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PRIVATE LEGAL POSITION OF THE LEASING USERS IN THE FINANCIAL LEASING TRANSACTION - ANALYSIS OF LEGAL AND FORMULAR LEASING LAWS IN BOSNIA AND HERZEGOVINA

SUMMARY

The contractual position of the leasing beneficiary versus the leasing provider in the financial leasing business is atypical to the extent that leasing customers impose certain obligations that do not have their interlocutors in the lease contract model but follow the much more legal logic assumed in the model of the sale agreement. In this paper, the subject framework of the planned research was challenged with one subsequently arrived, but quite clearly a limited call for leasing practice in B&H, which is going to be reviewed and critically analyzed by the existing legal and formal leasing rights, practical and doctrinal conclusions regarding the quality regulation of the private legal status of the leasing users in the forms of a (financial) leasing contract. It is methodologically and substantially justified in collision and an unavoidable reduction in the opposite direction, all with the aim of presenting in their respective places and partial assessments of differences in the protection of the legal regulation of the private legal position of the published (ordinary owners) in relation to unpublished leasing providers (titles special ownership right) in formal forms of financial leasing contracts.

Keywords: *special ownership, publicity, registration, priority, leasing fees, secondary expenses, lags, installation, belonging, merging, insurance, risk of damage.*

1. Sources of regulation of leasing business in the B&H legal system

In the countries of the former “socialist legal circle” there was no adequate legal infrastructure or awareness of the importance of leasing business for the development

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of the national economy.³ Leasing operations were sporadically present in the practice of Hungary and Czechoslovakia, as well as the former Yugoslavia where certain expert discussions were conducted (for example, expert counseling held in Opatija in 1971) and in the legal regulation of these matters.⁴ However, as it did not happen, financial leasing existed as a stand-alone contract of autonomous commercial law in relation to the lease contract.⁵ The lack of regulation in the Law on Obligations of the SFRY (abbreviated: ZOO FB&H / RS)⁶ on it partly applied the regulations on foreign trade operations,⁷ while others share customs, foreign exchange and tax regulations⁸. Thus, leasing companies were exempted from their decision and developed customized leasing practices. This state of autonomous regulation lasted until the dissolution of Yugoslavia and the emergence of independent states in which the clear need to regulate this complex area of commercial law was recognized legally. In the Republic of Serbia, the Law on Financial Leasing was first adopted in 2003,

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- 3 Some specificities of belonging to the legal order to the socialist legal circle (eg Czechoslovakia, Hungary Yugoslavia, etc.) are sketched in the discussed chapter: Gavella, N., *Građansko pravo i pripadnost pravnih poredaka pravnim krugovima*, in: Gavella, N., Alinčić, M., Klarić, P., Sajko, K., Tumbri, T., Stipković, Z., Josipović, T., Gliha, I., Matanovac, R., Ernst, H., 2005, *Teorijske osnove građanskog prava-Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalnoeuropskom pravnom krugu* (ur. Gavella, N.), Pravni fakultet, Univerzitet u Zagrebu, pp. 20-24.
- 4 Spasić, I., 1990, *Ugovor o lizingu* (dissertation), Pravni fakultet u Beogradu, Beograd, pp. 25-26; Knezevic, S., 2008, *Ugovor o Lizingu* (master's degree), Pravni fakultet u Novom Sadu, Novi sad, pp. 11; Trifković, M., 2001, *Međunarodno poslovno pravo*, Ekonomski fakultet u Sarajevu, Sarajevo, pp. 294.
- 5 Velimirović, M., 2001, *Privredno Pravo*, Istočno Sarajevo, pp. 344; Vasiljević, M., 1999, *Poslovno Pravo*, šesto izmenjeno i dopunjeno izdanje, Savremena Administracija, Beograd, Rn. 1381, pp. 649; Korica, M., 2011, *Leasing opreme*, Poslovna akademija, Zagreb, pp 13; Medic, D., 1995, *Leasing*, *Advokatura- časopis Advokatske komore Republike Srpske*, no. 13-14, p. 59; Djurdjevic, M., 2002, *Pravne karakteristike i bitni elementi ugovora o finansijskom lizingu*, *Pravni život*, no. 11, pp. 546; Cicmil, N, 2008, *Nadzor NB Srbije nad davanjem poslova finansijskog leasinga*, *Pravni život*, iss. 12, pp. 812; Draškić, M., 1990, *Međunarodno privredno pravo*, VI izdanje, Beograd, Savremena administracija, pp. 365; Okičić, M., Bijorac, R., 2003, *Finansijski lizing – nova mogućnost za sigurniji plasman sredstava banaka*, *Pravni život*, no.11, pp. 717.
- 6 The legal order of the RB&H was taken over by ZOO SFRJ ("Official Gazette SFRY", No. 29/78, 39/85, 45/89 and 57/89) on the basis of the Decree with the force of the Presidency of the RB&H ("Official Gazette RB&H, Nos. 2/92, 13/93 and 13/94), while in RS it is taken over by the Constitutional Law for the Implementation of the RS Constitution ("Official Gazette of RS", No. 21/92). In order to fulfill the commitments made in the signed Stabilization and Association Agreement with the EU and the promotion of economic freedoms within the single economic area, there have been several attempts to harmonize the reform of the area of obligatory relations in B&H. However, political reasons have nevertheless managed to obscure the value and the first initiative since 16.06.2003. with the presented Draft ZOO FB&H / RS, as well as the other from 10.12.2009 with the public available to the proposal of the ZOO on the level of B&H.
- 7 The Law on Foreign Trade Policy of B&H ("Official Gazette B&H", no. 7/98).
- 8 Vasiljevic, M., o. c., Rn. 1381, pp. 649.

but in 2011, was subject to significant changes (abbreviated as: ZFL RS)⁹. On the other hand, the Republic of Montenegro passed the Law on Financial Leasing in 2005. (abbr. as: ZFL RCG)¹⁰, while the Republic of Croatia originally adopted the Leasing Act of 2006. replaced by new 2013 (abbreviated: ZL RH)¹¹. From this inevitable process, neither B&H was adopted, in which two entity leasing regulations were adopted: the Leasing Act of the Republic of Srpska in 2006, which was revised in 2011. (abbr.: ZL RS);¹² and the Law on Leasing of the Federation of Bosnia and Herzegovina in 2008. which was updated in 2013. (abbreviated: ZL FB&H).¹³ In addition to the contractual aspects,¹⁴ the regulation of financial leasing before the adoption of entity leasing regulations has become specific in that it has been recognized, to a certain point, the insurance function of these transactions. This can best be seen on the example of the results of the reform of the mobile insurance law in B&H after the adoption of the Framework Law on Pledge in 2004. (abbreviated: OZZ B&H).¹⁵

2. Defining business (financial) leasing in the B&H legal system

The entity leasing regulations of the adopted definitions of financial leasing of a business and financial leasing contracts were designed on the basis of the adopted definition of international financial leasing in the Ottawa Convention (Canada), which was adopted in 1988 under the auspices of the International Institute for the Unification of Private Law (International Institute for the Unification of Private Law, UNI-

9 "Official Gazette RS " no. 55/2003, 61/2005 and 31/2011.

10 "Official Gazette of Montenegro ", no. 81/05.

11 "NN, no. 141/13.

12 "Official Gazette of RS " no. 70/07, 116/11.

13 "Official Gazette of FB&H " no. 85/08, 39/09, 65/13 and 104/16.

14 A detailed overview of legal solutions is given in the reports: Perović, J., *Moderni ugovori -- izvještaj za Srbiju*, pp. 240-261; Salihovic, E , *Moderni Ugovori - izvještaj za BiH*, pp. 267-278; Spaić, A., *Moderni ugovori – izvještaj za Crnu Goru.*, pp. 281-288; Keglevic, A ., *Moderni ugovori – izvještaj za Hrvatsku*, pp. 189-200. The above reports were published in: *Civil Society Forum for Southeast Europe - Selection of Works and Analysis*, Book III, First Regional Conference Cavtat, 2010.

15 "Official Gazette of B&H", no. 28/04, 54/04.

DROIT).¹⁶ In ZL FB&H, “financial leasing business” is defined in a transaction in which the leasing provider conveys to the leasing user the right to own and use the leased asset for a certain period of time, while the leasing user is obliged in return to pay the agreed leasing fee with the option of buying or acquiring ownership rights of the subject of leasing.¹⁷ From this definition, at first glance, it can be seriously mis-
 sed, which is not emphasized that the leasing provider must also acquire the owner-
 ship right on the leasing object delivered to the user of leasing. However, this impre-

16 In Art. 1. Of the Ottawa Conventions of cross-border transactions in a three-way relationship are defined in such a way that the leasing provider (lessor) concludes a supply agreement with the supplier (according to the specifications and under conditions determined by the lessee)) acquires the plant, capital goods or other equipment, and then concludes a leasing agreement, according to which the leasing user acquires the right to use equipment for business or professional purposes in return for payment of the leasing fee. Otherwise, the activities on the adoption of this Convention began in 1974. by UNIDROIT, which was founded in 1926. based in Rome. At the 53. session of the UNIDROIT Governing Council, it was proposed to examine the possibility of regulation and harmonization of the rules on financial leasing on the international plane, which resulted in the creation of a Working Group that prepared a set of appropriate recommendations on the basis of which a survey questionnaire was addressed to all major companies , which deal with leasing business, as well as experts of various profiles in this field. In line with the content of responses received and expert analysis, the Leadership Council set up a new Exploratory Working Group with two tasks: to examine whether it is appropriate and feasible to separate privately from the fiscal legal aspect of leasing and whether it is desirable to separate leasing from other rights to movable property “security interest in movables” and regulate it separately in the international unification instrument, because this issue was dealt with especially by the UN Commission for International Business Law (UNICITRAL). The answers to the questions asked were affirmative, but several guidelines were suggested that the study group should follow later (it was established only at the 56. session of the UNIDROIT Governing Board held in 1977.) when drafting a pre-draft of the members of a future international unification instrument. After several symposiums and seminars (eg in New York, Milan, Rome, etc.) were held, from which the comments and suggestions were taken into consideration by the study group, the text of the future Convention was updated in May 1984. the final approval of the Management Board, which had no objection to it, already formed a special group of government experts (held three meetings in the period 1985-1987) with the task of improving the text of the Draft Convention for acceptance at the diplomatic conference. As a result of such undertaken activities, the International Finance Leasing Convention was adopted at the Diplomatic Conference held on 28 May 1988. Mr. in Ottawa (Canada), which entered into force only on May 25, 1995. (see Miklaušić, R., 2001, “Opći prikaz i ocjena Unidroit Konvencije o međunarodnom finansijskom leasingu”, *Pravo u gospodarstvu*, No. 3, pp. 22-26; Marušić, S., 1990, “Međunarodni finansijski leasing”, *Privreda i pravo*, vol. 29, 11-12, pp. 774-778; Spasić, I., I o. c, pp. 258-271; Korica, M., o. c, pp.15. So far, the Convention has been signed by 14 countries and ratified by 10 states. It was necessary for its entry into force in accordance with Art. 16. item 1. Provide three ratifications. This happened at the time when the ratification, in addition to France and Italy, was carried out by Nigeria on August 25, 1994 (see <http://www.unidroit.org/english/implement/i-88-1.pdf>).

17 This definition of financial leasing referred to in Art. 5. par. 1 and 3 of the ZL FB&H otherwise had an adopted definition of ex art. 5. Law on Leasing of the Republic of Croatia (“NN”, No. 135/06), abbreviated: ZL RH (2006).

ssion falls after the role of the supplier in the financial leasing business is interwoven properly.¹⁸ Subsequently, neither the financing function of the leasing provider nor the existence of a three-way relationship between the subjects of the financial leasing of a business was scrutinized. Nevertheless, the adopted definition is not impoverished, because the missing information in it with the same content is borrowed from the adopted definition and the contract on financial leasing.¹⁹ On the other hand, the ZL RS has deviated from this in significant terms with the adopted definition of financial leasing of the business, which emphasizes not only the financial character of the operation by emphasizing the three-way relationship, but also that the leasing fees are determined according to the amortization of the whole or most important part of the value of the lease item.²⁰ The explicit provision in the ZL RS that the leasing provider, on the basis of the contract of delivery, acquires the ownership right on the leasing subject, is a systematically better solution than the ZL FB&H, because it contributes, if nothing, to the conceptual separation of the mutual relations of the subjects of the financial leasing business. In this way, the complexity and mutual conditionality of the contractual elements within the financial leasing transaction, as well as the specificity of the position of the leasing beneficiary, which is not a contracting party in the delivery contract, is expressed.²¹ Some of these conceptual issues include, inter alia, the occasion that certain discussions with the purpose of reviewing the ZL FB&H begin. For these purposes, 2016. the Law on Amendments to the ZL FB&H was adopted, which in its introductory part contains the definitions of direct and indirect leasing.²² Of the aforementioned definitions of financial leasing in entity leasing regulations, it now deviates in a significant and revised definition in the Financial Leasing Act of the Republic of Serbia (abbreviated as: ZFL RS) from 2011, since the legislator, contrary to the accepted *sui generis* qualification²³, decided that the financial lease defines the construction of “financial intermediation”, in which the leasing provider takes the role of only intermediaries between the suppliers and

18 The supplier of the object of leasing shall be any person who conveys the right of ownership to the leasing provider by a contract or other legally prescribed manner (see Article 4, par. 4 of the ZL FB&H).

19 Compare art. 35 item 1. ZL FB&H and ex art. 35. century 1 ZL RH (2006).

20 See Art. 6. ZL RS.

21 Perović, J., 2003, Komentar Zakona o finansijskom lizingu, Glosarijum, Beograd, pp. 242; Compare.: Spasić, I., 2005, Prava i obaveze učesnika u trostranoj finansijskoj leasing operaciji, u: Novi ugovori od značaja za privredni razvoj Jugoslavije - Zbornik radova sa Savetovanja održanog 16. i 17. III 1995. godine u Beogradu, Institut za uporedno pravo, Beograd, p. 69.

22 See Art. 2 of the amendments ZL FBH (“Official Gazette FBH” no. 104/16) supplementing ex Art. 5. ZL FB&H and after par. 4 adds a new par. 5 which first determines the position and number of entities in the leasing business, then p. 6 which defines the business of direct leasing and par. 7 which defines an indirect leasing business.

