

The Definition of the Contracting Part in “Leasing” Contract according to the Specific Law

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Abstract

The definition of the contracting parts in the financial leasing contract, despite the treatment in the Civil Code of the Republic of Albania, is appeared with another specter in a specific Law issued by the legislator for this contract. Taking into the account the importance of the complex nature of such contract, the Albanian legislator has chosen to regulate in a specific law the nature, the specifics and generally all the essential and important elements of this contract.

Keywords: Financial Leasing, juridical relation, financial leasing contract, tenant, lesser, furnisher, juridical facts, sale contract, juridical denominations.

1. Introduction

In Article 1 of this law¹, there are given the definitions over the terms' meanings, that will be treated in the law.

Like in the Civil Code, in this law is given the definition of the financial leasing contract. It is interesting the fact that in the specific law, differently from the Civil Code, isn't used at any case the naming “leasing” for such contract. While in the Civil Code, this naming is used not only in the direct disposition related to this contract, article 849, but also in the article 631² where it is treated in the code the meaning of producer. It's worth strengthening at the beginning, that the special law nr. 9396 date 12.05.2005 “For the financial leasing” presents a dual treatment of the juridical act named “Financial leasing Contract”.

From one part, the law treats the concept of “financial leasing” and from the other part it treats the concept of the “financial leasing contract”.

In the theoretical meaning, the law shouldn't have distinguished these two labels, because these are labels that corresponds to the same juridical act, the “leasing” contract, which is treated in the article 849 of the Civil Code.

It is very important to highlight, that just in that aspect, appear the uncertainty and contrarieties in the law.

In the article 1 entitled “Definitions” there are given the definitions for the law concepts' meanings. At point 9 and 11 of this article, are treated in specific manner the definitions for the two above mentioned notions.

2. Research Methodology

This is a theoretical research, based on secondary data. In order to comprehend the issue in hand, many books and scientific articles were studied. Besides that, official statistics, documents, and local newspapers concerning to the issue were analyzed and evaluated.

3. The definition of the contracting part in “leasing” contract according to the specific law

In order to have a correct and clear analytic-semantic treatment of the definition done by the law, we will initially treating the “financial leasing” definition and later the definition of “financial leasing contract”.

The law has used the below definition for the concept of the “financial leasing”:

“11. “The financial leasing” is the juridical relationship, where the tenant purchases by the furnisher one item chosen by him next to the furnisher and the furnisher gives it to the tenant to use it for a defined time-schedule, against a specified price in the contract and after the finish of the contract, the tenant can purchase the item, can continue to keep it with leasing for another time-schedule or to return it to the lessor”.

From the above statement, there are noticed some contradictory and non-professional attitudes for some reasons :

1-From one part, the financial leasing is presented as a single and unique juridical relation (there is used in the prominent form the statement " is the juridical relation") and from another part following the statement is shown the performance of two juridical actions, a- the purchase of the item by the lessor from a third person (the furnisher), b- the lending of the item by the lessor to the tenant with the aim to be used by him (it is used the verb " lend")

2-it gives the mistaken perception that the item's selection by the tenant, positions in juridical relation the later with the furnisher , by alluding for a "three parts" juridical relation between : the lessor- the tenant , the lessor- the furnisher , the tenant-the furnisher".

There is questioned:

The juridical relation which is stated in the point 11 of article 1 of the law nr. 9396 date 12.05.2005, is a juridical relation with property character or a juridical relation with personal non-property character?

The answer is already resolved by the doctrine with its consolidated attitudes in such aspect , by classifying this relation to the property relations' group.

The juridical relation is before all , a fact relation , which upon its regulation by the objective rights' norms , is changed into a juridical relation. The juridical relations don't produce the juridical facts, on the contrary. It's the juridical fact the one which makes possible the creation, the change or the finish of the juridical relations.

The juridical facts are divided into the administrative acts and court acts. While the people' or collectives' acts are divided into legal and illegal actions. There are exactly the juridical acts which belong to the juridical facts' type and consist the biggest groups of the later. The juridical acts regulate the people activity according to the functioning of their needs' fulfillment .

In the Civil Code there is defined the meaning of the juridical relation of obligation, by defying it as a relationship between the creditor and the debtor.³ In cases of the mutual contracts, the parts appear as creditors and debtors to each-other.⁴

The above attitude is supported also in the analyses' case of the point 1 of Article 3 of the specific said law, which ranks who are the parts in the financial leasing⁵. It is necessary in this moment to clarify that the legislator hasn't used the statement " parts in the financial leasing contract ", but has used the statement "parts in the financial leasing ", which as it was treated above, has been seen by the legislator as a wider process than the financial leasing contract .

