

University of Latvia

Janis Karklins

**“Main Modernization Directions of the
Latvian Contract Law**

Summary of a doctoral thesis for the acquisition of Doctor’s degree in
Jurisprudence

Specialty – Civil law sub-branch in jurisprudence

Riga, 2006

The topic of the thesis is researched at Civil Law Science Department of Juridical Faculty of University of Latvia from year 2003.-2006.

Specialty of the PhD thesis: Civil law sub-branch in jurisprudence

Adviser of the PhD thesis: prof. Dr.habil.iur. K.Torgāns, University of Latvia

Co-adviser of the PhD thesis: prof. Dr.iur. Nis Jul Clausen, Syddansk Universitet

Reviewer of the PhD thesis: 1) prof. Dr.iur. O.Joksts, Police Academy of Latvia,
2) asoc.prof. Dr.iur. Nina Legind, Syddansk Universitet,
3) prof. Dr.iur. J.Rozenfelds, University of Latvia

Presentation of the PhD thesis: 22nd of February 2007, at 3:00 pm
University of Latvia, Raga, Raina bulv.19, room 8

One can get acquainted with the Promotion Paper and its abstract in the Library of the University of Latvia in Riga, Kalpaka blvd. 4.

Head of the Promotion Council: prof. Dr.iur. J.Rozenfelds, University of Latvia

Secretary of the Promotion Council: prof. Dr.iur. I.Čepāne, University of Latvia

THESIS OVERVIEW

Thesis Essence

The thesis is a scientific research of “Main modernization directions of the Latvian contract law” which fully and thoroughly analyzes contract breach legal consequence possible modernization solutions in the Latvian Republic Civil Law. The question raised in the thesis has been examined by use of comparative, analytical and inductive study methods and the judicial practice analysis method as well. The thesis summarizes and analyzes Latvian and foreign jurisprudence literature about the studied question. In the result new theoretical cognition, which is practically applicable in Latvia, is put forward and suggestions for the improvement of legal regulations at contract breach legal consequence definition and application are expressed.

Thesis Goal

The thesis goals are the following:

- 1) to research the contract breach legal consequence regulation general principles of civil law and common law systems;
- 2) to compare the contractual law regulation general principle understanding and practical application in different countries and legal systems and its modernization tendencies as well;
- 3) to study the contractual law modernization processes and tendencies in the context of the European Union;
- 4) to study the contractual law principle modernization attempts and general principles accepted among law scientists;
- 5) to analyze LR Civil Law contract breach legal consequence and every separate legal institution regulation and need for its modernization;
- 6) to make suggestions for fault removal in theory and practice.

Subject Urgency and Scientific Novelty of the Study

The currently effective Latvian Republic Civil Law was passed in 1938. In spite of the fact that this law has been effective for 68 years, practically it has been in force for little more than 10 years. The almost 50-year break of the Civil Law validity term which is connected with the occupation of Latvia suspended the development of the law and did not let to improve it according to the course of time. Even during the period from 1992 to 1993 when the Civil Law was put into force again its conditions were not practically amended or improved. Furthermore from the historical point of view it should be taken into consideration that the currently effective Civil Law is not a new set of regulations which was created in 1937 but it is an improved set of 19-century civil law regulations.

The events of the last decade connected with world and Europe contractual law modernization and unification and the fact that Latvian Civil Law is mostly the reflection of 19th century legal thoughts

and even older ones let to raise a question whether the Latvian liability law conforms to the newest contractual law requirements and its changeability.

Taking into account the fact that the Civil Law is the Latvian civil law system base and that there are modern contractual law regulation at some spheres, the need of contractual law modernization is analyzed within this thesis from the civil law general regulation aspect.

Since Latvia is a member state of the European Union (hereinafter – EU) and has to fit in the unified economic and legal system the question about contractual law has become an especially topical one in modern Latvia. Moreover among EU member states the modernization and harmonization of contractual law is a task not only for Latvia but for the whole of Europe. The essential step at the foundation of a unified and modern European contractual law are the resolutions approved by the EU for the purpose of a unified European private law foundation as well as a large number of European Committee directives and several unofficial contractual law summaries.

From the contractual law modernization point of view the thesis describes the concept of remedies, its application preconditions and limitations as well as the consequences that arise due to its application. Contract breach consequence definition methods of two formally different legal systems – the common law system and the civil law system - are compared in the thesis. Defining the consequences, which arise in the result of contract breach, one of the systems - the common law system – pays special attention to the remedy applied by the sufferer against the violator. In the case of contract breach in the other system the main attention is paid to the liability of the party which does not fulfill his/her obligations.

The attention is paid not only to the civil liability which is one of the remedies but also to all other remedies available for the sufferer. The contract breach legal consequences are described not from the liability aspect but from the remedy aspect.

Analyzing international contractual law regulation documents it has been found that the greatest attention is paid to Latvian Civil Law, related international contracts, standards which are effective at the EU level and the last achievements in European contractual law modernization and unification. Since Latvia is part of the EU, the EU activities regarding contractual law modernization and the possible development perspectives are very important and significant ones. That is why in the beginning of the thesis the contractual law modernization and harmonization necessity, attempts and possibilities in the EU as well as related problems are described.

Latvian and foreign normative acts has been analyzed, court practice materials and literature issued in Latvian, English, German and French languages has been used in the process of thesis preparation. A total of 352 different sources (259 literature sources, 93 normative acts and court practice materials) has been used.

The novelty of the study is defined by the fact that the question regarding the detailed analysis of contract breach legal consequences from modernization necessity aspect has not been studied yet. The thesis describes problematic aspects and contains suggestions regarding their solutions.

Thesis Theoretical Meaning

Thesis theoretical meaning is expressed by the contract breach legal consequence and applicable remedy concept problem understanding and the concept sign and application theoretical analysis which has produced new theoretical cognitions.

Thesis Practical Meaning

A number of suggestions regarding contract breach consequence legal regulation improvement and modernization are described in the thesis.

Thesis Result Approbation

Theoretical conclusions, which have been gained during the work-out of the paper, have been contained in publications and conference reports in Latvia, as well as foreign countries.

The publications:

1. Kārklīš J. Perspectives of Contract Law Modernisation in Latvia within Context of European Contract Law. Humanities and Social sciences. Latvia. 3 (40). University of Latvia. 2003.
2. Kārklīš J. Latvijas līgumtiesību modernizācijas virzieni vienotas Eiropas līgumtiesību izpratnes veidošanā (I). Likums un Tiesības. Nr.55, 2004.gada marts.
3. Kārklīš J. Latvijas līgumtiesību modernizācijas virzieni vienotas Eiropas līgumtiesību izpratnes veidošanā (II). Likums un Tiesības. Nr.56, 2004.gada aprīlis.
4. Kārklīš J. Vainas nozīme, nosakot civiltiesisko atbildību. Latvijas Vēstnesis, Jurista Vārds, 2005, Nr.15 (370).
5. Karklins J. Force majeure – Excluding Liability for the Breach of Contract in Latvia and Europe. Juridiske emner ved Syddansk Universitet. Jurist – og Okonomforbundets Forlag. 2005.
6. Kārklīš J. Līgumtiesību principu vienveidošana Eiropas jurisprudencē. Tiesību harmonizācija Baltijas jūras reģionā 20.-21. gs. mijā. Rīga, 2006.

The conferences:

1. Kārklīš J. Starptautiskā zinātniskā konference “Tiesību harmonizācija Baltijas jūras reģionā XX-XXI gs. mijā”. Konferences materiāli „Līguma brīvības precizējumi Eiropas jurisprudencē”. 2003.gada 29.janvāris, Rīga.
2. Starptautiska koference Odensē (Syddansk Universitet), Orhūsā un Kopenhāgenā (Copenhagen Business School), Dānija. 2004.gads.
3. Kārklīš J. Starptautiskā zinātniskā konference „Tiesību harmonizācija Baltijas jūras reģionā pēc Eiropas Savienības (ES) paplašināšanās”. Konferences materiāli „Atsevišķi līgumtiesību modernizācijas aspekti LR Civillikumā,„. 2007.gada 25.-26. janvāris, Rīgā.