23 See ex art. 2. ZFL RS (2003).

the leasing customers in terms of financing a particular lease item.²⁴ However, this lexically coined definition can barely be presented and faithfully reflect the typical flow of the creation and development of a leasing relationship, because the leasing provider does not only supply the supplier and the leasing user in direct contact, but bases with the first and legal relationship in their own intrepair. From this legal transaction, the leasing provider gives to the leasing user, as a party to the lease agreement, only a mandatory right to exploit the usable value of the leased asset until the expiration of the agreed period, which means that only after that or execution of the option of purchase can be contracted in the interest of the leasing user and acquiring property rights. Despite this terminological illogicality, the Serbian legislator expressed a clear commitment to a more precise definition of financial leasing in relation to other related contractual institutions, since the dissected features, within the structure of financial mediation, were certainly typical of the regulation of financial leasing. Starting from the detailed regulation of the content of the contract of delivery and the leasing contract, in a particularly impressive way the legislator succeeded in his efforts to throw out the surface and the interior of the relationship of triangles that adorn the tasks of financial leasing. Compared to the entity leasing regulations, it is interesting to point out some specific features of the definition of leasing activities in the 2013 Leasing Act of the Republic of Croatia (abbreviated as: ZL RH)²⁵. The adopted definition of financial leasing has been fundamentally changed²⁶, although it is based on an earlier statement of some typical marks of this business²⁷, such as the function of financing, a three-way relationship, the taking of ownership risks, the calculation of the lease fee and the determination of the purchase option price according to the amortization of the leased asset at the time of its execution²⁸. However, what nevertheless shows, it is important to distinguish it, is the function of financing the leasing provider, which is not limited only to the conclusion of the contract of

24 For the qualification of financial leasing of a job as a construction of financial intermediation in the sense of the new Article. 2. ZFL RS requires: 1) that the leased asset is determined by the leasing user; 2) that the leasing provider transfers the ownership of the leasing user by the expiration of the period on which the contract was concluded and after the payment of the total contracted amount of the leasing fee; 3) that the leasing user has a contractual right to purchase a lease subject after the payment of the total agreed amount of the leasing fee; 4) that the leasing user has the right to extend the term of the lease contract; and 5) the period at which a leasing contract is concluded corresponds to the period in which the entire or most important part of the lease is amortized.

25 NN, no. 141/13.

26 See Art. 5. par. 2. ZL RH.

27 Compare: ex. 5. par. 3. ZL RH (2006).

28 Josipović, T., 2011, "Financial Leasing in Croatia", *Uniform Law Review*, Vol. 16, No. 1-2, pp. 277-279. The ex art. 36. century 1 and 2 of ZL RH, the purchase option was not designated as a mandatory element of the financial leasing agreement, although it indirectly indicated the legal definition of the financial leasing of the business.

sale with the supplier²⁹, because the subject of leasing can be obtained by some other forms of business such as the exchange contract, the barter or a gift.³⁰ A significant novelty in the ZL RH is the license to finance future things through leasing (the same is envisaged in the Law on Amendments and Supplements to the ZL FB&H from 2016),³¹ and that the supplier can be a natural person.³² However, on some of these solutions, before the adoption of the ZL RH, certain objections were made by the Association of Leasing Companies - the Croatian Chamber of Economy (HGK). In favor of clarifying that financial leasing occurs only in relation to the triangle between suppliers, leasing and leasing beneficiaries versus operational leasing arising in a bilateral relationship, the definition of indirect and direct leasing could be useful at first glance.³³ However, this was a decisive reason for the HGK to send criticism also to the account of the proposed definition of indirect leasing with the explanation that it prevents the participation of several persons in the role of the supplier. Nevertheless, the Croatian legislator's initial position remained unchanged. A significant novelty in the ZL RH also presents the definition of return and lease (sale and lease back) back as a special type of leasing in which the leasing provider first acquires the subject of the lease, but from the leasing user himself, in order to leave it to him and to use it³⁴. In its legal effects, this contractual form is on track and permits for the fiduciary transfer of ownership of movements from the Ownership Law and other substantive rights (abbreviated as: ZVSP RH).³⁵ In contrast, the sale and lease back as a specific contractual form, irrespective of functional equivalence with fiduciary

29 Art. 4. par. 1. in conjunction with Art. 51. ZL RH.

30 Perovic, J., o. c., s. 22; Stefanović, Z., 2009, "Poslovno pravo za ekonomiste i menadžere – sa elementima uvoda u pravo, stvarnog i obligacionog prava", drugo izmjenjeno i dopunjeno izdanje, Gutenberg, Beograd, Rn. 1943, pp. 446.

31 Compare art. 2. par. 1. sent. 2. ZL RH and Art. 1. ZL FB&H.

32 Art. 2. par. 9. ZL RH.

33 Art. 5. par. 5 and 6 of ZL RH.

34 Art. 5. par. 7. ZL RH.

35 Art. 34. par. 5 ZVSP RH (NN, Nos. 91/96, 73/00, 114/01, 79/06, 146/08, 38/09 and 153/09 143/12).

prohibited by the FB&H / RS Act of Rights Act (abbreviated as: ZSP FB&H / RS)³⁶, in order to respect the numerus clausus of real rights, nevertheless found its way to take the appropriate place in the latest amendments to the ZL FB&H from 2016. (the opposite is still maintained by ZL RS and ZFL RS). This resulted in a significant change in the leasing practice of the FB&H, since business entities were now placed on the disposition and definition of the sale and lease back of the business³⁷, which was modeled after the adopted definition of this work in the ZL RH. However, even before the domestic leasing company was prevented from achieving, with one endeavor and purely contractual principle of connection, the economic effect of imminent sale and lease back. However, the domestic leasing companies have not been prevented even now to achieve, with one endeavor and on a purely contractual principle of connection, the economic effect that is immanent sale and lease back. So, for example, the producer can sell to the economically well-defined buyer from whom the

36 After the dissolution of Yugoslavia in the former republics, an extensive process of transformation of the matter of civil law and the abandonment of the history of the former socialist order began. However, the starting positions of newly born states were different, so some (eg R. Slovenia and Croatia) successfully completed this process and today they are members of the EU, while others who are on that road (eg B&H, R. Serbia and etc.), reform processes are still in place or have been completed in a way that has not resulted in the creation of an effective civil law system. The greatest difficulties in this process were faced by B&H, as war events resulted in the establishment of a complex constitutional structure (the B&H Constitution is an integral part of Annex IV of the Dayton Peace Agreement, which was initialed on November 21, 1995 in Dayton, US, and signed on 14 November. December 1995 in Paris), in which the reformist troubles of building a civil law system became largely dependent on international influences, and only to a lesser extent relying on the domestic legal profession. Significant support was also provided to the reform of certain segments of civil law by various international organizations, such as the USAID-United States Agency for International Development, the IRZ-Germany Foundation for International Legal Cooperation (Deutsche Stiftung für internationale rechtliche Zusammenarbeit), the GTZ-German Technical Cooperation Organization (Deutsche Gesellschaft für Technische Zusammenarbeit, which now operates within GIZ-Germany the International Bar Association, the Deutsche Stiftung für Internationale rechtliche Zusammenarbeit), the ABA-CELLI American Bar Association, etc. However, the fact that certain reform projects have become possible and without significant expert support from these organizations is testified by the Law on Real Rights of RS and FB&H (Official Gazette of the RS, No. 124/08 and Official Gazette of FB&H no. 66/13), which regulates the area of real right in an extremely consistent manner in both entities of B&H. Although the ZSP RS was adopted on December 27, 2008, and its application started on January 1, 2010, the FB&H with minor deviations adopted the same regulation no later than 28 August 2013. Considering that the application of the ZSP FB&H was postponed for six months, from 5.3.2014. the 1998 Law on Basic Property and Legal Relations has been officially abolished and enforced. (published in: "Official Gazette of FB&H", No. 6/98, 29/03, abbreviated: ZOVO FB&H). In addition to the FB&H / RS ZSP, which relies on the ZVSP RH, and this model, modeled on solutions of Austrian real law, should not be forgotten by the Brčko District, which still implements the Ownership and Other Real Rights Act ("Official Gazette of the Republic of Croatia", no. see DB " , No. 11/2001).

37 See Art. 2 of the Law on Amendments to the FB&H ZL supplementing ex art. 5. ZL FB&H and adds par. 4 except for the above and par. 8. Defining the business of leasing (sale and lease back).

already selected leasing provider will also purchase the same and then leave it for use to the manufacturer, but now as a leasing user. The economic impact of this business, from the perspective of the leasing user, is, in addition to the initial benefits of releasing tied capital, substantially weakened by the non-monetary item of value added tax (VAT) of 17% in the leasing fee from the previous purchase of the lease by a potential supplier. This necessarily involve a potential supplier in structuring the first purchase, as an unavoidable prerequisite for the other by the leasing provider, is the reason why the cost of using the leasing object is ultimately increased. This must also be considered by the potential leasing beneficiary before entering this complex operation, as soon after the expense of the initial arrival they use from the sale of the lease, the good may come in such a situation that it later becomes difficult and the execution of the highly matched amount of leasing fees. Of the entity leasing regulations, as well as the ZFL RS, the most important step made in the ZL RH is the status part which now envisages a number of provisions governing the liberalization of the Croatian leasing market for those leasing companies coming from EU Members, but also by improving the segment of the internal organization³⁸, internal audit and supervision of the operations of Croatian leasing companies.³⁹ However, as the focus of the interest of the Croatian legislator on the status issues of leasing business prevailed and left the highest mark on the ZLRH, it explains why and why there is no detailed elaboration of the system of rights, obligations and responsibilities of the parties in the financial leasing business. In the end, the missed opportunity for the team only confirmed the longstanding suspicion that achieving a fair balance between the leasing provider and the leasing beneficiary is unrealistic in the conditions in which a wide area of autonomous regulation is left.⁴⁰

3. Typical obligations of leasing users in financial (leasing) operations

3.1. Paying leasing fees and incidental expenses

After the regular delivery of the leasing subject, the obligation of the leasing beneficiary to pay the leasing fee, which is usually executed on a monthly basis, arises, although it can be determined at different intervals (for example, quarterly, semi-annu-

38 See Art. 32-43. ZL RH.

39 See Art. 70 and 74 (internal and external audit of financial statements); and Art. 77-103 (control of leasing companies).

40 This is a clear invitation to reaffirm the same criticisms that were sent to the account of ex ZL RH (see Brežanski, J., 2008, Ugovor o leasingu - novo zakonsko uređenje, Pravni fakultet Sveučilišta u Splitu, Vol. 29, No. 1, pp. 640-641).

ally or annually).⁴¹ Leasing contracts, with a call for general business conditions, the leasing user is obliged to make monthly payments of the leasing fee to the designated lease holder's account in the amounts specified in the repayment plan.⁴² Regarding the maturity date, the leasing user is obliged to pay the first leasing fee on the first or second subsequent working day of the month in which the bearer confirms the acceptance of the leasing object.⁴³ This dynamics is usually matched monthly by the next leasing fees for which, in accordance with the repayment plan, the leasing provider also issues an invoice to the lease beneficiary along with the calculated VAT item.⁴⁴ By contrast, the general terms and conditions of the leasing companies in the Republic of Croatia envisage that other leasing fees, and all subsequent matures on the 16th calendar day or the last day of the following month, depending on whether the delivery of the lease was made in the first or second half of the previous month.⁴⁵ As mentioned above, leasing fees are calculated at the time of concluding the lease agreement, so that it contains only one part of the total investment costs of the leasing items increased by interest and the related entrepreneurial profit of the leasing provider. From the cost of using the leased object and the obligatory and casual insurance item, the initial costs of transport and transport insurance of the delivery should be differentiated, as well as other incidental expenses that the user of the lease pays without counting in the leasing fee.⁴⁶ In addition to the already paid leasing fees, the leasing user may be liable to the leasing provider and to pay a special fee for the provision of technical know-how in the amount determined according to the degree of technical innovation, the expected production effect and the durability of

41 Koščica, D., 2003, "Međunarodni ugovori od značaja za zemlje u tranziciji – klauzule u lizing ugovorima", no. 11, pp. 90.

42 See Art. 6. sent. 2. and 7. General terms and conditions of the financial leasing agreement for legal entities Raiffeisen leasing d.o.o. Sarajevo, from 08.07.2014. Mr. (abbreviated: OU RL); and dot. 1 and 4 under the heading "Terms and means of payment of leasing fees", in the General Conditions for the conclusion of the financial leasing agreement ASA leasing d.o.o. Sarajevo, dated December 19, 2016 (abbreviated as: AS ASAL).

43 See point 4.2. sent. 1. General terms and conditions with the financial leasing agreement concluded with legal entities in the FB&H area - Sparkasse leasing d.o.o Sarajevo, dated 04.06.2016 (abbreviated as: SLO); point 3. under the heading "Terms and method of payment of leasing fees" AS ASAL; and dot. 7.2. General Terms and Conditions of Hypo Alpe-Adria-Leasing d.o.o. Banja Luka, from 18.07.2013. Mr. (abbreviated: OU HAAL).

44 See point 4.2. sent. 2. OU SL.

45 See point 16.2. General conditions for the conclusion of the financial leasing agreement Porsche-leasing d.o.o. Zagreb, from 10/2009 (business on the leasing area of the Republic of Croatia)

46 According to the point 4.3. OU SL costs include all payments made by the leasing provider in favor of third parties in connection with the contract and the leasing facility, except for the payment of the purchase price (eg fiscal charges, VAT, insurance, bank charges, customs duties, fines and other damages, tolls, mostarines, costs of notaries, lawyers, consultants, appraisers, experts, debt collectors, costs associated with court, administrative or other administrative procedures).

technical knowledge and experience⁴⁷. During the leasing period, it often happens that the leasing provider unilaterally changes the calculation of the leasing fee in relation to the variable interest rate on the day of the contract conclusion⁴⁸. In order to protect the users of leasing-consumers in financial leasing operations, the ZL RS (2011) added a provision that allows leasing companies to vary the agreed interest, costs and fees only depending on the change and contracted elements, such as, for example, reference interest rate or consumer price index.⁴⁹ Although the LPRS does not determine, the general operating conditions of some leasing companies already contain the obligation to notify leasing users about the change in the nominal interest rate before the date of its application.⁵⁰ The same method of changing the nominal interest rate is also advocated by the Law on the Protection of Financial Services Users from 2014 (abbreviated: ZZKFU),⁵¹ although leasing companies, besides explicit leasing notification, are obliged to announce, during the duration of the financial leasing, and any change in the contracted elements on which it depends.⁵² In addition, practical reasons suggest that this turnover should have happened much earlier, because the long-term inertia of the federal legislator has only made a more complicated and current task to suppress an inappropriate leasing practice in which lenders can change at their sole discretion and an agreed leasing fee with the simple sending of a written notice to its customers-leasing customers.⁵³ From this nothing less insignificant in practice is not the question of the right of leasing users to make early payment of financial lease obligations with the deduction of contracted interest and costs until the due date. The consumer has this right with the consumer loan with a call for proper implementation of the Consumer Protection Law of B&H (abbreviated as: ZZP B&H).⁵⁴ If the ZL FB&H is taken into account, or the general binding rules on the timing of the fulfillment of the monetary obligations referred to in the ZL RS, then it is clear that the leasing user can, under the assumption of the leasing provider's notice, pay the leasing fee even before the expiration of the agreed term in the financial leasing with the purchase option or mandatory transfer of

47 Velimirović, M.: o. c., pp. 348.

48 See the "interest and fee" clause in Art. 15. par. 1. sent. 1 and 2. OU HAAL.

49 See Art. 3. ZL RS (2011), par. 3 in Art. 9. ZL RS (2007).

50 See the heading "nominal interest rate (NKS)" in Art. 15. sent. 6. OU HAAL.

51 In Art. 2 par. 10. ZZKFU ("Official Gazette of FB&H", No. 31/14), the user of the leasing-consumer is defined as a natural person who uses leasing services for purposes other than those intended for his business or other commercial activity.