The above theoretical-meaning treatment is considered as necessary in this part, for a better understanding of the essence of point 11 article 1 of the said law.

4. Juridical relation of the financial leasing

Analyzing the above mentioned point 11, it is noticed that the legislator has confounded the juridical relation of the financial leasing (which expressively qualifies as juridical relation) with two juridical facts (which are specifically juridical acts) , with the purchase (selling contract) and renting (passing of the possession's right through leasing) .

This moment, the mistaken statement in the point 11 of article 1, consists the genesis of uncertainties and contradictory and divergent attitudes in the law, in connection with the subjects of the financial leasing contract , but also in the definition of the rights and obligations between them. The later will be wider treated in the respective chapter, that speaks about the subject of leasing contract.

While in point 9 of article 1 of the said law, the legislator stays correct to the general meaning aspect of the financial leasing contract , treated in article 849 of the Civil Code.

According to article 1 point 9 of the specific law, the financial leasing contract , which is equaled with the statement "leasing contract" is defined in this manner : "Leasing contract" is the financial leasing contract that is correlated between the lessor and the tenant for the item's usage for a schedule, which is the same as the biggest part of the item's consume schedule, against the periodic payments , the sum of them is the same as the real market value of the item , but it achieves to cover the lessor's investment and to ensure a profit over the investment".

Comparing the statements of point 9 and 11 of article 1 , law nr. 9396 date 12.05.2005, it's noticed that the legislator has aimed that all the final act of financial leasing contract between the lessor and the tenant, including the sale contract between the lessor and the furnisher, to entitle with a joint name " financial contract".

The name " financial contract" is the name that should be used for the concrete juridical act define in article 849 of Civil Code, that is for the financial leasing contract , and it shouldn't be expanded beyond the meaning limit , by including also other juridical acts such as the sale contract between the lessor and the furnisher. The latter two parts, can't be

entitled as "lessor and furnisher" in the sale contract, because the contract between them is a sale one, and its subjects have well-defined juridical denominations. The naming "lessor" and "furnisher" is used for these subjects to clarify that which of the leasing contract's parts is entering into another juridical act, the sale contract.

Exactly, this joint denomination with the term "financial leasing" of two separate juridical acts, has brought confusion in the law for the subjects' definition in the financial leasing contract, even some unclear qualifications of leasing contracts' types.

5. The lessor in leasing

As it is noticed by the statement "leasing contract" and in the contract's definition in the specific law nr.9396 date 12.05.2005, there are two subjects, part of this contract, the lessor and the tenant.

Differently from the Code Civil treatment, which doesn't deal with the subjects' definition, but with their characteristics' definitions by "wearing" them with the "habilitation" of rights and obligations, the specific law makes a special definition for each of these subjects, as it makes a definition for the name "furnisher".

Regarding the contracting part, the said law describes that the "Lessor" is the juridical person, who has and keeps the property's right over the item and gives to the tenant the right to keep and use the item during the leasing contract, according to the contract's conditions ⁶.

From the definitions in the law nr. 9396 date 12.05.2005, there are evident these important aspects:

The specific law doesn't present in a fully manner the nature and the general characteristics of these parts in the financial leasing contract. By defining their definitions, the law is confined with the "wearing" of such subjects with a relatively small part of their rights and obligations. It's naturally, that can't be treated all rights and obligations in one definition, but it's necessary their summary recording to have an initially clear picture about these subjects. Furthermore, in specific cases, in situations connected to legal regulations' conflicts, the doctrine and the jurisprudence is often referring to the definition of an institution.

In the Albanian contracting right, like the European ones, the major principle is that the civil rights shouldn't be limited for a physical person, despite the exceptions foreseen by law ⁷. Also is well-define the moment where the physical person wins the full right to act. ⁸.

This principle consists the rule related to the conditions that have to be fulfilled to become part in a contract.

Based on the specific law, and differently from the Civil Code, the lessor, represents a narrow specter of the subjects' types, who is given the right to become such a part in a contract.

In article 849 of Civil Code, doesn't dismiss a special type of person, to have the quality of the lessor in the financial leasing contract. While the specific law clearly defines that only the juridical persons can carry such quality (as a lessor), thus dismissing any case of the physical persons, mercantile physical person ⁹ according to the law "For the merchants and mercantile associations" nr. 9901 date 14.04.2008, and also the physical persons according to the Civil Code.

It's necessary to clarify in this moment, if there is any contradiction between the legal regulation of the specific law for the person's type that may be a contracting part as a lessor according to the definitions of articles 1, 79, 659 of the Civil Code.