The thesis has been discussed a number of times at the Department of Civil Law Science of LU Juridical Faculty.

Thesis Structure and Volume

Structurally the thesis has been prepared as follows:

- 1) introduction,
- 2) seven extensive chapters,
- 3) summary,
- 4) bibliography cited.

The total volume – 10,5 author's sheets.

Thesis content

The Introduction discovers subject urgency and study object and methods.

Chapter One

Contractual Law Understanding and Modernization in Europe

Chapter one is devoted to the question regarding contractual law understanding and modernization attempts in Europe. Latest works related to the European contractual law modernization and unification and the fact that Latvia has joined the EU raise a question regarding contractual law modernization in the context of the whole of Europe.

Since the EU's successful internal economic activity also depends on the creation of unified contractual law it is vitally important to develop the contractual law understanding fit for Europe. The short-term task for Latvia in this connection is to understand the essence and direction of contractual law modernization processes and the possibility to affect these processes and at the same time to improve State normative acts.

There is given the analysis of doctrine contractual law unification when a number of documents have been created uniting the contractual law principles (UNIDROIT Principles, European contractual law principles, European contract code project etc.) at the beginning of the Chapter. In the process of analysis it has been concluded that the documents mentioned above are a significant step towards European contractual right understanding development but those are academic materials only which may be applied to the party legal relations only if the parties have agreed upon them in the contract. Therefore the undefined juridical status of the documents mentioned earlier cannot safely assist in the realization of four EU freedoms - product, service, capital and the person movement one.

The Chapter further gives an analysis of the EU institution role in the development of the unified European contractual law. In order to find the best solution for the goal achievement the European Committee has carried out four action options and presented them to the public for discussion:

- I. Do nothing and leave everything to the market economy;
- II. To develop the unified contractual law principles which will reduce the difference between national rights;
- III. To improve the existing EU regulation quality and consistency;
- IV. To approve a new regulation at the EU level which would regulate the contractual law of all member states.

In 2003 after summarizing all the opinions the European Committee issued a document called “More concerted European contractual relations. Action plan” offering a further action plan for the development of European contractual law.

The action plan is based on the 2nd and 3rd action option further development which consists of three tasks:

- 1) currently effective EU regulation improvement in the sphere of contractual relations;
- 2) EU contractual typical condition development activation;
- 3) unofficial European contractual law document development support.

In order to perform the tasks defined in the action plan the Committee is up to develop a so called "Common Frame of Reference" for the purpose of unified juridical terminology and main jurisprudence concept development; e.g. the definition of losses, legal consequences in the case of contract breach etc. The second task of the Common Frame of Reference is to create a basis for the future European contractual law. Though the Common Frame content is not fully definable the European Committee denotes the following:

- 1) it should be related to the contractual law, i.e. to all the international contract types;
- 2) it should regulate the general conditions regarding contractual conclusion, efficiency, interpretation, execution, non-execution, remedies etc.

By taking into account the Common Frame unclear juridical status (it is not planned that it will be related to the EU member states) it should be concluded that the task carried out by the European Committee will possibly not be able to achieve its goal.

The second essential novelty at the EU level is the activation of contract condition development. According to the Action Plan the task of contract typical conditions applicable in the whole EU would be to make it easier to conclude international deals and to avoid the definite limitations of national legal systems. The European Committee denotes that contract typical condition development is the first goal which really may be achieved in a short time. This is proved by the fact that typical conditions developed by separate merchants are successfully applied at the whole EU. For that reason the European Committee has determined a goal to develop the typical conditions not for each of the member states but for the whole EU. It is noted in the Action Plan that despite the fact that national regulations of each country define different imperative norms and different civil regulations most of the merchants often conclude simple contracts which typical conditions are sufficient for.

The analysis carried out by the European Committee states that contract typical conditions should be related to simple or everyday contracts only. It has been concluded in the thesis that the suggestions expressed by the EU do not give the necessary solutions because of the following reasons:

- 1) there are not any peculiar problems at simple contract conclusion because the contract general conditions are very similar in all EU member states;
- 2) nearly all EU member states already have the unified conditions for separate contract regulation, e.g. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), Convention on the Contract for the International Carriage of Goods by Road (CMR, 1956), Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) etc;

- 3) the typical conditions do not give a solution in the case if controversy arises between the parties regarding the proper fulfillment of contract liability, object fault liability, seizure, compensation of losses etc.;
- 4) the typical conditions do not provide a solution for the provision of contract liability fulfillment or contract recognition in another country.

At the end of the Chapter it has been concluded that the European Committee initiative regarding the development of unified typical conditions will provide a number of technical improvements for the international deals but will not realize the European Parliament wish to develop the unified European contractual law expressed in a number of resolutions.

Chapter Two

Principles of European Contract Law (PECL) juridical status and its effect on Latvian contractual law

Since today the Principles of European Contract Law (PECL) (hereinafter – PECL) are the most authoritative contractual law principals, this Chapter gives the analysis of European contractual law principle juridical base and the regulated object.

The PECL publication is considered as a significant step at European contractual law improvement and harmonization. The PECL goal is to make market relations easier and to consolidate the common European market as well as to develop a unified contractual law infrastructure in Europe. The PECL is a guide to legal norm appliers and legislators and an attempt to unite the common law and civil law systems.

Taking into account that the PECL developers justify its application by the fact that the PECL should be considered as today's *lex mercatoria*, the thesis gives an analysis of the question regarding *lex mercatoria* juridical status and its role in the PECL application. It has been concluded that the PECL goal is to create a European *lex mercatoria* and it is created on the basis of currently effective legal norms at the whole European Union and innovations as well. There is no reason to consider the PECL as part of *lex mercatoria* (and therefore as an official law source) until the moment when merchants and individuals adopt the PECL as the source of law.

At the end of the Chapter the author analyses the question regarding the European Contractual Law Principle and LR Civil Law application in Latvia. In the process of the analysis it has been concluded that since there are differences between the LR Civil Law and the PECL then currently it is not possible to apply the PECL in Latvia as the source of law if the Civil Law does not provide an answer for some concrete question. Though the majority of law scientists think that the PECL is *lex mercatoria* and, therefore, custom which means that it may be applied at adjudication but these may not be considered as Latvian traditional laws and therefore in Latvia they have a doctrine value only. There are two exceptions when Latvian courts may refer to the PECL as to the source of law:

- 1) if the contract parties agree that their legal relations will be regulated by the PECL;
- 2) if one of the parties is EU member state and the parties defined in the contract that their relationships will be based on European *lex mercatoria*.

Chapter Three

Contract breach legal consequence general concepts and concept differences

Since the thesis goal is to find possible solutions for contract breach legal consequence modernization in the LR Civil Law the essential question, which must be answered in order to find a better solution, is to analyze existing different legal system concept differences in the case of contract breach legal consequence definition.

The essential question in the contract breach analysis is referred to breach amount and content understanding. Different to the civil law system the contractual liability in the common law system has not been developed as a scientific element. But it should be noted that by adopting Roman law methods concerned with liability violation consequences civil law system has not come to the unified contract breach consequence understanding.

The significant difference between these two systems is that the common law system analyzes the contract breach legal consequence appearance from the applicable remedy aspect when the Roman-German one analyzes the contract breach legal consequence appearance from the applicable civil liability aspect.