52 Art. 18 and 24. of the ZZKFU.

53 Art. 41. ZL FB&H.

54 See Art. 65. ZZP B&H ("Official Gazette of B&H", No. 25/06).

ownership of the leased asset.⁵⁵ Apart from operating leasing operations, to leasing users as natural persons or consumers, it is meaningful for ZL RS in the mentioned constellations of financial leasing to apply the mandatory rules on ring sales. This is necessary because, in the same way as in the case of annulled customers, under the nullity of the contrary provisions, the right of the lease beneficiary to the prepayment is fixed, with no agreed interest and costs to maturity.⁵⁶ However, there are different practices in leasing practice, showing the general operating conditions of individual leasing companies, ranging from total ignoring⁵⁷ to a transparent recognition of the right to early payment, with only the amount that is deducted from the manipulative costs of closing the financial leasing relationship.⁵⁸ In some forms of leasing contracts, all the categories of lease beneficiaries have the right to early payment⁵⁹, while in other cases only consumers are beneficiaries of leasing.⁶⁰ In order to prevent, after early redemption, the practice that leasing customers reimburse losses to leasing providers in the form of a loss of profit that contains unpaid interest rates, ZZKFU prescribes⁶¹, as modeled on Directive 2008/48 EC on consumer loan agreements. Leasing, as well as banks in the loan agreement, are entitled only to objectively justified and contracted cost reimbursement.⁶² However, this right leasing can be realized only on the assumption that the fixed nominal interest rate was applied at the time of prepayment⁶³. With regard to determining the amount of compensation, the ZZKFU allows leasing companies to contract up to 1% of the amount of prepaid liabilities if the period between prepayment and the due deadline for fulfilling obligations from financial leasing is longer than one year.⁶⁴ In the event that the period is shorter than one year, then the cost reimbursement can be agreed up to a maximum

55 See Art. 4. Point g) ZL FB&H from 2013; and Art. 315 par. 1. FB&H / RS.

56 Art. 545 ZOO FB&H / RS.

57 This is the case in OU SL and RL.

58 The amount of manipulative closure costs for legal entities must not exceed the cost of establishing a financial leasing relationship, while in relation to natural persons (consumers) the fee is not calculated at all (see points 1 and 2 under the heading "Payment before the agreed deadline", OU ASAL).

59 Ibidem.

60 See par. 9. point 4. OU HAAL.

61 See Art. 27. par. 7. ZZKFU.

62 See Art. 27. par. 2. ZZKFU and Art. 16. par. 2. sent. 1. Directive 2008/48 EC on consumer credit agreements (OJ L 133/66 of 22 May 2008) repealing Directive 87/102 EC of 22.12.1986. on the approximation of laws, regulations and administrative provisions of the Member States relating to consumer credit (OJ L 42/48).

63 See Art. 27. par. 2. ZZKFU and Art. 16. par. 3. (c) of the Directive.

64 Art. 27. par. 3. sent. 1. ZZKFU.

of 0.5% of the amount of prepaid liabilities.⁶⁵ Although the method of determining the cost of compensation in the ZZKFU is taken from Directive 2008/48 / EZ,⁶⁶ it still suffers some criticisms. On the one hand, the upper limit of the fee, depending on the moment and amount of early repayment, may disproportionately burden the leasing customers with the repayment of large amounts of leasing fees,⁶⁷ while, on the other hand, in the case of early repayment of lesser leasing fees, it may be that leasing companies become deprived of to cover in large part the administrative costs of closing a particular lease agreement. Then, leasing providers are fully exempted and determine the amount of compensation in case the lease period, for example, is exactly one year. Despite this scarcity, leasing providers regularly insist in practice to pay interest in the repayment plan before the principal so that leasing users may have interest in early payment in a relatively shorter period after the conclusion of a financial lease agreement. Ultimately, the ZZKFU can be a significant step forward in relation to the ZL FB&H, which stipulates that the right of early payment is a special element of financial leasing, as well as ZL RS, which by the absence of regulation or by referring to the obligatory rules leaves too much space for leasing providers to deny or impede the exercise of this right to consumers -Users of leasing.

3.1.1. System liability of leasing users due to delay in payment of leasing fees

3.1.1.1. Prerequisites for termination of financial leasing contracts

After the lease is leased, the leasing provider is very interested in the fact that the leasing user fulfills the obligation to pay the leasing fee in a regular and timely manner for the entire duration of the contract. These expectations of the leasing provider come into serious temptation if there are certain disadvantages with payments on the side of the leasing user. Until the adoption of the ZL FB&H / RS, leasing companies did not miss their chance to, by referring to the general terms and conditions of business in the leasing agreements, regulate the contents of the rights and obligations of the leasing beneficiaries, as well as the consequences of late payment of the leasing fee. Faced with this leasing practice, the courts have been forced to merge the results of painstaking research into differently designed payment clauses from the leasing agreement under the application of the general rules on termination

65 Art. 27. par. 3. sent. 2. ZZKFU.

66 Art. 16. par. 2. sent. 2 and 3 of the Directive.

67 As with the loan agreement, the amount of the fee can not be higher than the amount of interest that the consumer would pay during the period between prepayment and the agreed date of termination of the lease contract (see Art. 27, Par. 5 of the ZZKFU and Art. 16, par. 2 sent. 4 of the Directive).

of the contract due to non-fulfillment.⁶⁸ However, it took no time for the courts to make a slight step forward in the adopted position that financial leasing is a mixed contract that contains elements of ring sales and sales with the retention of ownership. By subcontracting, certain provisions of the leasing agreement were often suspended on the basis of the correct application of the provision of Art. 549. par. 2. ZOOFB&H / RS, which regulates the termination of the contract for sale with installment payments, as well as the general rule of Art. 523. ZOO FB&H / RS regulating the issue of compensation for damages in case of termination of the contract of sale. In the event of early termination of the contract, leasing providers could exercise the right to compensation of ordinary damage and loss of profit to the user of the lease, with the amount of damages awarded in no case exceeding the amount of actual damages.⁶⁹ Although the contracting parties also determined the method of calculating the positive contractual interest,⁷⁰ the amount of the damage, quite logically, could not include a contractual penalty in itself.⁷¹ In determining the amount of damage and assessing the validity of a contractual clause on a positive contractual interest, it was decisive to discount not only the amounts of the lease payment paid at the time of the termination of the lease, but also to deduct the residual value of the prematurely returned lease item.⁷² Here, it is interesting to mention also a decision on a relatively older date in which the leaseholder (potential owner) is obliged to only pay the leasing provider the use of things in the amount of the usual rent until the day of termination of the contract. In its reasoning, the court with an appeal to the provision of Art. 549. ZOO SFRJ (1978), decided to favor without any hesitation of the leasing beneficiary because he obliged the leasing provider to return the excess of the received amount of leasing fees in relation to the determined amount of the fee for the use of the lease item until the termination of the contract.⁷³ On the other hand, the Croatian leasing practice also played a more interesting case in which the parties, in addition to the leasing agreement, in relation to the agricultural tractor of the “Zetor” tractor, also resorted to the conclusion of a subsequent accessory agreement on the transfer of ownership in order to secure claims on the said leased object. Upon the

68 The judgment of the Municipal Court in Sarajevo, no. 65 0 PS 190418 11 PS dated 6 April 2012; judgment of the Municipal Court in Sarajevo no. 65 0 Ps 080878 09 Ps of 18 December 2009; judgment of the Municipal Court in Sarajevo No. P-4643/05 of 14 January 2008 confirmed by the judgment of the Cantonal Court in Sarajevo, no. 09 0 P 010033 08 Gz dated 15 November 2012).

69 See Art. 266. ZOO (1978).

70 Judgment and decision II Ips 104/2007.

71 Art. 270 par. 3. and Art. 548. ZOO (1978).

72 Higher Court in Ljubljana VSL decision I Cp 499/2009.

73 Vs B&H, Pz. 773/91, dated 24 October 1991 - Bulletin Vs B&H 4/91 - 46. The same view was also expressed in the decision of the High Commercial Court of Croatia (Pz-3592 of 5.11.1994 - Collection of Decisions of the Croatian Commercial Courts, no. 3/143).

delay of the leasing beneficiaries with the payment of two consecutive monthly leasing fees, as stipulated in the transfer agreement for the purpose of insurance as a reason for the maturity of the secured claim, the leasing provider initiated the enforcement procedure against the lease beneficiary on the basis of a credible while the user of the lease as an executor filed an objection to the decision on execution,⁷⁴ and the proceeding was therefore continued in the lawsuit.⁷⁵ In the course of the procedure, the leasing user filed an objection in respect of the amount of the claim from the claim, citing the fact that his debt should be reduced by the amount of damage paid in a traffic accident, since the damage he had incurred on the leasing object itself corrected, although he concluded a CASCO insurance policy against all risks and vinculated it to the benefit of the leasing provider charged by the insurer. The court rejected this complaint as unfounded, because it is Art. 2. The general terms and conditions for leasing contracts for motor vehicles and rental vehicles (AVB) of the leasing provider were excluded from the right to liquidate the claims of the leasing provider with the claims of the leasing user. Considering that the claim of the leasing provider was expressed in the domestic currency according to the accessory agreement on securing the receivables, and under the leasing agreement in foreign currency, the leasing user filed a first instance decision of the court obliged to pay the debt in foreign currency and lodged an appeal with the argument that the court's position on such conduct is insufficiently reasoned. In addition, the leasing user stated in the appeal that he had not been recognized the cost of repairing the tractor concerned, necessary for regular maintenance in function and purpose, and that consequently the contractual interest calculated by the leasing provider could be recognized only during the contractual period relationship. In the instructional instruction of the second instance court that approved the appeal of the leasing users and the abolished first instance decision, it was established that the provisions of item. 6 and 7 of the General Business Conditions (AVB) stipulate that the leasing provider in case of delay of the leasing beneficiary with payment of leasing fees has the right to calculate interest and compensation of incurred expenses, that is, the right to early termination of the leasing contract without notice.⁷⁶ With the reference to earlier court practice, the second instance court also pointed out that contractual relations from the leasing contract, in the absence of explicit provisions, should apply in the first place to the provisions of the ZOO (1978) on the sale with a term repayment of the price.⁷⁷ Accordingly, the obligation of the leasing beneficiaries in the leasing

74 Verdict.5871 / 04 of 05 May 2005.

75 The judgment of the Municipal Court in Čakovec of November 28, 2007 no. VIII P.1028 / 05-29.

76 Judgment of the County Court in Varaždin, Gž-1311 / 11-2 of 15 June 2011.

77 Decision of the High Commercial Court of the Republic of Croatia P.555 / 00 dated February 26, 2002.

contract would be based on the correct application of the provision of Art. 549. The ZOO (1978) announced that it would return the tractor to the lessee and pay the fee for the use, and the leasing provider to return him a surplus of the received amount of the leasing fee. From this point of view, in the repeated procedure, according to the findings of the second instance court, the answer to the question of the undefined status of rights and obligations of the parties in the leasing agreement, as well as its relationship with the insurance agreement as an accessory contract should be addressed to the leasing provider in the realization of his claims against the leasing user. Since the insurance agreement is a later date in relation to the leasing agreement, the answer to this question is of great importance because the lessee has no ownership position in relation to the subject of the lease during the lease term, but only by the proper execution and payment of the rest of the value of the object leasing. Starting from the fact that the leasing provider as the fiduciary owner has initiated the execution procedure on the leasing object, which is its thing, it also makes it necessary to explain the reasons why it did not initiate a public announcement on the basis of an insurance agreement made in the form of a notary public document.⁷⁸ To give these questions clear and unequivocal answer, it becomes much clearer and why the issue of determining the type of concrete leasing agreement came to the forefront. For these purposes, the second instance court pointed out that the leasing contract is a specific legal transaction that contains elements of the lease contract and the sale contract. However, this finding in the absence of special rules would be difficult to present in the repeated proceedings and that it was a generous basis for the first instance court in the execution of his conclusion to the question whether the situation between the parties was marked by the existence of only a lease agreement or a contract of ring sales. Nevertheless, the second-instance court found it appropriate to declare it as vitiabile and later for cases which were to be under the impact of *ex post*.

5. ZL RH. Ultimately, the insistence of the leasing provider in the repeated procedure for the fulfillment or termination of a leasing contract should be conducted by the provincial court to explain in more detail its position in respect of the currency for the payment of principal and incidental receivables in the name of the agreed interest. In an effort to upgrade this inconsistent area, Entity leasing regulations now envision a set of specially designed disposable rules on the reasons and consequences of the termination of the lease agreement. However, this situation cannot still be presented by some significant shift in practice, because the lack of prior control of autonomous sources of regulation still leaves the leasing of the society to reach for the protection of its economic interests at the very edge of the border of compulsory regulations. According to the ZL FB&H / RS, the leasing provider can terminate the

78 This was provided for by Art. 277. of the Enforcement Act (OG 57/96; 29/99; 42/00-decision of the US RH; 173/03; 194/03).

contract and claim damages if the leasing user is late with the payment of the first lease fee, or with two consecutive payments after the first lease fee is paid.⁷⁹ On the other hand, the detailed elaboration of these provisions contains the general terms and conditions of the business of the leasing companies in which it is often stated that the leasing provider should send a written warning to the leasing user who is late with the payment of the leasing fee for more than 7 days to settle his debts within the 30-day deadline.⁸⁰ In addition, the leasing provider may send the leaseholder and another notice with the same deadline if, after sending the first reminder, he failed to meet the late payments, but with the addition and legal default interest rate of 12%.⁸¹ In case that does not happen at the time, then the leasing provider, if it has not done so earlier, can by the sending of the third warning to produce the automatic effect of the termination of the leasing contract.⁸² Of the aforementioned resolutions of the entity leasing regulations, the ZFL of RS significantly varies which allows the leasing provider to terminate the contract or demand payment of the remainder of the fee increased for interest, if the sum of consecutive unpaid leasing fees after the payment of the first lease fee reaches one quarter of the total fee.⁸³ Ratio legis of such a decision adopted in the ZFL RS, it is primarily managed to protect the users of the lease, which is at the very moment that the expiration of the contract becomes the owner of the leasing object or by the execution of the agreed purchase option.⁸⁴ If this is the commitment of the Serbian legislator, however, the cases in which the leasing companies, instead of the right to terminate the contract, can demand only the payment of the remainder of the leasing fee plus interest.⁸⁵ If, for example, the lea-

79 See Art. 54. par. 1. a) and b) in conjunction with Art. 55. ZL FB&H; and Art. 39. par. 1. and 2. ZL RS. "In accordance with the established factual situation, which the court, after a careful analysis, linked with the provisions of Art. 51. in conjunction with Art. 54. par. 1 and 2 of the ZL FB&H, it was concluded that the plaintiff's claim was fully established, and as in the pronouncement it was decided on the basis of the aforementioned provisions, the provisions of Art. 277 of the ZOO in conjunction with Art. 52. ZL FB&H (see the Verdict of the Municipal Court in Sarajevo, No. 65 0 Ps 159478 10 Ps of 31.10.2011).

