

Abstract

In my dissertation I am concerned with the issue of leasing in commercial relationships. Leasing is a legal concept that was taken over from abroad after 1989. A close connection with lease and relatively short legal history are probably the reasons behind the certain degree of heterogeneity of opinions on leasing. And the diverse opinions on leasing were the main reason for my choice of this topic. I was particularly interested in delimitation of leasing in relation to lease and in legal regulation of leasing. At the same time I assumed that despite the difference of opinions the practice of conclusion of leasing agreements will be unified, considering the large volume of leasing agreements concluded in our country each year.

The aim of my dissertation was to cover the majority of the main lines of opinion on leasing, make a comparison of leasing and lease and to assess whether it is necessary to apply the statutory regulation of lease on leasing agreements. Another aim of the dissertation was to assess individual components of leasing relationship, i.e. its participants, subject and content (subjective rights and obligations), both on purely theoretical level and in terms of the specifics of leasing as reflected in concrete business terms and conditions.

My primary concern during my work on the dissertation was to get acquainted with available theoretical sources, i.e. in particular with available journals and publications dealing with the legal aspects of leasing. In addition, for the purposes of analysis of the form of leasing relationship in practice I have also taken into consideration publicly available statements, opinions and business terms and conditions relating to leasing, some of which form annex hereto.

The dissertation is subdivided into five parts; Part One is formed by the Introduction, Parts Two to Four are the three main chapters, and Part Five contains a conclusion. In the introductory part of the dissertation I primarily focused on

definition of the terms related to leasing and basic division of leasing into financial and operating, as well as on outlining a brief history of leasing. Last but not least, I drew attention to the activities of Czech Leasing and Financial Association and the European Federation of Leasing Company Associations.

Part Two of my dissertation concentrates mainly on a comparison of leasing and lease. Two basic approaches to financial leasing are examined. The first one maintains that financial leasing is a mixed agreement in accordance with Section 491 par. 1 and 3 of Act No. 40/1964 Coll., Civil Code, as amended, having the characteristics of lease agreement and agreement on purchase of leased property. This opinion is supported by some, however, not the most recent judicial decisions¹, part of the doctrine, and explanatory memorandum to Act No. 513/1991 Coll., Commercial Code. The second and presently prevailing legal opinion both in literature and in case law² considers financial leasing as a specific legal concept to which the statutory provisions of lease agreement type of contract may not be applied.

As far as the classification of operating leasing is concerned, the opinions are not quite homogeneous either. The majority of authorities understand it as lease, as it has all substantial characteristics of lease and simultaneously lacks specific characteristics of financial leasing (acquisition of ownership to the subject of leasing by the lessee and the risk of damage on the part of the lessee). Nonetheless, until recently the Czech Leasing and Financial Association recommended that operating leasing agreements be concluded as innominate³ agreements.

¹ Decision of the Constitutional Court, file No. II.ÚS 339/99 of 2 February 2000, published at the website of the Constitutional Court <http://www.nalus.usoud.cz/>.

² Decision of the Supreme Court of the Czech Republic of 27 November 2003, file No. 30 Cdo 2033/2002, published in *Právní rozhledy* 6/2004 and also on the website of the Supreme Court of the Czech Republic <http://www.nsoud.cz/>

³ See General terms and conditions of financial and operating leasing of movable assets recommended by the Czech Leasing and Financial Association on its website <http://www.clfa.cz/> until the end of 2008.

Further, in Part Two the sources of law governing leasing in the Czech Republic and on the level of the EU are positively delimited and a short comparison with legal regulation of leasing in selected countries is provided. In this connection I noted the growing number of countries that have proceeded to enact a statutory provision on financial leasing agreement as a separate contract type.

Part Three is concerned with leasing relationship and its components, i.e. the participants of leasing relationship, subject of leasing, and its content, i.e. subjective rights and obligations of participants of a leasing. I described the participants of leasing relationship and reached the conclusion that financial leasing in the form commonly effected in our country is in fact not a trilateral legal relationship, even though it is often labeled as such.

Further I also addressed the issue of the subject of leasing. I noted the fact that the subject of leasing may only be assets fit for use. On the other hand, I reached the conclusion that the subject of a leasing may also be other (secondary) subjects of civil relationships than tangible assets, i.e. for instance computer programs. Leasing relationship is almost exclusively based on a leasing agreement. Therefore, I proceeded to examine the contracts concluded within leasing operations and their properties.

In addition, I have also looked at the usual arrangements regarding securing fulfillment of leasing agreements, in particular the issue of liability for defects, which is sometimes seen as a weak point of financial leasing. With regard to the fact that there is no legal relationship between the lessee and the supplier of the subject of the leasing, the lessee does not have the right to claim in his/her/its own name and his/her/its own account the rights from liability for defects, despite the fact that the lessee uses the subject of the lease at his/her/its own risk. In this connection I noted that the countries that decided to enact a statutory provision on financial leasing as a separate type of contract rendered financial leasing actually a trilateral legal relationship and

granted the lessee the right to claim the rights from liability for defects with the supplier.

Part Four provides an analysis and commentary on business terms and conditions of financial and operating leasing. Pursuant to the provisions of Section 273 par. 1 of Act No. 513/1991 Coll., Commercial Code, as amended, a part of the content of the agreement may be also determined by reference to general business terms and conditions prepared by professional or interest organizations or by reference to other business terms and conditions. I have labeled the General terms and conditions of financial and operating leasing prepared by the Czech Leasing and Financial Association as general business terms and conditions, whereas the business terms and conditions of professional providers of leasing as "other" business terms and conditions in accordance with the said provision. Subsequently, I proceeded to compare the aforementioned business terms and conditions providing a commentary on some of their parts. In this connection I pointed out the problematic provisions and suggested partial modifications of the business terms and conditions provided with a commentary.

Part Five provides a summary of the conclusions drawn in the dissertation and also a brief contemplation of the future of leasing. I was inclined to the current opinion of the Supreme Court of the Czech Republic which allows conclusion of financial leasing agreements as innominate agreements, even though the reasoning of the Supreme Court of the Czech Republic is not fully satisfactory. In agreement with the Supreme Court⁴ I am convinced that it is necessary to apply the statutory provisions of the respective contract type of lease agreement on operating leasing in its usual form. And leasing agreements are in fact in practice usually concluded in line with the foregoing.

⁴ Decision of the Supreme Court of the Czech Republic, file No. 2 Afs 26/2004 of 7 April 2005, published at the website of the Supreme Court of the Czech Republic <http://www.nssoud.cz/>.

Nonetheless, even after twenty years of existence of leasing in the Czech Republic the position of leasing within the legal order and lease has not been quite clarified yet. In particular for this reason I was in my dissertation inclined to advocate enactment of a statutory provision containing a definition of financial leasing agreement that would unambiguously differentiate the legal concepts of leasing and lease. Additional benefit of such statutory provision would in my opinion be a definition of financial leasing as a trilateral legal relationship and granting of the right to claim the rights from liability for defects to the lessee in relation to the supplier of the subject of the leasing and elimination of some deficiencies of the existing, purely contract-based regulation. A statutory provision defining financial leasing agreement as a separate type of contract is, however, at present probably rather unlikely to be passed.