

THE CONNECTION AND DIFFERENCE OF THE FINANCIAL LEASE WITH OTHER CONTRACTS

PhD(c). Endi Kalemaj¹ and Msc Kejsi Marku²

¹Faculty of Law (UT), Specialist at the Albanian National Youth Agency

²Legal Specialist at Credins Bank

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Abstract-The meaning of the leasing contract based on Albanian legislation is found in Article 849 of the Civil Code, but the legislator is not satisfied with this part alone, giving a definition of the leasing contract in the law no. 9396/2005 "On Financial Rent", amended.

Article 849 of the Civil Code provides the definition of the leasing contract by providing: "With the financial lease contract, one party is obliged to make available to the other party, for a certain time, a movable or immovable object, against a payment in periodic installments determined in relation to the value of the item, the duration of the contract and possibly other elements according to the agreement of the parties."

In addition to the definition made by the Civil Code for the leasing contract, as we mentioned above, a detailed definition is also made by law no. 9396/2005 "On Financial Leasing", amended, which in its article 1, point 11 defines financial leasing [1].

In this paper, it is intended to deal with the financial lease contract and its comparison with other contracts, as well as to highlight the importance of this contract by dealing with legal concepts, the real possibility of changes.

Keywords: Leasing Contract, Supplier, Sublease, Bank Loan, Property Reserve, Etc.

I. INTRODUCTION

Leasing is a tool that has found application a long time ago. It was the Babylonians who implemented a variant of it with their ships and animals. Leasing first appeared in the US during the 1700s to finance the use of horse-drawn carriages. In the early 1900s, companies began to act as lessors of equipment, leasing it while still retaining ownership. This is because often the tenants wanted to be the senders of various cargoes without bearing the responsibilities of ownership. At the same time other manufacturers were looking for new ways to sell their goods. At the end of the 50s, beginning of the 60s, financial leasing began to develop in Europe as well. In the 1970s, this concept also moved towards the developing countries of Asia, South America and

Africa. The 1980s marked a worldwide recognition of financial leasing. Leasing is the largest external source of equipment financing for American corporations, it is larger than bank loans, than financing with bonds, shares or even commercial pledges[2]. In Albania, this contract is provided for the first time in the Civil Code of 1994. The provision of the leasing contract in the Civil Code is systematized in Chapter VI, Title I of Part V of it as a type of lease contract, while the meaning and term "The financial lease contract" is found only in Article 849 of the Civil Code[3].

Despite the similarities with other contracts provided for in the Civil Code, the financial lease contract, due to its unique characteristics, is differentiated from each of them. It is presented as a specific contract which is difficult to incorporate into known types of contracts[4]. It is also considered as an atypical contract [5]. However, thanks to its commercial nature and its unique characteristics, they give this contract the originality to stand as a contract on its own, making it different from other contracts provided for in the Civil Code.

II. FINANCIAL LEASE CONTRACT IN RELATION TO OTHER CONTRACTS

2.1. Financial rent and traditional rent [6]

2.1.1. *The object*

The object of the financial lease contract are movable, individually determined, non-consumable items, because in the event of not exercising the right to purchase the item, the same item must be returned[7] or immovable items. If the object of the contract were items defined by gender, then we would be in front of the loan contract. Both in the leasing contract and in the rental contract, the object is only the items, whether they are movable or immovable. An important condition is the fact that the item must be individually defined and at the same time non-consumable. The object of the contract in the financial lease is selected and built according to the requirements of the lessee. The possibility of building and selecting the item according to the requirements is not possible in the traditional lease contract. In the leasing contract as well as in the rental contract, the lessees intend to use the item.

2.1.2. *The parties*

The parties to a finance lease are the lessor, the lessee and the supplier. The financial lease contract is a two- or three-party legal relationship between the lessor, lessee and/or supplier[8]. The parties in the financial lease are: the lessor, the lessee and the supplier. This means that the financial lease transaction has three parties, but the financial lease contract is executed only between two parties, the lessor and the lessee. The relationship you create between the lessor and the supplier is a contract that affects the finance lease but does not interfere with the finance lease contract between the lessee and the lessor. In this relationship we have two contracts: a. supplier - lessor contract b. lessor - lessee contract The lessor can only be a legal entity[9], the activity which is licensed and supervised by the Bank of Albania in accordance with the law "On financial lease", the law "On banks in the Republic of Albania" and other by-laws. The activity of financial lease and all entities that perform this activity are licensed and supervised by the Bank of Albania. Lessees can be legal persons (the Lessee is an entity that carries out commercial activity and is registered as such in the CKB. Depending on its commercial nature, this contract is classified as a commercial financial lease contract) or physical (the Lessee is not registered for exercise of commercial activity. This type of contract is known as a civil financial lease). The lessee acquires the right of ownership if he has kept the item for the entire term specified in the contract, has paid all the rent payments and also paid the final purchase price.