80 See Art. 6. sent. 16 and 17 of the OU RL.

81 See Art. 6. sent. 14. OU RL; point 4.7. sent. 1. OU SL.

82 See Art. 6. sent. 18 and 19. OU RL.

83 From this it is noticeable that the provisions on late payment of leasing fees from Art. 28. ZFL RS are not taken over in Art. 39. ZL RS.

84 Otherwise, Art. 28. par. 2. The ZFL of the RS is motivated by the need to act in practice as a clearer standard of failure to fulfill its obligations in a minor part of the provision of Art. 131. ZOO prohibiting the termination of the contract.

85 Some authors consider that it is sufficient for the leasing user to pay only 76% of the leasing fees from the contract and that due to the delay for the remaining obligations can not be called for the termination of the contract (see Okičić, M., Bijorac, R., o. c, pp. 723; contrary: Perović, J., o. c, pp. 84-85).

sing beneficiary repaid only 80% of the agreed amount of the leasing fee before the arrears, then the leasing provider can only claim to him the claim for the payment of 20% of the remaining leasing fees together with the interest rates actually calculated and the future leasing receivables. As interest rates are, as a rule, a consequence of arrears with the payment of the due amount of leasing fees, this solution is also shown as an absolutely illogical sanction for the leasing user.⁸⁶ Although, at first glance, the ZL FB&H / RS strives to model a system of stepped accountability, the elaboration of attempts at all does not go hand in hand to the economically weaker party - the user of leasing.⁸⁷ The designed concept of liability of leasing users shows significant deviations in comparison with the Ottawa Convention which stipulates that a leasing provider may, in minor cases, require the payment of the due amount of leasing fees plus interest and expenses, while in the event of material injury, it may require the payment of all future amounts of leasing fees (accelerated payment of the future rentals) or termination of the contract for compensation of damages and return of the leasing object.⁸⁸

3.1.1.2. A special procedure for the return of the leasing object

What constitutes the essential point of separation of the ZL FB&H in relation to the ZL RS are procedural provisions on the return of possession on the object of leasing due to the delay of the leasing beneficiaries with the payment of the leasing fee.⁸⁹ According to the ZL FB&H, the parties to the financial leasing agreements can conclude in parallel a settlement agreement in the form of a notarized document in which the lessee, due to the delay in paying the lease fee, also agrees to the direct execution

86 Spasić, I., 3 2003, *Odgovornost stranaka u finansijskom lizingu*, *Pravni život*, No. 11, p. 557.

87 Spasić, I., 3 o. c., pp. 557; Stefanovic, Z., o. c., Rn. 1901, pp. 437.

88 See Art. 13 (2) of the Ottawa Convention.

89 On similar premises it is formed in Art. 30. ZFL RS, as well as Art. 17. ZFL RCG is a special executive procedure for restitution of possession on a lease subject if it is ignored if the parties settle the settlement agreement in an out-of-court procedure. With regard to the application of Art. 30 of the ZFL RS has already been reflected in the case-law in the way that it is sufficient for the decision to seize the leasing case only if the executive creditor, along with the proposal for enforcement, submitted the signed minutes, while on the enforcement debtor the burden of proving that the conditions for the adoption of the said decision were not fulfilled by submitting written evidence that he had duly paid the obligation to pay the leasing fee (see the Decision of the Commercial Court of Appeal, No. 1394/2010 of 21 May 2010).

of the request for the transfer of the lease item.⁹⁰ In the event that the leasing user, after the termination of the contract,⁹¹ due to delay in paying the leasing fee, does not voluntarily return the subject of the lease, the leasing provider may submit a proposal for execution to the competent executive court. Such a procedural dispensation of the leasing provider stems from the FB&H and RS Enforcement Procedure Act (abbreviated as: ZIP FB&H / RS)⁹², which stipulates that the notarized document is considered an enforcement document.⁹³ On the submitted proposal of the leasing provider, as a prosecutor for the execution of the lease by the lease beneficiary as an executor, the competent executive court must pass the appropriate decision within five days.⁹⁴ The purpose of this *lex specialis* designed execution procedure is that the leasing provider returns the subject of leasing as soon as possible and in a cheaper way after the termination of the leasing contract.⁹⁵ For these purposes, to a greater extent, precisely the derogatory rules on enforcing execution for the surrender of movable items to the ZIP FB&H / RS have been derogated.⁹⁶ In certain discussions, however, it is often suggested that such procedural provisions should be removed as soon as possible from leasing regulations, as they can cause serious difficulties in seizing more complex lease cases in order to force leasing users to fulfill only one late leasing fee.⁹⁷ Besides the undeniable advantages for leasing providers, such rules have not yet come to life in practice.

3.1.1.3. Legal consequences of the sale of the leased lease back

Unlike the leasing provider who counts on the quicker return and sale of objects, leasing, the appropriate degree of protection is necessary, after the termination of the

90 See Art. 57. par. 1. ZL FB&H in conjunction with Art. 73. p. 4. The Law on Notaries of the Federation of B&H ("Official Gazette of FB&H", 45/02); Art. 68. par. 4. The Law on Notaries of Republika Srpska ("Official Gazette of RS", No. 86/04, 2/05, 74/05, 91/06, 37/07, 76/05, 50/10); Art. 47. par. 4. The Law on Notaries of the Brčko District of B&H ("Official Gazette of the BD B&H", No. 1/00).

91 See point 7.2. sent. 3. SL.

92 FB&H Law on Enforcement Procedure ("Official Gazette FB&H", No. 32/03, 52/03, 33/06, 39/06 and 39/09, 35/12 and 46/16 - entered into force 16.09.2003 .g.); RS Law on Enforcement Procedure ("Official Gazette of RS", No. 59/03, 85/03, 64/05, 118/07, 29/10, 57/12 and 67/13 - entered into force on 1st August of 2003).

93 Art. 23. ZIP FB&H / RS.

94 Art. 57. par. 2 and 3 ZL FB&H.

95 Perovic, J., o. c., pp. 91.

96 See Art. 196-201 ZIP FB&H / RS (Chapter XVII - execution for the surrender and delivery of movables).

97 Spasić, I., 3 o. c., pp. 549, foot. 8.

leasing agreement, to the user of leasing.⁹⁸ Upon the return of the leasing object, the leasing provider calculates that it will settle the remaining leasing receivables with his sale together with the legal default interest and damage.⁹⁹ As it often does not exist, the leasing provider is compelled to point out the subsequent claim for compensation of damage to the leasing user in the difference between the outstanding debts arising from the sale of the lease item¹⁰⁰. This case certainly does not exclude the one for the leasing user, but in practice it is very rare, in which the leasing lease with the sale of leasing objects is able to keep for itself and a greater amount of the one who would receive by paying the leasing fee in the course of the course. In Art. 55 par. 2. The ZL FB&H has explicitly approved an earlier practice of autonomous regulation of the amount of damage in the event of termination and the reimbursement of the lease, but assuming that it does not exceed the interest of fulfilling the leasing contract.¹⁰¹ In one case, which happened before the entry into force of the ZL FB&H, the leasing provider suffered a loss in the difference between the calculated value and the rationale by terminating the leasing contract and the sale of the returned equipment.¹⁰² This finding was also confirmed by the court in its decision when it obliged the leasing user to compensate the leasing provider for the rest of the damage in cash.¹⁰³ That the same course has continued and recent case law shows, one in a series of cases in which the leasing provider, due to the delay of the leasing beneficiaries, terminated the financial leasing agreement and proceeded to sell the returned motor vehicle on the market. In the reasoning of its decision, the court notes “that the leasing provider is entitled to compensation for damages after the sale made pursuant to Art. 55. par. 2. ZL FB&H; that the amount of damage compensation is regulated by the contract and general business conditions; and that the amount of such a claim was not questioned in any way, apart from the lump sum claims of the leasing beneficiary that he was not aware of the manner in which that statement was

98 See Art. 13. (2) under a) the Ottawa Convention.

99 It is by no means excluded that the leasing provider, even with the termination of the contract, activates the possibly available insurance instruments (eg security, bank guarantee) and, by that time, settled, and unpaid amounts of leasing fees (see Article 6, sent. 21.22 and 23. OU RL).

100 See. Art. 7.2. sent. 4. SL.

101 The same is determined by Art. 13. (2) under (b) and (3) concerning (4) the Ottawa Convention.

102 Both parties called for a point 24. par. 3. General terms and conditions of the business of the leasing provider by providing evidence that it is regulating the basis for the compensation of the difference between the selling price and the calculated value. However, the court could not base its decision on the general terms of business, since neither the number nor the date of the adoption of the general conditions were stated in the contract itself, nor is it indicated in the same way that the lessor was informed by the leasing user with the contents of the general conditions (Judgment of the Municipal Court in Sarajevo, No. 65 0 P s 067595 08 ps of 23.12.2011).

103 Art. 185. par. 2. ZOO.

made.”¹⁰⁴ The aforementioned provision of the ZL FB&H can also be interpreted in the opposite direction, that the leasing provider has no right to keep the excess of the ration even though he is the owner of the leasing object. However, it is difficult to find an excuse for an analogy¹⁰⁵ such as the payment of leasing users until the termination of the contract is not “pro rei”, but “pro usu rei”¹⁰⁶. This is confirmed by the deeply rooted view that the leasing user, irrespective of the repayment made, does not have a real right position analogous to the position of the German buyer in the sale with the retention of title. Although the fate of the rally is related to the content of the leasing contract, this does not mean that the direct entry of one or several provisions, or the reference to the general terms and conditions of the business of leasing companies, is the right way to achieve the real balance of the economic (legal) interests of the participants in these transactions.¹⁰⁷ In response, amendments to the ZL FB&H from 2013 the obligation of the leasing provider to inform the leasing users about the exemption and sale of lease items, as well as the repayment of surplus in relation to the total obligations of the leasing customers in the financial leasing agreement, was introduced.¹⁰⁸ By introducing such an obligation raised in a rank compulsive to protect the users of leasing, it is actually revealed that the leasing provider is limited to the role of the financiers, and that the formal ownership of the leasing object serves only as a means of insuring the invested capital. Although the elaboration of such ideas has been done in the wrong place, it does not have, nor can it, ultimately result in a functional equalization of the position of the leasing provider with that lien creditor. For this procedure, it would be necessary, by recruiting in the CBC of B&H, to derogate the ownership position held by the leasing provider by approving the model of settlement already available to the misleading creditor, including the harmonization of all other sequential areas. With this fence, the protection of leasing users could be achieved in a much more quality way that the ZL FB&H, by which case, predicted that, without recourse to leasing providers, the rules of the CBC B&H, as well as the Rules on Pledge (abbreviated as PZ) on the procedure for the sale of items insurance through an auction, a tender or a direct contract.¹⁰⁹ Withdrawal of this, a modest expression of the ZL FB&H’s commitment to protecting leasing users only at the contractual level, tried to further strengthen the misdemea-

104 Judgment Municipal Court of Sarajevo, no: 65 0 P 184725 11 P of 19.04.2013. g.

105 Art. 55. par. 3. ZL FB&H.

106 Matz, Y., 2002, Regulierung typischer Leasingtransaktionen im neuen Schuldrecht, Dissertation Karlsruhe, pp. 32.

107 Judgment of the Municipal Court in Banja Luka, no. 11 71 Ps 00 4804 05 Ps from 03. 10.2008.g.

108 The proposed obligation of the leasing provider in Art. 37. p. 1st point k is not typical for ZFL RS, ZFL RCG and ZL RH.

109 See Art. 29 and 30 of the MSZ and Art. 25-60. Rulebook on Pledge - PZ (“Official Gazette of B&H”, No. 53/04).

nor liability of the leasing provider in case of failure to comply with the aforementioned provision in the financial leasing agreement.¹¹⁰ In an effort to show some of the disadvantages associated with this, in the following we will use one example. Suppose that a financial leasing agreement has been concluded between Firm A (leasing provider) and Firm B (user of leasing) that has a machine X with a purchase value of 29,000 BAM. The total costs of financing Firm B to pay out Firm A is 44,000 BAM. At the time of the conclusion of the contract, Firm B gave Firm A an initial payment in the amount of BAM 8,000. In addition, a six-year contract period has been agreed that does not match the lifetime of the use of the machine, as well as a certain obligation for Firm B to pay the monthly lease fee in the amount of BAM 500,00, in proportion to the duration of the contract. And finally, it is envisaged that Firm A becomes the owner of the lease with the expiration of the contract. Let's assume that, after four years of contract, there has been a delay in payment of company A leasing fee and the seizure of lease items. At that moment, the total value of leased payments would amount to 32,000 BAM, while the remaining debts would amount to 12,000 BAM. This remaining amount of company B's debt is precisely the interest that Firm A wants to compensate for by selling the machine that is estimated at that moment to have a value of 13,000 BAM. Despite the evaluation of whether Firm A was acting in accordance with the standard of care of a good businessman,¹¹¹ it is difficult to imagine that she has an interest in selling a machine on the market with a higher amount of 12,000 BAM. From an economic point of view it remains unclear whether such a sale and under what conditions can be characterized as the most commercially viable way of selling a particular type of machine on the market. Also, the question of the liability of the leasing provider for the lack of the reason for the unreasonable sale of the object of leasing is also questionable. The clear answer to these questions depends also on the quality of the leasing user's protection to effectively counter the unfounded claim of a leaseholder to compensate for the difference in the outstanding balance of the sale of the lease item. The described example from the beginning can be observed and other time situations arise from the delay of the leasing beneficiaries, but in the absence of a concretization of the procedure for the sale of leasing objects, we give up this, because the obligation of the leasing provider to restore the surplus is reduced in each of them to mere coincidence. In addition to the behavioral assessment and the manner in which sales are carried out, difficulties may arise in practice as to how the leasing user should be informed of the time and place of sale. Such suspicions are a serious reason why the federal legislator, with the new amendments to the ZL FB&H, or the state legislator, changes the ESA, foresees that the sale of the subject of leasing without the reclassification and the participation of the executive court apply the rules on the procedure of selling the object of insurance.

110 On the treatment of the leasing provider contrary to Art. 37. par. 1st point k) ZL FB&H (2012) applies Art. 91. par. 2. point e) ZL FB&H (2008), which sets a fine of 700 to 5,000 BAM.

