

# Legal Nature of a Leasing Agreement

**Prof.dr. Emir Sudžuka**

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**IZDAVAČ:**

**PRAVNI FAKULTET ZA PRIVREDU I PRAVOSUĐE  
UNIVERZITET PRIVREDNA AKADEMIJA**

Geri Karolja 1, 21000 Novi Sad  
Tel.: 021/400-484, lokal 109; 021/400-499

**SUIZDAVAČ:**

**„PRAVO” DOO**

Novi Sad, Geri Karolja 1  
Poštanski fah 13, 21102 Novi Sad

**Glavni urednik:**

Marijana Dukić Mijatović

**Odgovorni urednik:**

Vuksan Lakićević

**Sekretar redakcije:**

Nenad Stefanović

**Lektor i korektor:**

Mara Despotov

**Lektor i korektor za engleski jezik:**

Jelena Dunderski

**Tehnička realizacija i štampa:**

Alfa-graf NS, Novi Sad

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Miroslav Vrhovšek, profesor emeritus, Pravni fakultet za privredu i pravosuđe,  
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Zdravko Petrović, doktor pravnih nauka, advokat, Beograd

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Miloš Trifković, akademik, Pravni fakultet, Univerzitet Travnik  
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Univerzitet Privredna akademija Novi Sad

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## LEGAL NATURE OF A LEASE AGREEMENT

**ABSTRACT:** A lease agreement is an appointed legal transaction arose from business and legal construction created with the aim of the efficient meeting the needs of participants in the transaction. The legal theory and practice set out the criteria for the division of leasing contracts, so this legal transaction got its basic characteristic features. That is the way of a creation of basic forms of leasing agreements. According to its characteristics, a lease agreement has a mixed legal nature. Depending on the type of a contract, it may have the characteristics of a contract of sale, tenancy agreement, loan agreement, etc. In certain types of leasing, some characteristics of one of the listed traditional contracts dominate in a weaker or stronger intensity. This paper deals with a theoretical analysis of the relationship of the leasing contract with the contract law agreements. A special emphasis is placed on the operating and financial leasing as two basic types of leasing contracts varying by their nature.

**Keywords:** *legal nature, lease agreement, contract of sale, tenancy agreement, loan agreement.*

### 1. The term leasing agreement

The word “leasing” is of an English origin and it means renting, or giving out for lease. In contemporary business and legal terminology the term leasing obtains a derived juridical meaning. It becomes a technical term signifying complex organizational, technical, technological, economic, commercial and

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\* Master of Law, A senior teaching assistant at the Faculty of Legal sciences, The “Vitez” University, e-mail: emir.sudzuka@unvi.edu.ba

legal business intended to satisfy various needs of economic and other entities in relation to the encumbered acquisition of the use value of items by obtaining time limited usage in it. <sup>1</sup> In legal terms, leasing is a complex legal transaction consisting of two agreements: of delivery and leasing. <sup>2</sup> From the economic aspect, leasing is a special form or technique of financing procurement of both movable and immovable investment equipment without engaging personal investment funds, cash payment and without indebtedness in a classic loan form. <sup>3</sup>

This institute has emerged in conditions of a developed market of goods and capital and a highly developed technology whose fast progress is difficult to follow by using classic business forms. <sup>4</sup> A legal relation concerning leasing agreements is a very complicated and complex one, which makes it difficult to be embraced in one legal definition. <sup>5</sup> According to professor Rozenberg <sup>6</sup>, a Leasing Agreement implies a special method of financing various movable and immovable investment goods based on the constituted agreement or contracting relations, given out for lease to a lessee along with the fee defined or for a defined contracted period of agreed lease in such a way that those goods may be depreciated in the period longer than the duration of the Leasing Agreement. <sup>7</sup> According to professor Đurović <sup>8</sup>, the mentioned definition of a Leasing Agreement from the aspect of economics and contract law in wider terms is not adequate and fails to include all important elements and peculiarities of this legal transaction – business agreement.

We consider that professor Vukadinović <sup>9</sup> gave the most complete definition of a Leasing Agreement stating that a Leasing Agreement is a complex

<sup>1</sup> Trifković, M., et al. (2009). *The International Business Law*, The School of Economics and Business in Sarajevo, p. 311.

