

Some Legal Aspects of Leasing in Albania – A Comparative Approach to the Unidroit Model Law

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ABSTRACT

Leasing provides the possibility to use property without the legal ownership of it. The last five years have resulted in an increase of leasing contracts in Albania.

The scope of this article is limited to the provisions of the Albanian legislation and its approach to the international provisions regarding leasing contract and the main base of comparison is the UNIDROIT Model Law on Leasing. This detailed analysis will drive to the conclusion to what extent the Albanian leasing legislation does compile with the international accepted principles of leasing.

In contrast to the other European countries leasing regulations, Albanian leasing legislation is quite new and there are few practical judicial cases. Having a detailed understanding of the legal provisions is indeed the core element toward further increase and development of leasing market.

Keywords: Albanian legislation, leasing, UNIDROIT

INTRODUCTION

The origins of leasing as a usage-based means of financing assets dates back to 1877, when the Bell Telephone Company in the US decided to rent out its telephones rather than sell them. The overall volume remained minimal for many decades, however, with only a handful of manufacturers using leasing as a tool for distribution. Leasing received a crucial boost when the first pure leasing company, the United States Leasing Corporation, was established in San Francisco in 1953. (Credit Suisse, Swiss Issues Economic Policy, February 2013, page 7)

The industry extended to Europe and Japan in the 1960s, then to Canada, and has been spreading throughout developing countries since the mid-1970s. By the 1990s, leasing had been established in over 80 countries. (The Canadian Finance & Leasing Association)

The financial leasing concept is introduced to the Albanian legislation for the first time in 1994 in the Civil Code of the Republic of Albania, explained in one single provision in Article 848 and the first paragraph of this article states that “*With a leasing contract, one party is obliged to make available to the other party, for a certain time, a movable or immovable asset, with periodical payments, defined in accordance to the value of the property, the duration of contract and eventually with other elements agreed between the parties*”. After eleven years, in 12.5.2005 a dedicated law on financial leasing was approved by the Albanian Parliament (Law No. 9396, “On the financial leasing”). These few years of leasing legislation in force have not had a great impact in busting leasing market. There is little to no study regarding leasing legislation in Albania. Lack of information on the advantages of leasing and on the legal framework, more likely are the reason why people consider other forms of financial instruments such as loans.

The International Institute for the Unification of Private Law (UNIDROIT) consist of 63 member states. Considering that Republic of Albania is not a member state and has not signed the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), this paper will analyse whether the existing Albanian legislation does converge to the same regulations as the UNIDROIT Convention of Financial Leasing and UNIDROIT Model Law on Leasing or does it make leasing contracts difficult to create a real impact on the financial market.

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The article is divided in three main Sections: 1. Types of Leases as per the Albanian Legislation – This section will help have a clear understanding of types of leasing applied in Albania and will aim to avoid any confusion resulting from the terminology differences. 2. Leasing in Figures – This section will help perceive a general view of leasing contracts and their relevance in the Albanian financial market. 3. Analyse of Leasing Legislation – This is the most important section of the paper, which will provide a detailed analyse on a comparative basis of the leasing legislation in force.

Tax and accounting regulations on leasing in Albania are not the purpose of this paper and will not be part of the henceforth analyse. Nonetheless, this paper can serve as a starting point to further studies on legal and accountant leasing related issues.

TYPES OF LEASES AS PER THE ALBANIANA LEGAL FRAMEWORK

Article 8 of Law No. 9396 dated on 12.5.2005 “On Financial Leasing” provides a clear division between what is known as Domestic Financial Leasing and International Financial Leasing.

- 1. Domestic financial leasing is when the asset leased takes place in Republic of Albania and the lessor and the lessee, have permanent residence in Republic of Albania.*
- 2. International financial leasing is when the lessor and the lessee, or one of them, does not have residence or permanent residence in Republic of Albania. Leasing in this case is governed by international law on leasing or, where applicable, by bilateral agreement, to which Albania is a party.*

This division comes in accordance with Article 3 of UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) that provides the following “*This Convention applies when the lessor and the lessee have their places of business in different States and:(a) those States and the State in which the supplier has its place of business are Contracting States; or (b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State*” Republic of Albania has not signed the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), but this is not a barrier for bilateral applicable agreements that will lead to international leasing contracts with Albanian resident parties.