111 Art. 18. par. 2. ZOO.

3.2. Use of leasing items in accordance with the contract or purpose

The strong touch of the financial leasing agreement with the tenant's position in the lease agreement is also reflected in the obligation of the leasing beneficiary to use the delivered leased object in accordance with the contract or purpose.¹¹² This issue also deals with the Ottawa Convention which stipulates that the leasing user is obliged to take appropriate care of the equipment, use it in a reasonable way and keep it in the state in which it is delivered, with fair wear and tear and any modifications of equipment agreed between parties.¹¹³ In terms of ZL FB&H / RS, the execution of such an obligation is measured by the standard of care of a good businessman or a good host, depending on whether a legal or natural person is in the role of a leasing user.¹¹⁴ On the other hand, the ZL RH determines that the leasing user should use the leasing object with the care of a good businessman, which implies that the financial leasing agreement is of a commercial nature and then, when the leasing customers

112 Art. 581. par. 1. and 2. ZOO FB&H / RS.

113 Compare art. 9 (1) The Ottawa Convention and Art. 18 (1) under a) Model Law on Leasing, formally adopted on November 13, 2008 at a joint session of the General Assembly of UNIDROIT and the Committee of Governmental Experts held in Rome. According to its structure, the Law on Leasing is divided into four thematic units: the first defines the basic concepts and the field of its application; the second one contains provisions on the effects of leasing contracts, the third deals with issues related to the execution of leasing contracts; and the fourth contains provisions on the consequences of non-performance of contractual obligations (see text Model Law available at: <http://www.unidroit.org>). The provisions of the Model Law reflect the basic premises of the Ottawa Convention and the achievements of comparative analysis and reference contractual practice. Model law as a "loose form" of unification and one in a series of a large number of different optional instruments is usually easier to implement than using the method-convention, but its implementation at the domestic level is extremely difficult to follow. In addition, recent UNIDROIT reports indicate that the Model Lease Act has been implemented or that its implementation is present in Afghanistan, Jordan, Latvia, Tanzania, etc. (see Kronke, H., 2011, Financial Leasing and Its Unification by Unidroit: General Report, Uniform Law Review, Vol. 16, Issue 1-2, pp. 42; Spasić, I., 2007., General Unification of Leasing of Business, Legal life, No. 12, pp. 383-384). About this and other methods of harmonization in more detail: Spasić, I., 2009, UNIDROIT - doprinos unifikaciji nekih od najvažnijih pitanja međunarodnog trgovinskog prava, Strani pravni život, no. 2, pp. 31-33; Stanford, M., 2009, UNIDROIT's Preparation of a Model Law on Leasing: The Crossing of New Frontiers in the Making of Uniform Law, Uniform Law Review, No. 3, pp. 578-598; Buxbaum, H. L., 2003, Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform, Uniform Law Review, No. 1/2, pp. 326-328).

114 See Art. 18. ZOO FB&H / RS in conjunction with 48. par. 3. ZL FB&H and 36 par. 1. ZL RS; same Article 8. in conjunction with Art. 25. par. 1. and 2. ZFL RS. This is indicated by the general terms and conditions of business (see Article 8, par. 2, point 4 of the HA HAAL, point 3, sent. 1 and 2, under the heading "Liability for the subject of leasing", OU ASAL; 5.1 words 1 and 4 in relation to item 5.3 of the word 1. SL - the attention of a good businessman.

use leasing items for their personal needs or the needs of their household.¹¹⁵ This obligation is the inevitable content of all financial leasing contracts, but it takes a special place in those constellations in which the leasing user is obliged, after the expiration of the agreed period, to return the subject of the lease to the lessor.¹¹⁶ In the event that the condition of the leasing object when returning the leasing provider to the leasing provider is not a response to the parties designated by the contract, then the question arises whether the leased object is used by the leasing user in accordance with the contract or purpose with the appropriate degree of attention and whether the wear can be attributed to the regular mode its use.¹¹⁷ As leasing providers count on this, they are looking from the very beginning to instruct leasing users and to use appropriate leasing facilities. So, for example, the leasing provider may oblige a leasing user to whom he has allowed the use of a particular light-advertising machine to use only the original toner of a particular manufacturer before providing commercial services to clients. In doing so, the leasing provider nevertheless prevents the leasing user from achieving maximization of profits by purchasing no less quality toner from other manufacturers at a much more favorable price and without adversely affecting the usability and maintenance of the machine itself. The contrary treatment is regularly envisaged in the leasing contracts as a reason that the leasing provider terminates the contract¹¹⁸, but assuming that the leasing user, even after written warning, does not harmonize his economic-technical exploitation procedures with the agreed lease agreement.¹¹⁹ By this, it becomes clear that the purpose of the control verification of the manner of use is the subject of leasing primarily managed by the protection of the leasing provider to realize the uncontested right to the return of the residual value of the lease object by the expiration of the contract. This applies to all mobile financial leasing constellations, including those in which the transfer of ownership to the leasing object is obligated after the expiration of the agreed deadline and the orderly fulfillment of obligations by the leasing user. In this case, the leasing provider wishes to forego any risk of reducing the expected value of the lease if it is early

115 In practice, the leasing provider seldom discharges from the leasing contract the provision of Art. 60. par. 1. ZL RH, as this presupposes the application of Art. 10. ZOO RH which procedures related to the use of leasing by the leasing user as a natural person make it dependent on the assessment of the standards of a good host.

116 In Art. 4. sent. 1 and 2 of the RL of the RL states that the leasing user is obliged at all times to provide the leasing provider and / or an authorized person with an unobstructed access to the leasing subject as well as on the written request of the leasing provider within 15 days to bring the subject of leasing for inspection and control . The same obligation of the leasing user is envisaged by Art. 8 par. 2. point 5. HA HAAL and point 5.6. SL.

117 See Art. 9 (2) of the Ottawa Convention; Art. 18 (2) Model Law; Art. 49. par. 1. ZL FB&H; Art. 43. par. 2. ZL RS; Art. 62. par. 3. ZL RH; and 33. par. 2. ZFL RS.

118 See Art. 22 par. 1. point 3. OU HAAL; Art. 8. par. 1. point 4. OU RL.

119 Martinek, M., o. c., pp. 205.

repaid due to the delay of the leasing and termination of the leasing contract. The basic rule in the ZL FB&H / RS is that the leasing user, in case of accidental loss or damage to the lease, bears the responsibility to compensate the leasing provider in the amount that corresponds to the interest for the fulfillment of the contract, without the possibility of invoking the grounds for exclusion of liability. However, an unauthorized user of leasing, besides liability for damage to the ZL FB&H, also has the risk of paying a leasing fee, if the leasing object fails as a result of malpractice in relation to usage.¹²⁰ With regard to the same liability, the ZL RS only speaks of the fact that an unauthorized user of leasing should be compensated damage which, depending on the degree of damage of the leasing object, can also occur in the form of lost profit of the leasing provider.¹²¹ On the other hand, the method of punishing an insolvent leasing user adopted in the ZL FB&H places at the disposal of the leasing provider whether it will require the continuation of payment of a leasing fee or compensation for damages caused by mischief or damage to the object of leasing. Without a doubt, the right of the leasing provider to require the payment of a leasing fee is meaningful in those mobile financial leasing constellations in which the transfer of ownership or options of purchase that can be executed after the expiration of the contract is mandatory, since it is then considered that the unqualified leasing user has opted for the purchase of a failed subject of leasing. A somewhat different situation arises, however, when the lease beneficiary has, from a certain time point, the option of returning the object of leasing or extending the leasing contract. Then the leasing provider should insist from the very beginning to compensate for the failure of the leased object, since the need to pay the agreed amount of the leasing fee can not be compensated in full, ie, The expiration of the value of the object of the lease can not be realized by expiry of the contract. It is indisputable that the leasing provider may, in parallel or subsequently, state the claim for compensation for the loss of the leased asset in the part that has remained uncovered by payments of the agreed amount of the leasing fee. However, such a modeled solution nevertheless significantly complicates the system of liability of the leasing users, because the objectives of punishment policy can be achieved in a very simple manner and by highlighting the claims itself for compensation of damages. For these reasons, there is widespread support for the approach adopted in the ZL RS which allows the leasing provider to include not only the amount that the leased entity would have at the moment of return, but also the loss of profits because of the inability to return the failed leasing object with a prominent claim for compensation of damages to the leaseholder.

120 See Art. 48. par. 5. and Art. 49. par. 2. ZL FB&H.

121 See Art. 36. par. 2. and Art. 37. par. 2. ZL RS.

3.3. Maintenance of leasing objects - installation, belonging and joining

In relation to the operating leasing, a much wider discussion requires a deviating point in the financial leasing transaction that the leasing user assumes the obligation to maintain the leasing object.¹²² What has become common in leasing practice is that the leasing provider entrusts an unprofessional leasing user with a leasing contract to conclude with a precisely determined person an agreement on servicing the lease item.¹²³ In the event that the leasing user fails to perform the prescribed services at the leasing facility at an authorized repairer at his own expense, then the leasing provider is authorized to terminate the leasing contract.¹²⁴ During the duration of the contract, the built-in parts of the leasing or authorized service personnel, which are necessary for the normal functioning of the financial lease, become the property of the leasing provider.¹²⁵ Of the regular expenses borne by the leasing user, which are related to the use, as well as the necessary costs related to the maintenance of the lease,¹²⁶ it is necessary to distinguish between the cases in which the leasing user makes the luxury costs on the leasing object.¹²⁷ As luxury costs can be beneficial to the leasing provider, the question arises and whether the leasing user could be authorized in contravention of the necessary and useful costs to request their super-company in the scope of improving the value of the lease itself. In this place, further analysis can start on two tracks, depending on whether the leasing contract with or without the option of buying, or obligatory transfer of ownership, solves the issue of luxury (useful) costs that the user of the lease in his own initiative did, but and the interest of the leasing provider. In the absence of such provisions, the leasing user

122 See Art. 48. par. 4. ZL FB&H and Art. 37. par. 1. ZL RS; Art. 15. ZFL RCG. This is also indicated by the general terms and conditions of business (see Article 5, par. 1, sent. 1 of the OU RL, point 3, item 1, under the heading "Liability for leasing", ASAL ASAL, also in: point 5.1. .

123 See Art. 5 sent. 2 and 4 OU RL; point 5.1. sent. 5. OU SL; same in: point 5.2. OU HAAL.

124 See point 7.1. sent. 10. OU SL; Art. 8. par. 1. point 4. OU RL; Art. 22. par. 1. point 3. OU HAAL.

125 Koblitz, A., (1990), *Mobilien-Finanzierungsleasing und Crédit-bail Ein Vergleich des französischen und des deutschen Zivilrechts unter besonderer Berücksichtigung der Rechtsstellung des Leasingnehmers*, bd./vol. 909, Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft, Peter Lang, Frankfurt / M., Bern, New York - Paris, pp. 112; compare .: Stefanović, Z ., o. c., Rn. 1908, pp. 438-439.

126 It is indisputable that the provision of Art. 129. par. 3. ZSP FB&H / RS, as well as Art. 44. par. 3. ZOVO FB&H does not apply for financial leasing, because it refers to the compensation of necessary and useful expenses related to the maintenance of things. Such a provision monitors the position of the leasing user in the operating lease, as this may require the leasing provider to reimburse the costs of urgent repairs, as well as any other costs incurred to maintain the lease in proper condition. It is obvious that the leasing user in every way shares the position that the tenant has with the lease contract (see Bikić, A., Bikić, E, 2011, *Obligaciono pravo-posebni dio, drugo izmijenjeno i dopunjeno izdanje*, Pravni fakultet u Sarajevu, Sarajevo, pp. 77-78).

127 See Art. 129. par. 4. ZSP FB&H / RS and Art. 44. par. 4. ZOVO FB&H.

may appear in the sense of the general rules of the obligatory right and as a negotiator without charge (*negotium gestor*)¹²⁸ with the right to compensation of luxury (useful) expenses or separation of (*ius tollend*) built-in parts, provided that they do not threaten damage to the lease itself.¹²⁹ In addition to the right of separation, Entities' statutory regulations allow the user of the lease to claim a refund of luxury costs that are considered useful and for the leasing provider. On the other hand, the ZVSP RH adopts a slightly different approach, as it puts the leasing provider on the lease if it will compensate for luxury costs, while the leasing company is entitled to only the right to separate, provided that it does not threaten the damage to the object of leasing.¹³⁰ However, luxury costs, which are not beneficial in terms of entity real estate regulations and which the lessee cannot separate without leasing the lease, become the property of the leasing provider. The previous discussion regarding the protection of leasing users could make sense here and that the leasing provider did not preclude the possibility that the lessee (retinent) in the ownership dispute should issue a supplementary claim for the compensation of luxury (useful) expenses that cannot

128 About useful management without an order in: Bikić, A., 2007, *Obligaciono pravo, opći dio*, drugo izmijenjeno i dopunjeno izdanje, Pravni fakultet u Sarajevu, Sarajevo, pp. 272-274; compare.: Antić, O., 2009, *Obligaciono pravo, četvrto izdanje*, Službeni Glasnik, Beograd, pp. 545-547; Loza, B., 1981, *Obligaciono pravo, opšti dio*, drugo dopunjeno i izmijenjeno izdanje, Sarajevo, pp. 248-252; Radišić, J., 1993, *Obligaciono pravo-opšti deo*, peto izmenjeno i dopunjeno izdanje, Beograd, pp. 328-333.

129 Such a result can be achieved by analogy with the application of a special rule on the return of leased items (Article 585, page 2) or general rules on management without order (Article 220 in conjunction with Article 225 of ZOO FB&H / RS).

