

Leasing Services as a Type of Investment Activity: Russian Experience of Legal Regulation

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ABSTRACT

In the context of the COVID-19 pandemic, many businesses need to attract investment to operate effectively. The purpose of the study is to characterise the Russian experience of legal regulation of leasing services. The study's methodological basis is a comparative legal approach, which allows us to study the experience of legal regulation of leasing from the point of view of national legal traditions. The primary study results are to determine the essence of the financial lease (leasing), to clarify the features of the UNIDROIT Convention's use in Russia. In the current Russian legislation, the essence of the financial lease (leasing) reflects the contradiction between the form (lease) and the content (lending with elements of doing someone else's business). Current legal regulations refer to leasing as a type of lease. Law enforcement practice considers leasing as a form of lending, in which the lender invests money in the thing specified by the borrower (acquires it) and transfers it to the borrower on the terms of periodic payments (transfer of money hidden in the item). Legal certainty of the concepts of "financial lease", "financial leasing" ensures the development of models of legal regulation of leasing services, reduces the risks of parties to financial lease agreements and financial leasing. The peculiarities of using UNIDROIT Convention in Russia are due to different terminology and are related to international leasing relations.

Keywords: *Leasing, Financial leasing transaction, Financial lease agreement, Leasing services, Leasing payments, UNIDROIT Convention.*

1. INTRODUCTION

In the COVID-19 pandemic context, many enterprises need to attract investment for effective operations (updating fixed capital, introducing digital technologies, improving product competitiveness) and ensuring cybersecurity. In a special study, G. Gagliani noted that the diffusion of technologies makes cybersecurity concerns ever-present [1, p. 724]. The lack of financial resources and limited bank credit access lead to leasing, which integrates credit and investment operations elements.

The international leasing market is also actively developing. The UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) forms the legal basis for the regulation of leasing

relations [2]. Article 1 of the Convention proposes the concept of a financial leasing transaction. The essence of a financial leasing transaction is that one party (the lessor) enters into a supply contract with a third party (the supplier) according to the specification of the other party (the lessee). Under the contract, the lessor under the terms approved by the lessee to the extent that they affect his interests, acquires equipment, means of production and enters into a lease agreement with the lessee. Under the lease agreement, the lessee is granted the right to use the equipment based on periodic payments. The UNIDROIT Convention applies regardless of whether the lessee has the right (or acquires such a right later) to purchase the equipment or continue to use it under the terms of the lease agreement in the subsequent period, as well as regardless of the payment of the nominal price or periodic payments. The Convention does not say about the

possibility of the leaseholder (lessee) to acquire the object of the lease agreement ahead of time at the end of the term of this agreement. The UNIDROIT Convention considers leasing as a single three-way transaction involving the seller of the property, the lessor, and the lessee, linked by a delivery contract and a lease agreement.

In practice, different countries' national law uses the concept of financial leasing to refer to different legal relations. For example, in the English legal language, the concept of "leasing" has two meanings: 1) property lease agreement and 2) secured transaction [3; 4; 5]. In a study on asset identification, Sir Roy Goode notes that UNIDROIT Convention provides for the improvement of the secured transaction and the lease agreement's security. Thus, the Convention created a new, autonomous international interest that covered security interests and titles reservation agreements and leasing agreements with a set of basic default remedies for the creditor [6, p. 139]. In French legislation, the concepts of "credit-bail" (loan-lease) and "location avec option d'achat" (lease with the possibility of redemption) are used [7; 8; 9]. M. Realdon believes that secured debt fair credit spreads always increase in the debtor's default probability, where financial leasing fair credit spreads may well decrease in the lessee's default probability and even be negative. The reason is that the lessor, unlike the secured lender, can gain from the lessee's default, especially when the leasing contract envisages initial prepayments or the lessee's terminal options to either purchase the leased asset or to extend the lease maturity [10, p. 1298].

In the current Russian legislation, the concept of financial leasing is absent. S. Pakhtusov and D. Bay note: leasing is an example of a technique long in use in more developed economies that have been transplanted to Russia, with changes made to reflect the particular circumstances there [11, p. 140]. In Russia, the federal law "On Financial Lease (leasing)" has been adopted [12]. The law aims to develop types of investment activities based on the financial lease (leasing). The Law defines leasing as a set of economic and legal relations arising in connection with the lease agreement's implementation, including the leasing acquisition. The concept of "financial lease" is not disclosed in the law. This leads to the fact that the essence of the financial lease (leasing) is not clearly understood by lessors (lease providers) and lessees (leaseholder). In practice, this is associated with the risks of a financial lease agreement (leasing) and restrictions on investment policy. E.V. Sapir and I.A. Karachev in the study of investment mechanisms notes that the protection and promotion of capital investments, the development of leasing services and their advertising are included in the Russian Federation's priority instruments' investment policy [13, p. 125]. The purpose of the study is to characterise the Russian experience of legal regulation of leasing.