<sup>2</sup> Vukadinović, R. (2012). *The International Business Law, a general and special part*, Kragujevac, The Association for the European Law, p. 737.

<sup>3</sup> Backović, E. (2007). *Financing Foreign Trade Transactions*, The School of Economics and Business in Sarajevo, p. 203.

<sup>4</sup> Spasić, I. (1990). *A leasing agreement*, a doctoral thesis, Belgrade 1990, according to: Medić, D. (2004). *Leasing*, *A Legal Advisor*, 4(12): 37-43, p. 37.

<sup>5</sup> Đurović, R. (2004). *The International Economic Law*, Contemporary Administration Belgrade, p. 374.

<sup>6</sup> Rozenberg, Lj. (1971). *Legal problem of leasing – making Leasing Agreements*, Advising of a possibility of application of leasing in Yugoslav practice, Opatija, pp. 14-15., according to: Đurović, R.: *idem* page. 374.

<sup>7</sup> Dukić Mijatović M., Gongeta S. (2012). *Economic and legal aspects of contract of financial leasing*, Yearbook The Faculty of Law of the University in Kragujevac, VIII conference “XXI Century-Century of service and service law”, pp. 99-109

<sup>8</sup> Đurović, R.: *ibid*, p. 374.

<sup>9</sup> Vukadinović, R., *ibid*, pp. 737-738

transaction consisting of the Agreement of Delivery and Leasing Agreement. The mentioned definition refers only to a financial leasing as one type of a Leasing Agreement. UNIDROIT<sup>10</sup> Convention of the international financial leasing from 1988<sup>11</sup> also construes leasing from two agreements: an agreement of procurement of equipment and a lease of equipment.<sup>12</sup> In these or similar meanings, leasing is used also in the Comparative Law.<sup>13</sup>

Therefore, it can be concluded that a Leasing Agreement is a complex operation wherein a person that desires to procure and use certain things contacts the specialized financial institution, which purchases the subject of leasing for him/her, and then cedes it for utilization for a certain time.<sup>14</sup>

The basic specificity of the Leasing Agreement is a deep permeation of elements of “economic” and “legal” defining the backbone of this transaction.<sup>15</sup> It is a multi-layered and complex legal transaction that most frequently implies a three-dimensional relation, and/or the existence of three entities of transaction: lessor, lessee and deliverer. The existence of a deliverer is not mandatory, because the goods may be made by a lessor. Likewise, it is not necessary that the lessor performs the purchase, because the goods may be purchased by the user of lease, and then sold to the lessor. Subsequently lease may be taken from the lessor with the so-called sale and lease back option. Thus, the owner gets his/her working capital. In large number of cases there is hidden a credit secured by the fiduciary transfer of the ownership.<sup>16</sup>

A Leasing Agreement is a complex economic (a three-sided financial leasing operation) and more complex legal relation.<sup>17</sup> As we have already mentioned, looking from a legal aspect, in order to make this agreement functional there have to be two agreements, a procurement agreement (sale, delivery)

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<sup>10</sup> The International Institute for the Unification of private law: <http://www.unidroit.org/>

<sup>11</sup> This Convention was adopted on 28th May 1988 and it became effective on 1st May 1995. The Convention was ratified by: France (1991), Italy (1993), Nigeria (1994), Panama(1997), Hungary (1996), Latvia (1997), Russia (1998) and Belarus (1998). The Convention was only signed by: Ghana (1988), Guinea (1988), Phillipines (1988), Tanzania(1988), Morocco (1988), Czech Republic (1990), Finland (1990), Belgium (1990), USA (1990) and Panama (1990). Bosnia and Hercegovina is not a signatory of the Convention.

<sup>12</sup> According to: Trifković, M., et al., op. cit., p. 311.

<sup>13</sup> Ibid.

<sup>14</sup> Medić, D. (2004). Leasing, A Legal Advisor, IV(12), 37-43, p. 37.

<sup>15</sup> Spasić I., op.cit, p. 13.

<sup>16</sup> Čulinović, E. (1998). Contracting security of claims by pledging the movables without a handover of things into the possession of a creditor, Rijeka, p. 21. According to: Medić, D., Ibid., p. 38.