The supplier [10] is a natural or legal person. It is the party that owns or produces the item according to the tenant's requirements. The supplier is selected and contracted by the lessee, but the latter does not assume obligations in the supply contract. The item is sold to the lessor, who is obliged to notify the supplier in writing that he is buying the item to lease. The traditional rental contract is a contract which has only two contracting parties.

2.1.3. The right of ownership

The lessor in leasing retains the right of ownership over the item and the lessee passes the right to keep and use the item according to the terms of the contract. The right of ownership by the lessor is preserved even in the traditional lease. At the end of the contract term, the lessee chooses between three options: buy the item by paying a symbolic price defined in the contract, request a renewal of the contract[11] or return it to the lessor. The lessee in the traditional lease is never given the opportunity to become the owner of the property. The possibility that the lessee has in the financial lease to transform from user to owner is also the most striking feature of this contract.

2.1.4. Payments

Payments for the object of the financial lease contract are made periodically, in cash, the amount of which is the real market value of the object. This amount manages to cover the lessor's investment and provide a return on investment. The number and amount of these payments or their calculation formula must be part of the content of the contract. The payment made by the lessor in leasing is not considered a consideration for the use of the item, as in the case of rent, but a reimbursement of the capital invested by the lessor.

These payments are treated as purchase installments and their repayment creates ownership rights if, at the end of the contract term, the lessee exercises the right to purchase the item. The traditional lease contract is a contract for consideration. This reward is given as an obligation of the lessee to the lessor for the use of the thing. The parties to the contract must determine the type of remuneration which may be in cash or in kind, the amount of the remuneration, the place of awarding the remuneration and the nature of the remuneration which may be periodic or immediate according to the agreement of the parties.

2.1.5. Deadline

The term of the financial lease is a term which is determined by law and is reflected in the third chapter of the law on "Financial lease" [12]. The law expressly determines the minimum lease terms for both movable and immovable property [13] relying on the nature of the item [14]. While the maximum term is contractually determined by the parties based on the depreciation of the item and its economic sustainability. The duration of the contract corresponds to the economic life of the item. According to Article 803 of the Civil Code, the traditional lease contract cannot be concluded for a term longer than 30 years. If the parties to the contract foresee a term longer than 30 years, the part of the contract that exceeds this term is invalid. It may happen that the parties do not foresee a term in their contract, but even in this case its duration can reach a maximum of 30 years. This article, in the paragraphs below, provides some exceptions for the duration of the rental contract. The lease contract cannot be concluded for more than 5 years for buildings used for housing or the lease term for movable items given to equip an immovable item is equal to the duration of the lease of the immovable item. The land lease has a maximum term of 99 years.

2.1.6. The form

The financial lease contract is a formal contract, it is always made in writing. This form is required for evidentiary effect, as the law does not provide that not making it in written form will result in invalidity of the contract. It is bound in writing and made by a notarial deed, when the contract contains conditions for extra-judicial repossession of the item in cases of early termination of the contract due to the lessee's fault. In addition to the financial lease contract, the parties also sign the repossession act as an integral part of the contract. The traditional rental contract appears as a formal and informal contract. The formality of the lease contract is given in article 803, which contains: "The lease contract, for a period longer than one year, must be made in writing" [15]. The non-realization of the form required by the provision does not make the contract invalid, but unprovable in case proof of the existence of this relationship is required. Lease contracts with immovable objects must not only be made in writing but must also be registered. Registration is mandatory when the term of the lease contract is over nine years[16]. When the immovable property is intended for agricultural cultivation, the contract is made with a notarial deed and registered. The written form/notarial deed and registration are made for the effect of validity [17]. For contracts that have a duration shorter than one year, they can be made with any form of manifestation of will, accepting in this way that rental contracts can be informal.

