⁸ "The contract, being canceled, the issue arises whether the debtor still owes to the creditor the due monthly installments until the date of cancellation, as requested. The court considers that no, since a request to that effect by the creditor is equivalent to a contract performance given that the creditor itself chose to abolish it. Therefore, if the creditor has chosen to abolish the Convention, it can only require from the debtor damages, damages that must, of course, be proved." Civil Sentence no. 1332/07 April 2010 pronounced by the Court Vaslui in the archive no. 1610/333/2010.

anymore, from the date on which it was declared⁹. So if the user refuses to voluntarily hand over the asset or to pay the due and unpaid installments accrued until the cancellation date, the sponsor will only have available the common law. The sponsor, however, may waive its right to demand the contract cancellation; he may require the contract performance by the user, also forcing him to pay damages for the late performance of his obligations, over the period stipulated in the contract, taking advantage of the enforcement benefit conferred by the leasing contract law. So if the sponsor will choose to keep the contract, he will benefit from its power of enforcement, the asset will remain in the user's possession and the sponsor will be able to execute according to the title held the entire value of the leasing contract, less the residual value, I consider, because until its payment the user has the option right on the purpose the leasing contract will take¹⁰.

c) **If the user is in a state of statutory reorganization and/or bankruptcy** (article 14 paragraph (1) thesis II)¹¹. So if, during the execution of the leasing contract, the user is in a state of reorganization or bankruptcy, the sponsor has a right of option between declaring the contract cancellation with damages, registering in the list of creditors or demanding the asset from the debtor¹².

If the sponsor will opt for the contract's cancellation, as provided by the Law 85/2014, article 123, paragraph 1¹³, he will have to notify the legal administrator / legal liquidator, in the first 3 months after the initiation, with the intention to terminate the contract. The legal administrator / legal liquidator has the right, within 30 days of receiving the notification, to oppose the leasing contract cancellation, if he decides that the assets covered by the leasing contract are required from the debtor to continue and recover his activity. If he does not send a reply within the period stipulated in the law, the contract is considered terminated, its execution unable to be requested anymore. According to the insolvency regulatory rules, in the event that the

leasing contract will be cancelled at the donor's will, he has the possibility to choose between:

- The transfer of ownership to the user, acquiring a legal mortgage on that asset of equal rank with the leasing operation. It will also be registered in the list of creditors with the invoiced amounts and unpaid by the debtor (including their accessories), and with the remaining amount to be paid under the contract, but that will not exceed the market value of the asset determined by an independent assessor.
- The recovery of asset and the registration in the list of creditors with the value of the due invoiced rates value and unpaid by the debtor at the opening of the procedure (including their accessories), and with the remaining amounts to be collected from the leasing contract, from which the market value of the recovered asset will be decreased. The asset value will be determined by an independent assessor.

The new law of insolvency entitles the legal administrator / legal liquidator to unilaterally terminate any leasing contract, if this is in the interest of maximizing the debtor's estate (Law 85/2014, article 123, paragraph 12) or to request the sponsor to maintain the contract, undertaking to specify quarterly in the activity reports if the debtor has the funds necessary to cover the claims arising from the contract execution.

Thus, I conclude that, although by the provisions of the ordinance, only the sponsor has the right to cancel the leasing contract, in conjunction with the provisions of the Civil Code (article 1549) and with the provisions of the Law on insolvency prevention procedures and on insolvency procedures, remains to be appreciated the legislature intention that, by related laws, restores the contract equilibrium. Thus', we retain that, by opting for cancellation, the creditor practically abolishes the enforcement that is the leasing contract, having only available the common law.

Because of the unusual and highly complex character of the leasing contract, and the lack of a clear legislation in this field, the leasing characters are subject to numerous personal interpretations,

⁹ The same solution has been retained in the specialized legal literature. Thus, in the work of the industrial, commercial and real estate leasing developed in the Enterprises Law Centre of the University of Lausanne is considered as in case of leasing rates non-payments by the user, the sponsor can choose one of the following options: 1) to request the contract enforcement, demanding payment of the unpaid lease leasing rates; 2) to maintain the contract in force, giving up further claims and demanding damages; in this case he resumes the asset and puts it on sale, requesting from the user the unpaid rates value, with penalties plus the not due rates, from which decreases the net value resulted from the sale of the asset; 3) the cancellation of the contract with damages. Gabriel Tita-Niculescu - Leasing, Publishing House C. H. Beck, 2006, page 208.

¹⁰ Tomescu Raluca, Conditii și efecte ale pactului comisoriu in contractul de leasing, Perspectives of Business Law Journal, Volume 4, Issue 1, 2015.

¹¹ Article 14. - (1) if the tenant / user (...) is in a state of reorganization and/or bankruptcy, the owner / sponsor has the right to cancel the leasing contract with damages.

¹² Piperea Gheorghe, Drept Comercial - Volume II, Publishing House C. H. Beck, Bucharest 2009, page 115.

¹³ Article 123 - "The legal administrator / legal liquidator must respond, within 30 days of receipt, to the contractor notification, formulated in the first 3 months after the initiation, by which he is required to terminate the contract; in the absence of such a response, the legal administrator / legal liquidator may no longer demand the contract execution, being considered terminated. The contract is considered terminated:

a) on the expiration of a period of 30 days from the contractual request receipt on the contract termination, if the legal administrator / legal liquidator does not respond;

b) on the date of the termination notification by the legal administrator / legal liquidator".

thus generating a large number of litigations. It is quasi known, or if not, can be verified with a minimum diligence, that the most common disputes arising in the legal practice, in the field of leasing, are generated by the leasing contract cancellation for non-payments. So I considered it appropriate to stop on this issue so controversial lately with the purpose of consolidating the leasing concept and developing

a theoretical and methodological knowledge and understanding frame of it.

Perhaps because of the thorough ignorance of the international private law legislation, and also perhaps because of the support some leasing companies enjoyed before the Romanian legislature, I believe that currently the entire Romanian leasing legislation should be reviewed.

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