Assignment of the Lease Contract

Diana DEACONU-DASCĂLU, PhD.
Postdoctoral researcher, "Titu Maiorescu" University of Bucharest (ROMANIA)
diana.dascalu@gmail.com

Abstract
Assignment of the lease contract may be pursued both conventionally, respecting, along the general rules imposed by art. 1315 and following of the Civil code, the special dispositions introduced by art. 1833 and following of the Civil code, but it may also present itself under the shape of a legal assignment of contract, in the case in which the owner-seller (the assignor) would sell the assent leased to a third (assignee), case in which the latter will be forced to respect the lease foreclosed by the initial owner within legal conditions. The present article treats the assignment of a lease contract, regarding at both the conventional manner, to which it special rules apply, rules that are divergent of the regular regime of contracts assignment, and the legal, forced version of the latter.
Keywords: *legal assignment, lease, conventional assignment*

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013

1. Premises of analysis within the assignment of the lease contract

The current Civil code dedicates its 8th section, 1st Chapter, 2nd Title of the 4th Book to rules that apply within the matter of contract assignment, which form the general frame, applicable with predilection to the conventional contract assignment.

Yet the national legislature regulated certain types of operations, qualified by the national doctrine as legal contract assignments, situations in which certain special dispositions intervene, which modify in some places the dispositions comprised within the reminded sections, IE the case of legal assignment of the lease contract.

The new Civil code establishes particular rules regarding the assignment of certain types of contracts, rules that may defer from the general rule of the assignment. In these situations, the transfer of the contractual report does not occur as a provision of the law but within the terms of a tri-lateral will agreement of parties, within the legal provisions. Special rules are set in the matter of the lease contract (that may be assigned only by written agreement of the lessor if it regards a mobile asset – art. 1805 NCC), the farm lease contract (the lessor may assign the contract only to the spouse or its legal major descendants with the written agreement of the lessee – art. 1846 NCC),

the insurance contract (which may be assigned by the insurer only with the written agreement of the insured, agreement which is not though necessary within the portfolio agreement between insurance companies – art. 2212 NCC).

According to art. 1778 of the Civil code, 2nd paragraph "the lease of mobile and immobile assets is called renting, and the lease of agricultural assets is named farm renting."

The assignment of the lease contract may be pursued both conventionally, attending the general provisions imposed by art. 1315 and following, of the Civil code and the special amendments introduced by art. 1833 and following of the Civil code, but it may also have the form of a legal contract assignment, in the case in which the seller-owner (assignor) would sell the rented home to a third (assigned), case in which the latter would be forced to keep the existing lease contracted by the original owner within legal provisions.

Thus the assignment of the lease contract may intervene either through initiative of the lessor, usually meaning a sell of the leased asset to a third party, the lease contract being continued having the new owner as lessor (situation recognized by doctrine as being legal), either through initiative of the lessee, which, unable or unwillingly to continue the lease contract, wishes to find another party interested of it, which to overtake its contractual position, managing thus to set itself free of the contract before the provided date, and without having to withstand certain penalties for an early foreclosure.

We will continue to analyze the specific aspects of conventional assignment of lease contracts, but also the hypothesis of the legal assignment of the contract of housing lease.

2. Specific provisions in the matter of conventional assignment of the lease contract.

The conventional assignment of a lease contract, comprises, as stated above, special dispositions different of the ones that are found within art. 1315 and following of the Civil Code.

National provisions in this matter have had as an inspirations source, among others, the French Civil code.

French Civil code, although it does not comprise general provisions in the matter of contract assignment, (proceeding recognized within French doctrine long before within the Romanian one), it does comprise special provisions regarding the assignment of the lease contract, similar (and sometimes identical) to the ones in the Romanian Civil code, proving thus, once more, the fact that it represented a milestone and a source of inspiration in the process of modernization and update of the national legislature.

Article 1717 of the French Civil code stipulates the right of the lessee to sublet and to assign the lease to a third, if that faculty has not been forbidden.

We observe thusly an identical provision to the one within art. 1805 of the Romanian Civil code, instating a rule in the matter, mainly the right of the lessee to sublet or to assign the lease to another party.