The following contractual civil liability definition is given in the thesis: *a contractual civil liability is a new unilaterally legal relationship which in the case of the illegal violation defines the sufferer's duty to perform actions that reduce or eliminate the possible losses concerned with the violation and defines the violator's legal duty to compensate losses arisen in the result of the violation and foreseen at the moment of contract conclusion from the right violator's point of view or otherwise to restore the sufferer's legal or property condition which the sufferer would be in if the violation would not take place if it is possible and/or to pay a fine.*

In its turn the contractual remedy definition is expressed as follows: *A remedy is an institute of law, which the suffered person with or without using the court applies in case of an illegal violation of a law norm against an offender and which grants rights to the suffered person to perform activities, which decrease or prevent infringement of the suffered person's legal interests or ensure a legal obligation for the offender to perform commitments, indemnify losses caused as a result of the committed offence and foreseen during closure of an agreement from the viewpoint of the offender or otherwise as far as possible renew the suffered person's legal and material condition, as it was before the offence, and/or pay the contractual penalty, or in case of material change of circumstances grants the rights to change the nature of the obligations.*

But taking into account both systems' (civil liability approach and remedy approach) tasks at sufferer protection realization and the result which is achieved by both systems it can be concluded that differences between the systems exist only in their form but not in their content.

The similar idea is expressed by Russian law scientist A. Komarov – “actually there are not any significant differences concerned with legal consequences between the systems. It appears at juridical technique only. But each system's regulation type shows rather significant difference in approach”. The idea that the difference lies in technique only is expressed also by law scientists K. Torgan and E. Bushova who state that Latvian lawyers know and apply in practice the very same juridical instruments which are identified by the common law system as remedies.

Chapter Four

Remedy application preconditions at performance of a contract

Since the remedies are applied against the violator in any case of illegal breach then problems regarding remedies application and creation moment are analyzed in the Chapter. The task is to analyze the contractual remedy concept and therefore the question regarding the desire expression which creates the contractual relations and separates them from delict relations. The contract concept and signs of its conclusion and efficiency are also analyzed in this Chapter. The following legal institutions which are connected with the breach of contract and applicable remedies are described:

- 1) illegal action,
- 2) causal relationship,
- 3) the existence and amount of losses,
- 4) fault.

Special attention is paid to casual relationship and fault theoretical aspects.

In the process of casual relationship theoretical analysis five different causal relationship theories are described including the alternative causal relationship theory. The conclusion gives the most appropriate casual relationship theory - "necessary and foreseen causality theory" which takes in to consideration the separate concepts of all 5 mentioned theories which are amended by the last modern contractual law principles, e.g. the loss foresight principle. A significant part of the study is devoted to the fault concept and its meaning at civil liability definition.

In the civil law system the fault establishment is traditionally considered as a precondition for a person's liability. In the common law system the establishment of the breach of contract, causal relationship and the amount of losses are the only preconditions for a person's liability and therefore the remedies may be applied against it.

When it is defined whether the person's civil liability is established, i.e. whether the creditor has any remedies against the violator, in the so called non-fault system then it is checked whether the right violator has legal reason for his/her actions (e.g. force majeure or sufferer's wish etc.). In order to state that the civil liability is established for the person in the fault system which the Latvian civil system relates to it is analyzed whether the person is objectively fault.

Similar to the liability definition the unified definition of fault has not been developed yet. This can be explained with contradictions related to the fact that fault objective and subjective interpretation exists. The criminal and administrative law, where the fault concept is related to a person's subjective (psychic) treatment, has a definition of fault. But civil law which has different fault identification methods has no unified definition of fault. Since the fault concept and establishment in civil law is connected with the objective conditions then it is difficult to separate fault from the other objectively stated condition - the illegal action.

By describing the definition of fault in the literature about the civil law system it has been concluded that fault is characterized as a person's treatment (design or inattention) of his/her liabilities and its consequences defined by comparing the concrete person's action within the bounds of existing liabilities with the action which would be performed by the discerning person within the bounds of existing liability. It has been concluded that the definition of fault is incomplete because the person's

treatment (design or inattention) of his/her liabilities and consequences has no meaning at civil law but only those objective conditions are significant which let to define whether the person acts causally or not. When the establishment of civil liability is defined it is not important how the person treats the violation but it is important whether the person acts causally even if the treatment is impeccable. Fault content definition, i.e. whether the person acts on purpose or with inattention, does not mean anything because when the civil liability is defined the person's subjective (psychic) treatment of the violation is not taken into consideration. Moreover the juridical person cannot have any psychic treatment and therefore it is not correct to relate fault to a person's treatment.

The Chapter gives a detailed analysis of fault regulation provided by the LR Civil Law.

Though the LR Civil Law may be considered as fault source but current civil regulations let to solve civil liability problems by use of new methods without changing the existing norms. The difference between fault and non-fault systems lies not in the material legal norms but in the approach which defines how concrete person's liability is established at law theory level. This lets to conclude that the non-fault liability doctrine may be applied to Latvian civil law without changing the LR Civil Law norm content. But it would be better to express the non-fault system doctrine in the Civil Law more clearly and transparently.

At the end of the Chapter it has been concluded that it is not necessary to analyze fault as civil liability establishment precondition because if it is stated that the person has acted legally then there will be no need for fault consideration because regardless whether the person is or is not at fault the civil liability cannot be established because of the lack of one of the main preconditions – the illegal action.

It has been concluded that separate emphasize on four liability preconditions mostly has a theoretical meaning but not a practical one. Analyzing civil liability basics it would be enough to state three preconditions for the compensation of losses - loss amount, causal relationship and action taking into account the illegal action (fault) exclusion conditions (legal justification).

Chapter Five

Contract Breach Legal Consequences and Its Realization Mechanisms

This Chapter gives an analysis of questions regarding contract breach legal consequences in the LR Civil Law and foreign normative acts. In order to achieve the thesis goal more precisely the Chapter gives an analysis of contract breach legal consequence realization mechanisms which are shown as applicable remedies.

As the first essential aspect for the definition of contract breach legal consequences the pre-contractual relations are discussed. Analyzing the pre-contractual relation concept the *culpa in contrahendo* and *quantum meruit* doctrine has been studied. The pre-contractual relation regulation in the PECL and the LR Civil Law has been analyzed too. In the result of the analysis it has been concluded that according to Latvian laws the pre-contractual liability is established only if the other party has acted deceitfully which conforms to the LR Civil Law common principle which defines that each one must compensate losses caused by his/her illegal action or inaction which means that Latvian law approach to the pre-contractual relations is connected with legal relation delict regulation.

The Chapter gives a suggestion to insert the regulation regarding violations at pre-contractual relations into the LR Civil Law and to define:

- 1) the duty to carry out pre-contractual conversation for the purpose of going into pre-contractual relations and
- 2) the duty to preserve party information confidentiality regardless of the fact whether the contract will be concluded later or not.

Considering the pre-contractual relations from the remedy aspect it has been concluded that in the case of the mentioned duty violation it would be necessary to introduce the loss compensation and obtained benefit compensation duty.

The following Chapter describes civil liability which covers loss compensation and fine payment. The loss concept, division and classification are analyzed in the Chapter. The questions regarding loss compensation and reduction duty and need for loss foresight principle are analyzed too, and concrete suggestions on its introduction are given.

In analyzing the loss concept the question regarding loss compensation in the case of contract cancellation is discussed by concluding that there are no universally provided rights to cancel the contract and to demand the compensation of losses in the LR Civil Law, i.e. if the person cancels the contract illegally then he/she has no right to demand the compensation of losses. Though the LR Civil Law does not define the sufferer's right to cancel the contract and at the same time to demand the compensation of losses. This arises from clauses 1589 and 1779 of the LR Civil Law, i.e. if the creditor has the right to cancel the contract defined by the contract or law then he/she will act legally (clause 1589) but since the contract cancellation right will arise if the debtor breaks the contract conditions then the person who has broken the contract will have to compensate losses caused by his/her illegal action or inaction (clause 1799). But according to the clause 1636 debtor's losses concerned with the breach of contract will not be compensated. When remedy cumulative application is defined according to the Civil Law the essential question is to clarify whether the sufferer has the right to cancel the contract or to demand the contract cancellation. In the latter case the sufferer may always combine the both remedies, i.e. to demand the contract cancellation and loss compensation.

