Aspects regarding the Assignment of Lease Contracts

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Abstract: The assignment of the lease contract has been acknowledged and accepted by legal practice prior to the provisioning of the contract assignment, as a distinctive legal operation, autonomous, that found a legal provisioning within the content of articles 1315-1320 of the new Civil Code. Improperly called novation, the assigning of the lease contract has known a vast utilization due to the practical advantages it presents for all parties involved (lessor, lessee and assignee). The present paper introduces, within general lines, important aspects regarding the legal operation of the lease contract assignment, marking the advantages of parties when appealing to this legal mechanism.

Keywords: lease agreement; assignment; novation; assignee; assignor.

Introductive notions regarding the Lease Contract

The lease contract has a special provisioning, the standard law in this field being G.O. nr. 51/1997 with ulterior modifications, but this type of contract is also somewhat provisioned within the current Civil Code, provisions that indicate especially towards the effects of the annulment of the lease contract (as is article 1757 3rd paragraph).

The definition of the lease contract is offered by the 1st article of the G.O. no. 51/1997, presenting it by the legal operation “through which a party, called a lessor/financier, transmits, for a determined period of time, the right of usage of an asset, which it owns, to another party, called lessee/user, at the latter’s request, for a periodic fee, called a lease rate, and at the end of the lease period, the lessor/financer is compelled to respect a right of choice of the lessee/user, right that is limited to three possibilities: to buy the asset, to prolong the contract with no change brought upon the nature of the lease and without ending the contractual reports”.

From the analysis of the above, we conclude that:

a. The object of the lease, namely what is transmitted through the lease, is a usage right of an asset, who’s owner remains the lessor or the financier;

b. The contract resembles a locative contract, by the fact that both impose the lessor the obligation to ensure the usage of the asset, in return for a periodic amount of money. This amount of money is called rent in the case of the locative contract and “lease rate” in the case of the lease contract;

c. One element of specificity is represented by the obligation of the lessor to respect the right of choice of the lessee/user, right that is limited to three possibilities: to buy the asset, to prolong the lease contract, with no change to the nature of the lease or disposition to end the contractual reports. This choice right of the lessee does not subsist in the case of a locative contract, being specific to the lease contract;

Article 1, paragraph 1, 1st index, introduced by article I, 2nd pt., of the Law no. 287/2006, broadens the applicability sphere of the G.O. presented above to the situation of a “sublease” - sublease agreement - the situation in which the lessee/user of an asset, that is part of a lease contract, perfects with another lessee/user, called final lessee/user, a lease contract, which comprises the same asset.

In the above mentioned situation, the legal provisioning imposes that at the perfection of the lease contract with the final lessee/user to have already had a written agreement from the initial lessor/financier and also the lessee/user should comply with all legal requirements of a lease company.

In that case, the above legal provision, states that should the initial contract of the original lessee/user be terminated, for any given reason, it will lead to the legal termination of the lease contract perfected by the latter with the final lessee/user.

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1. Assignment of the Lease Contract as seen by legal practice before the new Civil Code

Previous to the new Romanian Civil Code, thus before 1st of October 2011, the assignment of any type of contract had not been expressly provisioned, as the national law did not recognize an assignment of debt, but only an assignment of claim.

Legal practice, confronted with actual situation in which certain types of contracts would transform, both in what regards the active and the passive side, with changes brought to the contractual partners, has known such operations, although the name chosen was not the most adequate.

Thus, the assignment of a lease contract has been interpreted by legal practice, previous to 2011, as being a novation through change of debtor.

Yet, obviously, choosing this type of translation for contractual obligations, presents several disadvantages. The most important of them being that the novation supposes a remittal of the initial valid obligation, and the birth of a new one, to replace the old, the difference between the two being given by the replacement of one of the contractual parties, thus the new debtor should replace the initial debtor. Once the old obligation depleted, along it will cease to exist any potestative rights or other accessories of the claim, having thus many practical disadvantages.

Altogether, appealing to the institution of novation to recognize the operation of replacement of one of the initial contracting parties is ineffective, from a different point of view, also.

By the end, novation through change of debtor supposes a modification in what regards the debtor, but only within the context of the passive side, of the obligations, that are transformed, depleted and “reborn”. But, following such a complex operation, some of the accessory rights born with it can disappear during the execution of the contract, through this *game* of cancelation of the old obligation and replacement of the latter with a new one.

Moreover, legal practice confronted a major problem, appeared in the context of such operations, in what regards the proof of intent to novation, without which novation may not be admitted.

