University of Latvia

Lauris Leja

The Qualification and Substance of Leasing Agreements in Latvian Private Law

Summary of Doctorate Thesis for the Attainment of a Doctor's Degree
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Doctorate tutor: Prof. Dr.habil.iur. K.Torgāns, University of Latvia

Doctorate thesis consultant: Prof. Dr.iur. Nis Jul Clausen, University of Southern Denmark, Denmark (Syddansk Universitet, Denmark)

Thesis reviewers:

1) Assoc. Prof. Nina Legind, University of Southern Denmark, Denmark

2) Prof. Osvalds Joksts, Latvian Police Academy, Latvia

3) Prof. I.Čepāne, University of Latvia, Latvia

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The Doctorate thesis and its summary will be available from the Library at the University of Latvia in Riga at Kalpaka bulv. 4.

Doctorate Council Chairman: Prof. Dr.iur. J.Rozenfelds

Doctorate Council Secretary: Prof. Dr.iur. I.Čepāne

GENERAL DOCTORATE THESIS' OVERVIEW

Doctorate Thesis Specification

The Doctorate thesis is a scientific research into „The Qualification and Substance of Leasing Agreements in Latvian Private Law", in which questions related to the qualifications and the substance of leasing agreements are analysed as comprehensively and eclectically as possible.
The theoretical basis for the research is the scientific work of generally recognised obligation law specialists, whose findings are used within the doctorate thesis both for the analysis of problems and for the synthesis of theoretical findings with practice. The methodological basis was developed following scrupulous and comprehensive analysis of scientific sources. The best known of the foreign authors specialising in the doctorate thesis' field whose works were used during the performance of the research include: *Dr.Dr.h.c.mult. C.W.Canaris, Dr.iur. V.Emmerich, Dr.iur. M.Lieb, Dr.iur. Dr.rer.publ. Dr.iur.h.c. M.Martinek, Dr.iur. P.Plathe, Dr.iur. D.Reinicke, Dr.iur. K.Tiedtke, Dr.iur. F.Graf von Westphalen.*
Normative regulation, legal practice and legal doctrines originating in Latvia and other countries were used in order to investigate and justify the problem under consideration.
The innovative section of the Doctorate thesis is comprised of research carried out by the author that is reflected in scientific publications and which has been presented at scientific conferences.
Generally accepted methods of epistemological analysis have been used during the development of the Doctorate thesis – methods of formal and constructive, inductive and deductive logic, research into historical development, international comparisons, expert methods, the method of analysis into legal practice, as well as methods involving the utilisation of personal experience. The method of scientific induction was used in order to form general findings or links from individual facts. In contrast, the method of deductive or scientific deduction method was used in order to reach conclusions, systematise and theoretically justify both the research and experience of other authors, as well as my own.
Bearing in mind that Germany and Latvia – as states within the network of the legal system of continental Europe have a very similar regulation of private law and, in contrast to Latvian regulation, the legal regulation in Germany has developed over a much longer period of time, the thesis attributes fundamental significance to the evaluation of the soundness of German regulatory system, and to the judgements of German courts and opinions articulated in legal literature.
As a result of the thesis, new theoretical and practically applicable findings for Latvian legal science are provided and recommendations are put forward regarding the legal regulations governing leasing.

Purpose of Doctorate Thesis

The Doctorate thesis has four principal purposes.
The first purpose of the research is to determine the most suitable leasing agreement qualification for Latvian private law. Among other things, the determination of the most suitable qualification has not only a theoretical, but also a major practical significance for the solution of the problems referred to in the second section of the thesis and the satisfaction of the second, third and fourth purposes. It is not possible to answer many problematic issues without determining the agreement's qualification in advance. The clarification of the leasing agreement's qualification is linked to the requirement to determine the normative regulation imperative on leasing agreements, as well as to determine the normative regulation that should be applied in the event of the broader translation of the agreement.

The second purpose of the research is, based on the leasing agreement qualification determined for Latvian private law, to evaluate whether financial terms and conditions often included in financial leasing agreements are fair (and accordingly in force) such as, for example, the absence of any liability on the part of the lessor regarding failings in the leasing object, the absence of any liability on the part of the lessor regarding the non-delivery or late delivery of the leasing object, the risk in regard to the performance and counterperformance imposed on the lessee, the risk imposed on the lessee regarding the capability of the supplier to fulfil its obligations and the various rights of the lessor in the event of any overdue payments on the part of the lessee.
The third purpose of the research is to ascertain how the cancellation of the supply agreement affects financial leasing agreements.
The fourth purpose of the research is to ascertain the right of the lessor in the event of the lessee illegally alienates the leasing object to a third person-good faith purchaser.
The purpose of the Doctorate thesis is not to prepare a detailed draft legislative thesis or amendments to the law regulating leasing agreement, because such purposes are not compatible with the scheduled timeframe of the research and would mean an undesirable shift of emphasis in the overall concept of the research. Likewise it is not expected that the author of the thesis' recommended basic strategy and methods will be the subject of general agreement and acceptance. The issues under research are considered to such wherein many oppositely held opinions come together.

The Current Relevance of the Subject and Scientific Novelty of the Research

The thesis considers one of the most contradictory and variously interpreted agreements in commercial transaction theory and practice – the leasing agreement, which has two forms - financial leasing and operative leasing, each of which may have several forms and modifications. Leasing agreements are a significant alternative to other methods how to acquire goods necessary for use. Equipment may be purchased either through immediate payment, or they may be financed in the form of a secured or an unsecured loan from a third person acquired on the basis of a deferred purchase agreement. However, these other financing methods may not always be available, may involve the commitment of more financial resources than the user is prepared to spend or furthermore may not be available for a sensible cost. Banks may not wish to lend money for specific forms of entrepreneurial activity or alternatively certain types of equipment may be considered to be a high risk investment. In such cases, leasing may be the best or even the only feasible means of acquiring the equipment required for use. Since leasing agreements are a consistently popular form of agreement that are used by undertakings, as well as consumers, issues that are related to the subject of leasing are currently relevant both in terms of legal practice and private law theory, bearing in mind that leasing agreements are not regulated in Latvian civil law.
Until now, there have been no fundamental researchs in Latvian legal theory regarding this subject. One of the most important tasks of the thesis is to offer solutions to the comparatively vague and variously interpreted questions regarding leasing agreement qualification within existing theory and practice. Bearing in mind that leasing transactions are often entered into by consumers, it is important to review such transactions from the perspective of the consumer. The thesis also investigates legal transaction-related issues that are related to the rights of the lessor if the leasing object has been alienated to a third person.
Bearing in mind that leasing agreements in many countries within the continental European system are not regulated, various questions arise, such as, for example, how leasing agreements are to be qualified or how normative regulation regarding hire or purchase are to be applied in regard to them. The author has researched this and other problems, broadly utilising German legal findings and legal doctrines. The author instigates a discussion involving the opinions

encountered in foreign legal doctrines and criticises several superficial opinions regarding the qualifications for leasing agreements expressed in Latvian literature.
The novelty of the research is determined by the condition that the issue of the qualification of a leasing agreement and its substance have not been previously scientifically analysed in Latvia. The thesis indicates the problematic aspects of the subject and recommends solutions for them.

Theoretical Significance of the Doctorate Thesis

The theoretical significance of the thesis manifests itself in the identification and theoretical analysis of problems related to the qualifications and substance of leasing agreements related to private law, as a result of which new theoretical findings have come to light.