<sup>17</sup> Spasić, I. (1995). Obligations and rights of participants in a three-sided financial leasing operation, New agreements important for the business development of Yugoslavia, The Collection of works from Advising held in Belgrade, p. 68.



and a leasing agreement, and both have to be legally binding. With these two agreements there is a unity of object and joint clause. Due to this reason, a Leasing Agreement has a complex legal nature.

## 2. Legal nature of leasing

Talking about the specificity and complexity of leasing, it is important to define a legal nature of a Leasing Agreement. Thus, carrying out rights and obligations of contracting parties will be facilitated and especially labeling specific characteristics of leasing as a *sui generis* transaction. This part of paper will provide a basic overview of specificities concerning a legal nature of leasing, its comparison with the contract law agreements whose elements it mostly contains. Prior to that, basic characteristics of leasing will be given as a business-legal construction and its evolution to a nominate legal transaction.

### 2.1. Leasing – a nominate agreement or legal construction?

an agreement is a narrower term than a legal transaction. Each agreement is a legal transaction, but each legal transaction does not constitute an agreement. According to a traditional understanding, an agreement is a consent of wills of two or more persons achieving some legal effect. It is a general term of agreement that is not a characteristic only to the Law of Contract, but it appears in other branches of law too.<sup>18</sup> An Agreement in the Law of Contract might be defined as a consent of wills of two or more persons achieving some legal effect.<sup>19</sup> It ensues from the previously mentioned definition that an agreement is always a two-sided legal transaction, in difference to an one-sided one where there is no consent of wills, but just a statement of one's will creates a certain legal effect. This definition of the contract law agreement represents a basis for the emergence of legal constructions, more precisely in the case of two-sided legal transactions and/or most frequently agreements.

Legal constructions in terms of newly emerged civil operations have emerged and mostly developed in the area of commercial law. Their purpose is, as it has already been stated, more efficient to meeting the needs of entities of primarily commercial law. Those persons, with their practice, have created a system of autonomous rules by using to a great extent existing nominated legal transactions. These new creations are called legal constructions. To

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<sup>18</sup> The term agreement appears in the family law as well, inheritance law, the Law of Things, business, administrative international law etc.

<sup>19</sup> Perović, S. (1986). The Law of Contract, Belgrade, p. 151.

support this claim, there is an even more progressive development of the rules of the international business law<sup>20</sup> and the emergence of new types of agreements between the entities of this branch of law. It finds their application more frequently in domestic laws.

Participants in economy are constantly seeking the most efficient manner of regulating mutual relations so that annexing and further complications are made to the existing contracts. However, some legal constructions have, although they emerged as the result of activities of business entities, found their place of application with natural persons<sup>21</sup> as subjects of civil law.<sup>22</sup>

Nominate legal transactions occur by introducing a certain legal transaction in legislative frameworks of one legal system. Legal constructions as nominate legal transactions are rare, commission and freight forwarder for instance. However, it is important to emphasize that there exists a tendency of introducing non-nominate legal constructions as agreements of the autonomous commercial law in contemporary legal systems. In that respect, leasing has achieved the greatest progress which has, from a classic business-legal construction, acquired a status of a nominate legal transaction in the majority of contemporary legal systems. Such a status was acquired by the intensive practical application in the manner that its certain characteristics were singled out and enabled its classification into special nominate legal transactions.

In accordance with the foregoing, it is possible to define basic characteristics of contemporary civil law operations and a leasing operation which make them special legal businesses having a mixed legal character.

**Complexity** – the majority of contemporary civil law transactions consist of two or more special nominate legal transactions, unifying themselves in one operation with the aim of facilitating the performance of the initial goal – the *cause* of the concluding business;

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<sup>20</sup> For more details of agreements of the international business law see: Trifković, M., et al. (2009). *The International Business Law*, The School of Economics and Business in Sarajevo, pp. 177-535.; Vukadinović, R. (2012). *The International Business Law, general and special part*, The Association for European Law, Kragujevac, pp. 337-778. Đurović, R. (2004). *The International Business Law, Contemporary Administration*, Belgrade, pp. 505-512., Mlikotin Tomić, D. (1999). *The Law of International trade*, Zagreb, Školska knjiga, pp. 144-323.