2.1.7. The registration

The law also provides that the financial lease contract must be registered both in cases where its object is immovable property and for the contract with movable property. The financial lease contract for immovable property, which contains conditions for acquiring ownership or the possibility of purchase, is registered according to the requirements of the Civil Code and the law "On registration of real estate", while the financial lease contract for movable property is registered in the register of insurance liens according to the law "On insurance liens". While according to the regulation of the Civil Code for the traditional lease, registration is required only when the object of the contract is immovable property and the duration of the lease is over 9 years. When the real estate is intended for agricultural cultivation, the contract is made with a notarial deed and is also registered.

2.1.8. Sublease

The lessee in the leasing contract has the right to sublease your property to third parties [18] only with the written consent of the lessor. In this case, the tenant is responsible to the landlord. The lessee can also transfer rights he has over the thing without getting the lessor's approval. The sublease is also provided by the Civil Code for the traditional lease as an opportunity for the lessee to conclude a sublease contract with a third person. The rental contract can be transferred to a third person only with the consent of the lessor and only if the parties to the rental contract have not provided for any prohibition. If the sublease contract is terminated or declared invalid, this will have effects on the sublease as well.

2.1.9. Containment of risks

The risks associated with the leased asset relate, among other things, to potential losses from unused capacity or obsolescence of the asset, as well as risks arising from the impact of the environment on the use of the asset. A lease is classified as a finance lease if it transfers substantially all the incidental risks and rewards of ownership. A lease is classified as an ordinary lease if it does not substantially transfer all the incidental risks and rewards of ownership [19]. Upon acceptance of the item by the lessee in the financial lease, any risk

associated with the item (damage, loss, theft, premature loss of usability) passes to the lessee. Even the risks for damage or malfunction of the thing that come due to the fateful case are borne by the lessee, who is not discharged from the obligation to pay annual rents. The bearing of the risks by the lessee constitutes one of the main characteristics of the financial lease

2.1.10. Renewal

In both contracts, both the lease contract and the financial lease contract, the lessee has the right to request the renewal of the contract. In order to renew the traditional lease, it is enough that the tenant continues to keep the thing in use and the landlord does not raise objections, despite the end of the lease, and this contract is renewed for a new term with the same conditions. While the lessee in the financial lease contract must exercise this right, a right which must be reflected in the basic conditions of the contract, and the renewal is made for another term or some other terms [20].

2.1.11. Preferences

A characteristic of the traditional lease contract is the preference, a right recognized by the tenant, that in case he wants to renew the contract, he will be preferred in relation to third parties who intend to rent the same object. The tenant can exercise this right if he has been correct in fulfilling his obligations. At the end of the term of the leasing contract, the lessee has the right to request the renewal of the contract and as an advantage has the fact that the rent is lower than the initial rent.

2.1.12. Safety

Article 38 of the "Financial Lease" law provides for the insurance of the object of the contract against any type of damage related to the risk of destruction, loss, deterioration or temporary obsolescence. The lessee as the user of the item is obliged to guarantee the insurance of the item in case it is not provided in the contract. Such a provision for the security of the thing by the lessee is not made in the provisions governing the traditional lease.

2.1.13. Retrieving the item

The financial lease contract is an executive title regarding the receipt of the object of the contract. The executive title is put into execution after the issuance of the execution order by the court through the bailiff [21].

2.1.14. Maintenance of the item

In the financial lease contract, the lessee is obliged to maintain the item at his own expense, unless otherwise specified in the contract. In the traditional lease contract, the obligation to maintain the item in a condition that allows its use belongs to the lessor. "The lessor must carry out, during the lease period, all repairs, with the exception of daily maintenance works that are the responsibility of the lessee". The classification of a lease agreement, as financial or ordinary lease, depends more on the economic content of the transaction than on the legal form of the contract. Lease agreements, which meet the criteria of a finance lease, according to this standard will be recognized in the financial statements as finance leases, regardless of the fact that legally or formally they can be considered as an ordinary lease agreement [22]. Examples of situations that, individually or in combination, would normally lead to the classification of a lease as a finance lease are: (a) the lease transfers ownership of the asset to the lessee at the end of the lease term. (b) the lessee has the option to purchase the asset at a nominal price. (c) the lease term covers most of the asset's economic life, even if title has not been transferred. (d) at the beginning of the lease, the present value of the minimum lease payments is

actually, at least, the entire fair value of the leased asset. (e) the leased assets are of a special nature such that only the lessee can use them without major modifications

