



Various Important Matters Related to the Concept, Characteristics and Content of the Leasing Contract Pursuant to the Law of the Republic of Kosovo on Leasing

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Abstract: The leasing contract is one of the most important contracts according to autonomous commercial law. Leasing contract is a contract entered into between a lessor and a lessee that grants the lessee the right to possess and use the leased asset for a period of time as specified in agreement, in return of payment by the lessee as per specified instalments. Issues related to leasing in the Republic of Kosovo are regulated by the 2009 Law on Leasing. The leasing contract appears in different types, but the most important type in Kosovo is the financial leasing. The leasing contract is a new and very important type of contract for the economy of Kosovo. The prospect of its implementation in practice will be of a broad scope, taking into account the main factors that influenced its introduction and implementation in the contemporary economy. Financing investments by this method is a necessity of the era. In this paper, we have considered the most important issues related to the leasing contract, analytically examining the notion of this type of contract, its characteristics, essential elements, legal nature, rights and obligations of the contracting parties - lessors and lessees. We have focused on the specific consideration of this very important contract for the economy of Kosovo. The review was conducted based on the applicable legislation in Kosovo, as well as often focused on the problems that exist in practice in Kosovo.

Keywords: Leasing contract; lessor; lessee; Law on Leasing; Kosovo

1. Introduction

According to the leasing contract, the lessor is obliged through money provision to cover the expenses of the lessee related to obtaining the lease asset and on his/her benefit: from the third party, the lease asset shall be obtained or the lease asset shall be produced in order to hand over the abovementioned lease asset to the leasing user

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for use (Obradović, 2003, p. 413; Simin, 1979, p. 32; 36; Berden, 1977, p. 229; 230; Vilus, 1972, p. 109).

Leasing contract concept is determined expressively by the Republic of Kosovo Law on Leasing in the Article 2, pursuant to which “a leasing contract is entered by the Lessor and the Lessee, it gives the Lessee the right to possession and use of a Leased Asset for the specified period of time in return for the payment of the defined installments by the Lessee”. Taking into account the fact that goods; production exists in the market economy, it is very important accepting the legal forms and institutes for regulating such production and exchange of goods. We are referring here to forms which in the process of conducting the circulation are signed, there are created legal matters which ensure and serve to facilitation and speeding up of conducting thereof.

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Taking into account the fact that goods; production exists in the market economy, it is very important accepting the legal forms and institutes for regulating such production and exchange of goods. We are referring here to forms which in the process of conducting the circulation are signed, there are created legal matters which ensure and serve to facilitation and speeding up of conducting thereof.

Circulation of goods is considered purchasing of goods with the aim of selling them, purchasing of goods with the aim of processing, respectively production of new products and selling the processed goods, respectively produced, and selling own produced goods. And services in circulation of goods are considered the services of the mediation agency, representation services, commission services, freight and other services (Antonijeviq, 1979, pp. 137-140).

The new business practice, but also the legislation of some states with developed market economy and with a high frequency of exchanging goods, services have brought some new names (of new contracts), which have not been regulated in detail with legal provisions, but the rules, obligations and rights and responsibilities which have been determined by the business practice, the good habits, or analogous application of similar rules and contracts are solving the problems of these contracts. Among such contracts the leasing contract is listed as well (Hetemi, 2007, p. 233).

The need to find new forms in investment financial constructions, and the permanent aim of the economic entities to be involved, to adjust and to command the contemporary course of technology, have conditioned creation of the alternative method for financing investments, which in the international business practice is known with the name “leasing” (Hetemi, 2005, p. 157).

In the last decades, in the western countries there appeared and developed new forms of credits. Among such forms of crediting, leasing takes an important place, and it represents sale of equipment and immovable property by specialised companies on renting of trade and industrial enterprises (Simin, 1979, p. 32).