<sup>21</sup> As an example, we can state a lease agreement emerged as a model of financing procurement of equipment for carrying out commercial activities, and ,today, when a leasing construction has reached a high level of evolution and natural persons use this legal transaction as a form of financing of procurement e.g. a car.

<sup>22</sup> On the entities of the civil law see: Klarić, P., Vedriš, M. (2008). *The Civil Law*, Zagreb, The Official Gazette, pp. 32-70. and Spaić, V. (1967). *The Civil Law*, The University of Sarajevo, pp. 78-105.

**Complexity** – newly emerged civil law transactions that are complex by rule. Primarily, in part that refers to mutual rights and obligations as well as the responsibility of the participants involved in business. A classic example of a complex contemporary business is a leasing agreement. This job does not contain the contract law relation between a creditor and debtor where rights and obligations of parties are precisely known and clear, because now that job becomes a three-sided contract law relation where it is necessary to define limits and rights and liabilities and responsibilities of each individual participant in the transaction;

**Innovation**– contemporary civil law businesses, including leasing are innovative models for resolving new practical problems and meeting the demands of entities.

**Specificity of legal nature**– with most of contemporary civil law transactions it is often difficult to define a legal nature of business. The reason lies in the complication and complexity as two previously mentioned characteristics. It could be said that contemporary agreements are by their nature *sui generis* agreements. Those are completely new creations because the peculiarity of those agreements is that the different state of facts, which is not defined by law, makes the internal unity.<sup>23</sup> Some authors believe that this concerns agreements *mixtiuris*, because of a combination of *essentialia* of various non-nominate agreement types.<sup>24</sup> For example, in the case of Leasing Agreements there are essential elements of a sale agreement, tenancy agreement, loan agreement etc., and, regarding a distribution agreement there are elements of a sale agreement, agreement of sale representation, license agreement etc.

**Efficiency** – the purpose of emergence and existence of this type of businesses is more efficient meeting the needs of entities. According to it, efficiency is one of its characteristics. Dynamics of business relations and market conditions require from participants to “invent” the simplest and the most secure manner of flow of goods and services. For this function, the previously mentioned contemporary civil law businesses and business legal constructions are most frequently used.

By its basic characteristics, a Leasing Agreement is a complicated and complex legal business. It is mostly a three-dimensional agreement with an unified object consisting of at least two agreements that are connected with

<sup>23</sup> Goldstein, A. (1991). The Commercial Treaty Law, international and comparative, Zagreb, The Official Gazette, p. 13.

<sup>24</sup> Mlikotin Tomić, D. (1986). Agreement of franchizing, Informator Zagreb, p. 143. According to: Horak H. (2005). The Agreement of distribution in law and business practice between Croatia and EU, Synergy – Publishing d.o.o, Zagreb, p. 30.

the same clause. Thereby, it has a specific legal nature. Possibly, in a legal theory there can be discrepancy on the issue of efficiency as one of characteristics of a Leasing Agreement. It means that, in most cases, authors who deal with this matter mention advantages and shortcomings of leasing.<sup>25</sup> With the existence of shortcomings, it is clear that the characteristic of efficiency is relative when it concerns only leasing. So, we can conclude that leasing, from the point of its emergence and commencement of application in practice, has a specific, complex and mixed legal nature. The rest of the paper will present basic specificities of a mixed legal nature of leasing through the existence of elements of several contract law agreements as integral parts of leasing.

## **2.2. The relation of leasing agreements with the contract law agreements**

leasing has a really complex construction and specific legal nature. It contains elements of more hitherto known and legally moulded nominate agreements, and therefore it can contain elements of a sale agreement, loan agreement, temporary service contract, agreement of providing services, tenancy agreement etc. It is true that all these elements in leasing are connected and conditioned. Besides possible theoretic separation and splitting of leasing, it can be said that it represents an unique business debt relation and thereby a specific legal relation – the agreement of the contemporary commercial law.<sup>26</sup>

It is particularly important to indicate the fact that a Leasing Agreement is the only one out of all contemporary legal businesses that gained a status of nominate legal transaction by the issuance of the law and leasing in Bosnia and Herzegovina<sup>27</sup>, and in the countries of the region<sup>28</sup> and Europe. Until the issuance of those laws, Bosnia and Herzegovina had been among the countries that had no complete and systematically regulated legal business of leasing, but there existed regulations that indirectly referred to leasing.<sup>29</sup> Following

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<sup>25</sup> On advantages and shortcomings of leasing see in more details: Vojteški-Kljjenak, D. (2008). Efficiency of the application of contemporary financial instruments in Serbia with a specific reference to factoring transactions, a doctoral thesis, Belgrade, The Singidunum University, p. 35 and Backović, E., *Ibid*, pp. 206-207.