Practical Significance of the Doctorate Thesis

During the course of theoretical analysis, the thesis puts forward several proposals for the improvement and modernisation of the legal regulation of contractual leasing relations, as well as proposals that may taken into account for the improvement of legal practice.

Approbation of the Results of the Doctorate Thesis

Theoretical findings that have been garnered during the course of the development of the thesis are included in Latvian and foreign publications and conference addresses.
Publications:
1. Leja L. Understanding and Application of Leasing in Latvia and Europe (I). Law and Rights, no.1 (41), January, 2003.
2. Leja L. Understanding and Application of Leasing in Latvia and Europe (II). Law and Rights, no.2 (42), January, 2003.
3. Leja L. On the Protection of a Good Faith Purchaser in Case of Illegal Alienation of the Leasing Object. Latvijas Vēstnesis, Jurista Vārds, 2004, No.5 (310).
4. Leja L. On the Protection of a Good Faith Purchaser in Case of Illegal Alienation of the Leasing Object. Latvijas Vēstnesis, Jurista Vārds, 2004, No.6 (311).
5. Leja L. On the Legal Nature of Financial Leasing. Latvian Vēstnesis, Jurista Vārds, 2000, No.14 (167).
Participation in international conferences
1. International conference *„The Beginning of a New Era – Europe of the 25: Ways towards a Common Development of Law”*. November 21, 2003, in Budapest, Hungary.
2. International conference in Odense (Syddansk Universitet), in Aarhus and in Copenhagen (Copenhagen Business School), Denmark 2004.
3. International scientific conference „Harmonisation of Laws in the Baltic Sea Region following the Expansion of the European Union (EU)”. Conference materials „Qualifications for Leasing Agreements in Latvian Private Law”. January 25-26, 2007, Riga.

The thesis has been discussed on several occasions at the LU Faculty of Law’s Chair of Civil Law Science. The thesis has been discussed on several occasions with Senators from the LR Supreme Court Senate and the thesis group established by the LR Ministry of Justice for the drafting of the Transaction Section of the Commercial Act (including – the leasing regulation).
Publications, with which the theoretical findings collected during the course of the development of the thesis have been approbated, are widely used in legal practice. Judges often refer to them in various court instances, as do persons that go to court with claims.

The research of the results will be used for the realisation of the Master Studies Course „Problems of Obligation and Delict Law".

Structure and Size of the Doctorate Thesis

Structurally the thesis has been formulated as follows:
1) introduction,
2) two expanded parts, of which the first consists of five and the second of seven expanded sections,
3) summary,
4) list of bibliographical sources used.
Total size – 10.5 author's sheets.

Contents of the Doctorate Thesis

The introduction presents the current relevance of the theme and the subject and methods of the research.

Part One
Qualification of Leasing Agreements in Latvian Private Law
Section One
General Insight into the Problem Regarding the Qualification of Leasing Agreements

Bearing in mind that leasing agreements are not regulated in Latvian civil law, the opinions of various legal scientists are collated and critically assessed in the first section of the first part regarding which contents of contractual agreements are covered by leasing agreements. Concluding that there are no ideally defined contents or lay out for a leasing agreement and that a leasing agreement is a common name for agreements of various forms. The aforementioned agreements share the common characteristic whereby a lessor provides a lessee with the opportunity to use some object and finances this, but the lessee makes the relevant payment for this. Ultimately, the finding is expressed that leasing agreements can essentially be divided into two categories: financial leasing and operative leasing, each of which has various forms and modifications.
Following an evaluation of which signs characterise financial leasing agreements and which characterise – operative leasing agreements, an analysis is performed regarding the qualification of leasing agreements of various foreign countries (USA, Germany, France, as well as the Netherlands, Italy, United Kingdom, Belgium and Luxembourg) in normative regulation and legal practice.
As a result of the analysis of the US normative regulation, it is concluded that even though linguistically *„lease"* and *„leasing"* are translatable as hire, in law – the contractual contents of *„lease"* and *„leasing"* can differ significantly from the legal regulation applicable to hire. In conformity with the US normative regulation, some leasing agreements are qualified as hire *(„true lease")*, but others as purchase agreements, in which the fulfilment is secured by the withholding of property rights *(„security interest")* and which are designated as hire only for the sake of appearances *(„lease intended for security purposes")*. The qualification of a leasing agreement as a loan, authorisation or independent form of agreement is alien to the US normative regulation. In conformity with the provisions of the *Uniform Commercial Code*, a transaction formulated as a lease shall be considered to be a purchase, if the lessee has the duty

to perform lease payments to the lessor for a specific period of time and the lessee does not have the right to terminate the lease prior to the scheduled expiry date, and provided that:
1) the lease term is the same as or greater than the remaining economic lifetime of the leasing object;
2) the lessee is obliged to renew the lease agreement for the remaining economic lifetime of the leasing object or the lessee is obliged to become the owner of the leasing object;
3) in accordance with the lease agreement, the lessee has the choice of renewing the hire agreement for the remaining economic lifetime of the leasing object without any additional compensation or for symbolic additional compensation;
4) in accordance with the lease agreement, the lessee has the right to choose to become the owner of the leasing object without any additional compensation or for symbolic additional compensation.
In comparison to the situation in Latvia, in Germany normative regulation do not regulate leasing agreements. However, in contrast to Latvia, in Germany over a period of more than twenty five years, a broad and stable case law has evolved in leasing matters. With judgements dating back to 1977, the German Supreme Court began developing the legal practice whereby leasing agreements should be qualified as hire and not as a purchase or any other kind of agreement. In conformity with the German case law, even in cases in which the parties have reached an agreement regarding the rights of the lessee to purchase the leasing object at the end of the basic agreement term, agreement-related obligations primarily arise in the realm of hire rights.
Since the LR Saeima has accepted and ratified the Unidroit Convention, dated May 28, 1988, regarding international financial leasing through the Law „On the Unidroit Convention regarding International Financial Leasing", dated June 19, 1997, this question of which qualification is supported by convention is placed under the microscope. Having acquainted himself with the convention's text in English and the explanatory statement prepared by the Unidroit Secretariat for the Unidroit Convention Project, the author concludes that the convention classifies financial leasing agreements as independent forms of agreements. Accordingly, the terminology used in the convention's official translation can be marked down as being quite unsuccessful. The translation of the word *„lessor"* as „hirer-out" and *„lessee"* as „hirer" could provide the basis for a mistaken belief that the Convention classifies financial leasing agreements as hire.
Even though the Unidroit Convention of May 28, 1988 classifies financial leasing agreements as a form of independent agreement, as a result of an analysis of the project materials worked out in relation to the Convention, the author concluded that the purpose of the Convention's authors was not to promote the introduction of *sui generis* contractual qualifications in national regulations. The authors of the Convention only rejected the hire/purchase contractual qualification, in order to avoid the necessity to change the traditional legal regulation of various countries regarding purchase and hire, and accordingly, in order to ensure that the Convention would be as acceptable to as many countries as possible. Therefore, the author concludes it ought not to be necessary to formulate a position in the matter regarding the qualification of financial leasing at Latvian national level the same way it is formulated in the Convention.
The determination of qualifications for leasing agreements in Latvian private law would not be imaginable without the prior evaluation of Latvian normative regulation, in which leasing agreements are referred to, as well as various Latvian court judgments. As a result of this evaluation, it is concluded that in some normative regulation, leasing agreements are compared to a loan/credit, others to – buy out hire purchases and deferred payment purchases, and others still – to hire. Various forms of qualification can be found in Latvian case law in conformity with judgments. The LR Supreme Court Senate has expressed its support for both the *sui generis* qualification (Judgement, dated February 27, 2002 in Case No. SKC-118), as well as

the hire-purchase qualification – recognising leasing agreements regarding „hire purchase agreements with deferred payment" (January 26, 2005 judgement in Case No.SKC-37). This inconsistent position in regard to the questions of the qualifications of a leasing agreement has a negative impact on the trust placed in the law and therefore in the conclusion of this section, the author concludes that this position should be viewed critically.