130 According to the real estate law of the leasing provider, it depends on whether the luxury costs will be compensated to the user of the leasing (Article 164, par. 4, ZVSP RH); On the other hand, in the case of reimbursement of useful costs, an objective criterion applies, provided that the purpose of the leasing object is not changed (Article 164, par. 3 of the ZVSP RH), since then the subjective criterion is applied. About this: Gavella, N., Josipovic, T., Gliha, I., Belaj, V., Stipkovic, Z., 1998, *Stvarno pravo*, Volume 1, Narodne novine, Zagreb, pp. 605-606; Klarić, P., Vedriš, M., 2009, *Gradansko pravo*, Narodne novine, Zagreb, pp. 299; Babić, I., Medić, D., Hašić, E., Povlakić, M., Velić, L., 2011, *Komentar zakona o stvarnim pravima RS*, Privredna Štampa, Sarajevo, pp. 432, hereinafter: Babić et al. / Komentar).

be separated from the object leasing without damaging it.¹³¹ Notwithstanding the lack of provisions of the ZL FB&H / RS,¹³² the lease contracts forms regularly contain a clause in the general terms and conditions of business requiring the user of the lease to obtain the written approval of the leasing provider before installing the parts in the leasing object, which improves its value.¹³³ Accordingly, an unauthorized leasing user could only take (*ius tollendi*) embedded parts into the subject of the lease before the expiration or termination of the lease contract.¹³⁴ Those parts that the user of the lease does not separate, or it is not feasible in the case, will be considered as the leasing owner.¹³⁵ Such treatment of the leasing user, contrary to the prohibition, is also caused by the claim of the leasing provider, if the subject of the lease cannot be returned to its original condition, i.e. separation of the built-in parts without damage and the leasing object itself.¹³⁶ On the other hand, a significantly different situation should be that in which the lease beneficiary, on the basis of the prior written approval of the leasing provider, also points out the request for the reimbursement of the approved costs. However, this is still not the case today in leasing practice, since the general operating conditions of some leasing companies by analogy also imply

131 In the absence of a lease agreement, the leasing user has the right to retention only in order to compensate for the necessary and useful costs related to the maintenance of the lease (Article 129, paragraph 5 of the FAS FB&H / RS and Article 44, paragraph 5 of the ZOVO FB&H), while the Croatian real right determines that the right of retention is not related to the maintenance of the leasing object (Article 164, paragraph 2 of the ZVSP RH). For the above reasons, the leasing user may exercise the right of retention in order to compensate for luxury (useful) expenses only if the general rules of the obligation right are applied (Article 286-289 of ZOOFB&H / RS). Wider on the concept and conditions for exercising retention rights: Rašović, Z., 2005, *Stvarno pravo*, drugo izdanje, Beograd, pp. 474-486; Morait, B., 2010, *Obligaciono pravo, knjiga prva-obligacije i ugovori*, knjiga druga-vanugovorni obligacioni odnosi, Banja Luka, pp. 84-86; Bikić, A.: o.c., pp. 159-161; Stanković, O., Orlić, M., 1986, *Stvarno pravo*, treće izmenjeno i dopunjeno izdanje, Naučna knjiga, Beograd, pp. 403-413; Kovačević Kuštrimović, R., Lazić, M., 2006, *Stvarno pravo*, Niš, pp. 346-352; Bikić, A.: o. c., pp. 159-160; Petrić, S., 2004, *Institut prava retencije u hrvatskom i usporednom pravu*, doktorska disertacija, Pravni fakultet Sveučilišta u Splitu, pp. 28-39; Gavella, N., 1992, *Založno pravo*, Zagreb, pp. 229-232; Gams, A., Petrović, M., 1980, *Osnovi stvarnog prava*, Naučna knjiga Beograd, pp. 146-147; Stojanović, D., 1987, *Stvarno pravo*, sedmo izmenjeno i dopunjeno izdanje, NIU Službeni List SFRJ, Beograd, pp. 289-291.

132 In the Polish Civil Code, a provision requiring the approval of the leasing provider for changes in the leasing subject (see Article 709 (10) of the Polish Civil Code) is also contrary to the ZL FB&H / RS.

133 See point 3. sent. 4. under the heading “Liability for the subject of leasing”, AS ASAL; Art. 5. sent. 6. OU RL; point 5.2. sent. 1. OU SL; same in: point 5.6. and 5.13. OU HAAL.

134 Installations made by the user of the leasing without the consent of the leasing provider are also envisaged as a reason for the termination of the leasing contract (see point 9 under the heading “Termination of contracts”, AS ASAL).

135 See Art. 9. sent. 8. OU RL.

136 See Art. 9. sent. 6. OU RL.

the obligation of an authorized leasing user to return the object of leasing into its original condition before the expiration or termination of the leasing contract.¹³⁷ This equalization is inappropriate because the previously given agreement of the leasing provider can be considered also by accepting the offer of the leasing beneficiaries for the establishment of an orderly relationship. Within the limits of the received order, the leasing user is authorized to undertake certain actual actions or to conclude a contract of work with another person in respect of the installation of certain parts in the subject of leasing. In addition, the question arises as to whether it is a free or charge order, that is, whether the costs after the execution of the order should be immediately compensated by the leasing provider or is it only a leasing user? This hybrid relationship, however, does not correspond either to the contract of work, nor to the order for the conclusion of a contract of work with another person, because the leasing user is the one who retains and draws in his own interest all the benefits from the leasing object during the lease term.¹³⁸ However, this should not be an impediment to the accrual of installation costs and the notes are recorded when the lease is returned in the part in which its value is actually increased and for the leasing provider. Starting from this, the leasing user would be able to bear the current installation costs and possibly claim that the leasing provider compensates for the recorded utility costs that exceed the residual (guaranteed) value of the lease item. If this commitment is still contrary to leasing practice, the contract templates in which to compensate for the already unregulated issue of costs are effectively prevented by an artificial clause banning the exercise of the retention rights (*ius retentionis*) of the leasing beneficiary, regardless of the basis from which the claim arises from the leasing provider.¹³⁹ Nevertheless, the courts should not be disturbed here in the ownership of the leasing provider in order to entrust the leasing user with the expenses for which he exercises the right of retention on the leasing object. Otherwise, there would be ungrounded enrichment with the leasing provider without the possibility that the leasing user against it would launch a new dispute from the same factual basis. From this approach, ZFL RCG is not significantly removed from the scope of the ZFL RCG, in which the leasing company is entitled to compensation of the approved costs, because the leasing companies without any difficulty can bypass its applicati-

137 In addition to leasing users, the separation of parts can be made about its cost and the leasing provider. In the event that this is not possible, the undelivered parts also become the property of the leasing provider (see point 5.2, sent.s 3 and 4 of the SLA, Article 9. sent. 5, 7 and 8 of the OU RL).

138 Đurović, R.: o. c., pp. 379.

139 See Art. 2. sent. 7. OU RL; same in: poin. 2.1. sent. 3. OU SL; point 3.2. OU HAAL. According to Art. 628. The FB&H / RS ZOO FB&H / RS user of leasing as a worker should have the right to retention on the leased object in order to secure collection of claims arising from a contract of employment or with a reference to general contractual rules. The right of retention is a legal lien, which also has the one employed by the leasing user with the permission of the leasing provider.

on in the general terms of their business. In addition to the reimbursement of previously approved costs, it is necessary to determine the fate of incomplete incorporated parts (eg spare wheel, repair tool, etc.) for the purpose of returning the leasing object in the absence of the contracted option to purchase or renew the leasing contract (for example, freight vehicle).¹⁴⁰ The ZL of FB&H states that the subject of the lease should be returned with all remuneration to the leasing provider or from the authorized person¹⁴¹, while in the ZL RS the absence of such a determination is not an obstacle to achieving the same result and applying the ZSP RS.¹⁴² In practice, it often happens that the user of leasing certain agricultural machinery (eg, tractor, water tank, seeds connectors, etc.) is made up of a piece of land (real estate according to purpose)¹⁴³ intended for performing certain agricultural activities.¹⁴⁴ Although there should not be a change in ownership relations with a pertinent relationship here, the cautious leasing provider should still enter the registration of a special ownership right in the inventory register¹⁴⁵, with the aim of preventing the leasing users from

140 Perović, J.:2 o. c., pp. 95.

141 See Art. 48. par. 8. ZL FB&H; same: Art. 33. par. 1. ZFL RS.

142 Art. 11. par. 1. ZSP RS.

143 About the concept of real estate by purpose in. Stankovic, O., Orlic, M.: o. c., pp. 28-30; Kovačević Kuštrimović, R., Lazić, M. : o. c., pp. 30-31; Gams, A. : Petrović, M.: o. c., pp. 23-24; Klarić, P., Vedriš, M.: o. c., pp. 77; Rasovic, Z. : o. c., pp. 12.

144 For some authors, the provision of Art. 11. par. 4. The FB&H / RS PSC is contradictory (property belonging to a real estate is a machine or device) and partly incomplete, because one of its parts is in the provision of Art. 14. p. 4. ZSP RS / FB&H that treats machines or devices as integral parts of the real estate (see Babić et al. / Komentar, p. 154).

145 This controversial generic term for domestic real estate regulation can also be presented as one plus to that dogmatically recognizable notion of formal ownership in favor of the protection of the position of the leasing provider in relation to the leasing user and third parties. According to the B&H Health Insurance Fund, holders of special proprietary rights are considered to be sellers in the contract of sale with the retention of title; lessors with a long-term lease contract; Sellers in the sale of receivables; and clients in the commission contract, provided that the business activity is not only the commissioner, but also the client in connection with the circulation of things under the commission contract (see Article 2, par. 1, of the B&H BH). For the same purposes, the B&H Health Insurance Fund also draws in its scheme the related rights under which legal and judicial pledge rights (Article 2, Par. 4 of the B&H Criminal Code), as well as those rights established abroad, which would be considered as special proprietary the right to be established in our law (see Article 2, par. 3, item 3, of the B&H Constitution). In addition, without prejudice to the validity of the established foreign law on the imported body security item in B&H, it becomes clear that the B&H Health Insurance Fund adopts the principle of transposition in that part which emphasizes that foreign law for the purpose of registration, determining the right of priority and execution, or special property rights created in B&H (see Article 35, par. 3, of the B&H CES). >

establishing their own willingness towards outside and in relation to third parties more permanent functional - not physical - link between leasing and real estate.¹⁴⁶ If this is indeed necessary, it follows from the ZSP FB&H / RS that determines that the real estate and subject of leasing, as an item on which the special ownership right of the leasing provider is registered in the inventory register, are not in the same legal

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- > This, however, requires a brief remark: the ranking of the primacy of foreign rights is not subject to the application of the general rule on the moment of entry into the inventory register, since the registration was made within 15 days after the import of the item was considered executed on the day of the import itself in B&H Article 35, par. 4, of the B&H BH). Until the adoption of the B&H Health Insurance Fund, the biggest difficulties in the leasing business was the lack of publicity of the leasing provider's ownership position. The distorted image, which previously could have created the direct possession of leasing users in the eyes of third parties, was removed by the public function of registering the special ownership right of the leasing provider (see Article 58, par. 2 of the ZL FB&H and Article 56, par. 1, ZL RS referring to the rules of the CBSA on the registration of a special ownership right of the leasing provider in the inventory register). For the purpose of registering and determining the ranking of the priorities of the B&H BH, instead of the concept of leasing, the term "leasing" has been adopted, which contains all the constraints of mobile financial leasing to which the ZL FB&H / RS allows the establishment of a special ownership right of the leasing provider (see Article 2, par. 5 B&H OZZ). In addition, the concept of leasing is subject to one substantive reduction through the term "long-term lease", which stipulates that its minimum duration must be longer than 6 months (see Article 2, par. 5, item a) B&H). In an effort to mitigate this view, the B&H MoH allows the registration of financial leasing contracts concluded for a shorter period on the assumption that an automatic extension of the base period has been agreed upon in them, or at the request of one or the other party exceeding ultimately a prescribed period of six months (see Article 2, par. 5, point a) Under 1. OZZ B&H). After the adoption of the OZZ B&H, a centralized and electronically managed registry was established in which all types of mobile insurance are registered, regardless of their origin, including quasi insurance, which is designated as a generic term "specially proprietary right". The keeping of the inventory register was entrusted to the Registry Office, which is part of the Ministry of Justice of B&H, while the manner of its work is detailed in the Regulations on Pledge - abbreviated: PZ (see Articles 16 and 17 of the CBC of B&H in relation to Article 3 par. 1 of the PZ). The inventory registry provides a decentralized approach for performing various enrollments, but within the weekly working hours, while searches can be carried out without any time limitations (see Article 3, par. 2 of the Penal Code). The access to registration and search, as well as the issuance of registration certificates (IRZ) is enabled through the PCS system or Public Service Provider (JDU). In both cases, it is necessary for persons to have open user accounts with sufficient amount of funds to pay the appropriate fee for the requested service (see Article 5 par. 1 in conjunction with Article 7, par. 1 and 24, par. 4, PZ) Those persons who wish to check or obtain an excerpt from the registry whether an object from the debtor's property is already subject to insurance may open a JDU user account or a user account type 2 (see Article 5 par. 2. point b and c PZ). On the other hand, banks or leasing companies need to open a user account type-1 (see Article 5, par. 2, point a PZ), because only in this way they are given the opportunity to register and receive an IRZ that has the status of an executive documents (see Article 26, par. 1, of the Constitution). The options offered in this way in any case leave enough space for the subjects to decide, depending on their commercial or private needs, which type of user account will open.

regime.¹⁴⁷ This approach deviates from the ZVSP RH which stipulates that the leasing provider's right to lease, as an incomplete incorporated part, ceases in case the whole thing is sold by the leasing user, on the assumption that the acquirer was conscientious.¹⁴⁸ However, this will not happen in the event of the recording of the rights of the lease owner in the land registry on a property for which it is otherwise bound and the subject of the lease as a member.¹⁴⁹ On the other hand, the German leasing provider can effectively prevent the object of the lease becoming a property with an inserted clause in the leasing agreement that the leasing user makes it only for temporary purposes.¹⁵⁰ In French civil law, a movable matter, as an object of leasing, linked to land can become a real estate by nature (*immeuble par nature*)¹⁵¹ or real estate by purpose (*immeuble par destination*)¹⁵². And if it happens that the subject of leasing versus real estate becomes natural by nature, the French leasing provider is not unprotected under the assumption that he had previously published his right to ownership of the lease in a commercial register. In domestic law, comparable to that of movable or immovable things, it develops the right to follow the leasing provider's enormous value and then, when the user of the lease out of the registered business activity gets rid of, for example, a trencher with a built-in drill connection for the land on which a special ownership right was published in the inventory register under the appropriate serial number. Although the motor vehicle registry does not provide data on the existence of a load on the drilling connection, because it is recorded in the inventory register, this does not mean that the buyer will acquire the right to ownership and at a connection that can be separated from the excavator as a whole.¹⁵³ In this case, the right to follow the leasing provider does not allow a third person, as in the case of a registered stock, to acquire the right of ownership and the whole thing with such a load.¹⁵⁴ Significantly different repercussions nevertheless cause the case

147 Art. 11. par. 4. ZSP FB&H / RS.

148 See Art. 6. par. 4. ZVSP RH; Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z., 1998, *Stvarno pravo*, Volume 2, Narodne Novine, Zagreb, en. 74; Klarić, P., Vedriš, M.: o. c., pp. 82-83.

149 See Art. 6. par. 2. in conjunction with Art. 118. par. 4. ZVSP RH.

150 Koblitz, A. : o. c., p. 115. In § 98 of the German Civil Code (*Bürgerliches Gesetzbuch - BGB, RGBI S 195*), inter alia, it is clarified that, in the case of land used for the performance of certain economic activities, machines and other devices may be used if they serve its economic purpose. For example, commercial vehicles for the storage or delivery of certain items, as well as the fleet of a factory, take into account that it becomes a member if there is a close connection with the performance of the economic activity on a particular land, and not when it is only temporarily (see Scholz., H, Lwowski, HJ., 1994, *Das Recht der Kreditsicherung*, 7. Neubearbeitete und erweiterte Aufl., Berlin, Erich Schmidt Verlag, Rn 93, pp.84).