According to the Civil Code, the Civil rights of the physical person can't be limited ¹⁰, despite the exceptions foreseen by law.

Furthermore, in law nr.9662 date 18.12.2006 "For the banks in the Republic of Albania", in article 54 point 2, character "c", is foreseen that the financial leasing is considered a financial action¹¹. In such case and based on the law, this activity can't be used without taking the permit by the bank of Albania.

Comparing to the Code, the specific law nr.9396 date 12.05.2005 by defying the lessor's definition, clearly treats the fact that this subject is the owner of the item in three moments:

Is the future owner of the item in the moment of financial leasing's commitment.

Is the owner of the item in the moment of handling the item to the lessor;

Is the owner of the item during the whole time of its, until the moment of passing the ownership's right to the lessor, if such a right is foreseen in the leasing contract.

Regarding the item's owner according to the above framework, the lessor is treated by the specific law as the person who transmits to the tenant the right of "usus" and "fructus", the right of enjoyment and possession¹². But this treatment (definition) is deficient, because the lessor appears in the leasing contract as a person who transmits to the tenant also the right of "abusus", i.e. the property over the item, is such a transaction is foreseen in the leasing contract.

In such case, at the moment of the ownership's transition, the tenants is totally appeared with the features of the seller in a sale contract.

Regarding the type of the juridical person, who according to the specific law, may appear with the quality of the lessor, this law doesn't directly distinguish between the types of juridical persons, public or private, profit or non-profit, but from the definition of the statement "leasing contract", derives that the lessor's activity in leasing, is a profit activity, thus there are dismissed the non-profit juridical persons.

6. The tenant in leasing

Article 4 point 22 law nr. 9662 date 18.12.2006 "For the banks in the Republic of Albania" foresees that "the Client" is the person who uses the bank and financial services.

The systematic interpretation of this disposal in relation with the forecasts of article 849 of Civil Code and article 1 of the law nr. 9396 date 12.05.2005, strengthens the idea that the financial leasing contract has only two parts, the person which lends the item, the lessor, and the person who rents the item in leasing, the tenant. The latter, in essence is the user of the financial service of the financial leasing, and being such, is named "the client", based on the law nr. 9662 date 18.12.2006.

Regarding the definition of the tenant as part in the leasing contract, it's observed that the said law doesn't rule out the person's type that may bear this position, unlike the lessor, where there were allowed only the juridical persons, even those who fulfill the criteria to be licensed by the Bank of Republic of Albania.

In point 13 of article 1 of the said law, there's given the definition for this contracting part, by defying that the "tenant" is the physical or the juridical person who may win the property's right after having used the item during the contract's schedule and after has paid all the rent payment and the final price of sale.

As it's noticed by the above statement, as a distinguished characteristic for this contracting part according to this law, isn't been chosen the possession with the aim to use the item, but one of the tenant's alternative rights at the end of the contract, the right to win the item's property at the end of the contract's period.

Naturally, in this moment, there may arise the question: the financial leasing contract is categorized as an administration or availability contract.

The treatment of this topic is important for the aim of this chapter, the treatment of the contracting parts and their specifics in the leasing contract.

Based on the fact if the part have foreseen or not the property's transit at the end of the usage, the financial leasing contract can be naturally defined in one of the above definition.

The tenant in such contract may be a physical or juridical person. In the case of the physical person, speaking of the fulfillment of the conditions, it's necessary to clarify that like in other contracts, typical or non-typical, the physical tenant in such contract, has to fulfill two conditions, to have the juridical abilities and full abilities to act, in order to commit into the contract. At the last case, it's referring when there's a contract's commitment in person, because the case of the physical person with limited or lack of ability to act, has its own specifics.

The question rightly may arise: Do the adult persons have the right to commit into a financial leasing contract, if they have limited abilities to act, or the court has removed this ability by a verdict?

In a simple aspect, it seems that the custody for such persons, resolves the situation, by thinking that the custody person may act upon the person as the legal representative. But the problem is more complicated.

Despite the caretaker's decision-making aspect, is considered necessary by the legislator to pass through another "filter", such as the approval of such acts by the Court.

The law foresees¹⁴ that the acts which overpass the borders of a simple administration of each property of the disabled persons, must be done only with the authorization of the District court. While the said disposition is directly connected with the minor persons, it applies the same disposition also for the disabled persons, whose have been removed or limited the ability to act by the court¹⁵.