Leasing operations have begun to be conducted relatively early, in fifties in USA, whereas in the Western Europe at the beginning of sixties, and in a very short time it managed to spread significantly. Practically leasing was unknown in Europe, as mentioned above it was created concretely in USA “around 1939, as a new method of financing real estate properties, whereas at the beginning of 1950 in the field of financing movable assets’ investment it crossed the Atlantic, and initially it developed in Great Britain, and later in 1960, after overtaking different obstacles; psychological, of legal-fiscal nature, it began to develop in the Continental Europe countries” (Obradović, 2003, p. 413).

The most important companies of leasing in USA are the following: Boot Leasing Corp. “United States Leasing Corp.”, “National Equipment Rentl”, “Ekiles”, “Hadson cyl guisael proc.”, “Leasing Corp.”, “Leas Plain International”, “American Industrial Leasing”. Among the Western Europe companies we may count: “Mercantile Leasing Corp” (Great Britain), “Deutsche Leasing GhBH”, “Munemaun Industrie Anloge A.G” (Germany), “Locatriche Italiana SpA” (Itali), “S. A. Locabel” (Belgium) (Simin, 1979, pp. 32-33).

Leasing has been developed and has a significant importance in France also, where the first financial leasing company is considered “Locafrance”, founded in 1962, whereas four years later in France there were founded 33 leasing companies. In 1970, the entire amount of their operations reached 8 FF billions, whereas in 1975, 34 billions. The hasty increase of the leasing operation is explained through the needs for investment, related with increase of technical progress which could not be realised through traditional methods of financing, also by using own sources and bank loans (Simin, 1979, p. 33).

The leasing contract is an important contract which for quite a long time has spread in a great scale in Italy as well based on American models. This type of contract is

concluded in between two types of entrepreneurs: on one side by the entrepreneur - producer (or distributor) of industrial plants, machinery, apartments of high level technique etc.; on the other side by the entrepreneur – user of such product/assets. The economic reasons of this enterprise are of different kinds, where the enterprise which aspirates to use such assets may not have available the necessary money to buy the assets from the producer, and it would be quite difficult to ensure them through loans, it can also be judged as not feasible the investment of the capital for purchasing the goods which technologically get old very quickly, and which quite soon are replaced by new technique inventions (Galgano, 1999, p. 544).

According to the Italian law, in essence the leasing contract carries out the function of a financing, equivalent, in essence with a loan of leasing enterprise for the user, where the leasing enterprise pays in cash the whole price of the assets in instalments, by guaranteeing the leasing enterprise for every contract default of the user, by the fact that such enterprise remains the owner of the asset until the last instalment has been paid. This contract allows the user to enjoy the asset but not the ownership thereof, even though he/she pays an amount of money as rent, and that amount is equal to or higher than the value of the asset, but that is exactly renting and not the ownership of the asset the enterprise aspires for (Galgano, 1999, p. 544).

In view of the aforementioned, the Italian Law considers whether the leasing enterprise or in contrary the user shall be favoured. This thing that shall depend on how will the physical and technological wear and tear act, after the contract has been concluded it results that the leasing enterprise which may allow to a new user for a new rent the enjoyment of the asset if the right of term extension has been foreseen or the right of the pre-purchase of the asset, the leasing enterprise shall realise receiving other rent or can set a sale price constituting an over-profit compared to the profit realised by the leasing contract.

If the technological or physical wear and tear of the assets occur at the moment of the term expiry, we can say that the user has entered into a feasible contract for him, but we must mention the opposite if the asset gets old before the expiry of the contract (Galgano, 1999, pp. 544-546).