151 See Art. 518 - 521, 523 of the French Civil Code (*Code civil des Français*, abbreviated: Cc).

152 See Art. 522, 524 Cc.

153 Art. 10. par. 2. ZSP FB&H / RS.

154 Art. 10 par. 4. sent. 2. ZSP FB&H / RS.

and when the movable thing on which the special ownership of the leasing provider is entered, merges with another movable property of the leasing user, in a way that it is impossible to separate it in terms of substantive regulations without damaging things as a whole.¹⁵⁵ If this situation is limited by discussion only to the relationship between the parties to the leasing agreement, then the leasing user is also considered unauthorized and the contract is excluded from the very beginning to become the owner of the leasing object with which his business is connected.¹⁵⁶ This applies in the case when the subject of the lease is obliged to return to the leasing provider after the expiration of the agreed period or the early termination of the leasing contract, as well as when the contract is concluded, and the option of buying a lease item or extension of the leasing contract by the leasing user is unrealized. In doing so, the leasing provider becomes the owner of the merged thing with the leased object being returned, and for the same it is not obliged to pay the market fee to the user of the lease, while the leasing user is excluded completely to become the owner with the payment of the market value to the lessor and in case his business was higher value of the lease item.¹⁵⁷ This discussion is definitely irrelevant in the opposite direction if the leasing user realizes a purchase option after the expiration of the contract, or if a mandatory transfer of ownership to the subject of the leasing with which it is connected is made. However, it deserves special attention if the leasing user takes away his own business with which he is connected during the lease term and lease. In this case, the buyer becomes the owner of a merged but inextricably linked part of this thing, even if the leasing provider has registered his special ownership right in the inventory register.¹⁵⁸ This outcome for the leasing provider is undesirable, but it can nevertheless considerably mitigate it, on the assumption that the initial registration of a special ownership right covered the proceeds of a leasing item that was sold together with the other matter of the lease beneficiary as an inseparable unit.¹⁵⁹

3.4. Securing lease items against the risk of ruin or damage

A regular companion in the forms of leasing contracts are those provisions from the general terms and conditions of business by which the leasing user is obliged to choose from the already offered list an insurance company and provide the economic good as a subject of leasing from those risks to the extent and in the manner determi-

155 According to Art. 10. par. 1. ZSP FB&H / RS an important part of the thing can not be an independent object of ownership if it is not otherwise specified by law.

156 Art. 114. par. 1. and 2. sent. 2. ZSP FB&H / RS.

157 Art. 114. par. 2. sent. 2 and par. 3. ZSP FB&H / RS.

158 Art. 13. OZZ B&H.

159 Art. 6. point a) OZZ B&H .

ned by the leasing provider.¹⁶⁰ In the domestic practice of insurance, specially established intermediary agencies play a significant role, which are often also the subsidiaries of the leasing companies' associations authorized to conclude insurance contracts with the commission on the cost of the leasing user.¹⁶¹ When establishing an insurance relationship, the leasing user appears as an insurance contractor, while the leasing provider is designated as the insured person to whom the insurance policy is to be extradited.¹⁶² From a comparative view, the German leasing company also concludes an insurance contract for the benefit of the leasing provider, but also undertakes to give it to him, but with the conclusion of the leasing agreement, all the claims on the basis of insurance of the object of leasing.¹⁶³ A somewhat different is the contractual position of the French leasing user who concludes the insurance contract with the insurer on his behalf, but also the name of the leasing provider, which is also designated as the insured in the insurance policy.¹⁶⁴ In the event that the leasing user does not provide the subject of the lease during the lease term, it can do so on his own expense and the leasing provider, or if he takes the sufficient reason to resort to an effective lease contract.¹⁶⁵ Also, the leasing provider reserves the right to terminate the leasing agreement if the leasing user unauthorized changes the insurer.¹⁶⁶ At this point, it is also necessary to give an answer to the question: is it sensible to require the leasing users to be outside the risk position at their own expense, and in the interest of the leasing provider, to provide the object of leasing? From the point of view of the leasing provider in an important part of the subjective influence of leasing users on the subject of leasing, there is a strong mistrust that the

160 Dispositional provision on the obligation to insure lease items is contained in Art. 44. ZL RS and 33. ZFL RS. The same result is achieved through Art. 36. par. 2. ZL FB&H which determines that this is an optional element of the leasing contract. The same provision was contained in ex art. 36. century 2. RH, but it is omitted in the ZL RH (2013). In practice, the obligation of the leasing beneficiaries to regularly secure the leasing facility (for example, against fire, natural disasters, water spillage, theft, fracture, etc.) is an integral part of the leasing contract (see Article 3, sent. 1 and 2 of the OU RL; Compare point 6.1., sent. 1. OU SL, Article 8. par. 2. point 8, sent. 1. OU HAAL).

161 Law on Mediation in Private Insurance (Official Gazette of FB&H, No. 22/05).

162 Greater insurance for a foreign account. Šulejić, P., 1980, *Pravo osiguranja*, Drugo prošireno izdanje, Beograd, pp. 217-224.

163 This prevents the disposal of rights from the insurance relationship by leasing users to third parties at the expense of the leasing provider (see Westphalen, F.G., 1992, *Der Leasingvertrag*, 4. Auflage, Verlag Dr. Otto Schmidt KG, Köln, Rz. 671, pp. 318).

164 Koblitz, A.: o. c., pp. 121.

165 See point 6.1. sent. 8. in relation to point 7.1. sent. 11. OU SL; Art. 8 par. 2. point 8. sent. 3. OU HAAL; Art. 8. par. 1. point 3. OU RL.

166 See point 6.1. sent. 7. in relation to point 7.1. sent. 11. OU SL; Art. 22. par. 1. point 9. OU HAAL.

risky, but also unavoidable obligation of voluntary insurance of certain investment goods left to be used, will not succeed in removing the consequences of the unauthorized use of the lease item.¹⁶⁷ The mechanism of a justified limitation of the manner of using such goods by the leasing and voluntary insurance beneficiaries, which does not cover in the event of an adverse event, is completely justified by the transfer of the risks of the leasing user to further payment of the leasing fee or compensation for the damage to the leasing provider.¹⁶⁸ Such increased liability is justified for the simple reason that it is also excluded the responsibility of the insurer to pay the damage incurred to the lessor with the right to compensation from an unauthorized leasing user. Regulatory requirements can only occur according to the unauthorized leasing user in the amount in which the insurer paid up the damage to destroyed or damaged goods of third parties up to the amount of insured sum. Although the cost of financing increases for the added insurance item, this remains a minor burden compared to those benefits that both parties to the financial lease agreement acquire if the collapse or damage to the lease is covered by contractual risks with the insurer. On the one hand, the payment of insured sums to the leasing provider by the insurer is a way to refund the costs of financing the non-depreciated value of a failed lease,¹⁶⁹ while on the other hand payment to the user of the lease, with the approval of the leasing provider, is significant for the compensation of the costs incurred in partial damages. its repair and maintenance of the contract in force.¹⁷⁰ In the case of the collapse of the leasing object, it is contrary to the request of the leasing provider to compensate for the actual damage in respect of the paid sum of the insurance, and the request of the leasing beneficiary to surrender the excess of the damage paid by the insurer.¹⁷¹ In the case of partial damage to the lease, the leasing provider regularly counts that the subject of the lease will be repaired, while the leaseholder is rarely able to take over the leasing costs of the person he has chosen and these settlements from the directly paid amount of damage by the insurer. This is indicated by the leasing contracts, which states that, with the prior approval of the leasing provider, the paid amount of damage by the insurer will be used in those workshops and services specified by the leasing provider or that the insurer will only pay for the repair of the

167 See Art. 10. point 9. and 10. OU RL; point 7 and 8 under the heading “Accident, damage or complete damage to the object of leasing”, OU ASAL.

168 See Art. 48. par. 5. ZL FB&H; Art. 36. par. 2. ZL RS; Art. 60. par. 2 and 3 ZL RH; and Art. 25. par. 3. ZFL RS.

169 See Art. 10. sent. 3 and 4 of the OU RL.

170 See the case of partial damage under the heading “Occurrence of the insured event by insurance policy”, in: OU HAAL; point 6.2. sent. 6 and 7 of the OU SL.

171 See point 6.2. sent. 3 and 8. OU SL; Art. 10. sent. 7 and 8 of the OU RL; same in: point 4.4. OU HAAL.

item leasing to designated workshops or services.¹⁷² In addition, the leasing provider may deny the insurer and pay partial damage to the leaseholder or an authorized repairer, if the leasing user before the occurrence of the harmful event was late in paying the leasing fee. In German leasing contracts, it is not a firm standpoint that the leasing user calculates the cost of repairing the leasing item up to the amount of the insured sum, but it is also often envisaged to include it in the remaining leasing fees.¹⁷³ Such clauses can be used by leasing users, depending on the amount of lease repair costs for which it is deprived of current compensation from the sum insured, in such an economic situation that does not ultimately lead to the leasing provider itself. From voluntary insurance of different economic assets, it is necessary to clearly distinguish those leasing items, such as freight vehicles left to users of leasing for use for commercial purposes, or private vehicles for private purposes. For these items, the leasing user shall bear the cost of completing the compulsory motor vehicle liability insurance (AO)¹⁷⁴ policy, but also the cost of an additional liability in the name of closing the insurance policy covering the risk of theft for the entire duration of the leasing relationship.¹⁷⁵ In domestic leasing practice, the regular leasing user concludes the policy of AO and CASCO insurance as an insurance contractor and insured, but it is vinculated, analogously to the German leasing practice, in favor of the leasing provider.¹⁷⁶ After the occurrence of the insured risk and the recorded minutes by the insurer at the request of the leasing beneficiary, it is not excluded that the leasing provider subsequently turn to the leaseholder for the unpaid amount of the loss of a failed or damaged lease item.¹⁷⁷ In one case, the leasing provider, after realization of the vinced shelf, charged the insurer with a smaller amount, because the vehicle was insured on a smaller amount than the purchase value of the leasing object. Based on the results of the conducted procedure, the court adopted the lease's claim and obliged the leasing user, who, before the accident, only paid five leasing fees in the amount of 2,803.00 BAM, to pay him the remaining amount of BAM 42,650.95 in the name of the principal. In the reasoning of the court decision, it is

172 See point 6.1. sent. 6. OU SL; See Art. 3. sent. 10 and Art. 10. sentence 1. of the OU RL.

173 Koblitz, A. : o. c., pp. 122.

174 This area in FB&H is regulated by the Law on Insurance Companies in Private Insurance ("Official Gazette of FB&H", No. 24/05) and the Law on motor vehicle liability insurance and other provisions on compulsory liability insurance ("Official Gazette of the Republic of Serbia", no. FB&H " , No. 22/05).

175 See Art. 3. sentences 5. OU RL; the case of total damage under the heading "Occurrence of the insured event under the insurance policy, in the HAU HA.

176 See Art. 3. sentences 11 and 12 of the RL; sup .: point 4.2. OU HAAL (the lease holder is marked in the policy as a policyholder).

177 See Art. 10. point 8. OU RL; point 6. under the heading "Accident, damage or complete damage to the object of leasing", OU ASAL.

pointed out that the leasing provider, on the basis of the general conditions of business in case of early termination of the contract, reserved the right to demand from the borrowers the unwanted amount of financing together with the loss of benefits. And finally, by the pronouncement of a court decision, the payer is obliged, on the basis of the general terms and conditions of business, to fulfill the established claim of the leasing provider according to the leasing user.¹⁷⁸ This issue was also settled before the Constitutional Court of Serbia when the user of the lease, after the registration of the theft of a vehicle covered by the contracted insurance policy of casco insurance against basic casco risks and additional risk theft, was obliged to pay the leasing provider the difference between the unpaid amount of damage by the insurer. In the dispute before the appeal, the Municipal Court in Novi Sad rejected the claim of the leasing beneficiary against the insurer, requiring that it be established that there was an agreement on the payment of damages between the leasing provider as insured and the insurer on the insurance policy.¹⁷⁹ This decision was then also confirmed in the appeal procedure by the High Court in Novi Sad.¹⁸⁰ In the lodged appeal, the leasing user made a statement that the calculation of the amount of the damage was unrealistic, with the explanation that the value of the found and returned vehicle to the lessee was much higher and that the contractors thus doubled it, that the said amount was not sufficient to fully settle the claim of the leasing provider. As the leasing provider activated a bill of exchange in order to collect the unpaid amount of damage from the insurer, the appellant considers that it is impossible to make a difference between what the leasing provider requires and the amount of insurance of the vehicle. In the reasoning of its decision, the Constitutional Court of the RS concludes in the first place that the user of leasing, pursuant to the provision of Art. 905. c. 1. ZOO (1978), concluded a contract for the insurance of a vehicle from which he assumed the obligation to pay the premium and other obligations as a security contractor, without having the rights belonging to the insured, i.e. leasing provider. Then, in order to correctly apply the provision of Art. 938. par. 1. The ZOO (1978) finds that the ownership of the lease holder over the leasing object has not been transferred to the appellant and, consequently, no insurance rights under the insurance contract with the insurer. In the end it was a decisive reason to reject the appeal of

178 Judgment of the Municipal Court in Sarajevo, no. P-116/2003-A of 8 April 2008, confirmed by the Judgment of the Cantonal Court, no. Gž-1497/05 dated 16 October 2008 and the Judgment of the Supreme Court of FB&H, no. 070-0-Rev-09-000087 of January 26, 2010.

179 See Judgment of the Municipal Court in Novi Sad P. 8306/07 of 23 September 2008.

180 See Judgment of the Higher Commercial Court in Novi Sad, no. Mrs. 830/10 of 14 April 2010.

the appellant as unfounded.¹⁸¹ The described method of concluding an insurance contract in practice is particularly significant in relation to the AO policy in those situations when participation in the accident is, for example, two or more motor vehicles owned by the same leasing company. The designation of a leasing company as an insured would, in the event of an accident, mean that there is no third party as a condition for payment of the insured sum from the AO basis and that the leasing user inevitably has to use the associated rights from the casco insurance.¹⁸² In addition, the leasing user may use dolphin (for example, drunk driving) by using a motor vehicle in traffic to cause damage to a motor vehicle owned by another person and to prevent the leasing provider from collecting damage to the destroyed vehicle from the insurer's insured under the casco insurance.¹⁸³ In this case, the insurer is obliged to pay the damage to the owner of another motor vehicle, but also has the right to regress from an unauthorized leasing user, while on the other hand, the leasing provider lays the right to an unauthorized leasing user for further payment of the leasing fee or compensation. This outcome, which establishes a stronger liability of the leasing user, should act as a reminder to them that they should give the subject of leasing a higher degree of attention in terms of usage, than they do with their own things.

3.5. Prohibition of dispensing with leasing

During the term of the leasing contract, the leasing user, in spite of the contractual prohibition of the lease holder, is alienated or pawned in his possession by leasing the object to a third party.¹⁸⁴ Such unconscionable treatment of the leasing beneficiary from the aspect of protecting the real right position of the leasing provider and third parties in legal transactions has different repercussions, depending on whether the registration of a special ownership right of the lease holder in the inventory regi-

181 The Constitutional Court of Serbia indicates to the appellant that it could possibly realize the right as a lease beneficiary to recover funds in the amount of the difference between the payment of insurance and the remainder of the debt held by the leasing provider, as well as the possibility of returning the deposit after the collection of the damage from the insurance, can cover the claims of the leasing provider (see Constitutional Court of RS, UŽ-2736/2010, dated 21 February 2013, the Constitutional Court of the RS, UŽ-2736/2010, dated 21 February 2013).