More concretely, when treating the case of the tenant in the leasing contract, it is necessary to explain that through this contract is fulfilled the tenant's interests for specific items or immobile properties, mainly buildings according to the tenant's requests. In this context, generally, the total rent value, that is the general sum that will be paid by the tenant, has relatively sensitive values, regarding the economic resources of the tenant. The inability to invest immediately the total sum, obliges the tenant to deal in such contracts.

Consequently, it's understandable that in such conditions when the sum is relatively high, it's obligatory to have the court's approval for the usage of this values in leasing contract.

An important aspect to be treated when we speak for the tenant as a physical person, is its quality or not, as a mercantile physical person.

In cases when there's a non-mercantile physical person, according to the meaning of such institution given by the Civil Code, the financial leasing contract isn't considered as a mercantile contract¹⁶.

The law doesn't clearly define when the leasing contract should be evaluated as "mercantile", but considering the interpretation "*ad contrario*" of Article 5 of the specific law for the leasing contract, it derives the conclusion that the primary necessary condition for a tenant to obtain a mercantile contract, is to be a physical person registered in the National Licensing Center as a "merchant" according to the meaning in the respective law.¹⁷

But the fulfillment of only this condition, isn't enough to qualify this contract as a "mercantile" one, because the contract should be prepared according to the business activity of the tenant, not only for the fulfillment of his personal and family needs, which are not directly involved with the trade activity.

7. Furnisher in leasing

We have concluded above that the financial leasing contract has two contracting parts, the tenant and the lessor. But the Civil Code and the specific law for the leasing contract, treat another third subject in such contracts.

In the dispositions of the financial leasing, the Civil Code is only touching the aspect of the third subject, by using the name "furnisher". While in article 631 of the Code, there's the naming "producer" for the same subject, despite the wider treatment of the cases in this article.

The specific law it foresees the definition ²⁰"furnisher". The law defines that the "furnisher" is the physical or juridical person, who based on the furnishing contract, sells to the lessor the item that is lend to the tenant²¹.

From the above definition, but also from other law's dispositions, its results that the furnisher isn't part in the leasing contract. The latter, is the pre-condition for the existence of the sale or furnishing contract between the lessor and the furnisher or producer.

This attitude is strengthened by the statement of the furnishing contract between the furnisher and the lessor. According to this statement, a "furnishing contract" is the contract between the furnisher with the lessor for the item chosen by the tenant, according to the tenant's definitions and his approved conditions, whereby the lessor wins the property right over this item".

It's obvious by the above definition, that the furnishing contract between the furnisher and the lessor, is an authentic contract of possession, because it aims the transit of property from the furnisher to the lessor. Only after this property's transfer, the lessor will afterwards have the right to transit the item which was the object of the furnishing contract to the tenant's ownership.

The same object for both of contracts, that is the same item object of contract, is the strongest connection between the leasing and furnishing contract in question.

Regarding the issue of being part in the leasing contract of the furnisher, the Civil Code, despite the superficial treatment of this subject, doesn't present dark points or contradictions in the conceptual treatment of this subject.

This aspect appears differently when we speak for the specific law nr. 9396 date 12.05.2005 "for the financial leasing".

Although there are given definitions as above for the term "furnisher" or "furnishing contract", during the law treatment, often appear contradictive attitudes for the place of this subject in the leasing contract.

Primary, such a contradictive attitude appears in the ranking of the part, done by the law. Based on this law, the parts in the financial leasing are the lessor, the tenant and the furnisher²².

We have to highlight the fact that although the law ranks as parts the subjects: the lessor, the tenant and the furnisher²², it doesn't use the statement "in the financial leasing contract", but uses "in the financial leasing". At the first sight, it seems that it doesn't mean the financial leasing contract, but after a careful insight, in the systematic interpretation of the disposition, we can say, that it means the total of the juridical actions related to the financial leasing.

8. Conclusions

After this reasoning, there's the conclusion that there wouldn't be any furnishing contract, without the need of the financial leasing contract.

The above systematic interpretation is supported by the other points of this article. Thus, in point 5 of article 3 of this law, it's defined that the furnisher is the part who has under his property, produces or builds the item, according to the tenant's request and afterwards he sells it to the lessor, against the payment of item's price by the lessor.

In the following dispositions of the specific law, it appears that even in the cases when it's spoken for the rights and obligations of the contracting parts, it creates the shadow of the doubt that the furnisher is a contracting part in the leasing contract. So, in the case of article 22 of the said law, it's created the idea that the furnisher being a person obliged before the tenant²³, it takes the position of the part in the leasing contract, even of the part which is responding in solidarity towards the tenant .

But despite the law's statements, which I think that in some cases are irregular concerning the legislative technique, the general essence of the law keeps the attitude that there are two contracting parts in the financial leasing contract, the lessor and the tenant.