2. RESEARCH METHODOLOGY

The study's methodological basis is a comparative legal approach, which allows us to study the experience of legal regulation of leasing from the point of view of national legal traditions and modern realities to identify general and national trends. In the research, the following methods were used: general scientific (scientific analysis of special literature, generalisation) and private scientific (interpretation of the law, formal legal, comparative legal). The legal basis of the study was:

- UNIDROIT Convention on International Financial Leasing; Federal Law "On the Accession of the Russian Federation to the UNIDROIT Convention on International Financial Leasing" dated 08.02 1998 No. 16-FZ [14];

- Civil Code; Law No. 66-455 of 2 July 1966, relating to companies practising leasing [15; 16];

- Civil Code of the Russian Federation (part one) of 30.10.1994 No. 51-FZ; Civil Code of the Russian Federation (part two) of 26.01.1996 No. 14-FZ; Tax Code of the Russian Federation (part two) of 05.08.200 No. 117-FZ [17; 18; 19].

3. RESULTS

The study's main results are to determine the essence of the financial lease (leasing) and clarify the features of the UNIDROIT Convention's application in Russia. There are two approaches to understanding the financial lease's essence (leasing): rental and financial in Russian law.

Within the lease approach framework, the financial lease (leasing) is considered a type of lease agreement with purchase and sale elements connected with the facts of the right of redemption. The lease approach is based on the UNIDROIT Convention's provisions, which sets out the financial leasing transaction. Within the lease approach framework, the essence of leasing services is as follows: the lessor (lease provider) acquires property in its ownership and transfers it to the possession and use of the lessee (leaseholder) on the condition of periodic lease payments. These lease payments constitute the lessor's income from investment activities.

The following contracts accompany leasing services: 1) a purchase and sale agreement between the lessor and the seller of the property; 2) a financial lease agreement between the lessor and the lessee; 3) a purchase and sale agreement between the lessor and the lessee on the purchase of the leased property. The current civil legislation determines the sale agreement's essence between the lessor and the property's seller.

The essence of the financial lease agreement (leasing) consists in the obligation of the lessor (lease provider) to acquire ownership of the property specified by the lessee

(leaseholder) from a specific seller and provide the lessee with this property for a fee for temporary possession and use. This definition allows us to consider the financial lease agreement as an integrative phenomenon that characterises the complex of legal and economic relations. This makes it possible to distinguish four components in leasing legal relations: 1) lease (transfer of property to ownership and use); 2) purchase and sale in instalments (transfer of property after payment of all lease payments); 3) loan (structural components of the lease payment are interest and principal debt); 4) order (the lessee instructs the lessor to purchase the particular property from a specific seller). All components are interconnected, forming a single system of legal relations.

The essence of the purchase and sale agreement between the lessor and the lessee determines the procedure for repurchasing leasing property if the financial lease agreement does not provide for the transfer of property after payment of all lease payments. However, the current Russian legislation does not fix the procedure for accounting for leasing the property's purchase price. Lease payments include reimbursement of the lessor's expenses related to the acquisition and transfer of property to the lessee, income of the lessor. If the financial lease agreement provides for the transfer of ownership of the property from the lessor to the lessee, the purchase price is not considered part of the lease payments. According to the current Tax Code of the Russian Federation, leasing property's purchase price is considered an expense for the purchase of depreciable property (Article 270). The lessee must separately consider the costs of leasing payments and the costs of repurchasing amortised (leasing) property.

Within the financial approach framework, the financial lease (leasing) is considered the transfer of money hidden in things to the borrower. The basis of the financial approach was the balance theory: when the financial lease agreement is terminated in the conditions of incomplete payment of lease payments, the final (compensation) payment takes place. The final payment can be made both in favour of the lessor (for repayment of the loan and agreed interest for the actual time of its use), and the lessee.

Within the financial approach, the essence of leasing services reflects a mixed contract that combines the features of doing another business and loan, where the lender invests in a specified borrower thing (gets it) and passes them to the borrower together with the item (inside it). The lessor's interest lies in the placement and subsequent return of funds at a profit. The acquisition of ownership of the leased asset serves as a security for the lessor of the lessee's obligations to pay the payments established by the contract, as well as a guarantee of return on investment.

The Constitutional Court of Russia considers leasing as a financial service. The lessor lends to the lessee on the terms of urgency, payment, reimbursement. The lessor acts as a lender, paying for the equipment that the lessee needs. The equipment (the subject of leasing) ensures the property interests of the lessor (the creditor) in case of non-fulfilment of monetary obligations by the lessee. The lessee saves his financial resources: he does not buy an expensive leasing object, but only pays its rent. Leasing as a financial service is a tool for financing industrial enterprises.