<sup>26</sup> Trifković et al. (2009). *op. cit.*, p. 311.

<sup>27</sup> The Law of Leasing of the Federation of Bosnia and Herzegovina, *The Official Gazette of the Federation of BiH* 85/98 from 2009 and the Law of Leasing of Republika Srpska, *The Official Gazette of Republika Srpska* no. 70/07.

<sup>28</sup> Special laws on leasing, from 2002 to date, issued the following countries: Republic of Serbia, Croatia, Macedonia, Albania and Kosovo.

<sup>29</sup> Salihović, E. (2010). Modern agreements, The Forum for civil law for South Eastern Europe, The Selection of works and analyses, the first regional conference, Cavtat, p. 267.

the issuance of these laws in Bosnia and Herzegovina as well as in the region as it has previously been mentioned, a Leasing Agreement as one *de facto* complex legal construction gains a status of a new, nominate legal transaction. What contributed most to this was its continued implementation that proved the need of a special legal regulation of this issue.

In further part of the paper, there will be given a breakdown of relations of Leasing Agreements with the contract law agreements, more precisely: a sale agreement, lease/tenancy agreement, loan agreement and credit agreement.

### **2.2.1. Leasing Agreement – sale agreement**

A basic task in both domestic and international business law is a sale agreement. As a basic legal instrument for carrying out domestic and international exchange of goods, a sale agreement should serve for removal of all obstacles in the process of exchange of goods, and to facilitate and enable its increase.<sup>30</sup> The sale agreement is the only legal transaction of the international trade regulated in all domestic legal systems of commercial law, and at the same time at the international plan there are unified all issues of making and fulfilling of the international sale.<sup>31</sup>

According to the Law of Contract<sup>32</sup> “by a sale agreement, a seller undertakes to hand over the item (the subject of sale) to a buyer, so that the buyer acquires the right of disposal and/or right of ownership, and the buyer undertakes to pay the price of the item to the seller.” According to a theoretic definition of professor Trifković<sup>33</sup>, a sale agreement is the result of the agreement of the parties by which one of them – a seller – undertakes to hand over (deliver) a certain item to the other party – a buyer, which is the cause of emergence of business, and to transfer the strongest effective right on him/her, and the buyer undertakes to give a certain amount of money to the seller and transfer the strongest effective right on him/her. The Draft of the Law of Contract<sup>34</sup> adapts the definition of the sale agreement to the new economic and

<sup>30</sup> Fišer-Sobot, S. (2009). The responsibility of the seller for delivery of goods in both international and domestic law, a doctoral thesis, The Faculty of Law, Novi Sad, The University in Novi Sad, p. 1.

<sup>31</sup> Mlikotin Tomić, D. (1999). The Law of International trade, Zagreb, Školska knjiga, p. 147.

<sup>32</sup> The Law of Contract, *The Official Gazette of SFRJ*, No: 28/78, 39/85, *The Official Gazette of RBiH*, No. 2/92, and 13/94.

<sup>33</sup> Trifković, M., Simić, M., Trivun, V. (2004). The Business law, agreements, securities and antritrust law, The School of Economics and Business in Sarajevo, p. 21.

<sup>34</sup> The Law of Contract, The Federation of BiH/ Republika Srpska, The Draft, stated on 16th June 2003., taken from <http://ruessmann.jura.uni-sb.de/BiH-Project/Data/Obligacije%2016.06.03.pdf>,

legal system and stipulates that by the sale agreement, the seller undertakes to transfer the ownership rights at the sold item to the buyer and to hand it over to him/her for that purpose, and the buyer undertakes to pay a certain amount of money (the price of the subject of sale) and collect the item.<sup>35</sup>

As a basic task of exchange of goods and services in contemporary law, a sale agreement has become an adequate background for the development of new types of contemporary civil law agreements and in most cases their final goal is the exchange of goods and services for money.

