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DOKTORSKI RAD

SAŽETAK

POSEBNOSTI UGOVORA O LEASINGU U PRAVNOM PROMETU

U središtu ovog rada prvenstveno su posebnosti ugovora o leasingu, odnosno njegovih pojavnih oblika. To znači da se u ovom znanstvenoistraživačkom radu pristupilo na način dase napravila jasna razlika između posla leasinga i ugovora o leasingu, utvrdio povijesni i gospodarski fenomen leasinga, i značajke ugovora o leasingu koje su specifične u odnosu nadruge ugovore autonomnog trgovačkog prava; prvenstveno ugovora o najmu, ali i ugovora okupoprodaji i ugovora o zajmu. Za ugovor o financijskom i operativnom leasingu određeno je da je to ugovor sui generis, jer u najvećoj mogućoj mjeri uvažava slobodu ugovaranja stranaka. Prema takvoj tezi, na ugovor o financijskom i operativnom leasingu se odredbe drugih zakonom uređenih tipova ugovora autonomnog trgovačkog tipova ugovora ne mogu primijeniti u potpunosti, nego tek pojedine odredbe na ugovore o financijskom i operativnom leasingu. Analizirane su pravne značajke osnovnog, izvornog modela financiranja, financijskog leasinga i operativnog leasinga, kao odgovora banaka, financijskih institucija na nove poslovne, tržišne i financijske potrebe i mogućnosti. Posao leasinga svoju realizaciju ima kroz sklapanje ugovora koji sklapaju davatelj leasinga i primatelj leasinga, a to se naziva izravni leasing. S druge pak strane postoji neizravni leasing koji se realizira kroz dva ugovora. Pravnotehnički to su ugovori o kupoprodaji između davatelja leasinga i dobavljača objekta leasinga, te ugovora o leasingu između davatelja leasinga i primatelja leasinga. Posao neizravnog leasinga odvija se u karakterističnom trostranom odnosu, u kojem dobavljač objekta leasinga i primatelj leasinga ne ulaze u nikakav ugovorni odnos. Davatelj leasinga nakon što je platio dobavljaču, odnosno proizvođaču objekta leasinga cijenu, predaje objekt leasinga izravno u posjed, korištenje i uporabu primatelju leasinga. Primatelj leasinga plaća naknadu u mjesečnim obrocima i to na način da se ona utvrđuje kao zbroj troškova koje je imao davatelj leasinga pri nabavi objekta leasinga i njegovih troškova financiranja. Dajući presjek trgovačkopravnog ugovaranja općenito, razumije se problematika investicijskog rizika kao jednog od glavnih različitosti financijskog i operativnog leasinga. Za posao financijskog leasinga karakteristično je da je investicijski rizik davatelja leasinga u cijelosti prenesen na primatelja leasinga, dok u poslu operativnog leasinga investicijski rizik

ostaje na davatelju leasinga u mjeri koja odgovara odnosu iznosa unaprijed kalkuliranog ostatka vrijednosti objekta leasinga prema iznosu nabavne vrijednosti objekta leasinga.

Metodološki pristup istraživanju prilagođen je analiziranim izvorima koji su determinirani pitanjima koje pojedino pitanje otvara, pa je tako u svim poglavljima rada dominantna normativna, povijesna i usporedna metoda, i jednako tako i uz navedene u značajnoj mjeri korištena metoda analize poslovne prakse, induktivna i deduktivna, dijelom statistička metoda, te metode sistematiziranja prikupljenih kvalitativnih i kvantitativnih podataka.

