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THE PROBLEM OF THE FINANCIAL LEASING LEGAL NATURE

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The article is devoted to the problem of the legal nature of financial leasing. Financial leasing has been used to purchase equipment, agricultural machinery, trucks and cars for a long time. But despite its long history disputes about its nature and possible approaches to regulation continue to arise. A lot of approaches in understanding its nature have been developed. The article provides information concerning the history of the emergence and development of financial leasing. The author describes the basic approaches of understanding its nature and highlights the main discussion issues.

There are three participants who are involved in the financial leasing legal relationship: a lessor, a lessee and an equipment supplier. All of them have a certain interest out of concluding a financial leasing transaction. A lessee has the opportunity to use the equipment with the possibility of buying it out gradually. This interest may be explained due to financial problems to purchase equipment right away or due to the fact that the equipment lessees are interested in is rapidly obsolete and for that reason they do not need it to be in their ownership they are interested in possibility of using it. On the other hand, a lessor renders to a lessee a kind of financial service and derives profit in the form of lease payments. And equipment suppliers get the opportunity to sell their goods to those who need them (to lessees) when without financial leasing lessees cannot afford to purchase it directly from suppliers.

As it is traditionally considered the history of the financial leasing started in the middle of the XIX century. Back then the American company, The Bell Telephone Company, began renting telephone sets out to attract customers. This gave an impetus to the rapid development of communication services, as it provided an opportunity for those who could not afford to buy a phone, rent it with subsequent buyout. Due to the development of rail transport financial leasing was widespread in the United States and Europe. Railway companies avoiding large expenses were acquiring locomotives, wagons and other vehicles not in ownership, but only for rent. For this purpose at the initial stage of financial leasing development in the US the function of lessors was performed by trust companies. Later, in early 50-ies of the XX century the interest of both vehicle manufacturers in selling their products and financial companies in a profitable investment led to the appearance of the first specialized leasing companies [1, p. 299-300].

In general, the emergence of such an institution as a financial leasing should be attributed to the development of applied science and the emergence of new equipment that needed to be promoted to the market. On the other hand, the overproduction of goods and services caused by the same scientific and technological progress increased competition not only among equipment manufacturers, but also its users [10, p. 152].

However, despite its prevalence, there is no such thing as a single universal concept of nature of financial leasing, it has not been worked out yet. Disputes about the nature of financial leasing are mainly based on the answers to three questions: firstly, is there already an elaborated type of contract to which the financial leasing contract can be attributed; secondly, if there is such type of contract, then what type is it; and, thirdly, if such type of contract does not exist, do legal science need a different understanding of leasing, and what it would be then?

To answer the first question it is necessary to distinguish two main concepts: the rental and the credit one. The first concept is based on the assumption that financial leasing is a type of lease, the rental agreement. This approach is widely supported in the doctrines of the post-soviet countries including Belarus and Russia. Externally the financial leasing seems to be very similar to the lease. A lessee uses a leased asset and pays leasing payments, there is no big difference. It is a quite simple idea. Furthermore, recognition of leasing as a type of lease in A. Ivanov`s opinion is "a convenient technical measure that avoids the duplication of many norms common to all types of leases. Peculiarities of legal regulation of leasing can be settled in a few very capacious norms" [6, p. 33].

The second approach in understanding of financial leasing is based on the peculiarities of the economic content of financial leasing, revealing its financial essence. Therefore, financial leasing is viewed as a mixed

contract with elements of credit and commission. E. Sukhanov believes that in contrast with lease aimed at transferring things into usage, which is an act of disposing of the thing for profit, financial leasing is a product of another economic situation: a lessee that wants to use certain asset, finds it in the market and appeals to lessor with financial offer to buy this asset with the aim to transfer to it for temporary use [3, p. 205]. A. Egorov notes that the financial leasing in its economic content is very similar to the commission and agency. A commission agent (a lessor) buys on the instructions of the committent (a lessee) the necessary goods, and additionally credits him on terms of reimbursement of costs for the purchase of the goods with accruing interest. Concurrently A. Egorov points out two facts, why financial leasing should not be recognized as the lease.