Within French doctrine, the contract of lease assignment has been defined as being a “contract of particular nature, comprising a claim assignment that would profit the assignor, but also a transfer of the payment of rent obligation and lease conditions execution”, “a such convention would not be assimilated to a sale, a price not being necessarily and compulsory”[1].

From the ruling of the 1717 art. of the Civil code, French legislature also presents cases in which the rule is to forbid the assignment, stipulating, in certain cases, exceptions that allow the assignment of the contract: IE L. 411-35 of the Rural Code, art. 78 of nr. 4801360 Law from the 1st of September 1948 in the matter of home lease etc.

There are, also, contrary situations that sanction as null clauses that would forbid the assignment of a lease contract. It is the case of a contract of lease of a commerce fund (contrat de bail commercial), in the case of which it is stipulated that “Conventions that would forbid the lessee to assign the lease are null, no matter of their form”[2]. Thus, this rule is a prohibitive one, of public order, sanctioning as null any clause contrary to the faculty to assign a lease in the case of the sale of a commercial fund.

Thus, art. 1805 states, as a general rule, the possibility of the lessee “to let the lease, entirely or partially, to a third party, if that faculty has not been forbidden expressly.

Albeit the asset is mobile, the subletting or assignment is not allowed unless the written agreement of the lessor exists."

Analyzing the quoted legal provision, namely article 1805 1st paragraph, thesis I of the new Civil code, one may observe that it imposes two general stipulations: the first states that for the lessee to be able to end its subletting or to be able to assign the lease, this faculty should not have been forbidden expressly, and the second stipulation supplements the elements of specificity of the contract assignment regarding this type of contracts, requiring the written agreement of the lessor and only if it regards mobile assets.

The lease contract, as a general rule, is consensual, being perfected, as stipulated by article 1781 of the Civil code "as soon as the parties have convened upon the asset and the price", having as an exception the agricultural lease contract, that must exist in a written form, required to be ad validitatem, by article 1838 of the Civil code.

In the matter of homing lease, previously to the current Civil code, the provisioning was regulated through Law nr. 114/1996, completed by the dispositions of the Civil code, which allowed subletting, but did not establish provisions regarding the assignment of lease.

The above presented Law provided that the tenant may sublet the accommodations only with existing written agreement and within provisions established by the landlord – art. 26 1st paragraph of Law nr. 114/1996.

Legal practice, previous to the new Civil code, namely civil decision nr. 226/C/25.05.2011 ruled in case nr. 34430/212/2009 of the Court of Appeal of Constanţa [3], the court, invested with a request to ascertain as intervened a lease contract assignment, presented the following reasoning: "The law of home leasing does not provide specifics regarding the assignment of lease contracts, situation which in the absence of regulations, has been appreciated by the doctrine and legal practice that does not forbid an assignment of contract, but for the assignment to be valid, dispositions of common legal provisioning must be enforced. According to the Civil code, the assignment of the lease contract is allowed within the terms that regulate and allow the lease (art. 1418 of the Civil code). That means that the assignment of lease

contract may only exist within the terms that allow the subletting namely, with a previous written agreement and within specifics provided by the landlord (art. 26, 1st paragraph of Law nr. 1996). If the special regulation provides this stipulation for the subletting, it means that it is all the more imposed within the case of an assignment that may produce effects even more austere then subletting (cessio est maius sublocatio est minus).” Starting from these considerations the Court ruled against the plaintiff, arguing that there was no agreement from the part of the defendant to the assignment of the lease contract towards the third party lessee, agreement that must exist, for the same considerations for which the law provides expressly the agreement of the lessor to have a valid subletting.

The quoted Law was referring at the consensus principle within the perfection of the lease contract, but required a written form, ad probationem, and the obligation to register the contract with the fiscal administration, provisions that are no longer regulated by the new Civil code.

Thusly, both Law nr. 114/1996, repealed by the new Civil code, as the new code itself, through the current regulations, maintains the general rule of the possibility to assign conventionally a lease contract.

The exception from this rule is constituted by an express interdiction of the assignment of lease, interdiction that is in most cases conventional.

The second stipulation, specific to the assignment of the lease of a mobile asset, but also of a house, that it refers to the existence of a written agreement of the lessor, must be analyzed in accordance with dispositions of art. 1316, which states the fact that “the assignment of contract and its acceptance by the assigned contractor must be perfected within the form required by law in order to be exist a valid assigned contract”.