Depending on the type of the sale agreement as it was analyzed in detail in the previous part of the paper, it is possible, during the conclusion of a Leasing Agreement, that the parties leave the possibility of repurchasing the subject of the Leasing Agreement following the expiry of the agreed period, and, with the payment of the fee for the repurchased value, the user would acquire the right of the ownership at the subject of leasing. It means that the cause of concluding such a transaction would primarily be acquiring the rights of the ownership, and/or purchasing of the subject of leasing by a lessee. Applicable legislation gives the possibility of agreeing these provisions and it is clear that the Leasing Agreement itself *de facto* contains the sale agreement.

The basic specificity of the nature of leasing concerns the fact that the sale agreement reflects itself in the manner of payment of price.<sup>36</sup> Therefore, a leasing operation could be considered according to its legal nature as a sale business with special settlements which can include either the sale with retaining the right of disposal and/or ownership right<sup>37</sup> or the sale with the installment payment of price.<sup>38</sup> This type of a background contracting relation is considered only in the case of the financial leasing, as a long-term business, without the possibility of facilitating the termination of the agreement. It also

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<sup>35</sup> Trifković, M., et al. op. cit. p. 177-178.

<sup>36</sup> With the contract law/business sale agreement and civil and business law, the price is an important element of the agreement, which is in most cases defined ( and/or has to be defined) by the agreement itself. It is also defined within a Leasing Agreement, but by the execution of the agreement it is not quite certain whether the user of leasing will become the owner of things because, according to dispositive provisions of the Law, he does not have to use that possibility, and/or agree with such a provision.

<sup>37</sup> This form of sales defined under the provision of Articles 540 and 541 of the Law of Contract (*The Official Gazette of SFRJ*, No: 28/78, 39/85, *The Official Gazette of BiH*, No 2/92, and 13/94.) according to which a seller of a certain movable may, by a special agreement, retain the right of disposal, and/or the right of ownership and after handover of items to a buyer, until the buyer does not pay the price in entirety.

<sup>38</sup> Articles 542-552 of the Law of Contract, according to which a seller undertakes to handover a certain movable to a buyer before the price is paid out in total, and a buyer undertakes to pay the price in installments, in certain time intervals.

happens in the case when it is of interest to participants in business that upon the expiry of the agreement the user of leasing becomes the owner of the subject of leasing. We consider that the subject of leasing can, without obstacles, include both movable and immovable property. If the subject of the Leasing Agreement was an immovable item, then it would be out of the question to define that transaction as a sale agreement with the installment payment because the legislator is explicit there and stipulates that the subject of this agreement may only be movables. However, concerning the sale with the retention of the right of disposal, and/or ownership right, we consider that no obstacles exist for the subject of the agreement to be real-estates. It can even be said that defining such a legal nature of a Leasing Agreement, when its subject includes real-estate, was the closest, because it is possible to draw the line between the right of disposal, ownership and possession of things considering the special regime of regulating the right of ownership over real-estates.<sup>39</sup>

On the other hand, concerning an operative leasing, we could not claim that the Leasing Agreement is the sale agreement by its legal character. Therefore, the additional classification of the Leasing Agreement can be made and it can be stated that a financial leasing with an option of acquisition of the right of ownership to the subject of leasing is a *prima facie* sale agreement of sale by its legal nature, and that operative leasing is by its nature a lease agreement.

### ***2.2.2. Leasing Agreement – lease/tenancy agreement***

A lease/tenancy agreement is a classical, nominate contract law agreement. By this agreement, a lessor undertakes to hand over a certain item for use to a lessee, and the lessee undertakes to pay a certain fee for that.<sup>40</sup> The economic purpose of lease/tenancy is reflected in the fact that the lessee obtains the subject of lease for the utilization and use for a certain period of time without paying its full value.<sup>41</sup> Namely, it happens that one party needs a certain item for certain time, but simultaneously it does not want to have or cannot have the ownership over that item. The reasons for that may be various: a specific

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<sup>39</sup> It is primarily considered that the registration of ownership at real-estates in land-registry books has a constituent effect, and, therefore, in the case of such a leasing agreement, it is possible to leave the registered lessor as the owner of the subject of leasing, and enter the right of disposal in favor of the lessee for the duration of the agreement in the encumbrance sheet C, and when conditions are met to register the transfer of ownership from the lessor to lessee.

