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LEGAL CONSEQUENCES OF OPENING THE BANKRUPTCY PROCEEDINGS ON FINANCIAL LEASING

Abstract:

The paper analyzes legal provisions, the standpoints of court practice, as well as opinions of jurisprudence regarding the legal consequences of opening bankruptcy proceedings on financial leasing. Special attention is devoted to the right of separation of the leased asset – an exclusion right (*right to separate recovery, right of exemption*) belonging to the lessor if bankruptcy proceedings are opened against the lessee. The significance of the prohibition of enforcement and settlement, as a legal consequence of opening bankruptcy proceedings, is highlighted. This prohibition also appropriately applies to the enforcement of the lessor's right to reclaim the leased asset from the bankruptcy estate until the decision on the debtor's bankruptcy (or until the approval of the reorganization plan). The study also examines the problems that arise if the bankrupt debtor or the bankruptcy trustee fails to adequately safeguard the leased asset, exposing it to risk. In such cases, the lessor may request the lifting of security measures imposed in prior bankruptcy proceedings or the termination of the stay of execution and settlement prohibition as a legal consequence of opening bankruptcy proceedings. The paper further explains the lessor's right to reclaim the leased asset in the event of a bankruptcy declaration, noting an exception where the bankruptcy judge may – upon the trustee's proposal and with creditors' committee approval – reject the reclamation (*separation*) request and order the full contractual lease payment as an obligation of the bankruptcy estate. The consequences of non-payment, which grant the lessor the right to demand repossession and enforcement on the leased asset in accordance with the contract or law, are also addressed. Lastly, the study analyzes theoretical and practical issues concerning the obligation of the bankrupt debtor or trustee to return the leased asset to the lessor after the approved reorganization plan is confirmed – if the plan does not provide for the continued use of the leased asset and payment of lease fees under the leasing agreement.

Keywords: *opening of bankruptcy proceedings; legal consequences; financial leasing; right to separate recovery; payment of leasing fees.*

INTRODUCTION

The consequences of opening bankruptcy proceedings on the legal transaction of financial leasing are defined in Article 95 of the *Law on Bankruptcy* (LB), The Official Gazette of RS, no. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018, 95/2018, 44/2025, within the chapter 'Consequences of opening bankruptcy proceedings on legal transactions. Therefore, this is one of the legal consequences of opening bankruptcy proceedings on legal transactions. The bankruptcy proceedings represent a specific type of civil court procedure,[1] and thus, in addition to the bankruptcy law, the relevant rules of litigation are applied subsidiarily and accordingly to issues that are not specifically regulated by it, in accordance with the principle of imperativeness and preclusiveness from Article 7, Par. 1 of the LB. [2]

If bankruptcy proceedings are initiated against the lessee, the lessor submits a request to have the leased asset exempted from the bankruptcy estate. [3] This is an exclusive right and a third-party claim, where the lessor, based on their real or personal right, seeks to separate a specific asset from the bankruptcy estate.[4] "Separation rights prevent assets belonging to the lessor from being included in the bankruptcy estate. "[5] The LB uses the term "financial leasing" solely in the heading of Article 95, while the provisions of said article – governing the effects of bankruptcy proceedings on leasing transactions – utilize the terms "lessor," "lessee," and "leased asset." These terms apply to both financial leasing and direct (true or quasi) leasing, wherein the lessor and the supplier of the leased asset are identical. "If the lessor and the supplier of the leased asset are the same person, the legal transaction concluded between them shall not be considered a financial leasing transaction… The lessor and the supplier in a financial lease must be separate entities, as otherwise, the rules of a lease agreement or some other legal transaction (such as an installment sale agreement, etc.) will apply."[6]

Therefore, the conclusion is that the provisions regarding the consequences of opening bankruptcy proceedings on the legal transaction of leasing – primarily concerning the lessor's right of separation – should also apply to direct leasing, meaning when the lessor and the supplier of the leased asset are the same entity. This is because both types of leasing share the common feature that the lessor is the owner of the leased asset, which constitutes an essential prerequisite for the existence and exercise of the right of separation. "The lessor (leasing provider) remains the owner of the leased asset until the expiration of the leasing term and full repayment of the leasing installments, and therefore holds the position of an excluding creditor in case of the lessee's (leasing recipient's) bankruptcy. "[7] Regarding other matters, different interpretations and deviations could be accepted because the financial lessor, as a business entity operating