Firstly, the rent payments are based on the average market rate for the use of a similar asset and the period of the lease. The leasing payment amount is determined differently. The sum of the financial leasing payment consists of the asset full price with interest accrued on amount of this price for the whole period of the lease plus the lessor's remuneration. This sum is divided by a number of periodic payments. Therefore, if the period of use is prolonged the amount of the leasing payment remains the same, but the amount of each periodic payment decreases, in contrast to this the prolongation of the lease leads to an increase of the whole amount of the rent payment even though rent payments remain on the same rate.

Secondly, financial leasing is fundamentally different from lease in the question of risk sharing. The issue of the risk of accidental loss or deterioration of the leased asset is regulated on the grounds of diametrically opposite approaches. In lease, a lessor is obliged to guarantee the useable state of the asset, this is the basic principle which implies the landlord`s duty to repair an asset and the impossibility of demanding rental payments in case an asset cannot be used due it damage. In financial leasing, the risk of accidental loss or deterioration of the leased asset rests with the lessee. In A. Egorov's opinion, using credit conception will avoid the problem of misunderstanding the above-mentioned essential differences between lease and financial leasing [5].

The third approach is based on the idea of recognizing financial leasing as an independent institution. E. Sukhanov supposes that complex leasing operations include not only relationship between lessor and lessee, but the activities of purchasing, attraction of financial resources, provision of agency services, mutual guarantees. Therefore, attempts to determine the legal nature of financial leasing with the help of already known legal institutions as lease, purchase and sale, loan, credit, commission and others inevitably lead to the fact that some part of the relations of the participants in the leasing transaction is left without due legal qualification, since it contains features that are not inherent in these institutions [3, p. 206]. Thus, A. Stukalo argues financial leasing as an institution of a special type ("sui generis"), which combines the elements of the contract of lease, the contract of sale and the contract of conditional sale. [13]. S. Shatalov has developed and proposed the construction of the so-called "composite multiplicity" of financial leasing [14].

E. Kabatova recognizes financial leasing as a single tripartite transaction and the combination of the contract of sales and the contract of lease. She believes that financial leasing is a complex structure that makes up a single set of relationships in which none of the elements can exist independently without being connected with all the others. One element generates the emergence of another, the participants in the relationship are closely related. For example, the equipment supplier concluding an agreement with the buyer (the lessor), transfers the equipment to the lessee and is responsible for the quality of the equipment before lessee, but not before the party to the contract of sale and purchase [7, p. 78-79]. M. Savransky believes that the recognition of sales and leasing contracts as a single tripartite transaction refers to the principles of the Unidroit Convention on International Financial Leasing (1988, Ottawa) [9; 12].

Y. Svyadosts argues that "financial leasing embraces a more complex set of relations, which involve not two but three parties: the equipment manufacturer, the leasing company and the user company. I. Reshetnik considers it necessary to recognize the tripartite nature of the financial leasing agreement, because it would leads to creation most effective regulation in accordance with the needs of each of their participants. Y. Kharitonova expresses the idea that leasing should not be viewed as a complex transition which is formalized by two types of contracts: the contract of sale and purchase and leasing contract. In her opinion, it is necessary to recognize financial leasing as a holistic contract within its own holistic regulation [Cit. on 11].

A. Ivanov, the proponent of rental concept of the financial leasing criticizes the recognition of the financial leasing as a tripartite transaction. He argues that participants of financial leasing do not have a single right or obligation that belonged to all of them. In A. Ivanov opinion, a multilateral agreement must have rights or obligations that would be corresponded to each of the parties [4, p. 232]. A. Ivanov argues that it is necessary to recognize the financial leasing agreement "as a bilateral transaction, inextricably linked with the contract of sale of leased asset. At the same time, there is a special case of transfer of a performance of an agreement, in

which only a seller becomes liable to a lessee and only by virtue of the direct instruction of the law. And the contract of sale appears as an agreement in favor of a third party - in favor of a lessee. Author believes that this peculiar mutual, bilateral connection between a financial leasing contract and a contract of sale distinguish financial leasing as a special type of lease [6, c. 18].

Sharing this point of view with A. Ivanov, V. Vitryansky supposes that "the view of the financial leasing agreement as a tripartite transaction does not fit into the existing understanding of a civil transaction in civil law, because "two independent bilateral transactions: sale and lease - even in the closest connection cannot form a third trilateral transaction. V. Vitryansky believes that relationship based on leasing appear to be "a complex structure of contractual relations, consisting of two types of contracts: a contract for the sale of leased assets, concluded between the seller and the lessor, and the leasing contract concluded between the lessor (as the owner of the leased assets) and the lessee" [1, p. 612]. This approach is also supported by V. Kanashevsky and M. Shimkovich [8; 15].