1.1. Leasing Terminology

As for the leasing contract, it has been tried to translate the term “leasing” as a similar institute as the rent, and to regulate it by a particular law. In France and Italy it has been tried to translate the term “leasing” as a similar institute as the rent, and to

regulate it by a particular law. Thus, in the French law on leasing in 1966 the term “credit - bail” was used, in the Belgium Law in 1967 “location – financement”, whereas in the Italian Law for tax facilitations of 1968, and in the proposals on the Law on Leasing of 1973, 1977 and 1979 the term “locazione finanziaria” was used. In Germany, none of the terms like (Miefinanzierung, Finanzmiete, Maschinenmiete) could replace the term as it has been known Mobilien-Leasing and Immobilien-Leasing, which have been accepted in the literature and in court practice (Obradović, 2003, p. 413).

In the etymological aspect the expression leasing originates from the English language word in verb form to lease, which means (has the meaning) of rent, to lease (Spasić, 2008, p. 238-239).

In the Republic of Kosovo, the leasing contract is regulated by the particular law on leasing, which has been approved by the Assembly of Kosovo, 2009. This law uses the term “lizing - leasing” (hereafter LLK).

In the legislation in Albania, starting from the Civil Code of Albania of 1994 which initially regulated this matter, but also in the particular law for leasing (The law on financial rent, no. 9396, 2005) the term “financial rent” is used, and from the name we understand the Albanian legislation considers it as a particular form of rent.

It is important to note that in the French practice the expression credit bail is used, which in the meaning fits to English language term leasing – and in the nowadays conditions it is accepted as the leasing concept in the business and banking practice (Pavlović, 1992, p. 3).

2. Legal Characteristics and Nature of the Leasing Contract

Leasing contract characteristics are as follows: it is a two side binding contract, formal contract, commutative contract, according to the technique of entering it is categorized as contract of adhesion, it is an intuitu personae contract. It is a two side binding contract, (contractus bilaterales) because it establishes rights and obligations for both contracting parties, lessor and the lessee. In this contract there exists a balance of conditions. The legal grounds of these contracts is the entirety of the rights and obligations of the contracting parties. It is a contract with name (contractus nominatus) because it is expressively regulated by law (Dauti, 2007, p. 60).

It is a Form contract because the law on leasing foresees that the leasing contract must be entered into in written. (As per form of the contract we shall deal in the

section of form, as a specific condition for entering into a leasing contract). It is an intuitu personae contract which is concluded taking into account the personal contracting features of the lessor and the lessee (Vasiljević, 1997, p. 671).

It is an adhesion contract, because one contracting party – the lessor, determines the elements and terms of the contract preliminary, whereas the other party can bind by signing the contract or by rejecting en bloc signing it. Thus the lessor according to the rules determines in its general conditions that the offer of the lessee must necessarily contain the general business conditions. This manner of concluding the contract is accepted in the Continental Europe, and according to some formal contracts in USA the lessor – financer directly proposes his conditions, whereas the next lessee signs also and at this moment the contract is concluded (Obradović, 2003, p. 417).

It is a commutative contract, as its' content is known for the party at the moment of signing the contract. The rights and obligations of the contracting parties – lessor and the lessee at this contract are safe in a way that the occasion does not influence the rights and obligations of the contracting parties.

The leasing contract is a form contract (type), because it is entered into a specific form, and in such a form there are found the necessary conditions, and their content is determined preliminary by the party which delivers the assets or provides the service (Dauti, 2007, p. 60).

As far as it concerns the legal nature, there is no unique opinion in science in the legal doctrine. Even though it contains elements of already known and mentioned contracts – the rent contract, loan, sale by preserving the right of ownership, leasing cannot be categorized in any of these contracts due to the fact that we deal here with unique legal relationship. We can establish that leasing is a contract which constitutes a specific financing construct and placement of investment assets selected by the lessee for use. Leasing is not a classical contract of the right of obligations, but it is a contract of modern economy, created in the international business practice (Gorenc, 2006, p. 219).

Authors explain in different manners the legal nature of this contract, considering as rent contract, service contract etc., but what is more important to mention here, is that we cannot categorize this contract in any of the above groups, though it has elements of these contracts, because the Leasing Law of the Republic of Kosovo itself of 2009 considers this contract as a specific contract with specific elements,

pertaining only to the leasing contract (sui generis) (Law on Leasing – Law no. 03/L-103).