Section Two
The Significance of the Agreement and the Terms and Conditions Included Therein in the Determination of the Qualifications of a Leasing Agreement

In attempting to ascertain the civil law qualification for a leasing agreement, it is necessary to answer the question whether it is possible to categorise leasing agreements among one of the forms of agreements regulated by legislation, i.e., should the leasing agreement considered to be a form of agreement that has already been legally regulated or whether it should be considered to be a *sui generis* agreement. In order to determine the qualification, it shall first be assessed whether or not the directions regarding the qualification of the agreement should be alluded to in the agreement.

As a result of the evaluation of various critical opinions, the author of the thesis subscribes to the prevailing opinion in legal doctrines that the title of a legal agreement, the parties entering into the agreement and the subject of an agreement do not have a decisive significance in the determination of the civil law qualification of an agreement. This is justified by the maxim that courts are aware of the laws (*iura novit curia* – latin.). Even if a leasing agreement were to be called a lease agreement, the lessee would be known as the lessee, leasing payments – as lease payments and the leasing object – as the subject of the hire, that in itself would not provide a basis, contrary to the nature of the contents of the agreement, to recognise that the relevant agreement should be qualified as a hire agreement regulated by the Civil Law. The attribution of the terms and conditions of a legally regulated agreement to a specific agreement does not depend on the specific agreement terminology chosen by the parties.

At the conclusion of this section, the author of the thesis concludes that the stance whereby the starting point for the evaluation of qualifications is based on the material contents of the contractual agreement rather than the designation for the agreement chosen by the parties is justified. If the material contents of the contractual agreement do not conform to the designations used in the agreement (this particularly applies to cases when attempts are made to bypass the law), the material contents of the agreement shall be decisive. It is not possible for the parties of the agreement to reach a decision regarding the place of the specific agreement within the civil law system. The principle of private autonomy for the parties of the agreement only provides them with the freedom to include or not include terms and conditions of significance for the legal qualification of the agreement. However, this principle does not provide the parties with the right to determine the legal qualification for the agreement, that is, the principle of private autonomy does not permit „label fraud" – qualification of the agreement regarding hire that does not conform to the terms and conditions of the hire.

Section Three
Evaluation of the Opportunity to Consider Leasing Agreements as Being Identical to One of the Forms of Agreement Regulated by the Civil Law

In Part Three, an extended analysis is carried out with the purpose of ascertaining whether the contents of leasing agreements are identical to the contents of any of the agreements regulated by the Civil Law.

During the first part of the section, such disparities are identified in regard to financial leasing agreements that provide a basis to conclude that financial leasing agreements are not identical to any of the agreements regulated in the Civil Law, including - neither loan, nor authorisation, nor hire, nor purchase agreements.
Observing the disparities between operative leasing agreements and the forms of agreements regulated by the Civil Law, in the second part of the section the author concludes that operative leasing bears not only parallel resemblance to hire, but is in fact identical to the legal nucleus of hire. Accordingly, the provisions which are applicable to 'hire' shall also be applicable to operative leasing agreements.

Section Four
Recognition of Financial Leasing Agreements as Independent or Mixed Obligation Agreements - an Alternative to Subordination to the Provision of an Agreement regulated by the Civil Law

In Part Four, an evaluation is made regarding the basis for the qualification of financial leasing agreements as a form of independent agreement, or in other words as a *sui generis* agreement. Ascertaining that legal circulation in obligation rights is not solely based on a limited number of agreements regulated by normative regulation, as well as, that the establishment of new agreements is permissible, observing the relevant legal norms that restrict the freedom of agreements, the author compares and subjects those statements by legal scientists which recommend the qualification of financial leasing agreements as an independent form of agreement to critical assessment.
Irrespective of the fact that there are no legal obstacles to the recognition of financial leasing agreements as an independent form of agreement, the totality of whose rights and obligations are not prescribed by the provisions of the Civil Law, but only by the terms and conditions entered into by the relevant parties, the author of the doctorate thesis concludes that the fact that financial leasing agreements are not to be recognised as being identical to any of the forms of agreement regulated by the Civil Law still does not provide grounds for considering financial leasing agreements to be agreements *sui generis* (independent agreements). The author expresses an opinion similar to that of *K.Klomann*, i.e. – that prior to making any decision regarding the recognition of any financial leasing agreement as an independent form of agreement or mixed agreements, it should firstly be ascertained whether any of the forms of agreement regulated in the Law conform to the pre-requisites for financial leasing agreements, because various types of side obligations or side actions may provide a basis for ascertaining digressions from the regulation covering the relevant agreement, but may not nevertheless provide a basis for amendments to the legal qualification for the relevant agreement.
The author reaches the conclusion that prior to the acceptance of a *sui generis* qualification; it should be evaluated whether financial leasing agreements bear comparison to any of the agreements regulated by the Civil Law to such a degree that their qualification as one of the agreements regulated by the Civil Law would nevertheless be justifiable.

Section Five
Clarification of an Agreement Regulated by the Civil Law Whose Subject Conforms to the Subject of the Financial Leasing Agreement

The first sub-section of Part Five is devoted to an evaluation of the justifiability of the loan contractual qualification of financial leasing agreements.
The author concludes that there are no grounds for qualifying financial leasing agreements as the kind of loan agreement, in which the object loaned is the leasing object. Firstly, because the