References

- ¹ Law nr. 9396 date 12.05.2005 changed with the Law nr. 9823 date 29.10.2007 and the law nr. 9966 date 24.07.2008.
- ² Article 631 paragraph 3, foresees : "Without avoiding the producer's responsibilities , is named " producer" each person which imports a product with the aim to sell it, to rent, to lease or another delivery form, in the framework of his mercantile activity. In such case, his responsibility is the same with the producer's ones".
- ³ Article 419 of the Civil Code foresees : "The obligation is a juridical relation where one person (the debtor) is obliged to give something , to do or not to do a certain action for the benefit to another person (the lender) , who has also the right to request to be given something , or to be done or not the action.
- ⁴ Ardian Nuni "The Civil Right" General Part, Part I – publication 2009 f. 78.
- ⁵ Article 3 point 1 foresees: "The Parts in the financial leasing are the lessor, the tenant and the furnisher."
- ⁶ Article 1 point 12 law nr. 9396 date 12.05.2005.
- ⁷ Article 4 first paragraph of the Civil Code .
- ⁸ Article 6 first paragraph of the Civil Code .
- ⁹ Article 2 point e law nr. 9901 date 14.04.2008 foresees: "Based on the meaning of the Civil Code, the Merchant is a physical person, which uses an independently economic activity , that requires a common mercantile organization".
- ¹⁰ Article 4 of the Civil Code : "The Civil right can't be limited to the physical person , besides the exceptions foreseen in the law " .
- ¹¹ Article 54 point 2 law nr. 9662 date 18.12.2006 foresees : "2. There are considered as financial activities :a) all loaning forms , including also the consummator loan b) factoring and financing of mercantile transactions. c) financial leasing; c) all the payment services and money transfer including credit cards, debit cards, payment cards. d) offering of guarantees and commitments dh) trade for its account or for clients' account, even in a value exchange , in a self-organized market, or as below :
- ¹² Point 12 Article 1 law nr. 9396 date 12.05.2005: "12. "A lessor " is the juridical person , who has and keeps the property right over the item, and gives to the tenant the right to keep and to use the item during the leasing contract's schedule , according to the contract's conditions".
- The exception done for the physical person in law nr. 9396 date 12.05.2005 "For the financial leasing" is an allowed exception by article 4 of the Civil Code , and consequently there aren't observed contradictions between the code and the specific law in such topic.
- ¹³ Article 43/1 law nr. 9396 date 12.05.2005: "Financial leasing activity and all the subjects that have this activity, are licensed and supervised by the Bank of Republic of Albania , according to the law's disposals , of the law "For the banks in the Republic of Albania" and the following sub-acts issued for this purpose. This dismissal is reinforced also by the subject of the following disposals of the specific law nr. 9396 date 12.05.2005, where it's foreseen the subject's licensing for this activity¹³.
- ¹⁴ Article 234 of the Family Code .
- ¹⁵ Article 308 of the Family Code foresees : "The care dispositions for the minors are valid also for the persons who have been restrained or removed the ability to act, despite when there's a different forecast in this Code " .
- ¹⁶ Article 5 of the Law nr. 9396 date 12.05.2005: "In cases when there's a physical person as a tenant , who isn't registered for the mercantile activity, the leasing contract is evaluated as a non-mercantile one and is subject of the general rules of the contracts.
- ¹⁷ Law "For the merchants and mercantile associations " nr.9901 date 14.04.2008.
- ¹⁸ Article 849 of the Civil Code , fourth paragraph – "According to the agreements, there may be foreseen that the tenant, before requesting his rights by the lessor, should request his rights to the one who gave him the item (furnisher).
- ¹⁹ In Article 631 of the Civil Code , fourth paragraph, it's foreseen : "Without avoiding the producer's responsibilities, there's named as a producer, every person which imports a product with the purpose of sale, renting, leasing or other delivery form in the context of his business activity". In such case, his responsibility is the same with the producer's ones".
- ²⁰ Law nr. 9396 date 12.05.2005.
- ²¹ Article 1 point 6 of the Law nr. 9396 date 12.05.2005.
- ²² Article 3 point 1 of the Law nr. 9396 date 12.05.2005.
- ²³ Article 22 of the Law. 9396 date 12.05.2005 foresees : "When the furnisher is selected by the lessor or when the lessor has intervene in the selection process of the item or the furnisher, and when the item isn't been handled to the tenant according to the leasing contract, or there are grave penallies of the contract, the lessor and the furnisher are both responsible in solidary or individually against the tenant."