According to the UNIDROIT Model Law on Leasing (13 November 2008), there are two main types of leasing explained, financial and other than a financial leasing (usually known as operating). Regarding this second type of division the Albanian legislation on leasing has not provided something as clear as in the first case of domestic and international leasing.

In accordance to the International Accounting Standards 17 “*Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than the form of the contract. Examples of situations that individually or in combination would normally lead to a lease being classified as a finance lease are:*

- a. the lease transfers ownership of the asset to the lessee by the end of the lease term;*
- b. the lessee has the option to purchase the asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be reasonably certain, at the inception of the lease, that the option will be exercised;*
- c. the lease term is for the major part of the economic life of the asset even if title is not transferred;*
- d. At the inception of the lease the present value of the minimum lease payments amounts to at least substantially all of the fair value of the leased asset; and the leased assets are of such a specialised nature that only the lessee can use them without major modifications.”*

While the Albanian Law No. 9396, dated on 12.5.2005 “On the financial leasing” states that: “*This law deals with financial leasing, rights and obligations of the parties in the relevant contract and regulates relations arising from financial leases of assets, movable and immovable property, which are distinguished by the following features:*

- a) the asset is selected by the lessee, in complete independence of the lessor;*
- b) the asset is purchased by the lessor or, where appropriate, is built with his financial means, in order to lease it to the lessee, according to the contract concluded or that will be concluded, for which the supplier has full knowledge;*

- c) *the lease is in the form of payments, which are calculated by assessing the rate of amortisation of property in a substantial part or parts thereof;*
- d) *at the end of the contract term, the lessee has the right to buy the asset, paying a symbolic amount, predetermined by the parties or determined at the time of exercise of the right to purchase, to renew the contract for another period upon payment of a lower rent than the original, or to return the asset to the lessor.”*

Although in the IAS 17 and in the UNIDROIT Model Law the difference between financial and operating leases is evident, there are also other leases that have elements from each type of lease, resulting so in what is known as combination leases.

Albanian legislation makes the difference between what is known as Financial Leasing and Direct financial leasing, that is applied when there is not a supplier as stated in Article 1/14 *“Direct Financial Leasing” is the lease under which the lessor gives to the lessee an asset that he owns, to use for a fixed term, at the end of which the lessee has the right to buy the asset by paying a determined price, to extend the contract of leasing or return the asset to the lessor.”* Article 41 provides further details for a leasing contract to be considered as direct financial leasing as follows *“Direct financial leasing contract between the lessor and the lessee has not an intermediary party and it is the same in form and in content with financial leasing contract.”* Except of the intermediary party, that is the supplier, there is not any other difference between direct financial leasing to financial leasing. This is made clearer when referring to the risk of loss provisions on a comparative basis. The second paragraph of Article 11 of the UNIDROIT Model Law on Leasing (2008) provides that *“In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.”*

Based on the above described legal situation, we can clearly state that the Albanian Law No. 9396, dated on 12.5.2005 *“On the financial leasing”* does not make a distinction based on the risk of loss element, providing that *“When not otherwise provided in the financial lease contract, upon acceptance of the asset by the lessee all the risks associated with the asset, including damage, accidental loss, theft or premature loss of usability, pass to the lessee.”*

In accordance to the principle of freedom of contract, the Albanian legislation by not making a clear division between each type of leases, in fact provides legal protection to all the possible combinations resulting in different types of leasing that parties might agree upon: financial, operating and combined leases

LEASING IN FIGURES

By the end of 2014 there have been licensed 22 non-bank financial entities by the Bank of Albania, to conduct financial activities in accordance to the legal and regulatory framework in force. (Annual Monitoring Report 2014, Bank of Albania, page 16)

The first non-bank financial entity in offering leasing service in Albania has been the company Credins Leasing licensed on 13.06.2001, while most of the other entities are licensed during 2009, such as Fin – Al, Tirana Leasing, Raiffeisen Leasing, Landeslease, adding two other companies Porsche Leasing in 2013 and Albania Leasing in 2014.