Pravni okvir leasinga u Bosni i Hercegovini je obrađen s fokusom na posebnosti ova dva leasinga. Ugovor o leasingu je u bosanskohercegovačkom pravnom okviru ugovor sa specifičnim sadržajem, reguliran Zakonom o leasingu Federacije Bosne i Hercegovine i Zakonom o leasingu Republike Srpske. Taj sadržaj ima elemente karakteristične za ugovor o najmu. I jedan i drugi ugovor imaju zajedničku karakteristiku, a to je prijenos stvari radi uporabe. Pored toga, postoje sličnosti s kupoprodajom. O tome se analizira, u kontekstu financijskog leasinga za kojeg držimo da se u poslovnoj praksi zapravo radi o kupoprodaji s obročnom otplatom cijene uz klauzulu pridržaja prava vlasništva, kada je riječ o tzv. financijskom leasingu s djelomičnom amortizacijom. S obzirom na zakonodavni pravni okvir za zaključiti je da je ugovor o leasingu u Bosni i Hercegovini normirani ugovor u katalogu ugovora trgovačkog prava kojeg se može odrediti kao imenovani ugovor trgovačkog prava.

Ključne riječi: ugovor o leasingu, posao leasinga, financijski leasing, operativni leasing,
izravni leasing, neizravni leasing, investicijski rizik

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DOCTORAL THESIS

EXTENDED SUMMARY

SPECIFICITIES OF LEASING CONTRACT IN LEGAL TRANSACTION

At the heart of this paper are primarily the specifics of the lease agreement, ie its manifestations. This means that this scientific research was approached in a way that made a clear distinction between leasing and leasing contracts, the historical and economic phenomenon of leasing have been identified, and features of leasing contracts that are specific to other autonomous commercial law contracts; primarily lease agreements, but also sales contracts and loan agreements. The financial and operating lease agreement is determined to be a sui generis agreement, as it respects the freedom of contract of the parties to the greatest extent possible. According to such a thesis, the provisions of other types of contracts regulated by law and autonomous leasing cannot be fully applied to the financial and operational leasing contract, but only certain provisions to financial and operational leasing contracts.

The legal features of the basic, original financing model, financial leasing and operating leasing, as well as the response of banks, financial institutions to new business, market and financial needs and opportunities have been analyzed. The leasing business is realized through the conclusion of contracts between the lessor and the lessee, and this is called direct leasing. On the other hand, there is indirect leasing, which is realized through two contracts. Legally, these are contracts of sale between the lessor and the supplier of the leased object, and lease agreements between the lessor and the lessee. The business of indirect leasing takes place in a characteristic three-way relationship, in which the supplier of the leased object and the lessee do not enter into any contractual relationship. After paying the price to the supplier, ie the manufacturer of the object of leasing, the lessor hands over the object of leasing directly into possession and use to the lessee. The lessee pays the fee in monthly installments in such a way that it is determined as the sum of the costs incurred by the lessor in purchasing the leased asset and its financing costs. Giving a cross-section of commercial law contracting in general, one understands the issue of investment risk as one of the main differences between financial and operational leasing. For the financial leasing business, it is characteristic that the investment risk of the lessor is fully

transferred to the lessee, while in the operational leasing business the investment risk remains with the lessor to the extent corresponding to the amount of pre-calculated residual value of the leased asset.

The methodological approach to the research has been adapted to the analyzed sources that are determined by the issues raised by each question, so in all chapters of the paper is the dominant normative, historical and comparative method, and equally used in addition to the above method of business practice analysis, inductive and deductive, partly the statistical method and methods of systematizing the collected qualitative and quantitative data.

The legal framework of leasing in Bosnia and Herzegovina has been discussed with a focus on the specifics of these two leases. In the Bosnia and Herzegovina legal framework, leasing agreement is an agreement with a specific content regulated by the Law on Leasing of the Federation of Bosnia and Herzegovina and the Law on Leasing of the Srpska Republic. This content has elements characteristic of a lease agreement. Both contracts have one thing in common, the transfer of things for use. In addition, there are similarities with buying and selling. This has been analyzed in the context of financial leasing, which we believe that in business practice is actually a sale with installment payment of the price with a clause of retention of title when it comes to the so-called financial leasing with partial depreciation. Given the legislative legal framework, it can be concluded that the leasing contract in Bosnia and Herzegovina is a standardized contract in the catalog of commercial law contracts, which can be defined as a named commercial law contract.

Keywords*:* *leasing contract, leasing business, financial leasing, operating lease, direct leasing, indirect leasing, investment risk*