1 Vasiljević, M. (1997). *Poslovno pravo.* Beograd: Savremena administracija, p. 328.

2 Šarkić, N., Radulović, D., and Počuča, M. (2019). *Posebni građanski postupci*. Beograd: Pravni fakultet Univerziteta Union i JP Službeni glasnik, pp. 319–320.

3 LB, Article 95, Par. 1.

4 LB, Article 50.

5 Milenović, D. (1990). Pravne posledice otvaranja stečajnog postupka. *Zbornik radova Pravnog fakulteta u Nišu*, (30), p. 180.

6 Ljubojev, N. (2009). Opšta koncepcija zakona o finansijskom lizingu i utvrđivanje subjekata finansijskog lizinga. *Glasnik Advokatske komore Vojvodine*, 81(4), p. 114.

7 *Ruling of the Higher Commercial Court, Ref. No. Iž 1568/2009 dated July 2, 2009* (Retrieved on June 24, 2025) from: http://www.propisionline.com

under a special regime, must obtain authorization from the National Bank of Serbia to conduct financial leasing operations as a form of financial intermediation. Furthermore, it must fulfill legally prescribed requirements concerning the minimum monetary portion of founding capital and other similar conditions.[8]

"One of the biggest challenges for lessors is that neither in the past nor today do they have legal means to urgently regain possession of the leased asset upon the lessee's default. This can only be done through court intervention, but often only after years of litigation, during which time the lessee not only continues using the leased asset, but it also partially depreciates. Moreover, the lessee may hide, dismantle, and sell the leased asset, thereby preventing the lessor from recovering it." [9] "This could lead to the collapse of the lessor, especially considering that 'Austria's fifth largest bank, Hypo Alpe-Adria-Bank, among others, went bankrupt due to problematic leasing operations in the Western Balkans,[10]... recording a net loss of €1.58 billion in 2009, primarily due to its troubled leasing portfolio and cross-border placements." [11]

When it comes to the enforcement of exclusion rights, our bankruptcy law provides exceptionally strong protection for creditors entitled to separate recovery. This primarily refers to cases where the bankruptcy administrator is obligated to prioritize payment of the monetary equivalent to the excluding creditor for the asset on which they held the right to separate recovery, [12] for instance, if said asset was wrongfully alienated after the declaring of bankruptcy proceedings.[13] In the event of alienation of the exclusion asset by the excluding debtor, the excluding creditor assumes the seller's position by operation of statutory subrogation, thereby acquiring the right to either collect the sale price (if not yet realized) or claim damages equivalent to its value from the bankruptcy estate[14] – which shall consequently be settled as a liability of the bankruptcy estate.

1. ANALOGOUS APPLICATION OF THE STAY OF ENFORCEMENT AND DEBT SETTLEMENT RULES TO THE LESSOR'S EXCLUSION RIGHT

The provisions of Article 93 of the LB regarding the stay of enforcement and settlement, as a statutory procedural consequence of the commencement of bankruptcy proceedings, shall apply accordingly to the exercise of the lessor's right to exempt the leased asset from the bankruptcy estate until: (i) a decision on the bankruptcy of the debtor is rendered, or (ii) the adopted reorganization plan is confirmed. [15] Following

8 *Law on Financial Leasing*, (LFL), The Official Gazette of RS, no. 55/2003, 61/2005, 31/2011, 99/2011, Articles 10 and 10a.

9 Thaythy, T. (2017). Leasing in the western Balkans and the fall of the Austrian Hypo Alpe Adria bank. *Pravni zapisi*, 8(2), p. 220.

10 *Ibid,* p. 219.

11 *Ibid,* p. 155.

12 Dukić Mijatović, M. and Kozar, V. (2019). *Postulati korporativnog stečaja u Republici Srbiji*. Novi Sad: Pravni fakultet za privredu i pravosuđe, p. 426.