In December 2014, the total actives of non-bank financial entities was 32.23 billion ALL, representing 2.5% of total actives of the banking system. Most of the portfolio of non-bank financial entities is in the lending and microcredit group with 61.9%, followed by that of leasing with 37.0%, while the remainder consists of factoring activity (1.1%). (As above, page 45)

Structurally, the portfolio of lending and of financial leasing entities, is constantly dominated by business funding (92.3%), oriented in the following sectors: "Trade, repair of vehicles and household equipment" (29.3%); "Agriculture and hunting" (12.9%); and "Other" (11.9%). Meanwhile, factoring financing have business purposes and are totally oriented in the sector "Others" (65.2%). More in detail, it is noted that the portfolio of leasing continues to be dominated by funds for vehicles, personal and working, with about 40.9% of the total each of them. (As above)

Over 50% of all leasing to businesses in Europe is made to micro, small and medium enterprises (SMEs) and an estimated 40% of all European SMEs used leasing in 2010. Leases are used by European businesses to gain access to many different types of productive assets, including plant and machinery, ITC and office equipment, medical devices, renewable energy equipment, vehicles and

other means of transport as well as logistics equipment. Of the total new leases granted in 2011, almost 90% were granted to finance the use of various types of equipment and vehicles. (Lease Europe)

From the here listed data we can see that no matter the small amount of leasing contracts in Albania, it is clear that leasing in Albania is orientated and has the same characteristics as in Europe. It is a need to further promote and increase leasing as reliable form of financing. The following section will analyse whether the Albanian legislation can be a supportive tool for leasing contracts.

ANALYSE OF LEASING LEGISLATION

The concern of this paper is to identify the differences between Albanian leasing legislation (Civil Code - 1995 and Law No. 9396, dated on 12.5.2005 “On the financial leasing”) and the international one, as main comparative base the UNIDROIT Model Law on Leasing (2008). Every leasing legal aspect that do compile with international provisions, will not be analysed in order to avoid repetition. That being said, every provision of that might be of concern, if not stated otherwise, is in full accordance to the UNIDROIT Model Law on Leasing.

Lease means a transaction in which one person provides another person with the right to possess and use an asset for a specific term in return for rentals. The term includes a sub-lease. (UNIDROIT Model Law on Leasing, Article 2)

In the Albanian Legislation the term lease is mentioned for the first time in the Civil Code of Republic of Albania, Article 849, within the same chapter as the renting contract. Referring to this article, it is clearly evident that it refers to one type of leasing that is the financial leasing.

The first paragraph of Article 849 does not make a distinction between what is known as a financial or operating leases: *“With a leasing contract, one party is obliged to make available to the other party, for a certain time, a movable or immovable asset, with periodical payments, defined in accordance to the value of the property, the duration of contract and eventually with other elements agreed between the parties”* The second and fourth paragraph make it clear that this provision in the Civil Code does regulate the financial lease, in full accordance to the title of the article *“The asset must be acquired or built by the lessor according to and description of the lessee and the latter has the right to obtain ownership, on the expiry of the contract term by payment of a determined sum. The agreement may provide that the lessee, before asking his rights from the lessor, can address to the supplier for his rights or for those that have been passed to him.”* Law No. 9396, dated on 12.5.2005 “On the financial leasing” in Article 1/11 defines financial leasing as *“as the legal accord under which the lessor buys an asset selected by the lessee from the supplier and gives it for use to the lessee for a fixed term, at a price set in the contract and, by the expiry of the contract the lessee may purchase the asset, continues the lease contract for another term or return it to the lessor.”*

As mentioned in the second section of this article, although the main concern of Law No 9396 “On financial leasing” is to regulate the financial lease, under its provisions we find also the term of direct financial lease, that can be considered a form other than a financial lease, close to what is known as operating lease, but not as clearly defined as the operating one regarding risk of loss elements. (See above section 2)

According to the Albanian legislation and doctrine, there are three elements to consider when analysing a legal agreement: The object, the subjects and the content (rights and obligations)

1. Referring to the object of the contract, we see that there is a difference between UNIDROIT Model Law on Leasing and the Albanian Law No.9396 dated on 12.5.2005 “On the financial leasing” regarding the assets of a leasing contract.

UNIDROIT Model Law on Leasing in Article 2 considers as asset *all property used in the craft, trade or business of the lessee, including immovables, capital assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities.* Law No 9396 dated on 12.5.2005 “On Financial leasing” in Article 1/16 consider as *asset every movable or immovable asset object of the financial leasing”* Article 6 and 7 provides the minimum term of a financial leasing contract by making the distinction based on the asset as a movable and immovable and in accordance to asset consumption rate.

Referring to the abovementioned provisions the first difference we see is related to future assets. The Albanian Law has not explicitly included future asset, but this cannot be an exclusion bearing in mind that Article 680 of the Civil Code of Albania provides “*Contract might contain obligations on future assets, unless expressly prohibited by law*” It is evident that in Albania a future asset can be object of a leasing contract.