Currently, the financial approach is becoming more popular. The essence of the financial lease (leasing) is defined as a model of secured financing. Under this model, the leased property ownership is acquired by the lessor to secure the lessee's monetary obligation to repay its financing.

The specifics of applying the UNIDROIT Convention in Russia are determined by national legislation. Russia has ratified the UNIDROIT Convention by Federal Law No. 16-FZ of 08.02 1998 "On the Accession of the Russian Federation to the UNIDROIT Convention on International Financial Leasing". According to this law, paragraph 3 of Article 8 of the UNIDROIT Convention does not apply in Russia. This clause allows the inclusion in the lease agreement of a condition on the possibility of exemption from liability of the lessor even for intentional violation of obligations. The content of paragraph 3 of Article 8 of the UNIDROIT Convention contradicts the mandatory norm of section 4 of Article 401 of the Civil Code of the Russian Federation (an agreement concluded in advance to eliminate or limit liability for intentional violation of an obligation is null and void).

In Russia, the UNIDROIT Convention applies in the following circumstances: 1) the lessor's and the lessee's places of business are in different States; 2) these States, as well as the State in which the seller has its place of business, are parties to the UNIDROIT Convention or the delivery contract and the leasing contract are governed by the national law of one of the member states of the Convention. The application of the UNIDROIT Convention provisions may be excluded by mutual agreement of the subjects of the delivery contract or the leasing contract.

The terminology of Russian national legislation does not coincide with the terminology of the UNIDROIT Convention. The Convention refers to a financial lease transaction. In Russian legislation, we are talking about a financial lease (leasing) agreement. The UNIDROIT Convention applies to the resolution of internal leasing disputes.

To improve the civil regulation of leasing services, the Ministry of Finance has developed a draft federal law on amendments to the Civil Code of the Russian Federation [20]. The project introduces the concept of

financial leasing and creating a transparent regulatory framework to increase the attractiveness of the financial leasing agreement and reduce the parties' risks. The following methods of civil regulation of financial leasing are proposed: establishing qualifying features of a financial leasing agreement that meets the requirements of integrity, consistency, and certainty; minimising risks through transparency and consistency of legal norms; ensuring a balance of interests of subjects by protecting the rights of the lessee and the property interests of the lessor. The project is undergoing a regulatory impact assessment and provides an independent qualification of the financial lease agreement.

4. DISCUSSIONS

The development of leasing services is hindered by the discrepancy between the current regulatory framework, established law enforcement practice and international standards.

The lease approach to leasing services considers them as a financial lease (leasing), in which the ownership of the leasing property remains with the lessor for the entire period of the contract. The lessee cannot buy out the leasing property during the contract term; the costs of lease payments are recognised as current expenses of a specific financial period. The lease approach to leasing services allows us to improve the lease model of leasing, in which (1) the leasing property is required for a short period, or (2) the moral depreciation of the leasing property outstrips the physical one.

The financial approach to leasing services considers them as a method of financing, which provides for the transfer of ownership of the leasing property from the lessor to the lessee at the final stage of the contract; the lessee can buy out the leasing property at the final stage of the contract; the costs of lease payments are reflected in fixed assets. The financial approach to leasing services allows us to introduce the concept of financial leasing, to develop a credit model of leasing, in which (1) leasing companies can receive direct subsidies for the development of leasing as an independent investment instrument, (2) lessees can acquire production assets if they lack their funds.

Rental and financial approaches to leasing services do not contradict each other. The approaches are dialectically interrelated and bring legal certainty to leasing-renting and leasing-financing.

The essence of finance lease (leasing) reflects the relationship between leasing-lease and leasing-financing, as two types of leasing. The development of leasing services demanded to bring legal certainty to the concepts of "financial lease" and "financial leasing". Applying the UNIDROIT Convention in Russia is due to different terminology and related to international leasing relations.

5. CONCLUSION

Financial lease (leasing) is a legal institution borrowed from foreign law. In the current Russian legislation, the essence of the financial lease (leasing) reflects the contradiction between the form (lease) and the content (lending with elements of doing someone else's business). Current legal regulations refer to leasing as a type of lease. Law enforcement practice considers leasing as a form of lending, in which the lender invests money in the thing specified by the borrower (acquires it) and transfers it to the borrower on the terms of periodic payments (transfer of money hidden in the item). Legal certainty of the concepts of "financial lease", "financial leasing" ensures the development of models of legal regulation of leasing services, reduces the risks of parties to financial lease agreements and financial leasing.

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