13 LB, Article 102, Par. 3.

14 Salma, M. (2010). Izlučna prava u stečaju. *Zbornik radova Pravnog fakulteta u Novom Sadu*, (3), pp. 235–236.

15 LB, Article 95, Par. 2.

the commencement of bankruptcy proceedings and until either: (i) a decision on the bankruptcy of the debtor is rendered, or (ii) the adopted reorganization plan is confirmed, a statutory prohibition on the separation of the leased asset in favor of the lessor takes effect pursuant to Article 95 par. 2 in conjunction with Article 93 par. 1 of the LB. Consequently, there is no need for the bankruptcy administrator to issue a formal decision rejecting the lessor's request for asset separation during this period."[16] The purpose of the moratorium is to temporarily allow the bankruptcy debtor to retain possession of the leased asset until either: (i) a bankruptcy ruling is issued that excludes the possibility of reorganization, or (ii) the adopted reorganization plan is confirmed. At that point, based on the content of the plan's implementation measures, it will be definitively determined whether the approved reorganization plan provides for the continued use of the leased asset and payment of lease installments in accordance with the leasing agreement or not. According to established case law, if a judicial settlement was concluded prior to the initiation of bankruptcy proceedings, the enforcement procedure is suspended, and the lessor exercises its rights in accordance with Article 95 of the LB. However, if a judicial settlement was concluded with the bankruptcy debtor during ongoing bankruptcy proceedings, and if it was executed by the bankruptcy administrator on behalf of the bankruptcy estate, then such settlement constitutes an enforceable instrument between the parties and may be enforced through the delivery of the leased asset. "[17]

In judicial practice, a stance has been taken regarding the bankruptcy judge's conclusion on the lessor's objection (as a legal remedy) to the bankruptcy administrator's notice on retaining the leased asset: "In a situation where the lessor submitted a repossession request immediately upon the opening of bankruptcy proceedings, if the bankruptcy administrator issued a notice that the leased asset should not be returned, the lessor may file an objection to such notice of the bankruptcy administrator before the bankruptcy judge. The right to repossession under the provision of Article 112, Par. 5 of the LB will be decided by the bankruptcy judge through a ruling on the objection to the bankruptcy administrator's actions, which is issued in the form of a conclusion, in accordance with Article 45, Par. 3 of the LB."[18]

However, the obligations of the bankruptcy debtor towards the lessor that fall due after the opening of bankruptcy proceedings are considered obligations of the bankruptcy estate[19], i.e., claims that are paid with priority and in full, ahead of the claims of bankruptcy creditors.[20] In essence, lease payments falling due after the opening of bankruptcy proceedings constitute obligations arising from a synallagmatic (bilateral) contract, the performance of which continues through the use of the leased asset even after the commencement of bankruptcy proceedings.[21]

16 Opinion of the Department for Commercial Disputes of the Commercial Appellate Court dated November 12, 2013, and November 14, 2013. (2013). *Case Law of Commercial Courts*, (3).

17 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 26 and 27, 2014. (2014). *Bulletin of Commercial Courts' Jurisprudence*, (4), pp. 115–116.

18 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Case law of commercial courts*, (3).

19 LB, Article 95, Par. 2.

20 From the bankruptcy estate, the costs of the bankruptcy proceedings are settled first, and after their full satisfaction, the obligations of the bankruptcy estate are paid (LB, Article 54, Par. 1).

21 The obligations of the bankruptcy estate include liabilities arising from a synallagmatic (bilateral) contract if its performance is claimed for the bankruptcy estate or must occur after the opening of bankruptcy proceedings (LB, Article 104, Par. 1).