<sup>40</sup> Article 567 of the Law of Contract .

<sup>41</sup> Bikić, A. (2005). The Law of Contract – a special part, The School of Law of the University in Sarajevo, p. 68.

item can be too expensive to be bought or the other party does not want to sell that item, but he/she only desires to give it for the utilization along with the fee for a certain period of time etc.<sup>42</sup>In practice, that is the most frequent case with cars, the investment equipment, expensive machines for production etc. Thus, by a lease/tenancy agreement the sale is supplemented in those cases when one or the other party does not want to have or does not wish to waive the right of ownership over some specific item. The lease/tenancy agreement is not the basis for acquiring the right of ownership over a certain thing, but it is a legal institute enabling the use and utilization of certain things or rights.<sup>43</sup> The Leasing Agreement can, in certain forms, have the characteristics of the lease/tenancy agreement. It is the case when both the lessor and lessee have on their mind only financing the utilization of the certain subject of leasing, and not its purchase and/or procurement.

Operative leasing as a short-term agreement with the possibility of the easier termination of a contracting relation than with a financial leasing is according to its legal character of the contract law agreement. The lessor gives the subject of leasing to the user or finances its “lease/renting” by the third party, and the user of leasing undertakes to pay the leasing fee for that (*de facto* lease) and undertakes to return the subject of leasing to the owner upon the expiry of the agreement.

### ***2.2.3. Leasing Agreement – loan agreement and credit agreement***

By the loan agreement, the loaner undertakes to give to the loanee a certain amount of money or a certain quantity of other exchangeable goods, and the loanee undertakes to return, after certain time, the same amount of money and/or the same quantity of the items of the same kind and quality.<sup>44</sup> This law of contract agreement represents a consensus, because it is considered to be concluded at the moment when the parties agreed on its important elements and not just by a handover of things to the loanee. Handover of things means the fulfillment of obligations by the loaner, but not concluding the agreement.<sup>45</sup> In addition, it is possible to agree the fee to the loaner for the utilization of his item.<sup>46</sup> It can be said that the loan agreement is a classical civil-law transaction and that it represents the basis of the credit agreement that is

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<sup>42</sup> Ibid., p. 68.

<sup>43</sup> Ibid., p. 70.

<sup>44</sup> Article 575, paragraph 1 of the Law of Contract.

<sup>45</sup> Momčinović, H. (1987). Agreements of the Law of Contract, the first book, Zagreb, The Official Gazette. p. 48.

<sup>46</sup> Bikić, A., op.cit., p. 93.



also a nominate legal transaction.<sup>47</sup> The fee in the case of the loan agreement, and/or credit agreement is labeled as interest.<sup>48</sup> The loan agreement being a characteristic of civil-law relations, is most frequently found in the relations between natural persons and it should be realized without a fee. However, the Law does not exclude the possibility of agreeing the fee, so that it is subsumed under encumbrance agreements. On the other hand, for the credit agreement, it could be said that it concerns the *sui generis* agreement, grouped under a special regime of agreeing regulated by *lex-specialis* regulations.<sup>49</sup>

A creditor may only be a bank as an authorized financial institution for carrying out activities of giving credits, and conditions of its establishment and supervision over its business activities are conducted by the competent state bodies. Concerning the connection of the loan agreement and/or credit agreement with the leasing agreement, it can be stated that it is subsidiary. The Leasing Agreement is not a classical loan agreement, and/or the credit agreement even though there are elements for their incorporation in legal nature of leasing. Leasing providers, leasing companies in their business operations act according to a special regime as well as banks perform their activities. They charge the fees for their services in the form of interest, as well as banks do. It could be said that the Leasing Agreement has most elements of the special-purpose loan or the agreement of the special-purpose credit, because a leasing company always finances the user of leasing, the exactly defined subject of the Leasing Agreement, and/or it never gives him financial assets that he can spend for general purposes.