leasing object could be an item that can only be loaned to such a degree that the leasing object is fungible property (for example, machines and equipment manufactured serially). Secondly, because the leasing agreement lacks a vital characteristic of a loan – i.e. the lessee does not acquire full rights of power (i.e., property rights) over the leasing object.
Likewise, it is concluded that the recommendation of *U.Jürgens* and *C.W.Canaris* to consider financial leasing agreements as a loan, in which financial resources could be recognised as the subject loaned in the sense of Article of 1934 of Civil Law, which the lessor pays to the supplier in conformity with the instructions of the lessee and which the lessee repays through leasing payments does not withstand criticism. If it were to be considered that the lessor acquires the leasing object by utilising the financial resources of the lessee and in the name of the lessee, then the rights of the supplier to request payment of the purchase price would exist not against the lessor, but against the lessee. The claim rights of the supplier against the lessee are not characteristic of leasing and are not compatible with the essence of leasing and, therefore, this precludes the qualification of leasing for a loan of cash resources. Likewise, there is no clear basis, as to why the financing function should be considered to be primary and the function of passing of the item that is the leasing object into use should be considered secondary.
The second sub-section of Part Five assesses the soundness of the authorisation-related contractual qualifications of financial leasing agreements. Evaluating the arguments „for" and „against" the authorisation-related contractual qualifications, it is concluded that the authorisation-related contractual qualifications do not withstand criticism. Elements of authorisation can be detected in the financial leasing agreement, however these elements are merely of „background significance" and they cannot be regarded as a basis for a financial leasing agreement to be qualified as an authorisation agreement.
The justifiability of the contractual qualification of hire and the contractual qualification of purchase agreements that are financial leasing agreements are evaluated by the author in the third and fourth sub-sections of Part Five.
The author concludes that in regard to the counter-performance of the lessee, it should be recognised that payments are performed for the use of the item that is the leasing object.
Bearing in mind that in the case of financial leasing, the lessee is entitled to approach the supplier directly with claims, the author expresses the conviction that equality between performance and counter-performance is ensured. The elimination of the liability of the lessor regarding shortcomings in the item that is the leasing object is connected to the provisions of Article 2134 of the Civil Law and cannot be regarding as obstacle to the qualification of financial leasing agreements as hire. Accordingly, the contention of *P.Koch and J.Haag* that the replacement of obligations that are characteristic of hire with the contractual regulations of other forms of agreement changes the very nature of hire in their deepest foundations does not withstand criticism and nor does the contention by *P.Plathe* that the period of time during which the leasing agreement is in force lacks any action characteristic of a hire agreement on the part of the lessor.
The fact that the lessor does not have an obligation to care for the maintenance of the leasing object is recognised by the author of the thesis as a condition that does not preclude the possibility of qualifying financial leasing agreements as hire. Firstly, because the normative regulation governing the relevant hire are dispositional, a fact that is verified among other things by the widespread practice of hiring residential premises. Secondly, because, in its own way, the equality of the fulfilment of both parties also ensures the contractually issued rights of the lessee to approach the supplier with claims regarding the eradication of shortcomings in the item that is the leasing object.
In analysing the argumentation put forward by *R.Sannwald, D.Reinicke/C.Tiedtke* and *P.Plathe*, in contrast to the viewpoints of these legal scientists, the author concludes that the imposition of the risk related to the accidental damaging of and/or destruction of the item that

is the leasing object on the lessee shall not be an obstacle to the qualification of a financial leasing agreement as a hire agreement. Even though, ordinarily, in the case of hire, the risk related to the damaging of and/or damage to the item that is the leasing object is undertaken by the lessor, the Civil Law does not preclude an opposite agreement being reached. Accordingly, for example, Part three of Article 2148 of the Civil Law includes the example of cases in which the person renting the relevant item or lessee definitely undertakes the risk. In the case of 'hire', as with any contractual relations involving obligations, the parties may freely agree regarding which of them undertakes the relevant risk.

Weighing up the various opinions, the author concludes that the contractual qualification of an agreement as a hire agreement is not precluded on the grounds that in the case of financial leasing, the basic period of use of the item that is the leasing object covers 40%-90% of the worthwhile period of use of the item that is the leasing object. The fact that the item that is the leasing object depreciates over time and that as a consequence the payment for its use includes payment for depreciation, does not provide grounds for the lessee to consider the action as being carried out *„pro re"* rather than *„pro usu rei"*. The opposing viewpoint which has received support from *W.Goldmann*, *P.Seifert*, *K.Klomann* and *U.Jürgens* is only worthy of consideration in so far as it relates to those special occasions which only occur extremely rarely when the leasing object is consumed in the genuine sense of the term. However, in regard to the remaining cases, this viewpoint does not withstand criticism.

Financial leasing agreements sometimes provide for the provision that at the end of the leasing term the leasing object is returned by the lessee to the lessor, the lessor proceeds to sell the leasing object to a third person and pays the person that took out the relevant leasing agreement part of the proceeds from the sale of the leasing object. This provision too, irrespective of the objections of *F.Graf von Westphalen*, is recognised as being such that it does not preclude the qualification of hire, because the payment that the lessee receives following the sale of the leasing object is directly linked to payments made previously by the lessee, which the lessor has cautiously set to be a little larger than they would have otherwise been expected to be (by forecasting the minimum possible sale price at the end of the leasing term for the item that is the leasing object), in order not to subject itself to the risk of any losses.

The author of the thesis concludes that in the event of the lessee facing an obligation to acquire the leasing object into his or her property at the end of the leasing term, such a financial leasing agreement cannot be qualified as a hire agreement, if a promise from one party is in place regarding the transfer of the relevant item following payment of the agreed upon sum of money and a promise is in place from the other party to pay the agreed upon sum of money for the relevant item, i.e., the vital characteristics of a purchase agreement included in Article 2002 of the Civil Law.

In this section, the author proceeds to indicate that the rights of the lessee to purchase the leasing object can be justified with three different legal constructions:

1) as an expression of unilateral will – a terminable offer from a lessor;
2) as a prior agreement entered into from which the rights arise to request that the lessor makes such an offer;
3) as a purchase agreement entered into with a deferral provision.

Each of the referred to legal constructions is equally permissible as a result of which, the author assesses in regard to each of them whether the relevant construction does not preclude the opportunity to classify leasing agreements as hire. Moreover, the author ascertains whether or not there are grounds to consider the relevant financial leasing agreements (with a purchase option regarding the price that is not symbolic) as buy out hire purchase agreements, which differentiates them from deferred purchases.

The author concludes that irrespective of whether the prior agreement is recorded as a separate document or is included in the same financial leasing agreement document, the prior agreement shall exist alongside the leasing agreement and shall in no way amend the civil law nature of

the financial leasing agreement, i.e., it does not preclude the qualification of the financial leasing agreements as a hire agreement. Likewise, the author concludes that entry into a purchase agreement with a deferral provision does not preclude the opportunity to classify the financial leasing agreement as a hire agreement.
Evaluating the contents of buy out lease, the author ascertains that in individual cases such agreement payments, even though they are called lease payments, are purchase payments according to their very nature. Accordingly, in each individual case, it should be evaluated whether the lessee is not being provided with an opportunity to acquire the item that is the leasing object into his or her ownership at the end of its term of lease for a symbolic price and whether the relevant lease payments do not exceed the actual compensation for the use of the item in question.
Taking into account, the use of the terms „buy out lease" and „hire purchase", the author concludes that in the context of legal reality, the term „buy out hire" covers both agreements that according to their nature are deferred purchase agreements, as well as agreements that according to their nature are hire with the contractually provided for provision of the future establishment of purchase agreement relations. Accordingly, the terms „buy out lease" and „hire purchase" shall be recognised as such that do not characterise the vital elements of an agreement. Bearing in mind, the legal difference between a deferred purchase from financial leasing agreements (i.e., in legal reality, the term „financial leasing ", like the term „buy out lease" and „hire purchase", is designated as such an agreement that conforms to the composition of a purchase agreement, as well as such an agreement that conforms to the composition of a hire agreement), the viewpoint is presented that the use of the terms „buy out hire purchase" and „hire purchase" in normative regulation alongside the term „leasing " does not facilitate exactitude in law and can be considered to symptomatic of verbosity, whereas, the use of the term „deferred purchase" should only be supported in regard to those leasing agreements that are qualified as being purchases.
Taking into account the various opinions expressed in legal doctrines and in foreign normative legal regulations, the author makes the proposal to apply a general stipulation whereby 'a leasing agreement shall considered to be a purchase, if after a certain period of time a lessee as a sensible decision-making partner in a commercial sense definitely ought to use his or her rights of choice' for the determination of the qualification of each specific financial leasing agreement.
Not agreeing with any of the opinions of the legal scientists subjected to analysis, the author puts forward the proposal to recognise that those financial leasing agreements that provide for the rights of the lessee to extend the financial leasing agreements for less than the entire period during which the item that is the leasing object can be used for a lower price, should be qualified as hire. Since purchases are characterised by the full transfer of the relevant item to the purchaser, if the relevant item at the moment of its return to the lessor has not lost its substance, there are no grounds to consider that the lessee would have received anything more than only the use of the relevant item. However, financial leasing agreements, which provide for the rights of the lessee to extend the financial leasing agreements for all the remaining period during which the item that is the leasing object can be used for a lower price (i.e., until the item that is the leasing object loses its substance) should be qualified as purchase agreements. The contractual qualification of the purchase agreement is justified on the grounds that the hire agreement during the period of which the leasing object loses its substance, shall be considered as a purchase, rather than a hire, because it is not possible to fulfil the obligation of the lessee to return the relevant item.
The author justifies why he cannot agree with the recommendations of individual legal scientists to classify financial leasing agreements as purchases of the right to use the leasing object in a sense of the property rights, nor as the purchase of the right of use in the sense of the rights of obligation.