"Claims arising from a leasing agreement become time-barred under the general statute of limitations of ten years... The Supreme Court of Serbia accepts the conclusion ... that in this case, the general limitation period under Article 371 of the Law on Contracts and Torts (LCT) could apply... because a leasing agreement represents a specific type of contract that incorporates elements of several contracts – a loan agreement, lease agreement, contract for work, and provision of services, and even elements of a sales agreement. However, not all of these elements are equally present in every leasing agreement, as there is no uniform type of such a contract. Precisely for this reason, to ensure consistent treatment of the agreement in all cases, regardless of the modalities of this legal transaction, a single limitation period should apply – namely, the period under Article 371 of the LCT." [22] Consequently, judicial practice has adopted the position that "claims for unpaid lease payments arising after the opening of bankruptcy proceedings constitute a debt of the bankruptcy estate, to which the general statute of limitations applies, as well as the conditions for suspension and continuation of the limitation period prescribed by the LCT."[23]

If the bankruptcy debtor or the bankruptcy administrator fails to adequately protect the leased asset, thereby exposing it to security risks, the lessor may request the lifting of the security measure under Article 62, Par. 2, Item 4 of the LB, imposed in the preliminary bankruptcy proceedings.[24] This measure allows the bankruptcy judge to prohibit or temporarily postpone enforcement actions against the bankruptcy debtor. Alternatively, the lessor may seek the lifting of the stay of execution and payment under Article 93 of the LB, which is an automatic legal consequence of the bankruptcy proceedings' initiation.[25] The moratorium constitutes a prohibition on individual enforcement actions against the bankruptcy debtor's assets for the purpose of satisfying individual creditors' claims. It takes effect mandatorily as a procedural consequence upon the opening of bankruptcy proceedings, or optionally – if the court orders a security measure containing such prohibition in the preliminary bankruptcy proceedings.[26]

The security measure under Article 62, Par. 2, item 4 and the moratorium under Article 93, Par. 1 of the LB may be lifted under the same conditions prescribed by Articles 93a and 93b of the LB.[27] When deciding on the lessor's request to lift security measures or the stay of execution and payment, the rules concerning the protection of separate and pledge creditors introduced by the 2017[28] legislative amendments shall apply. These rules stipulate the conditions for lifting the stay of execution and payment, the requirement to issue a decision on adequate protection of the leased asset instead of lifting the moratorium, etc. (Article 93a), as well as regulate the procedure for decision-making on proposals, the

22 *Judgment of the Supreme Court of Serbia*, *Prev 305/2000 dated September 20, 2000 (*Retrieved on June 24, 2025) from: http://www.propisionline.com/Practice/Decision/5222

23 Judgment of the Supreme Court of Cassation, Prev 339/2019 dated June 18, 2020. (2021). *Bulletin of the Supreme Court of Cassation,* (1). (Retrieved on June 24, 2025) from: http://www.propisionline.com/Practice/Decision/58905

24 Kozar, V., and Aleksić, N. (2018). Mere obezbeđenja i „moratorijum" u prethodnom stečajnom postupku. *Pravo i privreda, 56*(4–6), pp. 515–529

25 LB, Article 95, Par. 5.

26 Kozar, V., and Aleksić, N. (2018). Zabrana izvršenja i namirenja kao procesnopravna posledica otvaranja stečajnog postupka. In: Miodrag Mićović (Ed.), *Savremeni pravni promet i usluge – Conference Proceedings from a Symposium* (pp. 920). Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.

27 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 8-9, 2018. (2019). *Bulletin of Commercial Courts' Case Law,* (2), pp. 108–109. (Retrieved on December 26, 2020) from: https://pa.sud.rs/tekst/394/bilteni-sudske-prakse.php

28 *Law on Amendments to the Law on Bankruptcy*, The Official Gazette of the RS, no. 113/2017

right to appeal, etc. (Article 93v).[29] In this manner, the rights of financial lessors regarding adequate asset protection have been aligned with the amendments made to Article 93 and the new Articles 93a–93g (concerning similar rights of secured and pledge creditors), thereby harmonizing the provisions of Article 95 with the new legislative provisions.