So, it could be concluded that the Leasing Agreement by its legal character always contains the elements of the special-purpose loan agreement regardless of whether it concerns financial or operative leasing.

From the foregoing, it can be concluded that regardless of a large number of types of Leasing Agreements, two basic forms have been crystallized: financial and operative leasing. Their differences are emphasized primarily by their different legal nature.

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<sup>47</sup> Regulated under provisions of Articles 1065-1069 of the Law of Contract .

<sup>48</sup> Bikić, A., op.cit., p. 93.

<sup>49</sup> In Bosnia and Herzegovina, there are special regulations at the level of entities for the area of banking: The Law on Banks and the Law on Banking Agency of the Federation of Bosnia and Herzegovina and Republika Srpska.

### 3. Conclusions

1. A Leasing Agreement represents a complex legal business based on a business-legal construction and it simultaneously developed with other similar legal constructions directed at more efficient satisfaction of new needs and economic possibilities of participants in the market. Out of all other complex forms of legal constructions, leasing has achieved the most significant progress. Due to the significance of this business, it managed to find its place in legislation of majority of contemporary legal systems, thus becoming a nominate legal business.
2. There is not one unique theoretic definition of a Leasing Agreement from which basic elements of this agreement could be singled out. It is partially defined primarily based on its basic forms. Regarding the fact that a Leasing Agreement has been introduced in applicable legislations, it is to expect a more serious legal-theoretic treatment and study of this significant legal transaction.
3. According to its nature, a Leasing Agreement is a legal construction emerged in the autonomous commercial law. A legal construction of leasing is made from a mixture of nominate legal transactions which has, by its application, acquired the properties and the status of a *sui generis* legal transaction. The most important specific properties of leasing as a new nominate agreement include: complication, innovation, complexity, specificity of legal nature and efficiency.
4. Contracting relations in the legal system of Bosnia and Herzegovina are regulated by the Law of Contract which represents a head codification for contracting relations. This Law regulates those contracting relations that are typical, and/or common in legal transactions as well as those whose importance requires a special legal regulation. A great number of agreements falls under this category of legally regulated – nominate contracts. The Law of Contract does not recognize the leasing agreement, but the Draft of the Law of Contract envisages leasing as a special nominate agreement.
5. The legal system of Bosnia and Herzegovina follows a positive trend in undertaking legislative activities of regulating contemporary civil-law regulations, and/or modern agreements by special laws. It is to expect that following the termination of the contract law reforms through the adoption of the proposed Draft of the Law, the remaining *sui generis* operations being intensively applied in practice, will, apart from leasing, gain a legislative framework and thus become nominate

legal transactions. We consider this to be of a great significance, because by recognizing the status of these agreements by the law will be given the possibility of a safer protection and exercising rights and obligations of parties that ensue from these transactions.

### ***Emir Sudžuka***

Master prava, Viši asistent na Fakultetu pravnih nauka, Univerzitet „Vitez“

## ***Pravna priroda ugovora o zakupu***

### ***R e z i m e***

Ugovor o zakupu je određena pravna transakcija proistekla iz poslovnog i pravnog tumačenja sa ciljem da se efikasno zadovolje potrebe učesnika u transakciji. Pravna teorija i praksa je postavila kriterijume za podjelu ugovora o zakupu, tako da je ova pravna transakcija dobila svoje osnovne karakteristike. To je način formiranja osnovnih formi ugovora o zakupu. Prema svojim karakteristikama, ugovor o zakupu ima pomešanu pravnu prirodu. U zavisnosti od tipa ugovora, on može imati karakteristike prodajnog ugovora, ugovora o zakupu, ugovora o zajmu itd. U određenim tipovima zakupa, neke od karakteristika nabrojanih tradicionalnih ugovora dominiraju slabijim ili jačim intenzitetom. Ovaj rad se bavi teorijskom analizom odnosa ugovora o zakupu i ugovora o obligacionom pravu. Poseban naglasak je stavljen na operativni i finansijski lizing kao dva osnovna tipa ugovora o zakupu koji se razlikuju po svojoj prirodi.

*Ključne reči: pravna priroda, ugovor o zakupu, prodajni ugovor, ugovor o najmu, ugovor o zajmu.*

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