The Romanian High Court of Cassation and Justice decided that, if the lease contracts perfected between the lessor and lessee have been annulled as established by contractual clauses, the ulterior acquittal of the plaintiff of residual rates for the initial lessee and acceptance of those payments by the financer cannot lead to the conclusion that a novation through change of debtor had occurred, not being thusly the provisions of article 1131 of the Civil Code. Thus, according to these legal provisions, the intent to novation must result expressly from the parties convention, to state in a clear manner the will of the original creditor to liberate the initial debtor, requirement not found within the tried cause, which presents a lack of *animus novandi* by the part of the plaintiff [1].

The assignment of the lease contract has known a vast applicability due to the practical advantages that benefitted all involved parties.

The option to appeal to this operation would intervene at the moment when the lessee/user can no longer cover the lease payments, or the asset that has been leased is no longer of use either it wishes to replace the later with a new one.

Appealing to the assignment, the lessee/user, as the assignor, having completed all obligations towards the lessor, obligations born before the assignment, will be set free of any obligation from that moment on, leaving in an efficient manner the contractual report.

Also, the lessee – assignor will have the possibility to negotiate with the assignee so the price of the assignment should include the lease payments, or part of those, already paid as an execution of the lease contract, based on the usage of the car, the mileage, technical condition etc.

The assignee might also have an advantage of becoming a party within the lease contract, generally for the purpose of obtaining an asset at a much smaller value then by perfecting a contract that at a certain point would have transferred the property. That is as the assignor already paid an important part of the lease fees, the assignee thus obtaining a benefit by entering the contract, with all rights and benefits that spring from it.

The assigned, here the lessor/financer is mostly advantaged by the perfection of an assignment of lease contract then by any other available option he might have if the lessee could no longer pay the lease fees, for various reasons.

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First of them would be the fact that for the assigned, the contract would continue with no modifications, the only change being that regarding the contractual partner, namely the lessee, with no change in the object of the contract or its passive and active sides.

Also, as a rule, lease companies also receive a special tax, introduced under a contractual clause, usually as high as 2% of the value of remaining rates, the so called novation tax.

A somewhat provision of the lease contract assignment is to be found, previous to the new Civil Code, within the Methodological norms of appliance of article 129 of the Fiscal Code, regulated through G.D. 44/2004, pct. 7.3 - “If in the course of execution of a financial lease contract, an assignment should intervene among the users with the agreement of the lessor/financer or an assignment of the financial lease contract should change the lessor/financer, the operation does not constitute a delivery of assets, being considered that the party which would co-contract within the leasing contract will continue in the place of the assigned”.

Although this provisioning is effective within fiscal obligation matters, we observe that the effect of an assignment of a lease contract is only produces if an agreement of the financer exists, transformed in an assigned party, creating a substitution of the users, when the assignee would replace the assignor (initial user), meaning that the latter “continues the assigned party”.

The provisioning is important as it recognizes the substitutive effect regarding the parties of a lease contract, fact of the essence within the assignment – the translation of the contract, and not its annulment followed by the perfection of an identical one, as the case would be if the legal operation should be the novation.

2. The assignment of the Lease Contract following the new Civil Code

The lease contract is not expressly regulated by the new Civil Code, yet, several articles, regarding certain aspects, refer to it (article 1757 Civil Code).

For the above reason, the base law remains G.O. no. 51/2997 of the 28th of August 1997, updated, regarding lease operations and lease companies, yet in the case of the assignment of a lease contract, general provisions regarding assignments will be applied, as provisioned by articles 1315-1320 of the Civil Code.

Also provisions of art. 1, 1st paragraph, 1 ind. of G.O. 51/1997 updated, will be applied, since it applies to situations when the lessee/user would perfect a lease contract (sub-leasing), which regards the asset in use, with another party that will become a final user, being yet a benchmark into a judicial applicability of the rules of lease assignment, as the principle cession est maius, sublocatio est minus is still valid.