1.1. Surrender of the leased asset that is not crucial for the reorganization prior to the bankruptcy ruling and confirmation of the adopted reorganization plan

The bankruptcy judge may, upon the proposal of the bankruptcy administrator, and even before the bankruptcy ruling or the adoption of the reorganization plan, order the surrender of the leased asset to the lessor if the asset is not crucial for the debtor's reorganization. [30]„If the bankruptcy administrator determines that retaining the leased asset until the bankruptcy ruling or the confirmation and adoption of the reorganization plan is not expedient – particularly since lease payments due after the opening of bankruptcy proceedings constitute a liability of the bankruptcy estate – and assesses that this would impose an unnecessary burden on the estate, he may propose to the bankruptcy judge that an order be issued for the surrender of the leased asset to the lessor, provided the asset is not essential to the debtor's reorganization."[31]

2. RIGHT TO SEPARATION OF THE LEASED ASSET IN CASE OF BANKRUPTCY DECLARATION AND COMPULSORY ENFORCEMENT

In the event of a bankruptcy decision, the lessor has the right to request the separation of the leased asset[32], and the bankruptcy judge shall rule on such request without delay.[33] "If the court of first instance has already ruled on the lessor's separation request (prior to the bankruptcy decision or prior to the approval of the reorganization plan) by rejecting the lessor's request for separation, this does not prevent the lessor from resubmitting the separation request after the bankruptcy decision or the approval of the reorganization plan. The new request shall then be adjudicated in accordance with the cited legal provisions."[34] If the separation request is granted, the bankruptcy trustee is obligated to surrender the leased asset to the lessor without delay, and no later than within 30 days from the bankruptcy decision. Exceptionally, the bankruptcy judge may, upon the bankruptcy trustee's proposal and with the consent of the creditors' committee, reject the separation request and instead order the payment of the full contractual leasing fee, which shall then constitute a liability of the bankruptcy estate. If such payment is not made within 30 days

29 LB, Article 95, Par. 4.

30 LB, Article 95, Par. 5.

31 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated November 12 and 14, 2013. (2013*). Case Law of Commercial Courts*, (3).

32 The right of separation reflects the provisions of Article 50 of the Serbian *Law on Bankruptcy* and financial leasing regulations (LFL, Article 15), ensuring the lessor's priority over other creditors. Aligns with EU Directive 2019/1023 on restructuring and insolvency, which recognizes similar separation rights for leased assets.

33 Salma, M. *op. cit*., p. 238.

34 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Commercial Courts Case Law*, (3).

of the bankruptcy decision, the lessor shall have the right to demand repossession and enforcement over the leased asset in accordance with the contract or applicable law.[35]

Excerpt from the Financial Leasing Registry constitutes an enforceable instrument[36] based on which the court may order compulsory enforcement for the repossession of the leased asset, that is, for the delivery of individually specified movable items[37] or for the vacating and handing over of real estate[38], depending on whether the subject of financial leasing is a movable non-consumable item or real estate, which can be the subject of property rights in accordance with *Law on the Elements of Property Law Relations*, The Official Gazette of SFRY, no. 6/80, 36/90, Official Gazette of FRY, no. 29/96, Official Gazette of RS, no. 115/2005, such as equipment, facilities, vehicles, etc. [39] According to the interpretation adopted in court practice, "the stay of enforcement on the bankruptcy debtor's assets does not apply to the lessor's claim for repossession of the leased asset or enforcement against the leased asset in the event of the lessee's bankruptcy."[40]

The cited provisions regarding the obligation to approve the separation request are of mandatory nature. According to established case law, "when a bankruptcy decision has been rendered against the bankruptcy debtor (the lessee), the bankruptcy judge is obliged to approve the lessor's separation request, provided that the bankruptcy trustee has not previously contested the ownership rights of the excluding creditor over the leased asset, nor proposed to the court – with the consent of the creditors' committee – that the separation request be rejected while ordering payment of the full agreed lease amount."[41]