3. Conditions for Concluding a Leasing Contract

The leasing contract is concluded compliant with willing agreement of the contracting parties related to the essential elements of the contracts. In order to establish legal effects (the entirety of the rights and obligations of the contracting parties), agreement of the parties must be reached if certain conditions have been met. Conditions for contract conclusion are divided into two groups, general and specific ones. *General conditions* include: working ability of the parties, consent (agreement) of the will, subject of the contract and grounds of the contract. *Specific conditions* include: form of the contract (Dauti, 2007, p. 35).

Conditions for concluding a leasing contract are the same as those of the contract in general. The key elements of this contract are the following: contracting parties, contract subject (lease asset), award (price) given for the leasing, time frame - expiry, award payment manner and duration of this contract. deed of gift became source of obligations only at the time of empire. Then the parties' agreements that the donor will give to the recipient any of his property without seeking any compensation, began to be legally protected.

3.1. Contracting Parties

In a leasing contract the following contracting parties appear: 1) *lessor* and 2) *lessee – leasing user*. Lessor and Lessee shall agree (reach agreement) on essential elements for conclusion and fulfilment of a leasing contract.

Lessor as a contracting party is obliged in the contracted legal relationship that with the award in money related to the lease asset and on its benefit, from a third party they shall obtain the lease asset, secondly they shall produce the lease asset, and thirdly they shall hand over the lease asset to the user in specific time for use. The Lessor appears in capacity of a specialised enterprise which provides assets – equipment for use on return of award. The work of leasing contract most frequently finances banks, thus buying the request which the producer has toward the leasing user based on the agreed rent – award for using the lease asset. The Lessor can also be a producer of different equipment and in this case the lessor and the lessee enter into a leasing contract.

Lessee can be a natural or legal person who carries certain economic activity, registered at the competent body. In the case of concluding the leasing contract, the lessee obtains the right to use the movable or immovable property, until the expiry or the end of the contract duration at the term of extending the leasing contract and after expiry the lease asset has to be brought back or such contract subject has to be purchased.

The other contracting party in this contract, the leasing user is obliged to pay the award in money in the total amount, but it can be contracted also in instalments. The leasing user is obliged to pay the award in money; it can be contracted also in instalments. The leasing user is obliged to keep safe from using the lease asset in contrary with the conditions under which it is delivered, to maintain it in good condition, to undertake the incurring repairs on his own expenses, if the contract does not foresee otherwise.

According to the leasing contract the lessor is obliged that in return of money award covers the expenses of the lessor related with the obtaining the lease asset and on his benefit from a third person shall obtain the lease asset or shall produce the lease asset and hand it over at specific time for use to the user.

3.2. Subject (Asset)

Pursuant to the Law on Leasing “lease asset” refers to an asset which is subject to a leasing agreement. Pursuant to the Article 2 of this Law, “asset” is any movable or immovable sustainable goods. This term does not include non-sustainable goods, money, documents, financial instruments, accounts, commercial papers, securities, works of art, intellectual property or other intangible property.

The lessee as a contracting party at this contract “defines the asset subject to leasing and selects the supplier. The lessor obtains the asset subject to the leasing or the right of possession and use of the lease asset related to the leasing and the supplier has been notified by the lessor or the lessee, or in any other way has had knowledge of this fact “(Article 2 of the Leasing Law)”.

The right to lease asset immediately passes from the lessor to the lessee in the end of the leasing duration. Leasing contains a feasible option of purchase under which the lessee may obtain (take) the leasing assets in lower than the real market value in the end of the leasing duration (Article 2.2 of the Law on Leasing).