At the end of this section, those forms of financial leasing are indicated in form of proposals which it is not possible to classify as hires and which are qualified as purchases (purchase of leasing object).

Part Two
Normative and Contractual Regulation of the Rights and Obligations of the Parties to Financial Leasing Agreements
Section One
Liability of the Lessor Regarding Defects of Property

Analysing the various opinions expressed in legal doctrines on the issue of the rights of the lessor to contractually eliminate its liability towards the consumer – the lessee, the author offers the following opinion in the form of a proposal:
Even though the lessee chooses the item that is the leasing object and the supplier according to its own needs. Even though, this same person carries out discussion with the supplier regarding the utilisation of the relevant item and receives the item directly from the supplier, in many cases the lessee has no influence over the provisions in the supply agreement due to be signed, because the lessor does not harmonise the final edition of the supply agreement with the lessee. If the lessor has not discussed the final edition of the supply agreement with the lessee and has not received the agreement of the lessee, then all due care ought to be demanded of the lessor, i.e., the obligation to make sure that the supply agreement provides the lessor as the buyer with such rights that are characteristic of the consumer; in such a case, the elimination of the liability of the lessor and the transfer of the rights of claim against the supplier to the lessee shall be considered to be an unjust provision, provided that the lessee loses the protection that is characteristic of its consumer rights. However, if the final edition of the supply agreement has been discussed with the lessee and the lessee has given his consent to this, then the obligation of due care rests on the shoulders of the lessee. In such a case, the elimination of the liability of the lessor and the transfer of the rights of claim against the supplier to the lessee shall not be considered to be an unjust provision even if the lessee loses the protection that is characteristic of consumer rights.
The discussion of the terms and conditions of supply agreements with persons taking out leasing agreements in accordance with the procedure prescribed in the Consumer Rights Protection Law may in individual cases significantly hamper the job of the lessor. Leasing companies that enter into hundreds or even thousands of leasing agreements every month will be required to arrange or hire additional discussion and archive premises, as well as remunerate additional specialists. In the event of such an agreement, there will be a significant increase in the proportion of service functions in relation to financing functions and accordingly there will be an increase in the price of leasing services. Irrespective of the manifestly negative financial consequences, a situation should not be permitted to arise in which for cost-saving purposes, consumers-persons taking out a leasing agreement should find themselves in a situation where they are left bereft of rights and they are denied the protection that consumers typically enjoy.
In the event of growing support for the viewpoint that lessors can only be released from liability regarding the shortcomings of the subject of a leasing agreement provided that they have discussed the terms and conditions of supply agreements beforehand with the lessee, it is conceivable that, in many cases, the parties to a leasing agreement may follow the example of the United Kingdom where, for example, a purchase agreement (between the supplier and the lessee) is entered into at the same time as a reciprocal leasing agreement (between the lessor and the lessee). The only alternative to the United Kingdom's legal reality would be the normative prescription of an exception to the consumer rights regulation, i.e., to include the following compulsory legal norm in one of the normative regulation (for example, in the transactions section of the Commercial Law next to the regulation of leasing agreements): „If

the lessee is a consumer, the lessor shall receive all rights against the supplier, which the lessor would have if the lessor were a consumer. If the terms and conditions of the supply agreement provisions do not conform to normative regulation governing consumer rights, the consumer-lessee as the authorised person of the lessor is entitled to challenge the validity of the relevant condition of the supply agreement."

Section Two
Legal Consequences in Case the Lessee Brings an Action Against the Supplier Because of Defect of Property

At the beginning of this second section, the legal consequences are analysed in cases where shortcomings of the item that is the leasing object are discovered during the period in which the leasing agreement is valid and the leasing object is replaced with a new item following the receipt of the relevant request. The author concludes that in such cases, payment regarding use of the said item, in so far as it conforms to an increase in the remaining value of the item that is the leasing object shall be imposed on that party to the agreement which benefits from the increase in the remaining value of the item that is the leasing object, whereas the remainder shall be covered by that party which undertakes the risk of the insolvency of the supplier.
In cases in which a supply agreement is cancelled due to the lack of the item that is the leasing object, the rights and obligations of the parties to the relevant agreement shall be ascertained. Since it is not possible to receive a definitive answer from Latvian normative regulation and Civil Law to the question of the impact of the cancellation of the supply agreement on the power of the leasing agreement, German legal practice was initially evaluated along with the opinions of various legal scientists (for example, *O.Gebler*, *C.Müller*, *V.Emmerich, C.Reinking, B.Sefrin, F.Graf von Westphalen, M.Lieb, C.W.Canaris, M.Löbbe, A.Arnd, R.A.Bernstein, A.Schröder* etc.) on this matter.
Weighing up the aforementioned foreign legal practice, as well as foreign and international normative regulations in the context of the Latvian normative legislative regulation, in contrast to the practice of the German Supreme Court and in contrast to the viewpoints of legal scientists such as *O.Gebler* and *C.Müller, V.Emmerich, C.Reinking, B.Sefrin*, the author concludes that the cancellation of the supply agreement *eo ipso* results in the loss of the foundation of the transaction *ex tunc* retroactively starting from the day when the agreement was entered into, only in individual cases and according to specific pre-conditions.
Even though the author is broadly in agreement with the findings of several legal scientists (for example, those of *M.Lieb, C.W.Canaris, M.Löbbe, A.Arnd, R.A.Bernstein* and *A.Schröder)*, in contrast to the thoughts put forward by these legal scientists, that author concludes that legal consequences are to be differentiated in cases in which leasing agreements are qualified as hire, and in cases in which leasing agreements are qualified as purchase agreements.
If a leasing agreement is qualified as a purchase agreement and the leasing object does not have the status of an fungible property or the lessee expresses no desire to afford it such a status, in such cases the cancellation of the supply agreement shall be considered as the basis *eo ipso* for the loss of the foundation for the leasing agreement transaction *ex tunc* retroactively starting from the day on which the leasing agreement was entered into. The loss of the transaction foundation *ex tunc* is justified in that the lessee has the purpose of not only using the specific leasing object, but also acquiring it in ownership at the end of the leasing term. In cancelling the supply agreement, the purpose of the leasing agreement is irrevocably rendered unattainable.
If a leasing agreement is qualified as a purchase agreement and the leasing object is an fungible property or it receives the status of being such subject to a manifestation of will on the part of the lessee, in such cases the opportunity to adapt the leasing agreement to the relevant situation shall be assessed first of all (with the lessor transferring an equivalent item which has been