In essence, in the event of a bankruptcy declaration, the lessor holds a conditional right of separation, which may be suspended upon the bankruptcy trustee's proposal – provided the creditors' committee consents – through payment of the full contractual lease amount. This payment constitutes a liability of the bankruptcy estate and is therefore settled with priority and in full, before satisfying claims of bankruptcy creditors but after complete coverage of the bankruptcy proceeding costs. This legal solution bears similarities to the concept of real subrogation, as it involves the substitution of the obligation's object. Instead of reclaiming the leased asset (either movable "durable goods" or immovable property), the lessor acquires a monetary claim for payment of the full contractual lease amount from the bankruptcy estate, effectively accelerating the payment schedule beyond originally agreed maturity dates. In this arrangement, the bankruptcy trustee exercises a "purchase option for the leased asset" established under Article 95, Par. 6 of the LB. This mechanism prevents the asset's separation from the bankruptcy estate, as the leased asset thereby becomes part of the lessee's property and consequently part of the bankruptcy estate.[42] Notably, the lessee may also hold a contractual purchase option for the asset upon full payment of the total lease amount, as stipulated in Article 2, Item 3 of the LFL.

35 LB, Article 95, Par. 6.

36 *Law on Enforcement and Security* (LES), The Official Gazette of RS, no. 106/2015, 106/2016, 113/2017, 54/2019, 9/2020, 10/2023, Article 41, Item 3.

37 LES, Articles 344–347

38 LES, Articles 353–358.

39 LFL, Article 4.

40 *Ruling of the Higher Commercial Court, Iž 1568/2009 dated July 2, 2009* (Retrieved on June 24, 2025) from: http://www.propisionline.com

41 Judgment of the Commercial Appellate Court, Pvž 17/13 dated January 30, 2013. (2013). *Commercial Courts Case Law*, (4). (Retrieved on June 24, 2025) from: http://www.propisionline.com

42 Ekart, T. (2017). *Odstop od pogodbe o finančnem leasingu, magistrsko delo*. Maribor: Univerza v Mariboru Pravna fakulteta, **p**. 51.

Had the rejection of the separation (exclusion) request not been ordered, all lease payments due prior to the opening of bankruptcy proceedings could have been claimed by the lessor as an "ordinary" bankruptcy creditor from the third payment class[43]– i.e., proportionally to the amount of its claim and available funds. However, since the rejection of the separation request implies a "purchase option," for the bankruptcy debtor to become the owner of the leased asset, he must simultaneously pay the full contractual lease amount. This amount, by its legal nature, becomes an obligation of the bankruptcy estate, encompassing both lease payments that fell due prior to the opening of bankruptcy proceedings (without any reduction), and all lease payments maturing after the commencement of bankruptcy proceedings until the expiration of the contractual period. This position has also been adopted in court practice: "This further means that in the event of bankruptcy, if the bankruptcy debtor (as lessee) wishes to retain the leased asset, he is obligated to pay the lessor all outstanding lease installments due up to the opening of bankruptcy proceedings, and continue making regular lease payments during the bankruptcy proceedings... If the lessee intends to retain ownership of the leased asset, in addition to paying ongoing lease installments during bankruptcy, he must also settle all pre-bankruptcy arrears with the lessor to effect the transfer of title."[44]

However, if the bankruptcy debtor defaults on payment for more than 30 days from the bankruptcy ruling date, the right of separation is reinstated. In such case, an alternative claim exists, with the lessor having the election right to either demand full payment, or claim repossession of the leased asset. The lessor may initiate compulsory enforcement proceedings against the bankruptcy debtor to enforce either remedy.

3. LESSOR'S RIGHTS IN REORGANIZATION PROCEEDINGS

In the event of reorganization, the bankruptcy debtor or the bankruptcy trustee shall be obligated to surrender the leased asset to the lessor within eight days from the date of confirmation of the approved reorganization plan, unless the approved reorganization plan, as an implementation measure[45], provides for both continued use of the leased asset, and payment of lease installments in accordance with the leasing agreement.[46] Article 157, Par. 1 of the LB, which defines types of reorganization plan implementation measures, enumerates 16 specific measures in distinct paragraphs. However, this list is not exhaustive, as Item 19 additionally provides for *"other measures significant for plan implementation."* Consequently, such measures may include: continued use of the leased asset, and payment of lease installments in accordance with the leasing agreement. This interpretation is supported by the referenced provision of Article 95 Par. 7 of the LB.