III. FINANCIAL RENT AND ENTREPRENEURSHIP

The financial lease is a contract that is very similar to the business contract due to the fact that it can provide conditions for the construction of the property by the lessor [23]. According to Article 849, the property will be built according to the tenant's requirements, but ownership remains with the landlord. The thing can be built by the lessor himself or by a third party, (supplier), with whom the lessor creates a contractual relationship on the basis of the business contract [24]. These two contracts, in addition to the similarity, have differences between them in some essential elements. The scope of contracts is one of their essential differences. The object of the financial lease contract is always an object, whether it is movable or immovable, while the object of the business contract is the set of actions to achieve a result which consists in the realization of a work or the performance of a service. The payment in the financial lease is made in installments periodically, paying at the end the difference that remains between the amount of rent and the price of the item in total. In the enterprise, the payment can be made entirely or in installments according to the agreement of the parties. The transfer of the right of ownership to the financial lease takes place at the moment of the end of the contract term, always after the difference in the price of the item has been paid. With an enterprise contract, the right of ownership is transferred after the constructed work is handed over and the final formalities are completed. Regardless of the difference between the contracts regarding the moment of transfer of ownership, these two contracts have in common the way of realizing the transfer of ownership, which passes in two stages:[25] In the first stage, the parties agree on the terms of use of the item, the manner and destination of this use, the deadline and the price. In the second stage, after the conditions of the first stage have been fulfilled, the final sales contract is executed, which transfers the right of ownership and the item is registered in the public registers when it is immovable (In the financial lease contract, the items movable property are registered. Their registration is done in the register of insurance liens according to the law "On insurance liens")

3.1. Financial Lease And Bank Loan

The financial lease has similarities with the bank loan, but also changes with the structure of the latter. A leasing financing is more flexible than a loan since it is a financing on the vehicle. Leasing financing is easier to obtain than bank loans. Financial leasing contracts generally have some advantages in relation to bank loans, making leasing a more favorable alternative. If we assume that a company needs a machine, it has the alternative of buying the machine and producing it by itself. it through the use of its financial resources, taking a loan from the bank or using it with a financial lease contract. In the case when the financial possibilities are not at the right level, then the last two alternatives remain: obtaining a bank loan or financial leasing. If he chooses to take a bank loan, according to the practice of the banks, the borrower will be asked for a guarantee (collateral) which in our country reaches up to 140-150% of the requested loan amount. Whereas in the option of receiving the machinery through financial lease, the company does not need to place a collateral to secure the contract. The lessee also has the option of purchasing the equipment after the end of the lease term.

3.2. Finance Lease And Sale With Reservation Of Ownership

Regarding the legal nature of financial leasing in the doctrine, there are two different types of positions with each other: if it is a contract aimed at transferring the right of use or if it is a contract aimed at transferring the right of ownership. In fact, leasing is a contract that has both of these purposes, but based on the treatment (systematic interpretation of the code norms) that is given to this lease contract in the Civil Code, it is the last

contract as a form of display of the lease contract which closes the chapter dedicated to the lease contract. The purpose of the financial lease, as for any lease contract, is to put the item into use for a certain period, so the parties do not aim for the immediate transfer of ownership. The transfer of ownership at the end of the contract term is an eventuality and the lessee may or may not exercise this right. This type of contract gives the lessee the opportunity, at the end of the contract term, to exercise the right to purchase the item by paying a symbolic price, thus transferring the ownership from the lessor who has retained the right of ownership throughout the term of the contract. contract, to the lessee. If we refer to the contract of sale with retention of title, its main purpose is the transfer of ownership from the seller to the buyer [26]. In the financial lease contract, the object is selected or built according to the lessee's wishes, while such an option is not recognized by the buyer in the property sale contract. When the sale price is paid in installments, the buyer acquires ownership of the item upon payment of the last installment of the price... [27].