The second and most debatable difference is the fact that the Albanian Law has not excluded investments securities and by referring to the civil law principle “what is not prohibited, is allowed”, we might get the wrong impression that even investment securities might be object to a leasing contract in Albania. A deeper analyse will show the contrary. Securities as immaterial assets cannot be object of a leasing contract, because they do not fulfil the main requirements of a leasing contract i.e having a price that will correspond to the real value of the asset and that can be leased for a defined term in accordance with its consumption rate. Securities’ value may vary within days, so it will be difficult to make a forecast on the value of purchase of this asset in the due date of the contract term. Furthermore, securities transactions in Albania are regulated under Law No.9879 dated on 21.2.2008 “On Securities”.

Another concern regarding assets object to a leasing contract are patents, brands and other inventions. Even for this category of immaterial assets we assess that cannot be object of a leasing contract. It was determined hereinabove in this paper that in a leasing contract at the end of the term, the lessee might purchase the asset by paying a determined price. Considering that there is no legal limit on the number of parties to whom an inventor can grant a non-exclusive license, if the first “lessee” buys the asset at the end of the leasing contract term, it is impossible for the other supposed “lessees” to exercise their right of purchasing. There is incongruity between these two legal forms of using an asset, in this case a patent, excluding so the possibility for a leasing contract with object a patent/brand asset.

2. Regarding the second element of the leasing agreement, the subjects are the lessee, the lessor and/or the supplier. There is not any difference between Albanian legislation and the UNIDROIT Model Law when the lessee and the supplier are concerned; the only difference when considering the subjects is in the lessor. As per Article 1/12 of the Albanian Law No.9396 “On the financial leasing *“Lessor” means the entity that has and maintains the right of ownership over the property and gives to the lessee the right to retain and use the property during the term of the lease contract, under the conditions specified in the contract*” and Article 3/2 provides *“The lessor, who is not a financial institution or bank, cannot carry out activities other than that of leasing, which, at the time of registration as a legal entity by the court, must have a capital of not less than 20 000 000 ALL.*”

These two provisions make it clear that Law No 9396 “On financial leasing” requires the lessor to be a registered legal entity and does not allow individuals to act as lessor. On the other hand, the UNIDROIT Model Law on Leasing apart from legal private or public entities that can act as lessor includes also individuals¹.

The exclusion of individuals as lessor in the Albanian Law No 9396 “On the financial leasing” is done in order to have a better monitoring of leasing transactions in all the cases when leasing is carried out as a financial activity. Regardless of these provisions in Law No. 9396 “On the financial leasing”, individuals can act as lessor and sign a financial leasing contract in accordance to Article 849 of the Civil Code of Albania as long as this is not a financial activity of the lessor. Having clarified this aspect, we consider going deeper and emphasise that, although the Civil Code has not provided anything for the operating leasing, considering the freedom of contract principle, an individual has all the rights to sign a contract that has the characteristics of an operating leasing contract, just by not naming it so; a renting with purchasing clause contract is possible.

3. The content (Rights and Obligation) in the Albanian legislation for leasing contract is way much more detailed than in the UNIDROIT Model Law on Leasing. This is quite comprehensible, because an international model law cannot be limited in listing all the possible diapason of rights and obligations that parties might agree upon.

¹ Article 2 “Lessor means a person who provides another person with the right to possess and use an asset under a lease. The term includes a sub-lessor. Person means any legal, private or public entity or an individual.”

The Albanian legislation has provided detailed information regarding the term of leasing contract, the contract forms and registration, essential contract conditions, detailed rights and obligations of parties, termination of contract and procedural legal means, judicial and extra reversal of the asset, sub-leasing contract, insurance of asset and cases of lessee and lessor's bankruptcy.

As per the content, the Albanian legislation compiles with the UNIDROIT Model Law on Leasing and the only part that must be further analysed corresponds to what is not allowed to be altered by the member states as mentioned in Article 5 *“Except as provided in Articles 7(4) and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a lease.”*

In this final analyse, the aim is to define whether Albanian legislation has any provision that does not compile with Article 7/4 and Article 22/3 of the UNIDROIT Model Law on Leasing. Article 7/4 states that *“The parties may not derogate from or vary the effect of the provisions of paragraphs 1, 2 and 3”*² The main concern of this provision is to regulate the supplier position in the financial leasing contract and to ensure that the lessee will enjoy the asset in full accordance to the leasing contract. Albanian Law No. 9396 *“On the financial leasing”* provides the same assurances for the lessee as the UNIDROIT Model Law, but differently from the later, it has these protections spread in many articles, that is Article 14, Article 19, Article 21, Article 22, Article 24.