But not all the losses caused by the illegal breach have to be compensated. Modern civil law normative acts (NATO Vienna convention of 1980, UNIDROIT, PECL) limit full compensation of losses with the loss foresight principle according to which the person who affects the rights is responsible for those losses only that he/she was able to or should be able to foresee as the rational person. The loss foresight principle essence is that the person cannot be responsible for losses which are concerned with the contract sphere, i.e. the person's duty is to compensate only those losses which the other person would suffer from in the case of normal state of affairs.

It has been concluded that LR Civil Law as well as German law does not provide the loss foresight principle. The loss compensation amount is defined by use of causal relationship theory (CL clauses 1635, 1773, 1774). The LR Civil Law includes a general full (complete) loss compensation principle but this principle does not conform to justice and proportionality criteria and it is necessary to define the regulation within the CL according to which the violator will have to compensate only those losses that he/she was able to or should be able to foresee as the rational person.

The second widespread civil law liability type - the fine payment – is described further in the Chapter.

For the last time the question regarding fine institution essence and functions has been discussed in law literature taking into account that such institution is not provided by the common law system. The reason for these discussions is a fact that a fine works as a penalty (and sometimes the penalty does not have a compensative nature) but the main goal of civil liability is not to penalize the violator but to eliminate the consequences of the violation, i.e. to put the sufferer in such a property condition which he/she was in before the violation or which he/she would be in if the violation did not take place.

The civil law system lets to use a fine at civil relations but the common law system does not provide such possibilities with a few exceptions.

The rejection of the fine institution in the common law system can be explained with the fact that it does not conform to contractual liability function theory. According to that theory the relation of economic nature develop in some sphere of public activities. These relations are based on free competition and its goal is to maintain the relations at such amount so that it would not exceed the objective or existing bounds of these relations providing legal relation full and coordinated activities. These activities establish the economic stability and proportionality but a fine breaks this equilibrium and causes the deformation of economic relations. There is an idea in the common law system that fine collection puts the sufferer in a better condition then he/she would be in if the violator would fulfill the contract and therefore such a situation does not conform to the basic theory of contractual liability functions - to put the sufferer into the previous property state. Polish law scientist V. Varkalo explains that system differences are based on different approaches to contractual law principles and its functions, i.e. the normative regulation provided by the common law system is based on the sufferer remedy definition defining them not by the violator's liability but by the rights provided for the sufferer.

Different to a number of other countries of civil law system the civil law in Latvia does not provide the reduction of a fine though there are civil suits found in the court practice when fine reduction would be fair. The unfair reduction of a fine would conform to CL clause 1 which defines that rights should be used with good intention. Since good intention assures justice then if there are excessively large and unfair fines then justice is affected for benefit of the contract conclusion freedom principle which is not right because rights have the goal to protect a person's interests at relations with other persons and therefore to provide justice for any part of the public (individuals).

After the analysis of Latvian court practice it has been concluded that for the last time Latvian courts has taken a position according to which the unfair fine is not allowable and must be reduced.

Though Latvian court practice had reduced the amount of fine in some cases the reduction was not based on direct-action legal norms but it was based on principle derived from legal norms which conforms mostly to law renovation but not to law development. At the end of the fine institution analysis it has been suggested to insert in the CL a regulation similar to the PECL defining that a court has the right to reduce a fine if the fine is excessively large and unfair on condition that the fine may not be less then sufferer's losses.

Other remedies are described further in the Chapter.

1) Forced fulfillment of obligations.

The chapter describes differences between the common law and civil law system regulations as concerned with the forced fulfillment of obligations. The common law system apprehends the forced fulfillment of obligations as an exceptional remedy which is applied very rarely. The common law

scientists think that forced fulfillment may not be applied because when the obligations are fulfilled forcibly then they will be fulfilled with different quality and by the different time than when it was prescribed before. Therefore this remedy does not let to fulfill the initial contract in the way which the parties have planned. The civil law system in its turn apprehends this as one of the main remedy. Though there are such differences the PECL developed a compromise between the both systems by defining that forced fulfillment of obligations is a common remedy which is limited with separate exceptions.

According to the PECL developer statements the following conditions denote that forced fulfillment of obligations might be allowed at contractual relations:

- 1) the sufferer can obtain what he/she hoped for when the contract had been concluded;
- 2) the complex process of loss proof is not necessary;
- 3) the binding nature of the contract is emphasized.

Similar to a large number of civil law system countries the Latvian law takes the position so that forced fulfillment of duties is the main remedy available to the sufferer.

Thus similar to PECL the LR Civil Law provides the right to use the forced fulfillment of obligations and at the same time defines exceptions when the forced fulfillment of obligations may not be applied:

- a) if the fulfillment is personal,
- b) if the fulfillment is connected with specific abilities or relations.

But the LR Civil Law provides much less a limitation of forced obligation fulfillment than today's contractual law main concepts. Clause 1590 of the LR Civil Law does not provide a limitation so that forced fulfillment of obligations would be necessary if it created suffering party inadequate exertion or expenses. Such a position is connected with the principle of *pacta sunt servanda* which is mentioned in clause 1587 of the LR Civil Law and which defines that contracts will have to be fulfilled even if particular difficulties concerned with obligation fulfillment appear later. The LR Civil Law does not define also that forced fulfillment of obligations is not possible if the sufferer is able to make the contract fulfilled by use of a different source. Therefore the LR Civil Law has a contract binding nature. In the result of legal institution analysis it has been stated that the current LR Civil Law forced obligation fulfillment regulation completely conforms to the Roman legal system involved in the LR Civil Law. Therefore any changes in forced obligation fulfillment regulation will be possible only if the LR Civil Law remedy definition approach is changed. Thus changing the LR Civil Law remedy system a regulation of forced obligation fulfillment should be defined which is similar to that of the PECL (providing four exceptions) and which should reflect a compromise between the two different European legal systems.

2) Fulfillment delay rights

Analyzing the European country laws it has been stated that normative acts in most countries provide the fulfillment delay rights. The opposite situation occurs in Latvian laws where such a legal institution can be found only in separate cases separately mentioned in the law. The general LR Civil Law regulation is mentioned in clause 1588 which defines that *one party may not cancel the contract without the other party's permission even if the latter one did not fulfill and has not fulfilled his/her obligations*. Here the Roman law principle is adopted., according to that principle each parties'

promises are considered independent. The only exception is provided by clause 1589 of LR Civil Law which defines that *unilateral cancellation of the contract will be allowed only if it is reasoned by the contract nature or if the law allows specific conditions or if such right is clearly defined in the contract.*

It has been concluded that Latvian contractual law regulation normative acts relate to the delay right to property delay only but not to obligation fulfillment delay (with separate specific exceptions such as CL clause 2036 which regulates purchase contracts). Though the LR Civil Law contains separate exceptions it should be admitted that really there are a large number of situations when the creditor does not fulfill his/her obligations which disturbs debtor obligation fulfillment. For example concluding a building contract, which defines that the creditor should make a prepayment and a debtor according to the LR Civil Law is not authorized to start the building, works because the creditor has not fulfilled his/her obligation. The debtor of course will not be at fault of the delay if the delay is caused by the creditor's action or inaction, e.g. the workplaces has not been provided (CL clause 1636). But in cases when the creditor does not provide the related counter performance it is not a question of delay right from the CL aspect but rather a question of fulfillment impossibility through the creditor's fault. Therefore it can be concluded that the Civil Law does not provide fulfillment delay right regulation as it is in latest civil law principle summaries. The analysis has produced a conclusion that taking into account civil law turnover interests it is necessary to reject the Roman law principle (CL clause 1588) and to define a regulation within the LR Civil Law which will provide a suffering party with the right to delay his/her obligation fulfillment unless the other party fulfills his/her ones. But the introduction of such amendments should be concerned with the need for the definition of contract violation classification by significant and insignificant one in the LR Civil Law similar to the PECL. This will avoid the situation when the suffering party would delay his/her obligation fulfillment because of some negligible contract violation.