The financial leasing contract is an agreement between the lessor and the lessee where one party (the lessor) is obliged to place at the disposal of the other party (the lessee) a movable or immovable object, for a certain time, in return for a periodic payment calculated and established in the contract. With the full payment of the specified amount, the owner of the item transfers the right of ownership to the user of this item. We note that the moment of transfer of ownership is similar for both contracts, ownership passes with full payment of the price. According to Article 746 of the Civil Code, the buyer in the contract of sale with reservation of title assumes the risks from the moment of delivery of the item. Even in the financial lease contract, the legislator provides that all risks related to the item pass to the lessee, unless otherwise provided. In the contract of sale with reserve, if an installment of less than 1/8 of the value of the price of the item is not paid, this does not constitute a reason to request the termination of the contract, according to Article 748. Such a situation does not occur. in the financial leasing contract. If the value of the rent is not paid by the lessee, the lessor has the right to request the termination of the contract regardless of the unpaid value [28]. When the termination of the contract is the result of non-fulfillment of obligations by the buyer, the seller must return the payments made [29]. So, in this case the contract of sale with reserve is terminated for legal reasons and the seller must return all amounts paid by the buyer until the moment of termination of the contract. The possibility of terminating the contract due to non-repayment of payments also exists in the financial lease contract, but its consequences are quite different from the consequences of terminating the contract of sale with reserve. Not only does the lessee lose the right to keep and further use the thing, which is taken by the lessor, but also the value of the rent paid is not returned to the lessee. The lessor's obligations in leasing are not the same as those of the seller. The lessor is not responsible for the delivery of the item nor for the guarantees against the defects of the item. However, the lessor, as the holder of real rights over the thing, is obliged to provide the lessee with the full and quiet enjoyment of the thing and is responsible for the claims of third parties on the property which oppose, violate or limit the full enjoyment of the thing.

IV. ADVANTAGES AND DISADVANTAGES OF FINANCIAL LEASE

Leasing is a creation of international trade practice. In the contemporary international circulation of goods, the leasing contract is gaining special importance by being used more and more. Its creation is based on the economic/business philosophy [30] that property is not the basic and most important category in production contemporary. In the modern economy, the possibility of unimpeded use of goods, according to the interest of their user, is more important than ownership. Leasing is an alternative to bank financing and is a very efficient tool for all types of businesses to modernize and adapt to market needs. The leasing contract is a contract which

is receiving a great development in recent years, becoming one of the most preferred contracts for financing businesses or even for private family consumption.

4.1. The advantages

4.1.1. Balanced cash flow

Among the main advantages of financial leasing is the fact that the lessee benefits from the use of the item he needs without the need to pour large sums of money from the beginning. The cash flow related to the rental installments that the tenant (company or professional) must pay are spread over several years, thus maintaining the burden of paying the money in full and immediately. This helps a business to maintain a stable cash flow profile.

4.1.2. Easier access

Leasing companies have a greater opportunity to get to know and enter into contractual relations with banks or other financial institutions, manufacturers or powerful suppliers of goods inside and outside the country, creating trust and access to financial resources and consolidated markets, which it would be difficult for small businesses and especially for family consumers.

4.1.3. Quality tools

Small or medium-sized businesses have the opportunity to secure modern technology through leasing, enabling the increase in the quality of their production and services. A business has the opportunity to invest in quality assets that may seem unaffordable and very expensive. In this way, they can become worthy competitors for both domestic and foreign markets and creates the opportunity for further expansion and growth of activity. The lessor makes the equipment directly available to the lessee instead of the money needed for its purchase.

4.1.4. No risk of obsolescence

For businesses operating in this sector, where there is a high risk that the technology used becomes obsolete, leasing saves a business from the risk of investing in technology that may soon be depreciated, giving it the opportunity to acquire new equipment in accordance with the needs.

4.1.5. Low capital costs

Leasing is an ideal option for a newly established business, as it means lower initial costs.

4.1.6. Better utilization of capital

Bearing in mind that leasing an item does not require the lessee to post a guarantee, he will have free capital to use for other needs.

4.1.7. Minimal delay

It is generally easier to secure financing for a lease than buying a property. Usually, leasing companies take very little time in processing the lease proposal compared to the long loan procedure. Thus a firm can avoid delays in the use of an asset by leasing it.

4.1.8. Better planning

Rental expenses usually remain constant for the life of the property or increase in line with inflation. This helps in planning expenses. Benefit from taxes Leasing expenses or lease payments are considered operating expenses and are therefore tax deductible.

4.1.9. Last rights

At the end of the leasing period, the lessee has the right to purchase the property and terminate the lease, thus providing flexibility for the business.