In order to make visible this comparable almost same approach, part of the text of these articles will be presented as follows:

Article 19 provides: *“1. The obligations of the supplier to the lessor in the supply contract, including any warranties, express or implied, that the supplier gives the lessor, are also charges against the lessee, as if the lessee was part in the contract, but within the limits of interests the lessee has under the lease financial contract in report to the supply contract, and without prejudice to the conditions of the supply contract, and without violation of all rights the supplier has under the supply contract. 2. Involvement of the lessee in paragraph 1 of this Article shall be made only to protect its interests in the supply contract and in any case should not be interpreted as if the lessee takes over the duties or responsibilities.*

4. Regardless of the content of the provisions of paragraph 1 of this Article:

- a) the supplier cannot be held liable to the lessor and to the lessee, at the same time for the same breach of the terms of the supply contract or breach of duty on warranties expressed or implied, that the supplier gives to the lessor;*
- b) the lessee does not acquire liabilities in the supply contract;*
- c) The lessee has no right to terminate or seek abrogation of the supply contract or to request reduction of the sales price of the item, as defined in the supply contract without the consent of the lessor.*

Article 21 explains that the supply contract if altered without the consent of the lessee will not have any effect on the lessee's rights. Article 22 provides further safeguards by explaining cases when both the lessor and the supplier are responsible for any damages, jointly and individually, such as when the supplier is selected by the lessor or the lessor interfered in the selection process of the asset or supplier and when the asset is not delivered to the lessee in accordance to the leasing contract, or in cases of violations of contract's provisions. Article 24 states the right of the lessee to be compensated by the supplier for any damages caused by the later due to failure to comply with contract obligations.

² Article 7, paragraphs 1,2 and 3 provides the following:

1. In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.
2. At the request of the lessee, the lessor shall assign its rights to enforce the supply agreement to the lessee. If the lessor does not, the lessor is deemed to have assumed the duties of the supplier.
3. The rights of the lessee under this Article with respect to a supply agreement that was approved by the lessee shall not be affected by a variation of any term of such agreement unless consented to by the lessee. If the lessee did not consent to such variation, the lessor is deemed to have assumed the duties of the supplier to the lessee that were so varied to the extent of the variation.

The situation is the same with the provision of Article 22/3 of the UNIDROIT Model Law on Leasing “*The parties may not derogate from or vary the effect of the provisions of this Article.*”³ For this second impediment, in the Albanian Law No 9396 “On the financial leasing” Article 30/1 c) and 30/2 provide the following: “*With the unilateral termination of the lease contract, as stipulated by this law, the lessor has the right for:*

c) Compensation for damages suffered;

2. When obligations set out in paragraph 1 of this Article are fulfilled, the lessor is obliged to deduct the amount of the sold value of the asset that surpasses the obligations of the lessee. Any value received by the lessor in excess of the amount that comes from the collection of the obligations set out in paragraph 1 of this article belongs to the lessee. This article in contrast to Article 22 of the UNIDROIT Model Law refers only to the lessor, but nevertheless the lessee is protected by other articles as described hereinabove.

The articles of the UNIDROIT Model Law on Leasing that cannot be altered by member states are foreseen also in the Albanian Legislation. The sole difference is that the protection provided to the lessee and lessor in Albanian legislation is spread in many articles, but with matching content to the UNIDROIT Model Law on Leasing.

CONCLUSION

Albanian Legislation on leasing offers a broad protection is in accordance to the most recent international leasing legislation. Although the Albanian leasing legislation has not made a clear division between financial and other than financial leasing, the legal arena is likely to enable the two forms of leasing on the basis of freedom of contract of the parties.

The analysis presented in this article defined that there is a need for clarification on the terminology used in order to avoid any misleading conclusions such as securities and patents being object of a leasing contract. As regards the different types of leasing, a rigorous division will facilitate leasing accountancy in accordance to international standards.

Leasing agreements are not the first used financial instruments, as results from the data of the non-bank financial legal entities, but the legislation in force offers all the necessary protection for the intensification of leasing contracts in the near future.

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³ Article 22 Liquidated damages

1. When the lease provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.

2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.

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