Analyzing the two presented provisions, we observe immediately the specificity element that differentiates the assignment of lease of a mobile asset from the general provisioning within the assignment matter, specifically the written agreement of the lessor, in its role of an assigned party.

If one should apply the common provisioning in the matter of the assignment (art. 1316) and should they be compared to provisions of the Civil code, that does not institute a specific form to perfect a lease contract, it would mean that the assignment of

a lease contract should be as consensual as a lease contract, with no requirement for the agreement of the assigned, in this situation the lessor, to have a specific form.

Of course, within legal practice, lease contracts are perfected, as to prove their existence, in a written form; the agreement to an assignment being thus required, for a symmetry of form, to have the same form.

But, as a difference from the general dispositions of the assignment, that may allow an oral form to assign a lease contract which does not present in a written form, the special provisions, being applicable with priority, according to the principle lex specialis derogat legi generali impose, unconcerned of the form of the lease contract of a mobile asset, that the agreement to assign should be in a written form.

Another specificity element of the assignment of lease contracts is introduced by article 1806 of the Civil code, article that regulates the problem of the interdiction to sublet or assign a location, stating with a title of principle the following: a. the interdiction to perfect a subletting includes the one to assign the lease; b. the interdiction to assign a lease does not include the interdiction to perfect a subletting; c. the interdiction of assignment includes both the total assignment as the partial assignment of a lease contract.

Thus, although the regulations provided by art. 1315 of the Civil code, in the matter of contract assignment do not indicate the possibility of a partial assignment, referring only to a complete and total assignment, which has as effect the complete release of the assigned (perfect assignment), either keeping the latter as some kind of warrant, next to the assignor (imperfect assignment), the dispositions of art. 1806 present expressly the possibility of existence of a partial assignment, meaning only one party of the initial contract. IE, the lessee may assign the lease contract for one of the rooms, rented to a third (the assignee).

This provision is new, as it sets an extensive interpretation of the interdictions to assign the lease or to perfect a sublet, expressly stipulating that the interdiction regards both a total lease/assignment and a partial one, as a difference from the interpretation given by doctrine previous to the new Civil code, which would follow a restrictive interpretation, meaning that if an interdiction to a total sublet existed that would be interpreted as a possibility for a partial sublet to exist[4].

The same article also applies an old rule, recognized within doctrine, “cessio est maius sublocatio est minus” and it represents the legal provisioning of the interdictions regime in the matter of assignment of leasing and subleasing.

Thus, in a case in which the parties of the lease stipulate though a contractual clause the interdiction for the lessee to perfect a sublet, it means they do not desire to bring any modifications in what regards the subjects of the contractual report, conferring it a somewhat “intuitu personae” character. It is only normal, that if the sublease, which would not bring contractual modifications, having the same initial parties but, providing, in the legal aspect, the sub-tenant and, with it, the right of the lessee to satisfy the claim through a direct action upon it for the payment of the rent, may not be admitted, when the assignment of contract may not be admitted, involving, through itself, an important contractual modification, within the substitution of one of the contractual parties.

Article 1808 of the Civil code, providing effects of the assignment of lease contracts, states that “through the assignment of lease contract by the lessee, the assignor receives the rights and is being held by obligations of the lessee sprung from the lease contract”, the special provisions being completed by the general ones provided by article 1315-1320, 1833 Civil code.

According to article 1833 of the Civil code, “the tenant may assign the lease contract of the home or sublet the home only with written agreement from the lessor, case in which, in the lack of contrary stipulations, the assignor, or the sub-lessee will be held responsible along with the tenant for obligations assumed towards the lessee through the lease contract”.

We observe thus, from the analysis of the above text that this provisioning, imposing the written agreement of the lessor in order to exist a sublet or an assignment of a lease contract, derogates, first from the regulations imposed in the matter of immobile lease, which did not demand this written agreement, agreement provisioned only in a case of lease assignment of a mobile asset.

Somewhat later, we observe that dispositions of article 1833 of the new Civil code, derogate, in the matter of lease contracts, also from the regulation that imposed a release for the original contractor, establishing that the assignee will be liable along the

assignor for obligations assumed towards the lessor through the contract of lease, in the lack of a contrary stipulation.