If the bankruptcy debtor or the bankruptcy trustee fails to surrender the leased asset in accordance with the specified rules, or breaches the leasing agreement obligations after confirmation of the approved reorganization plan, the lessor shall have the right to demand repossession of the leased asset, and enforcement regarding the leased asset in accordance with the contract and applicable law.[47] In such case, the court may order

43 LB, Article 54, Par. 4, Item 3.

44 Opinion of the Commercial Disputes Department of the Commercial Appellate Court dated October 23, 2012. (2012). *Commercial Courts Case Law*, (3).

45 LB, Article 157, Par. 1, Item 19.

46 LB, Article 95, Par. 7.

47 LB, Article 95, Par. 8.

compulsory enforcement for recovery of possession of the leased asset, based on the extract from the Financial Leasing Register, which constitutes an enforceable instrument. [48]

4. COMPARATIVE ANALYSIS OF THE LESSOR'S LEGAL POSITION VIS-À-VIS EXCLUDING CREDITORS AND SEPARATE CREDITORS

Thus, a legal position analogous to the regime governing excluding creditors is also prescribed for the lessor in financial leasing when bankruptcy proceedings are initiated against the lessee. [49] The lessor's ownership ensures protection against the lessee's creditors in both bankruptcy and enforcement proceedings, "but, as evidenced by comparative experience, only if the leasing contract or the right itself is properly publicized"[50], which, under our legal system, is achieved through registration in the Financial Leasing Register. [51] „A leasing agreement may result in the conversion of a leasehold into a sale relationship only upon fulfillment of a deferred condition stipulated therein. If such condition remains unfulfilled, the lessor retains exclusion rights over the leased asset in the lessee's bankruptcy." [52]

Moreover, parallels exist with the position of separate creditors[53], as the stay of enforcement and payment (moratorium) also restricts the lessor's right to separate the leased asset from the bankruptcy estate until either a bankruptcy ruling is issued, or the approved reorganization plan is confirmed.[54]

In legal scholarship, the significance of the lessor's right to immediately recover possession of the leased asset upon the opening of bankruptcy proceedings against the lessee has been emphasized. In other words, it is widely accepted that for a secured creditor (including the lessor), the immediate right to repossession in the event of bankruptcy is crucial, as it alters the strategic position of the contracting parties: The lessee is prevented from damaging, concealing, or disposing of the leased asset and can no longer use it to generate revenue. The lessor can immediately sell the asset to cover its losses. Furthermore, once possession is recovered, it is not the secured creditor (lessor) who must file a lawsuit and bear the risks and costs of litigation to prove that the lessee breached the contract and that the lessor is entitled to recover the asset. Rather, it is the lessee who must initiate legal action and assume all associated costs and risks in attempting to prove that the lessor had no right to repossession or that the repossession violated applicable rules. In the United States, out-of-court disposition of repossessed collateral (including leased assets) is permitted—though this may not be the case in other jurisdictions.[55]

48 LES, Article 41, Item 3.

49 Kozar, V. (2010). *Komentar stečajnih zakona*. Beograd: Poslovni biro, p. 75.

50 Đurđević, M. (2002). Svojina na predmetu lizinga kao obezbeđenje lizingodavca u ugovoru o lizingu. *Pravo i privreda,* 39(9–12), p. 53.

51 Third parties are deemed to be aware of the existence of a leasing agreement based on its registration in the public registry. No party may invoke ignorance of the registered financial leasing data, in accordance with this Law (LFL, Article 48, Par. 1 and 2)

52 *Judgment of the Supreme Court of Serbia, Prev 110/03 of 2 April 2003.* (Retrieved on 24 June 2025) from: http://www.propisionline.com/Practice/Decision

53 Bilbija, V. (2011). Zakonsko pravo zaloge i retencije u srpskom pravu. *Pravo – teorija i praksa*, (4–6), pp. 79–98.

54 Kozar, V. i Aleksić, N. (2018). *Komentar Zakona o stečaju sa novelama iz 2017. godine i sudskom praksom*. Beograd: Poslovni biro, p. 239.