3) Breach of contract

European country legal doctrines emphasize the following two types of contract breach:

- 1) breach of contract through the other party's fault;
- 2) breach of contract before the establishment of the other party's fulfillment duty.

The contract breach regulation analysis produced a conclusion that the LR Civil Law uses the Roman legal position in this field too, defining that the expression of both parties' agreed intentions is independent and therefore must be fulfilled regardless of the other party's actions or inactions. LR Civil Law clause 1588 defines that the sufferer will not have the right to cancel the contract even if the other party does not fulfill it which means that in the case of obligation non-fulfillment the sufferer must provide his/her counter performance. Similar to the French Civil Code the Latvian LR Civil Law provides a possibility not to unilaterally cancel the contract but rather a right to demand the cancellation of the contract. Therefore the sufferer needs either the other party's permission or a court decision. Comparing the LR Civil Law regulation with modern contractual law principle summaries (PECL) regarding the question of breach of contract it can be concluded that the PECL approach is much more flexible and conforms to modern law theory concepts and in the result it is necessary to make a significant change in the LR Civil Law regulations providing a right to unilaterally cancel the contract in the case when the other party does not fulfill his/her obligations. But similar to the question regarding the delay rights the amendments to the LR Civil Law in these cases should also be

concerned with the need for the definition of contract breach classification by significant and insignificant ones which will avoid the situation when the suffering party would delay his/her obligation fulfillment because of some negligible contract violation.

There is a suggestion to amend LR Civil Law clause 1588 by inserting the definition and application of contract significant violation at the end of the legal institution analysis.

4) Price reduction

In addition to general remedy the PECL also defines separate instruments which the sufferer may use against the right violator.

According to the PECL clause 9:401 a sufferer will have a price reduction right if he/she accepts the other party's fulfillment which does not conform to the obligation content initially defined in the contract. Price reduction in the case of unsuitable product quantity delivery or in the case of defective product delivery is provided by all European country legal systems except the common law system. Analyzing this question in the context of the LR Civil law it has been concluded that it should be solved according to LR Civil Law clause 2007 which defines that the object of purchase should be defined in detail so that no doubts would appear regarding it as well as according to clause 1593 which defines that the alienator must be responsible for the fact that the object has no hidden defects and that the object has all the positive qualities which are declared or accepted. Thus in the process of controversy when it is defined whether the real object or the defective object has been delivered it is significant how precise the sold object description (objective part) is in the contract and what qualities the buyer wanted to obtain from that object (subjective part). In the process of controversy examination according to the LR Civil Law the objective part will be taken into consideration (contradiction between object actual qualities and the qualities described in the contract) and if the buyer has not given the subjective part in the contract then he/she will not be able refer to it saying that the wrong or defective object has been delivered. But most law scientists think that it is not possible to define a precise border here and, as Western European practice shows, the solution for that situation is up to the court, which should clarify party actual wishes.

Since such an indefinite situation does not conform to the legal system then the solution of that problem may be found by providing the sufferer with the right of choice – either to use the remedy (price reduction) or compensation of losses.

5) Fulfillment term extension

According to this legal institution a party who suffers because of contract obligation non-fulfillment has the right to provide the other party with an additional term in order to let him/her fulfill his/her obligations. According to contractual law principle regulations (PECL) the sufferer during that period is authorized to delay his/her obligation fulfillment and at the same time to demand the compensation of losses and has no rights to use other remedies. This means if the sufferer provides the other party with an additional term then the sufferer will not have the right to cancel the contract or to demand the reduction of the price. But if the sufferer receives the violator's notice which says that the latter one is unable to fulfill his/her obligations within the agreed term then the sufferer will have the right to use any of one of the remedies.

Analyzing the LR Civil Law regulations it has been stated that the law does not define the obligation fulfillment term and the LR Civil Law requires the creditor to inform the debtor about the obligation

fulfillment duty. According to LR Civil Law clause 1653 *in order to recognize debtor's delay he/she should receive the reminder from the creditor or his/her assistant*. Such a reminder is necessary only in cases if the delay cannot be stated according to the cases mentioned in LR Civil Law clause 1652. But this reminder is not similar to fulfillment term extension reminder defined by the legal institution because of the following:

- 1) the reminder is not connected with the debtor's delay,
- 2) the reminder issue does not assign a role of right affecter to the debtor,
- 3) the reminder issue is not connected with definition of the additional term for obligation fulfillment,
- 4) the reminder issue does not provide the creditor with the right to unilaterally cancel the contract.

Taking into account the LR Civil Law regulation it has been stated that the PECL additional term assignment reminder and its consequence regulation introduction to the LR Civil Law would not conform to its approach to remedy definition. Therefore the PECL regulations would be adopted only if unilateral rights to cancel the contract in case of significant violation were provided and the dominating Roman principle of *pacta sunt servanda* was extenuated.

6) Debtor's or creditor's remedy

Though remedy are meant for sufferer protection, modern contractual law principles provide an exception when in the case of contract violation there is a remedy, which can be used also by violator. This also does not exclude the case when a creditor can use this remedy in some cases. Such remedy is a right to change the obligation nature.

Though modern contractual law principles provide the very same regulation as LR Civil Law clause 1587 does, i.e. that the contract must be fulfilled regardless of difficulties which arose later, there is an exception provided for that principle defining that if obligation fulfillment becomes excessively difficult because of condition change then the parties must negotiate in order to change or cancel the contract.

Most European country normative acts define similar regulation providing a mechanism which helps to change the unfair situation for one or both parties which has arisen due to the change of conditions unpredictable by the parties at the moment of the contract conclusion.

The reason for such exception is concerned with a condition that party relations within bounds of their liabilities should not exceed the bounds of justice, i.e. the formal theory regarding binding force of the contract should not be more important than the provision of justice regardless of the consequences because as it was mentioned earlier rights have the goal to protect the person's interests in relations with other persons.

The condition change exception is similar to the loss foresight exception because they both are based on the same idea – it is not allowed to demand the person to fulfill the obligation which could not be predicted by him at the moment of the contract conclusion.

Analyzing the LR Civil Law regulation it has been concluded that it is strictly consistent with the contract binding force principle which defines that the contract must be fulfilled regardless of the later difficulties (CL clause 1587) and the Latvian laws do not provide a regulation similar to the PECL.

Taking into account modern law theory concepts and other country practice the author has expressed a suggestion to define exceptions for the LR Civil Law principle of *pacta sunt servanda* similar to

modern contractual right principles. The thesis gives a definite suggestion, which tells how LR Civil Law clause 1587 should be changed.

At the end of the Chapter the author describes cases when contract violation consequences disappear and therefore a sufferer loses his/her right to use he remedies against the violator.

Chapter Six

Conditions which exclude contract violation liability

The Chapter contains an analysis of conditions, which exclude the application of remedies for contract violation, statement criteria and legal consequences.