Therefore, the regulation becomes a sort of imperfect assignment of a lease contract, the assignor and assignee becoming solidary debtors towards the assigned party (the lessor).

The legislator formulates the provisioning in a facultative institution, the parties having the possibility to stipulate a release of the assigned, giving the option for the lessor to demand liabilities from the assignor alone, which is overtaking the lease contract.

3. Legal assignment of the lease contract

Legal assignment of contract is the assignment that springs directly from legal provisioning, with no stipulation of such within contractual clauses that regulate judicial reports amongst the parties.

We also believe, along other authors, that within this category of legal assignments, one must be include the so-called “forced assignments”[5], yet not the situations where the legislator provides certain stipulations or certain regimes of types of assignments (IE particular regulations are to be found within the matter of assignment of lease contracts).

Specialty doctrine also uses the notion of “ancillary assignment”[6], calling that the assignments that appear indirectly, through alienation of mobile or immobile assets that are the object of a certain contract. It is the case of the legal assignment of lease, through alienation of the rented asset, its buyer becoming an assignor, having the obligation to fulfill the lease contract, but being the beneficiary of all rights sprung from this contract.

Article 1811 of the Civil code recurs to the hypothesis provisioned by article 1441 of the old Civil code, hypothesis treated by doctrine as a legal assignment of contract. This is the situation in which a lessor sells the leased asset, and the buyer has an obligation to comply to the lease which exists before the sale.

The legal assignment of contract, translated by “the opposability” of the lessee’s right towards the new owner of the leased asset, subsists with the exception of the situation in which the parties convened within the leasing contract that an alienation of

the leased asset would result in a termination of contract, as provided by article 1812 of the Civil code.

There are differences between the old and the new provisioning, but not in what regards the instituted regulation in the matter of the specifics within which the rule would intervene.

Thus, if article 1441 of the old Civil code would present the obligation of the buyer to comply with the lease "as it was perfected by authentic legal documents or by private documents, but with given date", article 1811 of the new Civil code states different moments, based on which the lease would be opposable towards the purchaser.

In principle, the opposability conditions presented by article 1811 distinguish as the asset is mobile or immobile, subject or not to requisites of immobile publicity.

In the case of immobile assets, the right of the lessee becomes opposable to the purchaser in the case of immobile assets that are noted into the land registry, if the certain date of the lease if previous to the certain date of the sale.

The novelty brought by the new Civil code is that this opposability is recognized in what regards mobile assets also, as a difference from article 1441 of the old Civil code, which tied this legal assignment exclusively to immobile assets.

Thus, article 1811 of the Civil code ties the opposability of the lessee's right by the condition to fulfill the publicity formalities (in the case of immobile assets subject to be noted within the land registry), and in the case of other immobile assets, the condition for the valid opposition would be that the assets should be in the possession of the lessee at the time of the alienation of the asset.

If the publicity conditions are not met or the condition regarding the possession is not met, as instituted by article 1811, no obligation of the purchaser to comply with the lease will exist, thus there will not be a forced assignment of the lease contract, but a termination.

Yet, still in the same purpose of protection towards the lessee, even if the parties hat stipulated termination of lease through the alienation of the asset, article 1812 institutes a short term opposability stating that "the lease remains opposable towards the purchaser even after the lessor has notified the sale, for a term which will be twice

as long as the one that would have been appropriate to notify the termination of contract, according to provisions stated by article 1816, paragraph 2".

We therefore consider that, for the same considerations, the above term should subsist also in the case in which the sublet would be subject to termination, following a non-fulfilment of publicity conditions, stipulated within article 1811 of the Civil code.

Nevertheless, we agree with the doctrinal opinion [4], according to which a third party purchaser may plight itself, by the sale contract, to respect a lease contract which is not opposable to itself or it may agree on the matter with the lessor, implying in the end the principle of freedom of will when perfecting legal contracts.

Within legal practice born under the old Civil code, it has been appreciated that this type of assignment will only work regarding the lessee party, as an assigned co-contractor, and not within the seller party and its family members, which, with no property document may be evacuated at the purchaser's request [7].

The phrasing chosen by the legislator denotes the fact that the national regulation treats this situation not as a legal contract assignment but as a situation that attires an opposability towards the lease from the purchaser, distinguishing only by as the asset (mobile or immobile) is subject to formalities of land registration or not.