Subject of the leasing contract can be any asset which is in circulation and that can be given to another person for use. A subject of this contract may be either a movable or an immovable asset. We have more often cases of movable assets, equipment, machines, computers, communication means, engineering machinery, which are found as expensive equipment which the lessee is not able to buy or ensure loan for buying such equipment. The equipment subject to leasing must be described in detail, with all its' technical features. Normally every equipment, machine or asset that is subject to leasing contains special specification attached to the contract becoming an integral part of it. Leasing contract subject can also be an immovable good, e.g. when a certain store is leased, when a certain business premise is rented, when a certain communication bridge is built on concession.

Subject of the leasing contract may be giving movable goods for use (more rarely the immovable ones), usually of a higher value and high technology (computers, electronic equipment, modern machines etc.), of course the durability term of equipment in the technical aspect must be longer than the duration of the contract leasing. It is often contracted mandatory substitute of equipment if during the contract term the technology and equipment is obviously improved (Gorenc, 2006, p. 219).

3.3. Price (Award)

The price is the second essential element of a leasing contract. This price is paid as an award for using the asset subject to this contract. The amount is determined upon agreement of contracting parties taking into account the value of the contract subject, contract duration, benefits deriving from using the contract subject, expenses of servicing the equipment.

4. Other Elements of the Leasing Contract

As other elements apart from the substantial ones, there appear the extension of the contract duration, time and manner of paying the price, payment of award for maintenance of equipment, technical documentation, time and manner of contract conclusion.

4.1. Lease Term

Leasing term is the time interval determined by the contracting parties for the leasing. This term is determined by the lessor and the lessee. The Leasing Law in Kosovo on its article 2 defines the leasing term. According to this article “is the initial period as specified in the Financial Lease Agreement, during which the Lessee is entitled to posses and use the Leased Asset and that cannot be less than a year and longer than the economic sustainability of the Leased Asset”.

The lessee may evaluate the period in which the new production shall have safe placement in the market, and within the constraints of this term to borrow for use the respective equipment. After expiry of the foreseen duration, the user gains the opportunity of extending the use for the next period, to purchase the equipment, and if he/she estimates that it is on his interest, the received equipment is returned back to the lessor (Hetemi, 2007, p. 163).

4.2. Time and Manner of Paying the Price

Time and manner of paying the price is an important element of the leasing contract, because the status of the concluded contract in the future shall depend on meeting the obligation in the foreseen time and manner. One manner through which the price payment can be executed is payment through bank and through crediting. Article 2.3 of the Law on Leasing has foreseen expressively the leasing duration. In the legal doctrine there exists the opinion that with the expiry of the foreseen duration term according to the leasing contract, the leasing user has the right to choose among these possibilities: 1. To seek renewal of the contract by paying a lower award; 2. To buy the equipment/asset in a lower price; 3. Or to return the asset – to the lessor (Vilus, 1972, p. 108).

4.3. Payment of the Price for Servicing and Maintenance of the Assets

Award (lease) is paid depending on the contract and subject nature (asset, the good) that is subject of the leasing (Vilus, 1972, p. 108).

Payment of the price for servicing and maintenance of the asset is done by the lessee and that is paid to the lessor, who deals with servicing the contract subject.

4.4. Form of the Leasing Contract

The leasing contract must be concluded in written form. The form is a specific condition for entering into the contract (Dauti, 2007, p. 45).

The leasing contract form is expressively prescribed by Law on Leasing in our country (Article 4). The contract must contain the following elements:

1. Total price;
2. The amount, number and completing the particular awards;
3. Leasing duration;
4. Final payment and its' calculation method in case of temporary termination of the contract.

The leasing contract is strictly formal. The leasing contract must be concluded in written form. If in a concrete case this contract is not executed in the legally prescribed manner than it is going to be announced as invalid. The contract must necessarily contain the following essential elements; *firstly*, the total price, *secondly*, the amount, number and fulfilment of the particular awards, *thirdly*, the leasing duration, and the *fourth*, final payment and the methods of its calculation in cases of temporary contract termination.