After conducting a research in the history of leasing and analyzing the existing approaches due to its nature, we came to the following conclusions:

1. With respect to the rental concept of financial leasing, we believe that this concept does not correspond to the nature of the relations that caused its emergence. There are substantial differences in the regulation of lease and financial leasing on such fundamental issues as the calculation of rental (leasing) payments and the risk of accidental loss or deterioration of the leased asset. It should be emphasized that the recognition of the financial leasing as a type of lease does not simplify its legal regulation, does not relieve legislative of repeated rules, at least in the Republic of Belarus. The main regulation of financial leasing is contained outside of the Civil Code of the Republic of Belarus, and the Civil Code contains only fundamental provisions on financial leasing [2]. Moreover many researchers make erroneous conclusions that all the rules concerning leases (for example, on the lease of real estate) can be applied to the relations arising from financial leasing by analogy. And since it directly state in the Civil Code financial leasing is regulated by paragraph 6 "The Financial Leasing" of Chapter 34 "The Lease" of the Civil Code and paragraph 1"The General Terms of Lease", it means that not only the paragraph 4 "The Lease of Capital Structures (Buildings, Constructions), Isolated Premises or Car Places" and but also the all based on its norms legislation cannot be used for financial leasing of real estate. And it is a common mistake.

2. We are agreed that the credit theory of financial leasing better reflects the economic content of the leasing transaction. We believe that the recognition of the institution of commission in the content of the leasing transaction is justified. However, by the law of the Republic of Belarus, neither the loan agreement (due to the obligatory transfer of the ownership) nor the credit agreement (in view of the fact that only money can be transferred by this agreement) cannot be used to transfer the right of use and determine its terms. Therefore, we suppose that according to this theory the legal regulation of financial should still be based on the lease regulation, and due to a lack of simplification of legislation, we consider this approach as unsuccessful.

3. We believe that the approach that recognizes financial leasing as an independent tripartite transaction is the most successful nowadays. Financial leasing merely does not fit into any of the already developed types of contracts. This approach allows to protect the rights and legitimate interests of all three participant of financial leasing. After all, recognition of leasing only as a bilateral transaction between the lessee and the lessor, will inevitably lead to a disparagement of the role of the supplier in the leasing agreement and the role of the lessee in the contract of sale. This does not coincide with approaches contained either in international law or in Belarusian law, which provide certain rights and the obligations to a lessee in the contract of sale and to a seller in the lease contract. Otherwise, this will entail the need for creation a separate legislation to regulate of the contract of leasing assets sale.

4. We believe that financial leasing needs a separate independent regulation. The main provisions are already outside the boundaries of the Civil Code, but there is no single unified act. This measure will not complicate the legal regulation of financial leasing and, at the same time, will simplify the understanding and application of legislation on leasing. We believe that the development of a special regulation for financial leasing will eliminate the conflict of norms.

5. We agree with the authors proposing to recognize leasing as a trilateral transaction, which is formalized by two types of contracts. But we do not agree with the opinion that such transaction should be documented by contract of sale and contract of financial leasing. In our opinion this approach separates two closely related terms: the financial leasing transaction and the financial leasing contract. It is impossible to conclude a contract without concluding a transaction. We believe that this approach allows to conclude a

financial leasing contract without concluding a financial leasing transaction. Therefore, we propose a new term a "financial leasing transaction contract". By financial leasing transaction contract we propose to understand one of the two contracts which form a whole financial leasing transaction. It is either a contract between the supplier and the lessor, which mediate the transfer of ownership from the supplier to the lessor, or a contract between the lessor and the lessee, which mediate the choice of the supplier, the transfer to use and the conditions of using the leased asset. Both these contracts should be regulated by a single financial leasing regulation, and in the part not regulated by the special legislation, the provisions on purchase and sale for the first contract and the provisions on lease for the second one should be applied subsidiarily.

In conclusion, we believe that financial leasing should be recognized as an independent tripartite transaction which needs a special legal regulations and which is formalized by means of concluding two financial leasing transaction contracts. The norms on contract of sale and contract of lease should regulate financial leasing transaction contracts subsidiarily in the part that is not regulated by special financial leasing legislation.

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