182 Read more about this issue in: Radinov, N. i Vicenca-Padovan, A., 2012, "Sudar vozila u vlasništvu istog leasing društva i problem treće osobe iz AO", *Pravni fakultet Sveučilišta u Zagrebu*, Vol. 29, 62, (4).

183 See Art. 10. point 12. OU RL; point 9. under the heading "Accident, damage or complete damage to the object of leasing", OU ASAL.

184 See Art. 2. sent. 4. OU RL; point 2. sent. 1. under the heading "Ownership of the lease", AS ASAL; same in: point 3.3. OU HAAL.

ster has been made. In the event that the lessee leases the subject of leasing, in which the leasing company did not enter the ownership right, then the acquirer will become the owner of the lease with the realization of the assumptions related to the application of the rules on acquiring ownership from the non-owner. For this purpose, according to the ZSP FB&H / RS, it is required that the owner-user of the lease, based on a legal transaction, hands the object of leasing into an independent and immediate possession of a conscientious acquirer.¹⁸⁵ From the fictional methods of the leasing lease tradition, only *tradio brevi manu* is considered, since the immediate possession of the conscientious acquirer acquires the quality of an independent property at the moment of the conclusion of the transfer agreement.¹⁸⁶ Apart from the alienation of the leasing items, it is not excluded that the leasing user at a certain moment makes a decision to transfer the object of leasing to a third party and to use it - podleasing. In establishing the relationship between subleasing ZL FB&H, ZL RH, as well as the Ottawa Convention, the leasing user must obtain a written agreement from the leasing provider.¹⁸⁷ Otherwise, the leasing provider has a justifiable reason to terminate the leasing agreement and issue a claim for compensation of damages to the leasing user¹⁸⁸. This solution is not a novelty because it is a well-known rule for terminating the lease.¹⁸⁹ What is interesting in the method of regulation of the ZL RS, as well as ZFL RS, is the discharge of the problem of podleasing in its entirety. It is obvious that the legislators here counted on the analogy to apply those rules that apply to the under-subscription.¹⁹⁰ Domestic jurisprudence on the issue of the establishment of the subleasing relationship was also made in one case when the leasing provider on September 27, 2007, concluded a financial leasing agreement and financed a Passat motor vehicle selected by the leasing user in the amount of 34,300.00 BAM with the

185 Contrary to Art. 111. par. 1. ZSP FB&H / RS u ex art. 36. The ZOVO of FB&H was required that the general assumptions be met in one of the following three situations: 1) the leasing user has put into circulation the object of leasing within his registered economic activity; 2) the leasing user has alienated the subject of the lease transferred by the leasing provider only to use, i.e. the basis is not the acquisition of property rights; and 3) the subject of the lease is sold in public sale in the context of private law.

186 Art. 111. par. 2. and 3. ZSP FB&H / RS.

187 See Art. 51. par. 1 and 4 of the ZL FB&H; Art. 61. par. 1. ZL RH; Art. 14 (2) Ottawa Convention. These provisions also contain the general terms and conditions of the leasing provider (eg, point 5.4, par. 1, of the OU SL).

188 See Art. 54. par. 1. point c) ZL FB&H and Art. 61. par. 2. ZL RH; Cache: Art. 709 (12) of the Polish Civil Code; III.- 3: 102 (compensation for damages) III-3: 502 (termination of contract) DCFR. This is also indicated by the general terms and conditions of business (see point 10, par. 1, under the heading "Termination of contracts", OU ASAL).

189 The approach is also identical in the case of cancellation due to an unauthorized sub-fund (Article 588 of ZOO FB&H / RS).

190 See Art. 586-590. ZOO (1978).

obligation to pay 60 monthly installments, which were also stated in the repayment plan.¹⁹¹ As the leasing user fell in arrears with the payment of leasing fees, he gave the occasion and the leasing provider that on June 25, 2010 termination of the leasing contract and requires payment of the remainder of the determined debt in the total amount of BAM 42,415.29. In the first instance procedure, the leasing user unsuccessfully attempted to evade the obligation to pay the established debt to the leasing provider, arguing that the agreement in question was null and void, since the subject of the lease was not used by him, but his friend who paid for it and the payment (in advance). Later, he alleges that the leasing user complained that he was merely a signer of the leasing contract, and that the real beneficiary of the leasing object was his friend who had deceived him failed to indicate the second instance court that the first-instance court decision was found to be erroneous.¹⁹² Thus, it seems clear, finally, that the leasing user, by signing a leasing contract, was aware of his content, that is, the prohibition to lease the object of leasing to another for use without the consent of the leasing provider.

4. CONCLUSION

The desired condition of uniting a leasing relationship is that the supplier delivers the subject of leasing to the leasing user and that after this he regularly pays leasing fees to the leasing provider. However, for the duration of the contracted period, there may also be some disadvantage on the part of the leasing or leasing beneficiary, which will also affect the course of the leasing contract. On the one hand, the leasing user can alienate the subject of the lease after the regular delivery of the leasing item by the supplier during the lease term, while on the other hand, it can also be done by the leasing provider. In such a state of affairs, it is necessary that there are clear answers regarding the protection of the opposite party. The published leasing provider as a title-holder of a special ownership right will be protected by the alienation of a leasing object by the leasing user contrary to the contractual prohibition by the action of an unbelievable assumption of knowledge of the executed entry in the inventory register in relation to all third parties that appear as potential buyers, while unqualified leasing providers exposed to the enormous risk of losing their right of ownership with the enrichment of assumptions about the acquisition of ownership by non-owners. In the FB&H / RS PSC, assumptions about acquiring ownership from non-

191 See Judgment of the Basic Court in Sokolac, no. 89 1 P 020615 10 P of 21 May 2013.

192 Judgment of the District Court in East Sarajevo, no. 89 1 P 020615 13 Gž of 29 October 2013; and Decision of the Constitutional Court, no. AP-4991/13, promulgated at the session of 12 February 2014, rejecting the appeal of the leasing beneficiaries on the issuance of a provisional measure and the postponement of execution of the court decision of the Basic Court in Sokolac.

owners are now designed in a fundamentally different way than before in the B&H legal system. The leasing provider, after the conscientious acquisition of leasing by third parties, would not remain and the loss of his ordinary owner's position is limited only to the expiration of the claim against the user of the leasing, is clearly demonstrated and why it is useful to register the special ownership right in the registry before that. The registration of a special ownership right of the leasing provider in the central and electronically managed inventory of the pledge in which they are entered and all other mobile insurance is extremely important in order to obtain the rank of priorities in relation to the competitors of the lease beneficiaries on the leasing object. The registration of a special ownership right of the leasing provider in the inventory register is nothing less important, and in case the lease beneficiary, during the agreed period, leases the subject of leasing outside the registered economic activity. Then the irresistible assumption about the knowledge of the enrollment prevents the acquisition of ownership of potential buyers in the subject of leasing in good faith. On the other hand, the position of unlisted leasing providers is considerably weaker, because conscientious people can simply call for the fulfillment of assumptions about the acquisition of ownership by non-owners. On the other hand, neither the leasing provider as the owner of the leasing object has been prevented in its decision to dispose the object of leasing to third parties for the duration of the leasing relationship. If this happens then the user of the leasing is protected by the call for *cessio vindicationis* regulated by the ZSP FB&H / RS, since the buyers of the leasing object can point out all the objections that he could otherwise point out to the leasing provider. However, this entry of the buyer into the place of the leasing provider in the leasing contract is not meaningful, although it is formalized in the ZL RS, unlike the ZL FB&H. As the incorporation of the obligation in the transferred right by the leasing provider presupposes that, with the inevitable circumvention of the essential conditions for the performance of leasing activities, the buyer enters into some obligations of the leasing provider which he is not able to execute, the legislator should certainly consider improving the existing quality of protection of leasing. In that direction, the alienation of the leasing object, modeled on the Model Law on Leasing, was adopted on November 13, 2008. at a joint session of the General Assembly of UNIDROIT and the Committee of Governmental Experts held in Rome, could also give rise to the prior consent of the lease beneficiary or to adopt the solution from the Ottawa Convention that the leasing provider is still liable to the lease beneficiary for the fulfillment of obligations under the leasing contract. In the event that the leasing user fails to pay the leasing fee for the duration of the leasing contract then the lessor may terminate the contract and return the leased object and claim damages in the amount that is not compensated for by his sale on the market. While the ZL FB&H determines that the leasing provider may terminate the leasing contract and claim damages if the leasing user is late with the payment of the first leasing

fee or two consecutive leasing fees after the payment of the first leasing fee, until the ZL RS determines that the leasing provider may terminate the contract and request payment of the fee increased for interest if the sum of consecutive unpaid fees after the payment of the first lease payment reaches one quarter of the total agreed amount of the leasing fee. This concept of stepped liability of the leasing beneficiary is not a stronger side of the regulation of the Entity leasing regulations, as it does not depart from the concept of an essential and non-material violation that the Vienna Convention and the Ottawa Conventions insist. Although the detailed regulation of the assumptions for the termination of the leasing contract due to the delay of the leasing users contained in the general terms of the business, it is illogical, however, that the ZL RS insisted that the protection of leasing users, who are merely opt for purchase of leasing items, is provided by the exclusion of the rights of the leasing provider to terminate the contract about the leasing in the place that comes in and the right to reimburse the remaining amounts of the lease, together with the agreed, but undisclosed interest. What constitutes the specification of the regulation of the ZL FB&H in relation to the ZL RS is a specially designed enforcement procedure for the return of the subject of leasing after the termination of the leasing agreement on the assumption that the parties have previously achieved a settlement agreement in the form of a notarized document. Although the purpose of this procedure is that the leasing provider returns the subject of leasing as quickly and cheaply as possible, he still did not live up to the leasing practice. Regardless of this, it should also be much more adapted to the existing concept of stepped liability of the leasing beneficiaries because it would not have happened that the leasing provider would require the return of more valuable leasing items, even though the leasing user had failed in paying only two consecutive installments. After the termination of the leasing agreement, an additional problem arises in relation to the calculation of the amount of damage that the lender may ask from the leasing user. Since the payments of the leasing beneficiaries during the leasing contract are not valid, but only valid, they only confirm that the leasing user in terms of entity property laws does not have a real right position on the leasing object, analogous to the position of the German seller in the sale with the retention of ownership. However, it also seems important to add that the existence of the rights in the expectation is also denied in favor of the German leasing customers. In order to prevent the practice that the leasing provider seeks compensation for damage, and when the sale of the returned lease object has failed due to the delay of the leasing beneficiaries, the possibility that it is less or is not present, the 2013 ZL FB&H also established the obligation of the leasing provider to prior to the sale of the lease items of information about the leasing user, as well as the return of the excess of the ration. However, the deficiencies in the protection of leasing beneficiaries and in spite of imposed misdemeanor liability of the leasing provider, if it excludes this obligation from the leasing contract, is reflected in the fact that it is not prescri-

bed at all and the procedure according to which the sale of the returned leasing object should take place. This can also provoke controversy in practice not only in assessing the behavior of the leasing provider and the manner in which the sale is conducted, but also in terms of how the leasing user should be informed of the time and place of sale. On the contrary, a much better solution to the protection of leasing users would be that the ZL FB&H, by which case, directed that leasing providers without a reclassification and the participation of the court apply the rules of the B&H, as well as the PZ on the procedure of selling the items of insurance through the auction, tender or direct contract. In addition to paying the leasing fee, the leasing user is obliged to use the object of leasing in accordance with the agreed purpose for the whole duration of the leasing contract, as well as to bear the costs of its maintenance and insurance against the contracted risks in case of ruination or damage. Although these obligations are common for leasing customers, they still regulate the place of leasing regulations in much more general terms of business. This is why and why the leasing provider in the general terms of his business asks the leasing user to use the original parts for the use of the lease, although in order to maximize his profits he should be free to buy some other parts that are more favorable and are about the same quality. Also, the leasing provider regularly excludes the right of retention of the leasing users, and even if the costs or installations in the subject of the lease are executed on the basis of its prior consent. These examples are only partial indications of the supremacy of the leasing provider over the leasing user during the duration of the leasing contract. On the other hand, the subject of leasing can also become a piece of land that is intended for carrying out the agricultural activity of the leasing user. In the event of the disposal of a real estate property subject to leasing, the quality of the leasing provider's protection against the conscientious purchasers is dependent on whether he had previously registered and especially the ownership right on the lease item in the inventory register. This is a consequence of that determination in the entity property laws that the subject of leasing and real estate is not in the same legal regime. It follows that by failing to register a special ownership right, the unlisted leasing provider will lose ownership of the leasing object in favor of conscientious acquirers. However, the right to follow a leasing provider as a title-holder of a special ownership right develops enormous value by the cases in which the user of the lease is dispossessing his / her part of which has become an undeniable part before that and has become a subject of leasing. Of this, however, the case where the subject of leasing becomes an important part of some other movable thing of the leasing user, because of the alienation of this thing, the acquirer becomes the owner of the lease item. And, in spite of that, the leasing provider is protected if the initial registration of a special ownership right includes revenues from the sale of the leased asset.

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PRIVATNOPRAVNI POLOŽAJ KORISNIKA LEASINGA U TRANSAKCIJI FINANSIJSKOG LEASINGA - ANALIZA ZAKONSKOG I FORMULARNOG LEASING PRAVA U BOSNI I HERCEGOVINI

SAŽETAK:

Ugovorna pozicija korisnika lizinga nasuprot davaoca lizinga u poslu finansijskog lizinga je atipična u toj mjeri da se korisnicima lizinga nameću određene obaveze koje ne nalaze svog sagovornika u modelu uređenja ugovora o zakupu, nego slijede mnogo više pravnu logiku pretpostavljenu modelu uređenja ugovora o prodaji. U ovom radu predmetni okvir zacrtanog istraživanja je izazvan s jednim naknadno pristiglim, ali sasvim jasno omeđenim pozivom lizing prakse u BiH, a koji ide za tim da se preispitaju i kritički, analizom postojećeg zakonskog i formularnog lizing prava izvedu praktični i doktrinarni zaključci u pogledu kvalitete uređenja privatnopravnog položaja korisnika lizinga u obrascima ugovora o (finansijskom) lizingu. Tom pozivu metodološki i supstancijalno se sasvim opravdano stavlja u koliziju i jedna nezaobilazna redukcija u suprotnom smjeru, a sve s ciljem iznošenja na pripadajućim mjestima i djelimične ocjene o različitostima zaštite zakonskog uređenja privatnopravnog položaja publiciranih (obični vlasnici) u odnosu na nepublicirane davaoce lizinga (titulari posebnog vlasničkog prava) u formularnim obrascima ugovora o finansijskom lizingu.

Ključne riječi: *posebno vlasništvo, publicitet, registracija, prioritet, naknade za zakup, sekundarni troškovi, kašnjenja, instalacija, pripadnost, spajanje, osiguranje, rizik od štete.*