There is a general rule of the law on obligations that if the contracting parties have conditioned the contract in specific manner, and they have not adhered to the provisions of the contract, then the contract does not exist and does not produce legal effects (Dauti, 2007, p. 45).

The formal contract must be settled taking into consideration whether the form has been foreseen by law or by contract. If the form is foreseen by law, then the settlement must be made with formal agreement, whereas if the form is foreseen by contract then the settlement is made in informal manner. Here the court must take into consideration the aim of the form (Dauti, 2007, p. 45).

4.5. The Content of the Leasing Contract

The leasing contract must have specific content. The law on leasing in article 5 determines expressively the content of the leasing contract. According to this article, a leasing contract must contain as in the following:

1. Identity and addresses of the contracting parties;

2. Description of the Leased Asset sufficient to permit its identification, or the time of

Leasing Agreement establishment or later;

3. Duration of the Lease Term cannot be less than a year and longer than the economic sustainability of the Leased Asset;

4. Total amount of all payments to be paid by the Lessee;

5. Number, amounts and the frequency of each periodic payments;

6. Description of the conditions to buy the assets purchased through leasing;

7. The identity of the Supplier and reference to the Supply Agreement if a separate Supply Agreement is entered into (Article 5, paragraph 2 of the Law on Leasing).

Conclusions

Leasing contract is a new contract and quite important for the economy of our country. The perspective of its' execution in practice will be in a wide field of implementation taking into consideration the key factors which influenced its' appearance and implementation in the contemporary economy of circulation of goods and provision of services. Financing the investments through this method is a necessity of time, because the buyers are without sufficient financial means, whereas the seller each time has more difficulties to find the buyers of the investment equipment, thus they are advised to cooperate with each other.

In the Republic of Kosovo matters related to leasing are regulated by the Law on Leasing. In this outline we have reviewed the most important matters related to leasing contract, reviewing in analytical manner the concept of this contract, characteristics, essential elements, legal nature, rights and obligations of the contracting parties – lessor and the lessee. We focused on specific review of this very important contract for the economy of Kosovo.

There exist different types of leasing contract, where the most important ones are the leasing of consumables, investments, short term (operational), long term – financial, leasing of leasing associations, concerns, local and international. Leasing contracts may be terminated in several forms, but the main forms of terminating such a contract are: termination through expiry of the duration term as foreseen by the contract, termination by fulfilment and termination if the asset has been liquidated.

Reference

- Antonijeviq, Z. (1979). *The Law on Economics*. Prishtina.
- Berden, A. (1977). *Pogodba o leasing/Leasing Contract*. Pravnik. Ljubljana.
- Dauti, N. (2007). *Law on contracts*. Prishtina.
- Gorenc, V. (2006). *Basics of the trade status and contracting law*. Prishtina.
- Galgano, F. (1999). *Private law*. Luarasi. Tirana.
- Hetemi, M. (2005). *Various current issues on market economy*. Prishtina.
- Hetemi, M. (2007). *The international trade – business law*. Prishtina.
- Obradović, M. (2003). *Ugovori trgovačkog i privradnog prava/Commercial and commercial law contracts*. Beograd.
- Pavlović, B. (1992). *Ugovor o lizingu, ugovor u franšizingu, ugovor o forfeitingu, ugovor o faktoringu/easing agreement, franchising agreement, forfeiting agreement, factoring agreement*. Beograd.
- Simin, M. (1979). *Lizing kao forma kreditnih odnosa/Leasing as a form of credit relations*. Poduzeće – banka, 3 ožujak.
- Spasić, I. (2008). *Leasing posao u SAD, Uvod u prav/Leasing business in the USA, Introduction to law*. Institut uporednog pravo. Beograd.
- Vilus, J. (1972). *Pravni problem ležinga/Legal problem of leasing*. Anali PFBg. Beograd.
- Vasiljević, M. (1997). *Poslovno pravo/Business law*. Beograd.
- Law on Leasing – Law no. 03/L-103.