2.1. Stipulations regarding the assignment of the lease contract

a. The first requisite that must be fulfilled is the assembly of the tripartite according of will (assignor, assignee and assigned), parties that must offer a free and uncorrupted agreement to the assignment, within general legal requirements that are valid at the perfection of any legal document. The parties of a lease assignment are: the assignor (the party that assigns its contractual position), role played in this legal operation by the lessee/user, the assignee (the party that enters the contract, which would replace the assignor, occupying the role of user), and the assigned party, being the lease company, the lessor. The agreement of the assigned party is an essential element which results not only from the provisions of article 1315 of the Civil Code, but also from the interpretation of art. 1, 1st paragraph, 1 ind. of G.O. 51/1997 updated, which even if it regards the problem of subletting within a lease contract, states requirements that are applicable to the assignment also, in virtue of the principle cession est maius, sublocatio est minus. In virtue of art. 1, 1st paragraph, 1 ind. of G.O. 51/1997 updated, “the lease contract, perfected with the final lessee/user will be put through only with the previous written agreement of the initial lessor/financer and the fulfillment by the lessee/user of all requirements provisioned by lease companies”. The written form, we appreciate, will represent a requirement also in what regards the assignment of the lease, mainly because it is required even in a lower ranked operation – the sublease agreement – but also because in the case of the lease contract, a written form is imposed by article 7 of G.O. 51/1997, and foremost, article 1316 of the Civil Code requires a symmetry of forms in what regards perfection of a transmitted contract, perfection of an assignment contract and the form that the accept of the assigned party should wear.
b. The object of the assignment is represented by the entire contractual report born following the perfection of the lease contract, or, in other words “a unitary complex of active and passive legal situations that spring from the contract, including subjective legal situations that belong to the quality of party, as would be the potestative rights [2]. The elements of the lease contract, maintained after the assignment of contract are expressly provisioned by art. 6 of G.O. 51/1997 updated: a. the clause regarding the definition of the lease contract as operational or financial; b. the name of the asset which is stated as the object of the lease contract and its characteristics; c. the value of lease rates and the date at which they are due; d. the usage period of the asset in a lease system; e. the total value of the lease contract.

Should the lease be a financial one, the contract will comprise, obligatorily the entry value of the asset, the residual value of the asset as convened by the parties, if applicable, the value of the earnest, the lease rate. Aside these compulsory clauses, the legal provisions allow the parties to insert other convened contractual clauses.

Therefore, an assignment of the contract does not allow a modification within the contractual elements, as the contract will remain the same, yet it will be continued by the assignee party, the new lessee. It will also assume the active side, consisting in the right of usage of the asset and the right of final choice, as any other rights born out of the contract, with the existing warranties and accessories, and will also assume the passive side, consisting mainly of the obligation to pay, in respect of the contractual terms, the lease rates, the obligation to acquit the insurance rates for the asset and any other obligations assumed through the contract.

Articles 9 and 10 of the G.O. 51/1997 provision expressly which are the rights and obligations of the parties within the lease contract, allowing along these to conventionally ad other obligations and rights that will exist through the assignee, should the contract be assigned.

2.2. The effects of lease assignment

Article 1318 of the Civil Code regulates the main effect of the assignment of contract, as being the liberation of the assignor, with the result of a perfect assignment.

The liberation of the assignor is produced at the moment when the assignment produces effects towards the assigned, moment that may differ from the moment at which the contract is perfected, as is the case when the assignor offers an anticipated consent, case in which the assignment becomes certain at the moment of the notification of the latter, or at the moment of its acknowledgement.

The 2nd paragraph of the same article states that an imperfect assignment may occur, with no effect upon the liberation of the assignor, case in which, following a notification procedure of the assignor should the assignee not execute its obligations, the assignor will be held liable and compelled to redeem the unfulfilled obligations of the assignee.

We appreciate that this type of assignment, imperfect, will not find a practical applicability in the case of a lease contract, as the requirements that need to be met in order to perfect a lease contract, requirements that will be overseen by the lease company at the moment of its agreement towards the assignment, are strict, having a legal protection given by the contractual clauses.

As provisioned by article 1319 of the Civil Code, the assigned contractor may oppose the assignee all exceptions that result from the contract. The assigned contractor may not invoke, however, as defense in front of the assignee, consent vices, as any other defenses or exceptions born out of its own reports with the assigned, unless it expressly stipulated so when consenting to the substitution.

Article 1320 introduces a legal warranty case imposed at the task of the assignor for the validity of the contract, warranty that remains valid even in the particular situation of a lease assignment.

The warranty owed by the assignor to the assignee, ex lege may be prolonged by party convention to the execution of the contract. In that particular case, the assignor will be held liable as a fidejusor for the obligations of the assigned contractor [3].

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Conclusions

Concluding, the assignment of the lease contract has made an important step from the acknowledgement received by legal practice to the acknowledgement of the legislator, through the dispositions of articles 1315-1320 of the Civil Code, even if it hasn’t received a special regulation, but finds applicable the general dispositions in the matter of contract assignments.

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