55 Thaythy, T., *op. cit*., p. 200.

CONCLUSION

The opening of bankruptcy proceedings against the lessee in financial leasing agreements triggers significant legal consequences, particularly regarding the lessor's right to separate and reclaim the leased asset from the bankruptcy estate. This right of exclusion is temporarily suspended due to the automatic stay on enforcement and settlement upon the opening of bankruptcy proceedings, with asset recovery only becoming possible after either a bankruptcy decision or confirmation of a reorganization plan. The bankruptcy court may, upon the trustee's proposal and with the creditors' committee's approval, reject the separation request (exclusion claim) and instead order payment of the full lease amount as bankruptcy estate debt, with a 30-day deadline - if payment is not made, the lessor regains his right to reclaim the asset. In reorganization proceedings, the leased asset must be returned to the lessor unless the confirmed plan explicitly provides for continued lease payments. A critical issue arises when the bankruptcy trustee fails to adequately protect the leased asset, jeopardizing its value and justifying a request to lift the enforcement stay under Articles 93a-93b of the LB. It is important to note that under the Serbian LB, the term "bankruptcy proceedings" encompasses both bankruptcy (leading to asset liquidation and termination of the debtor's existence) and reorganization (business continuation under an approved plan). This distinction is crucial for understanding the lessor's rights - in bankruptcy he has separation (exclusion) rights, while in reorganization outcomes depend on plan provisions. Comparative analysis shows that while Serbian law follows EU standards through mandatory registration in the Financial Leasing Register, procedural delays in asset recovery persist, highlighting the need for reforms to balance creditor protection with reorganization objectives. The lessor's position resembles that of excluding creditors, but strategic weaknesses remain, particularly regarding urgent asset recovery - a challenge accentuated in cross-border insolvencies. Ultimately, the outcome depends on the duration of the enforcement stay, reorganization plan terms and the trustee's actions, with non-payment of lease installments reinstating enforcement rights for asset recovery under contract and law, regardless of whether bankruptcy or reorganization proceedings are involved.

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ПРАВНЕ ПОСЛЕДИЦЕ ОТВАРАЊА СТЕЧАЈНОГ ПОСТУПКА НА ФИНАНСИЈСКИ ЛИЗИНГ

Апстракт:

У раду су анализиране законске одредбе, ставови судске праксе, као и мишљења правне науке о правним последицама отварања стечајног поступка на финансијски лизинг. Посебна пажња посвећена је праву на издвајање предмета лизинга – излучно право, које припада даваоцу лизинга ако се стечајни поступак отвори над примаоцем лизинга. Указано је на значај забране извршења и намирења, као законској последици отварања стечајног поступка, која се сходно примењује и на остваривање права даваоца лизинга на излучење из стечаја предмета лизинга до одлуке о банкротству стечајног дужника, односно до потврђивања усвојеног плана реорганизације. Анализирани су и проблеми који настају ако стечајни дужник или стечајни управник нису на адекватан начин заштитили предмет лизинга тако да је његова безбедност изложена ризику, када давалац лизинга може захтевати укидање мере обезбеђења изречене у претходном стечајном поступку, односно укидање забране извршења и намирења као законске последице отварања стечајног поступка. Објашњена су питања везана за право даваоца лизинга на излучење предмета лизинга у случају одлуке о банкротству, и указано је на изузетак када стечајни судија може, на предлог стечајног управника и уз сагласност одбора поверилаца, одбити излучни захтев и одредити исплату пуног уговореног износа лизинг накнаде, као обавезе стечајне масе, као и на последице неисплате које дају право даваоцу лизинга да захтева повраћај државине и извршење на предмету лизинга у складу са уговором односно законом. На крају анализирана су теоријска и практична питања која се односе на дужност стечајног дужника, односно стечајног управника да предмет лизинга преда даваоцу лизинга након потврђивања усвојеног плана реорганизације, уколико њиме није предвиђен наставак коришћења предмета лизинга и плаћање лизинг накнада у складу са уговором о лизингу.

Кључне речи: *отварање стечајног поступка; правне последице; финансијски лизинг; излучно право; плаћање лизинг накнада*

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