There is a doctrine in the law science according to which a person's liability for contract violation is not established. This doctrine is based on two principles. The first principle defines a binding force (*pacta sunt servanda*) according to which contracts should be fulfilled regardless of any condition change after the contract conclusion. The second one is a contract goal principle, i.e. when the parties conclude a contract they enter into relations taking into account conditions which existed at the moment of the contract conclusion but not the conditions that took place later (*rebus sic stantibus*). It is admitted in the law theory that in separate cases there are exceptions to the contract fulfillment duty. But there should be some definite conditions which provide the party with the possibility to refer to this doctrine and not to fulfill his/her obligations as defined by the contract. Traditionally the common law system rejected the fact that a need for contract fulfillment excludes both party liabilities. This was so called "absolute" contractual law understanding that did not release the party from responsibility under any conditions. Changes in the common law doctrine took place already in 18th century when the English law scientist L. Leizer put that "the liabilities are faded away when the state of affairs strongly changes". But in the court practice the changes took place only in the 19th century when at the *Taylor v. Caldwell* trial the court decided that the party was not responsible for contract obligation non-fulfillment though it was not provided by the contract. Examining the concrete controversy the court had created a new doctrine, the contract frustration one. The precondition for the implementation of mentioned doctrine is "radical condition change" or *rebus sic stantibus*.

Opposite to the common law, France traditionally had a so called *force majeure* doctrine which in its turn contains *cause étrangère* and *cas fortuit* doctrines. Both doctrines consider the fault element as the main question in order to define whether the person may be released from responsibility.

According to the *force majeure* doctrine a person may be released from responsibility if he/she is not at fault of causing the unpredicted accident (objective element). In its turn according to *cause étrangère* and *cas fortuit* doctrine a person will not have to fulfill his/her duties if he/she is unable to fulfill them because of some accident.

It has been stated that in contrast to the common law system, the *force majeure* concept is narrower. The French court of review states that *force majeure* is concerned with such conditions only that make it impossible to fulfill the contract but does not disturb the fulfillment. Condition change, economical fulfillment impossibility, contract base termination or company business activity termination doctrines are not used in the court practice.

The question regarding unpredicted condition rise and its affect on the contract is well developed in Germany and in the result German law has had a strong effect on other country legal systems. In contrast to France in England and Germany one of the insuperable force cases is further fulfillment economic burdensome nature. But such economic burden as it was mentioned earlier cannot be applied for all cases, e.g. for price change in the purchase contract. This also conforms to the condition followed by German court practice. The condition defines that the corresponding conditions must have nature adjacent to the debtor.

Taking into account all that was mentioned above and as different insuperable force theories develop the author concludes that in all legal systems described above the insuperable force rises and the parties are released from their obligations in the following cases:

- a) if the conditions are objective and they were not affected by any of the parties,
- b) the conditions has risen within the period from contract conclusion till the contract execution,
- c) the parties has not undertaken the random hazard risk.

The consequences in all legal systems are the same. The contract is considered automatically cancelled if none of the parties has a legal claim against the other party.

In Latvia the exception has affect in separate concrete cases, i.e. the exception is not a general condition. LR Civil Law clause 1587 defines the *pacta sunt servanda* principle but this does not mean that according to Latvian law there is no need to fulfill the contract requirements under objective conditions.

In Latvia just like in Germany considering the question regarding insuperable force rise, the subjective and objective elements are distinguished (CL clause 1543). The LR Civil Law points to contingency or insuperable force as to the objective condition which releases the debtor from contract liability fulfillment (CL clauses 1773 – 1775, 1998, 2220, 2233) but the LR Civil Law as well as the German BGB does not give a clear definition of insuperable force though the LR Civil Law has a flexible approach to that question.

It has been stated that according to the LR Civil Law the insuperable force will raise if it is impossible to fulfill one's obligations due to random hazard.

According to LR Civil Law clause 1588 one party may not cancel the contract without the other person's permission even if the latter one does not fulfill it and because he/she does not fulfill it. The non-fulfillment mentioned above is related to both subjectively and objectively impossible fulfillment. Therefore the LR Civil Law does not provide the automatic cancellation of the contract if it is impossible to fulfill the obligations due to the insuperable force. In its turn LR Civil Law clause 1589 defines that unilateral cancellation of the contract is allowable only if its is reasoned by the contract nature or when it is allowed by the law in specific conditions or when such right is clearly defined in the contract. Since this does not define that the party has the right to cancel the contract unilaterally in the case of insuperable force then the only thing that the uninterested person can do is to ask a court to cancel the contract.

Thought the LR Civil Law has a flexible approach to insuperable force institution, the Civil Law should include a regulation regarding the fact when the obstacle should be considered accidental, when the insuperable force is related to the consequences caused by that obstacle. The regulation should also define a duty of the party, who has known about the insuperable force, to inform the other

party about that. It is necessary to define also what kind of remedies the parties have in the case of insuperable force.

In order to implement the suggestions regarding insuperable force defined at the end of the Chapter the LR Civil Law additional clause is offered.

Chapter Seven

Latvian contractual law regulation improvement

In Latvia the contractual law has not been intensively modernized for a long time. Comparing the LR Civil Law regulation with modern contractual law theory concepts it has been concluded that in some cases the LR Civil Law contains regulations which do not conform to today's contractual law turnover.

Analyzing Latvian contractual law modernization methods it has been concluded that there are three following ways to improve Latvian contractual law regulation:

- 1) current contractual law regulation improvement;
- 2) new contractual law by means of new LR Civil Law development;
- 3) current LR Civil Law conformity improvement which is based on the EU and world legal institutions, systematic interpretation etc.

Since the restoration of independence of Latvia and up to now the LR Civil law regulations have been improved using the first option, i.e. current contractual law regulation improvement (for the last time courts have realized current regulation incompleteness and have started to use the third option in some cases, i.e. the courts have started to improve the current LR Civil Law conformity). Legislators earlier activities concerned with contractual right improvement may not be considered as systematic regulation improvement. Separate CL affair, family and liability clauses have been amended but this cannot be related to the concept change.

It has been concluded that in a large number of cases the LR Civil Law does not conform to today's contractual law theory concepts which causes the following negative consequences:

- 1) parties cannot use all the modern contractual theory concepts, i.e. contractual law theoretical base is being limited without any reason;
- 2) in order to use modern contractual law theory concepts the parties should prepare a longer contracts which must contain regulations which conform to today's requirements and which are not provided by the Civil Law;
- 3) fast contractual law turnover is delayed.

Analyzing the LR Civil Law and modern contractual law concepts it can be stated that it is necessary to change such fundamental contractual law institutions as civil liability establishment preconditions, compensation of losses, fine, obligation fulfillment delay, breach of contract, insuperable force and others.

Though the LR Civil Law is the liability and, therefore, contractual law base in Latvia, Latvian law scientists should not understand the LR Civil Law as an unchangeable concept and should do everything possible in order to develop new LR Civil Law which would be a modern contractual right regulation normative act. At the same time it is clear that the development even of a small part of the

LR Civil Law is a very time-consuming task but unless the new Civil Law is developed the persons should comply to current LR Civil law and should improve its separate regulations.

Key conclusions and recommendations of the Promotion Paper

When updating Latvian contractual law, not only should separate updated law theory conclusions be taken into account, but also the activities carried out by the EU in the modernization and harmonization of contractual law, as well as the contractual law unification projects, which have gained the support of the European institutions and law scientists.

Although the contractual law unification projects developed by law scientists are a considerable step towards the creation and modernization of a unified European contractual law understanding, however provisionally they are solely material of an academic nature, which in the legal relationship between parties can be applied as a source of law only in case if the parties have agreed on it in the agreement. Thereby, the uncertain legal status of the mentioned documents is not a safe tool for the successful realization of the EU four freedoms – free movement of goods, free movement of services, free movement of capital and free movement of persons.

One of the ways that the Latvian contractual law could be modernized, is to involve it in the EU initiated common EU legislative enactments modernization and harmonization process. Although from the civil circularisation view, a unified EU contractual law regulation would be effective and at the same time it would solve the modernization issue of the Latvian contractual law, however there are five obstacles for the creation of unified European contractual law:

- differences in the basic principles of civil law;
- differences in legal thinking;
- differences in the legal (procedural) process.
- differences in the implementation of EU directives in legislative enactments of member countries;
- controversies and uncertainties in EU directives.