acknowledged as such to the lessee in place of the original leasing object) doing everything to retain the same level of power of the leasing agreement in question. Only then, if the delivery of an equivalent item is not possible for some reason, shall it be recognised that the basis for the leasing agreement transaction founders *ex tunc*.
If a leasing agreement is qualified as a hire agreement and the leasing object does not have the status of an fungible property or the lessee expresses no desire to afford it such a status, then in such a case the cancellation of a supply agreement cannot be regarded as the basis for the foundation of the leasing agreement transaction to founder *ex tunc*. The purpose of a leasing agreement, which is classifiable as a hire agreement is the use of the item that is the leasing object. During the period of time in which the lessee uses the item that is the leasing object successfully, the purpose of the leasing agreement is fulfilled. The purpose of the agreement is not attained only from that moment when the use of the leasing object is forbidden. Bearing in mind, the nonfungible property status of the leasing object, in this case it is most justifiable to apply the provisions of Part 2 of Article 2168 of the Civil Law. In other words, one can see that the right of the lessor has expired which gave the lessor ownership of the leasing object, as a result of which the leasing agreement concludes naturally. In such cases, leasing agreements do not conclude *ex tunc* and with the instigation of retroactive force, but rather *ex nunc* in regard to the future.
If a leasing agreement is qualified as a hire agreement and the leasing object is an fungible property or it receives the status of being such subject to a manifestation of will on the part of the lessee, in such cases the opportunity to adapt the leasing agreement to the relevant situation shall be assessed first of all (with the lessor transferring an equivalent item which has been acknowledged as such to the lessee in place of the original leasing object) doing everything to retain the same level of power of the leasing agreement in question. Only then, if the delivery of an equivalent item is not possible for some reason, shall it be recognised that the provisions of Part 2 of Article 2168 of the Civil Law shall be applied accordingly.

Section Three
Liability of the Lessor Regarding the Non-Delivery or Overdue Delivery of the Item that is the Leasing Object

Having acquainted himself with the rights doctrines, the author of the thesis concludes that some legal scientists (for example, *M.Lieb, H.J.Sonnenberger, K.Klomann* and *W.Goldmann*) believe that the elimination of the contractual liability of the lessor regarding the non-delivery of the leasing object and/or overdue delivery thereof should not be considered to be an unjust provision. At the same time, other legal scientists (for example, *C.T.Ebenroth, F.Graf von Westphalen, R.Sannwald, D.Reinicke/C.Tiedtke, R.A.Bernstein* and *N.Fehl*) favour the opposite viewpoint whereby the elimination of liability of the lessor places the lessee in a more disadvantageous situation and that the relevant provisions eliminating the liability of the lessor should be considered to be unjust. The Consumer Rights Protection Centre also concurs with the latter opinion.
Weighing up these mutually contradictory viewpoints, the author concludes that the viewpoint which holds that contractual provisions which eliminate the liability of the lessor regarding the performance of the supply should be considered as unjust is more justified (even when the rights to directly approach the supplier are transferred to the lessee by the lessor). This viewpoint is justified on the grounds that the lessee has no special means with the assistance of which to stimulate the relevant supplier to perform the delivery, whereas the relevant factor with which the lessor can stimulate the supplier is payment for the item that is the leasing object. As a professional, the lessor must act cautiously, carrying out payment regarding the leasing object only after the actual delivery of the item in question or protecting itself in another way. In the event of the non-delivery of the item that is the leasing object, the lessor

should not be issued with the right to request compensation for refinancing expenses from the lessee, provided that it is easier for the lessor as a professional to evaluate the capability (based on available financial information) of the supplier. Such a stance has another positive effect – the lessor is encouraged to act as scrupulously and wherever possible to observe the interests of the lessee.
Therefore, contractual provisions which provide for the elimination of the liability of the lessor regarding the performance of the supply of the item that is the leasing object, based on the provisions of Part Eight of Article 6 of the Consumer Rights Protection Law shall be recognised as being invalid following a request from the consumer-lessee.
The author of the thesis concludes that in exceptional circumstances, the elimination of the liability of the lessor regarding the performance of the supply of the item that is the leasing object shall be regarded as being justified provided that the lessee has requested the lessor to perform the partial (or full) payment of the purchase specified in the agreement to the supplier in advance i.e., prior to the receipt of the item that is the forthcoming leasing object.

Section Four
Bearing the Risk of Counter-Performance and That of the Item that is the Leasing Object

At the beginning of this section, the author evaluates the arguments with which legal scientists *D.Krause, C.T.Ebenroth, N.Berger, D.Reinicke/C.Tiedtke, A.Engel, R.Sannwald, B.Sefrin, W.Goldmann, F.Holdefer, H.J.Sonnenberger,* and *G.Stoppok* justify their belief that the imposition of the risk involving the item that is the leasing object and the price on the lessee is permissible are compiled and evaluated. Firstly, the imposition of the risk of counter-performance on the lessee is argued for using the entire body of commercial conditions and the financing function arising from this. Secondly – on the grounds that the lessee is closer to the item that is the leasing object than the lessor. Thirdly – due to the specific nature of a leasing agreement. Fourthly – due to the necessity to care for the condition of the item that is the leasing object. Fifthly – due to the opportunity to insure the item that is the leasing object. Sixthly– on the grounds of the size of the leasing payments. And finally – on the grounds of the benefit received following the expiry of the agreement term. Likewise, the author also considers the arguments with which legal scientist *J.Schmidt-Salzer* makes his case in support of the opposite viewpoint.
The author ascertains that in regard to leasing agreements, which are classifiable as purchase agreements, there are no grounds for questioning the conformity of the imposition of the risk regarding the item that is the leasing object on the lessee with the requirements of trust, because the relevant provision conforms to the provisions of Article 2023 of the Civil Law.
Furthermore, having analysed a whole range of arguments, the author of the thesis concludes that in regard to leasing agreements, which are classifiable as hire, the provisions of such leasing agreements which require the lessee to undertake the risk regarding the item that is the leasing object shall not be recognised as being unjust. Therefore, contrary to the viewpoint of *J.Schmidt-Salzer*, the author concludes that contractual provisions which require the lessee to undertake the risk regarding the item that is the leasing object are valid.
The only cases that are the exceptions to this rule and which result in contractual provisions which require the lessee to undertake the risk regarding the item that is the leasing object being recognised as unjust are as follows:
1) if in the event of the accidental destruction of the item that is the leasing object, the lessee has the obligation to also pay the lessor that share of profits due to the lessor,
2) if the lessor is grafting from the proceeds of a claim for insurance compensation or otherwise grafting in an unjust manner,

3) if a risk is imposed on the lessee regarding the period of time in which the leasing object is not in the possession of the lessee.