4.2. Disadvantages

4.2.1. Limited financial benefits

The long-term rental agreement can also become a burden on the business since the agreement is closed and the expenses for several years are fixed. In a case where the use of the asset does not serve the demand after a few years, the lease payments become a liability.

4.2.2. Penalty for termination of lease

Usually, the amount paid is not returned to the tenant if he terminates the rental contract before the expiration of the rental period. In cases where it is stipulated in the contract, the lessee must also pay penalties for terminating the contract before the agreed term.

4.2.3. No substantial interference with the item

Since the lessee is not the owner of the item, he cannot make any substantial changes to the asset. In the case of an outright purchase, the buyer can modify or change the asset to increase its utility.

4.2.4. Limited access to other loans

Since investors typically treat long-term leases as debt, it can become difficult for a business to tap the capital markets and obtain other loans.

4.2.5. Maintenance of items

The lessee remains responsible for the maintenance and proper operation of the rented item.

V. CONCLUSIONS AND RECOMMENDATIONS

The financial lease contract, as a smart legal solution, helps the market by clearly serving to facilitate the civil circulation of goods. This contract, in legal terms, perfectly suits the interests of the market operators, realizing optimally the matching of the wills of each of them.

The Albanian legislator, realizing the importance of such a contract, has included it in the Civil Code of 1994. Initially, the regulatory legal framework of this contract was poor, which was later supplemented through the

law "On financial rent". Even because this contract over the years has found a wider application and a more detailed legal regulation, we think it is necessary to review some problems related to it.

One of the main problems of the regulation of the leasing contract according to the Albanian legal framework has to do with the grouping of this contract as a special form of the rental contract. This fact is probably related to the name of this contract, which resembles a rental contract. Based on the arguments presented above in this paper, we think that this contract should have its own profile and not be an extension of the rental contract, since as mentioned above, we are dealing with an atypical contract with distinctive characteristics from the lease contract. Therefore, it is necessary for the leasing contract to have a wider provision in the Albanian Civil Code.

Also, a further legal regulation is necessary regarding the form of the leasing contract. Mainly, lessor subjects of this contract are Banks and Institutions that exercise leasing activity. The latter acquire the ownership of an item by adding their assets as a commercial company, so they are obliged to declare with the purpose of their registration with the CKB. The "Financial Lease" Law does not provide for compliance with the written form for the effect of validity. With what was presented above, I think that respecting the written form for the effect of validity is an element that should be reflected in the "Financial Lease" law.

Another problem that was presented during this paper has to do with the parties in the leasing contract, I think that the legislator should be more specific about whether or not the supplier is a party to the leasing contract, not leaving this issue simply in the framework of a debate with a doctrinal character.

Regarding the items that can be the subject of the financial lease contract, the legislator has shown himself to be limited. We think that including a wider category of items would further complement the law. Based on the economic characteristics of the Albanian state, as an agricultural country, the inclusion of plants and animals in the concept of items/assets that can be used through leasing would affect the more frequent use of this contract, therefore it would also affect the economy.

The Law "On Financial Lease" and the Civil Code, unlike other contracts, for the leasing contract do not present concrete cases of termination of this contract, causing confusion between the cases of termination and termination of the leasing contract, so we think that this is also a part that has need for amendment.

Based on the fact of the increasingly frequent use of this contract, we think that it would be worthwhile to review the forms of the leasing contract, since unlike the legislation of different countries of the world, the Albanian legislation does not regulate the different forms of the appearance of of this contract, forms which are being used more and more in practice.

Despite the fact of some problems or deficiencies appearing in the legal regulation, it is worth to appreciate the fact that the Albanian legislation has included the leasing contract, approaching the standards of modern European legislations which have centuries of consolidation and legal heritage in this field.

Reemphasizing once again the positive role that leasing plays in the growth of the local economy, we are closing this paper, hoping that in the future this contract will find a more specific regulation in the internal legislation, avoiding the problems that appear during its practical implementation.

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- [28]. Mariana Tutulani-Semini "The Law of Obligations and Contracts, General and Special Part", Skanderbeg Books, Tirana 2016, page 293.
- [29]. Article 749 of the Civil Code.
- [30]. Leasing contracts, like other contracts in the basic commercial field of its activity, have profit, therefore they are also known as business contracts.