Besides the mentioned obstacles, the following obstacles should be mentioned as ones that delay the creation of a unified European contractual law:

- in the creation of a unified European contractual law, it is necessary to find a compromise among all the national systems of the European law, which due to the jurisprudence traditions of each country (doctrines established at the national level) is practically impossible. An example here is also the unsuccessful attempt to adopt the European Constitution;
- creation of a unified European contractual law is the target of the European Union, but the newly established civil law act could be viewed only as a unified total of civil law acts of an international organization (EU), but not as a complete unification of European contractual law because only EU countries according to the European Parliament resolution would be involved in the law harmonization;
- non-matching legislative enactments, i.e., disharmony is reflected not only in a horizontal level, i.e., at the level of mutual law systems of member countries, but also in the vertical level (level of directives) or the level of EU law systems.

Although there are different regulations of directives and different implementation types of directives and their results, a solution may not be a transfer from a "minimum standards principle" to an "equal standards principle". In such a case, the role of an ES member country decreases to a minimum because the directives would be implemented directly and precisely, which would mean their direct impact or assigning of EU regulations status. Implementation of such a system would create harmony of contractual law at the level of all EU member countries, but by this the legislator's rights would be transferred to the EU leaving a symbolic meaning to EU member countries' parliaments in the implementation of directives.

Taking into account the analysis made in the Promotion Paper, the following main conclusions and recommendations have been made in the paper:

1. The ECLP is a considerable attempt of creating a unified European contractual law, which is based on the contractual law traditions of the separate European countries by reaching a possible compromise, including among different law systems – the civil law system and common law system. However, although the ECLP currently is not an officially recognized source of law, its contents and comprised modernization innovations may serve as a basis of justified guidelines for the creation of new contractual law norms both in separate European countries, as well as in the whole of Europe.

2. However, although the ECLP contains the basic principles of contractual law, due to the following reasons they do not comply with the terms of general law principles and therefore cannot be considered as an official source of law:

- a. the general law principles are identified and formulated based on the general spirit of official law. Due to the fact that the ECLP is not officially written law, then the principles included therein cannot be treated as a source of law.
- b. those general law principles, which have been taken over in the ECLP from national law of EU member countries, existed already before creation of the ECLP and therefore should be applied also without the ECLP.
- c. the ECLP also contains regulations, which so far are not found in any law system, as well as includes a compromise among the regulation of the different ES member countries' law. Due to the fact that general law principles are the traditions and spirit of each law system, but the ECLP is not a summary of one law system regulation, then there is no basis to admit that the ECLP contains general law principles of contractual law, which the courts can apply at any moment;
- d. provisionally there is no basis to admit that the ECLP would comply with *lex mercatoria* status;

However, it cannot be denied that the ECLP also contains separate principles, which are of the same type in the whole Roman-German law system (for example, the binding force of an agreement, loss indemnification principle, etc.), therefore the positive role of the ECLP would be a possibility to clarify or specify the contents and sense of contractual law principles contained in separate national laws, as well as a possibility to find a new approach to the regulation of separate national contractual law issues.

3. The European Commission provisionally is not planning to use the ECLP as the main instrument in the creation of a unified European contractual law, but instead of that as a faster achievement of the further direction target it has set as a task to develop EU contractual exemplary provision (models), initially only for simple or day-to-day agreements. Suggestions expressed by the European Commission for the reaching of this target will not give a large amount of progress due to several reasons:

- 1) there are no special problems now in the conclusion of simple agreements because the basic provisions of agreements in all EU member countries are very similar;
- 2) almost in all EU member countries there are already unified provisions operating in regulation of separate agreements, for example, UNO Vienna Convention of year 1980 „On International Purchase and Sale Agreements of Goods”, the Convention of year 1956 „On international conveyance agreement of cargoes (CMR)”, the Convention „On international conveyance agreement of passengers and baggage (CVR)”, etc.;
- 3) exemplary provisions will not give a solution in case if a dispute arises between the parties on the proper performance of contractual commitments, liability for shortcomings of a thing, loss indemnification, etc. In such a case, the legislative enactments of the respective EU member country should be applied by choosing the applicable law system and jurisdiction;
- 4) exemplary provisions will not give a solution for the ensuring of contractual commitments or admission of agreement in another country. The creation of separate exemplary provisions without a unified basis of legislative enactments, which would regulate a pre-agreement relationship, issues related to the conclusion of an agreement, issues related to the non-performance of an agreement, loss indemnification provisions, etc., will not give the desired result.

Thereby the initiative of the European Commission in the development of unified exemplary provisions will bring more technical improvement in transnational transactions, but will not meet the wish expressed in several resolutions of the European Parliament to create a unified European contractual law. Irrespective of this, it is a positive step in the further movement towards the creation of a unified European contractual law.

4. Both in the ECLP, as well as in other contractual law acts substantially large attention is paid to remedies, but there is still no definition found in the jurisprudence of unified contractual remedies. Due to the fact that a remedy is wider than the term of civil liability, the paper has offered the following definition:

A remedy is an institute of law, which the suffered person with or without using the court applies in case of an illegal violation of a law norm against an offender and which grants rights to the suffered person to perform activities, which decrease or prevent infringement of the suffered person's legal interests or ensure a legal obligation for the offender to perform commitments, indemnify losses caused as a result of the committed offence and foreseen during closure of an agreement from the viewpoint of the offender or otherwise as far as possible renew the suffered person's legal and material condition, as it was before the offence, and/or pay the contractual penalty, or in case of material change of circumstances grants the rights to change the nature of the obligations.

6. As a justified causal relationship theory, the author has brought forward the „necessary expected causation theory”.

According to this theory, legal consequences caused by a cause should be only in the necessary relationship (direct and indirect), but not in the relationship of an accidental case. Meanwhile, when fixing consequences caused by an offence, the ability of the offender as a reasonable person to expect the arising consequences should be taken into account. Thereby according to this theory, causal relationship can be fixed if the illegal action is a direct or indirect cause of legal consequences and they are limited with the loss expectancy principle, which narrows the result of the consequences referred to the cause.

7. In the common law system, contractual law liability is an objective liability, and such an aspect of subjective legal relationship as fault is not a precondition for a person to be bound by civil liability. In this system, in which, when fixing the consequences of a contractual violation, the main emphasis is laid on the fact what remedies can be applied by the suffered party towards the offender, it is not necessary to fix the existence of fault. The common law system fixes statutory cases (justifications), according to which an offence of agreement is not treated as illegal, but the civil law system, *inter alia*, also fixes whether there is fault seen in the activity (inactivity) of the offender.

8. ECLP, UNIDROIT and CISG do not provide the fixing of fault as a precondition of civil liability, similarly as it is also in the contractual liability of the common law system. The approach of this juridical construction is based on the fact what kind of remedies may be applied against the offender, but they do not provide what liability occurs to the offender. Application of the mentioned remedies depends on whether the person’s activities are lawful or unlawful, but not whether there is fault seen in the person’s activities.

Although both the common law, as well as the civil law system operates with such law institutes as carelessness or intention, however in the common law system they, contrary to the civil law system, are not tied with the term of fault degree, but with the fixing of preconditions, which are provided in the law whose existence justifies or do not justify the person’s action according to the law.

9. In civil law, the person’s attitude in the fixing the fault is not of importance (intent or carelessness – as expression of the person’s internal will) towards his/her undertaken commitments and the consequences of the offence, but the objective circumstances are of importance, by means of which it is fixed, whether the person has acted with fault or not, i.e., whether it can be reprimanded of the non-compliance with the law. In order to have civil liability, it is not important what is the person’s attitude towards the committed offence, but it is important that the person has acted with fault – even if the attitude was faultless.