Section Five
Bearing the Risk of the Capability of the Supplier

Irrespective of whether or not leasing agreements are qualified as purchase or hire, in conformity with the provisions of the Civil Law, the risk involving the capability of the supplier is undertaken by the lessor. The Civil Law does not contain normative regulation that in any way impose the risk on the purchaser/lessee of the capability of that person from which the vendor /lessor has purchased the relevant item that is for sale/for lease.
The fact that the lessee freely chooses the supplier and the leasing object and that the lessor does not influence the relevant choice, may justify the situation whereby the liability of the lessor regarding shortcomings in an item is swapped for the rights issued to the lessee to approach the supplier directly with claims. However, this is insufficient to justify the imposition of the risk of the capability of the supplier on the lessee. Irrespective of the fact that, that the lessee finds itself in close contact with the supplier, that the lessee may sometimes be personally acquainted with the supplier, that the lessee initially discusses the terms and conditions of the supply agreement with the supplier and that the lessor only learns of the person of the supplier after receiving an application from the relevant lessee, the lessee is not in a possession to be able to better evaluate the capability of the supplier than a professional - lessor. Even though, the lessor and the lessee have restricted access to financial information about the supplier, nevertheless, the lessor as the party entering into the agreement has broader opportunities to request additional financial information required for the taking of a decision regarding the ratification of the capability of the supplier directly from the supplier. The lessee is not one of the contractual parties entering into the supply agreement. Accordingly, it has no grounds for requesting information from a third person – the supplier. It is vital that the release of the lessor from the risk regarding the capability of the supplier in no way instigates a shift in the legal balance of the transaction, because, in the event that the lessor does not have to make sure of the capability of the supplier, the person taking out the relevant leasing agreement would have to make sure of such which would require just as much if not more time and resources.
The imposition of the risk of the capability of the supplier on the lessee also cannot be justified on the grounds that the lessee would be placed in exactly the same legal condition as if the lessee had bought the leasing object directly from the supplier. Contractual relations exist between the lessor and supplier and not between the lessee and the supplier. Therefore, it is the lessor who should undertake the risk of the capability of its transaction partner (the supplier). From that perspective alone whereby the lessee has chosen the supplier, has chosen the leasing object and has carried out pre-contractual negotiations, there are grounds to conclude that the lessee has an obligation to undertake the risk of the capability of the supplier. Moreover, it is vital that the lessor enters into the supply agreements in its own interests, even though this occurs in conformity with the instructions of the lessee. Action in conformity with somebody else's instructions in its own interests does not in itself confer grounds for the lessor to be released from the risk of the capability of its partner in the agreement.
The fact that the risk involving the capability of the supplier has not been taken into account during the calculation of the leasing payments does not provide a base for an argument in favour of the imposition of the risk of the capability of the supplier on the lessee. The specific aspect of the size of leasing payments is not a question of rights but rather – a financial question. Moreover, taking into account its large number of clients, the lessor may be the beneficiary of more advantageous insurance terms when it comes to taking out insurance in regard to the risk involving the capability of the supplier.

Likewise, there is no basis for arguing that the lessee undertakes the risk related to the capability of the suppler willingly and that there is no basis for denying a lessee the right to undertake the relevant risk. In the majority of cases, the lessor has prepared the terms and conditions of a leasing agreement in its own interests and as the stronger party within the agreement elicits the agreement of the lessee regarding the relevant form of provisions without corrections or with only minor amendments of negligible significance.
Therefore, the author concludes that leasing agreement provisions which require the lessee to undertake the risk related to the capability of the supplier shall be regarded as being unjust provisions and following a request from the consumer-lessee shall be recognised as being invalid.

Section Six
Means of Legal Protection in the Event of the Non-Fulfilment of the Payment Obligation by the Consumer - Lessee

The author concludes that in the case of leasing agreements that are qualified as hire, the provision whereby in the event of a leasing payment being overdue, the lessor receives the right to request the immediate payment of all outstanding future leasing payments and to give notice of the termination of the relevant leasing agreement should be considered to be unjust and accordingly considered to be invalid following a request from the consumer-lessee. This is justified on the grounds that the relevant legal means of protection have opposite purposes, as well as because such a provision would be geared towards the unfair graft of the lessor (whereby the lessor receives compensation for use of the item that is the leasing object in regard to a period of time during which the item in question will not be used).
In regard to leasing agreements that are qualified as purchase agreements, the provision whereby in the event of a leasing payment being overdue, the lessor receives the right to request the immediate payment of all outstanding future leasing payments and to give notice of the termination of the relevant leasing agreement is considered by the author to be unjust. He justifies this on the grounds that it is not permissible in the event of notice being given vis-à-vis a purchase agreement for the vendor to request either the payment of the full purchase price or for the item sold into the ownership of the other party to the agreement, because in such a case, the vendor is illegally grafting at the expense of the purchaser.

Section Seven
The Rights of the Lessor in the Event of the Illegal Alienation of the Leasing Object

Taking into account, the current significance of this issue in legal practice, the author assesses whether or not a lessor is entitled to request the return of the leasing object from an good faith purchaser, if the lessee has illegally sequestrated the leasing object.
Assessing the provisions of Article 1065 of the Civil Law by employing the method of grammatical and teleological translation, the author concludes that Article 1065 of the Civil Law is only applicable to such transactions which are dominated by the purpose of an owner to gain profit as is the case with lending, depositing and collateral. Employing the method of historical translation, the author reaches the same result as with the methods of grammatical and teleological translation.
Since the willing trust described in Article 1065 of the Civil Law („the owner has willingly entrusted a movable object to another person") is related to trust which is not possible in transactions which are dominated by the desire on the part of the owner of the item in question to receive a profit and since the contractual relations of a leasing agreement are dominated by

the desire on the part of the lessor to gain a profit, the author concludes that Article 1065 of the Civil Law does not restrict the right of the lessor (the owner of the item in question) to raise a property claim against the good faith purchaser of the referred to item.

Principal Conclusions and Proposals of the Doctorate Thesis

The thesis considers one of the most contrary and variously discussed agreements in commercial transaction theory and practice – the leasing agreement, of which there are two types - financial leasing and operative leasing, each of which in turn may have various forms and modifications.

The author of the thesis concludes that in Latvian, foreign and international normative regulation, in both Latvian and foreign legal practice, as well as in legal doctrines, operative leasing agreements are mainly qualified as being hire. In carrying out an analysis of the contents of operative leasing agreements and assessing the justification to separate operative leasing agreements from hire, the author of the thesis has induced that operative leasing bears not only parallel resemblance to hire, but is in fact identical to the legal nucleus of hire.

There is no consistency in the qualification of financial leasing agreements in Latvian normative regulation. Financial leasing agreements are qualified both as loans/credits, as well as hire or purchases, or as deferred purchases. In Latvian legal practice, the viewpoint is represented which considers financial leasing agreements to be „hire purchase agreements with deferred payments", as well as that „(..) the obligations of leasing agreements are not directly regulated in the Civil Law; therefore the regulation of these obligations shall be prescribed in the agreement itself. Leasing agreements should not be considered as merely being loan agreements that prescribe the relations between a lender and borrower. Likewise, they are also not merely agreements regarding the use of the item in question that are regulated by hire, rental or lending agreements." This thesis suggests ways how to eradicate the inconsistencies among normative regulation and the stated conclusions may be used for the establishment of common legal practice in the area of the qualification of financial leasing agreements.