Both within old Civil code and the ruling chosen by the contemporary legislature, the purchaser is bound to respect the lease, if the lessor and the purchaser have not perfected by contract to terminate the lease.

The new provisioning presents an opposability of the lease contract, but we appreciate, along the national doctrine, which accepted within the hypothesis presented by article 1441 of the old Civil code a legal assignment[8], that we are not only in front of a simple opposability of a lease contract, the purchaser not being only coerced to comply to the lease contract, allowing its continuation, but also in front of a forced, legal assignment of the lease contract, the lessee having the possibility to fulfill its obligations (payment of rent) towards the purchaser, but also to exercise its rights (demand of asset use) from the latter, in its turn, the purchaser being able to cash the rent in exchange for insurance in what regards the use of the asset.

Being a legal assignment of contract, in order to analyze its validity, we can no longer report to general regulations in the matter of assignment, namely those

provisioned by articles 1315-1320 of the Civil code, but to the special provisions stated by article 1811-1815 of the Civil code.

Thus, we observe that the special regulations do not take into account the consent of the assigned to the assignment, as a difference from the general regulations that would not validate an assignment in the absence of the agreement from the assigned co-contractor.

Besides, the agreement of the assignor is a forced one, embedded within the agreement given in the contract through which it alienates the assigned asset. Therefore, it is not a separate agreement, stand alone, which is demanded from the assignor; the assignment of lease contract would be valid in the presence of the agreement to perfect the contract which provide the assignor the property of the leased asset, with no special agreement to the assignment.

Observing the particularities of this operation, we consider that we are in the presence of a forced assignment, subsidiary, bound in an essential manner to the leased asset and of the passage of property towards it, a sort of “propter rem” assignment.

Due to the assignment of the passive side of the obligational report, the assigning co-contractor which is also a claimer of the lessee, and, at first glance, could not be set free of debt unless the lessor would agree to it, within conditions set by common law (art. 1318 Civil code), with the note that the lessee has specific terms to notify and sue the assigned co-contractor within the hypothesis in which the assigned co-contractor would not fulfill its obligations towards the latter (a 15 days term from the starting non-execution date or from the date when the non-execution has become known to it), after which it shan’t be able to claim execution of obligations unless from the assignor co-contractor (art. 1318, 2nd paragraph, Civil code). Nevertheless, article 1813 of the Civil code institutes a derogatory regime, provisioning that the initial lessor will not be liable unless for liabilities caused to the lessee, previously to the alienation (art. 1813, paragraph 2, Civil code)[6].

Article 1813 of the Civil code, regulates, thus, the effects of this type of legal assignments of contract, under two paragraphs.

First paragraph introduces an express, legal subrogation, of the purchaser within the rights and obligations of the lessor, which spring from the lease contract, subrogation with exclusive ex tunc effects, towards the future.

This means that the purchaser will be able to demand rent only from this date one, not having any right upon payments that became payable previously and hadn't been paid, with the exception of the case in which these claims were the object of an assignment of special subrogation. The purchaser cannot obtain termination of location contract for non-execution of past obligations either [4].

The second paragraph enforced the future effect of the subrogation, regulating the reports between the lessee and the initial lessor. In this sense, its stipulated the fact that "the initial lessor remains liable for prejudice caused to the lessee, previous of the sale".

Therefore, any non-fulfilled obligation of the seller-lessor cannot be demanded from the purchaser-lessor, as the latter is held only to future obligations, born from the contract.

Article 1814 of the Civil code harnesses the general provisions, according to which any claim is transmitted along with warranties and accessories, and states: "When the lessee of the sold asset has given warranty to fulfill its obligations, the purchaser is subrogated within the rights sprung from these warranty, within the terms of the law".

Conclusions

To conclude, the assignment of the lease contract presents atypical features and comports specific effects, may it be a conventional assignment, regulated by art. 1805-1808 of the Civil code, or a legal assignment, instituted by art. 1811 and following of the Civil code, specifics that have been presented in the content of the present paper.

We observed, thus, differences within the regulations towards dispositions of the old Civil code or special Laws in the matter of lease and new dispositions introduced by the Civil code, valid since 2011.

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