10. In the civil law, the fixing of intent or carelessness does not provide mitigating or stricter consequences of civil liability applicable to the offender (it can be explained by the fact that the role of civil sanctions is the giving of compensation to the suffered person rather than the punishment of the offender). Therefore such a breakdown serves not as a tool for fixing some person’s attitude towards the committed offence and the scope of applicable civil liability, but rather as a measure of

how in separate cases to divide lawful action from unlawful admitting that, for example, liability cannot occur in the case of light carelessness.

11. Norms, which contain the law institute of fault, are included in the CL, but at the same time they indicate to preconditions of fixing lawful or unlawful person's activities (inactivity). Thereby the Civil law has connected fault with the fact of unlawful action, which means that fixing of the unlawful action automatically excludes the non-existence of fault.

The indication in Article 1635 of the CL „./../ as far as he is at fault for this action” does not mean that it is also necessary to fix the fault for legal consequences to mentioned in this clause. The words „./../ as far as he is at fault for this action” mean referring of consequences of harm caused as a result of objectively fixed person's unlawful actions and causal relationship to the offender, i.e., that the person is liable for the harm, which has occurred in connection with his/her illegal action. In order to fix whether the person has acted unlawfully (with fault) or not, the cases (exceptions) provided in the law are selected when the person's action cannot be considered as illegal.

13. In pre-contractual relationship, on the one hand, there is a general principle that the offender should indemnify all losses to the other party, i.e., both the decrease of material values (in Latin - *damnum emergens*), as well as the loss of profit (in Latin - *lucrum cessans*), but on the other hand, there is no obligation in this relationship to sign the agreement. Taking into account the creation of pre-contractual relationship and its basis, it should be admitted that the suffered party cannot request from the other party losses, which are related to the loss of profit, i.e., when calculating the loss amount, the suffered party cannot be put into such a situation, as it would be in contractual relationship with the offender because non-compliance of good faith and honest action is not in direct causal relationship with the fact that the agreement was not signed. Thereby in pre-contractual relationship the suffered party may request from the offender only those losses, which are based on the decrease of current belongings.

14. There is no regulation found in respect to compliance of the confidentiality commitment in the Civil law.

In individual cases, Clause 2391 of the CL can be applied about dishonest graft, which provides that no one is entitled to graft dishonestly to the abuse or at the expense of another person. Due to the fact that the general recovery due to graft is meant for those cases when the defendant has gained material benefit at the claimant's expense, but not from the claimant's belongings, then this clause in case of use of confidential information is applicable if the other party as a result of use of this information has gained material benefit. Whereas, the regulation in respect to disclosure of confidential information, which does not create material benefit to the disclosing person, but causes only harm to the other party, is not provided in the CL, therefore it would be necessary to include in the CL a regulation about offences in pre-contractual relationship by fixing that:

- 1) the parties are obliged to carry out pre-contractual discussions in good faith, as well as
- 2) comply with the confidentiality of information independently whether the agreement is later signed or not.

15. The non-conditional existence of full loss indemnification principle (with the exception of Clause 1776 of the CL) in the CL does not comply with the criteria of justice and proportionality, therefore it is necessary to fix a regulation in the CL, according to which only those losses are indemnified, which the offender as a reasonable person expected or had to expect.

Also the regulations of other countries prescribe that the amount of consequences, to which the person's liability refers, is limited to those consequences, which the mentioned person could and had to expect at the moment of signing the agreement. In order to apply the principle of full loss indemnification, a precondition is expectancy of loss during signing of agreement, which thereby limits the range of those consequences, for which the offending party is liable.

16. Losses as an indemnifiable category are recommended to be defined in the Civil law as follows: losses are a decrease of the suffered person's belongings expressed in monetary terms or the loss of benefit as a financial expression of negative consequences, which the offender expected or as a reasonable person had to expect at the time of signing the agreement and which arise from unlawful, faulty (not justified) infringement of the suffered person's rights and which are in a causal relationship with the creation of harm.

17. It is necessary to improve the regulation of contractual penalty in the CL, similarly as in many European countries and the ECLP by fixing that the court is entitled to decrease the amount of contractual penalty if it is too big and dishonest. The following provision could be fixed as a necessary addition – the court cannot fix the contractual penalty less than the amount of loss caused to the suffered party. Thereby Clause 1717 of the CL could be supplemented by: the court at the debtor's request is entitled to decrease the amount of contractual penalty if it is too big and dishonest.

18. Taking into account the interests of civil circularisation, it would be necessary to include a regulation in the CL, which would expect the rights to the suffered party to suspend its performance until the performance of the other party is done. However, such amendments should be linked with the necessity to include the division of contractual offences in the CL being material and immaterial offences, similarly as it is in modern civil law acts, thereby avoiding a situation that the suffered party would suspend its performance at any minor offence of the agreement.

19. It is necessary to make changes in the CL by providing the rights to unilaterally terminate the agreement in case of material non-performance by the other party.

Division of offences into material and immaterial offences could be supplemented by Clause 1588 of the CL (based on ECLP regulation) in the following wording:

„1588. One party cannot withdraw from the agreement without the other party's consent even if the latter fails to perform it and because that it fails to perform it, except for the case if the non-performance of agreement is material. Material offence of the agreement is the one if any of the following circumstances has occurred:

1) the purpose of agreement is not reached as a result of undone performance,

2) *as a result of non-performance, the suffered party has not received what it had to receive according to the agreement, except for a case if the other party did not expect and could not expect such consequences,*

3) *non-performance is done intentionally and gives the reason for the suffered party to consider that the performance will not be done.*

In case of unilateral termination of the Agreement, the suffered party is obliged to inform the offender in writing.”

20. The principles of the ECLP and UNIDROIT contractual law provide a clause on changes in circumstances, which causes an obligation to the parties to organize discussions about changes in agreement if the performance of agreement by any of the parties has become too difficult.

When analysing this issue in the law of Latvia, it should be concluded that due to the fact that the CL strictly keeps to the principle of the binding force of an agreement (Clause 1587 of the CL), then a similar regulation as ECLP 6:111 Clause is not provided in the Latvian law.

Taking into account the latest law theory conclusions, as well as the practice of other countries, exceptions should be fixed in the CL based on the regulation of other countries and ECLP. Clause 1587 of the CL should be expressed as follows:

„1587. (1) A lawfully signed agreement places an obligation on the party to perform the promises and does not entitle any party to withdraw from the agreement, although indemnifying losses to the other party.

(2) In case if the performance of commitments becomes excessively difficult in connection with objective changes of circumstances, the parties are obliged to perform discussions in order to change the agreement or terminate it. A party may refer to the clause of changes of circumstances if:

1) the change of circumstances has occurred after the signing of the agreement,

2) the offender as a reasonable person could not expect the change of circumstances at the time of signing the agreement,

3) the offender had not assumed a risk of changes of circumstances.

(3) If the parties are unable to reach an agreement about changes of agreement or its termination, any of the parties is entitled to request the court:

1) to terminate the agreement, by fixing its final date,

2) to modify the agreement by equally dividing the benefits and losses among the parties due to the changes of circumstances.

(4) In addition, the court may place an obligation to indemnify losses to the party, which it has suffered if the other party has refused from discussions or stopped them contrary to good faith.”

21. CL does not sufficiently regulate the term of force majeure (obstacle) and consequences, which the parties incur in case of force majeure obstacle. The CL should be supplemented with the following clause:

„1588.a. (1) Non-performance of the parties is justified in case if it proves that there is an obstacle being outside its control and that it was impossible to expect such an obstacle in a reasonable way

during the signing of the agreement or if it was impossible to avoid from this obstacle, or overcome its consequences.

(2) If the obstacle is only short-term, non-performance is justified in the meaning of this clause only in the period, in which the obstacle exists.

(3) The failing party in a reasonable period of time since it got to know whether it had to get to know about the existence of the obstacle, should inform the other party about the obstacle and its impact on performance. The other party is entitled to request loss indemnification if such a notice has not been received.”