Casting a comparative eye upon the legal regulations in the US, United Kingdom, Germany, France, Italy (i.e., countries, in which there the greatest proportion of leasing transactions take place) and other countries, in the question of the civil law qualification of financial leasing agreements, it is possible to conclude that each nation's legislator /court has chosen to adopt a separate position to other countries in the issue regarding the civil law qualification of financial leasing agreements. So, for example, in conformity with the position adopted by the German Supreme court, in Germany financial leasing agreements are qualified as non-typical hire; in the US in conformity with UCC provisions, depending on the provisions included in them, financial leasing agreements are qualified either as a purchases, or alternatively as hires; in the United Kingdom there is a similar situation to that in the US; whilst Italian courts have recognised that financial leasing agreements are an independent form of agreement. Even though such major countries as Germany, France and the US have signed up to the UNIDROIT Convention (in which financial leasing agreements are qualified as an independent form of agreement), at national level the legislators of these countries and/or courts have systematically qualified financial leasing agreements in a radically different way to that of the UNIDROIT Convention regulation. The thesis analysis has ascertained that the task of the UNIDROIT Convention was not to find the most objectively suitable qualification for financial leasing agreements, but rather to establish such an international regulation that would be acceptable to as many countries as possible (if the authors of the UNIDROIT Convention were to assess the opportunity to be qualified leasing agreements as hire, a purchase or loan and to work the qualification deemed most suitable into the UNIDROIT convention, then a Convention with the relevant contents would at best be signed up to by only a few countries, and in the worst case– would only possess doctrinarian force).

Bearing in mind that among the world's major countries, there is no single prevailing viewpoint when it comes to the question of the qualification of financial leasing and that the carrying over of the UNIDROIT Convention regulation to the national regulation has been the subject of criticism in the majority of the world's major countries, the determination of the most suitable qualification for financial leasing agreements in Latvian private law should not under any circumstances be based on the 'blind' adoption of some other country's regulation. For this reason, the author of the thesis has carried out a fundamental analysis of the contents of financial leasing agreements, weighing up the grounds for the qualification of financial leasing agreements as loan agreements, authorisation agreements, hire, purchase agreements, mixed agreements or an independent form of agreement not regulated within the Civil Law, and has arrived at the finding indicated in the first thesis.
Taking into account, the qualification for financial leasing agreements most applicable in Latvian private law, the author of the thesis has assessed the fairness and validity of the provisions included in individual financial leasing agreements towards the consumer-lessee, the impact of the cancellation of a valid supply agreement on a financial leasing agreement, as well as the rights of the lessor, if the lessee has illegally sequestrated the leasing object transferred into its use.

Bearing the mind, the analysis performed within the doctorate thesis, the author of the thesis sets out the following conclusions and recommendations to be defended.

1. The belief that (which is also represented by among others: *Prof. Dr.iur. Dr.rer.publ. Dr.iur.h.c. M.Martinek* and *Prof. Dr.iur. F.Graf von Westphalen*), that financial leasing agreements should be considered to be a special form of agreement not regulated by the Civil Law – a two-sided *sui generis* agreement with the parties having independent rights and division of obligations does not withstand criticism.
Even though financial leasing agreements are identical to any of the forms of agreement regulated in the Civil Law, some of the financial leasing agreements used in practice are comparable to hire and a second section are comparable to purchases of physical items to such a degree that their qualification alongside one of relevant agreements regulated within the Civil Law is justifiable.
As this is justified within the doctorate thesis, such financial leasing agreements which provide for one of the following provisions should be recognised in Latvian private law as being purchase agreements related to physical items:
1) a lessee has an obligation at the end of the leasing agreement term to purchase the leasing object for a set price (if a promise from one party is in place regarding the transfer of the relevant item following payment of the agreed upon sum of money and a promise is in place from the other party to pay the agreed upon sum of money for the relevant item, i.e., the vital characteristics of a purchase agreement included in Article 2002 of the Civil Law);
2) a lessee is issued with the rights of choice to purchase the leasing object for a symbolic price at the end of the leasing term; wherein the payment in question shall be considered to be symbolic, provided that it is recognised that the lessee is regarded as a competent decision-making partner in a commercial sense who when it comes to using his or her rights of choice which should definitely be used after a certain period of time (if the lessee as a competent decision-making partner in a commercial sense should definitely use his or her rights of choice in regard to making a purchase, then it shall be considered, that a mutual agreement regarding a purchase was already in place between the parties at the moment when they entered into the purchase option agreement);
3) a lessee is issued with the rights of choice to extend leasing agreements at the end of the leasing term, until the leasing object loses its substance, for a symbolic price (because in

conformity with the provisions of the Civil Law, the hire of such an item, whose period of use loses its substance shall be considered as the sale of the relevant item);
4) a lessee is issued with the right of choice at the end of the leasing term to acquire the item that is the leasing object into his or her ownership for free or to continue to use the leasing object for free, until the leasing object loses its substance.
All other financial leasing agreements should be qualified as hire (or rental). As this is justified within the doctorate thesis, such a qualification does not preclude either the calculation procedure for specific leasing payments, nor the rejection of liability by the lessor regarding defects of the leasing object and regarding the supply thereof that is characteristic of financial leasing agreements, nor the non-guarantee of the usability of the relevant item on the part of the lessor, nor the imposition of the risk regarding the leasing object and counter-performance on the lessee, nor the specific purchasing process of the item that is the leasing object, nor the vital loss of attention regarding the leasing object during the leasing term, nor the rights of the lessee to receive some of the proceeds from the sale of the leasing object following the expiry of the leasing term, nor also the option issued to the lessee to purchase the leasing object for a price that is considered as being symbolic.

2. The thesis contains a critical assessment of the position taken by *Dr.iur. P.Plathe*, wherein he finds that financial leasing agreements, in which the provided for transfer of property rights vis-à-vis the leasing object to the lessee with a deferral provision or in which the mutual obligation of both parties provides for the purchase and sale of the relevant leasing object are qualified as purchase agreements related to the leasing object; whereas other financial leasing agreements are qualified as being subsequently non-transferable time-restricted purchases of rights that have the nature of rights. This position adopted by *Dr.iur. P.Plathe* is subject to criticism for two reasons.
Firstly, *Dr.iur. P.Plathe* provides for an overly narrow range of those financial leasing agreements that are qualified as purchases of a physical item. As this is justified within the doctorate thesis, also being qualified alongside the forms of financial leasing agreements referred to by *Dr.iur. P.Plathe* as purchases of a physical item are such financial leasing agreements which do not provide for the compulsory purchase of the item that is the leasing object by the lessee, but only provide the lessee with the right to select one of the following options:
1) a lessee is issued with the right of choice at the end of the leasing term to purchase the leasing object for a symbolic price;
2) a lessee is issued with the right of choice at the end of the leasing term to extend the leasing agreement, until the leasing object loses its substance for a symbolic price;
3) a lessee is issued with the right of choice at the end of the leasing term to acquire the leasing object as its property for free or to continue to use the leasing object for free, until the leasing object loses its substance.
Secondly, those financial leasing agreements that should be qualified as hire are unjustifiably qualified as being subsequently non-transferable time-restricted purchases of rights that have the nature of rights. Hire and rental provisions regarding the issue of rights of use of a compulsory-rights nature should be considered to be special normative regulation in regard to legislative provisions regarding a purchase. Accordingly purchase agreements regarding the purchase of such rights of use, which will only be created though an agreement should be recognised as hire or rental agreements in conformity with the normative regulation of the Civil Law.

3. The opinion of Prof. Dr.*Dr.h.c.mult. C.W.Canaris* that since the lessor essentially purchases the item that is the leasing object in the interests of the lessee, financial leasing agreements cannot be considered either as hire, nor also as purchase agreements, but should instead be

considered to be mixed agreements, in which elements of authorisation and loan agreements are dominant does not withstand criticism.
As this is justified within the doctorate thesis, the lessor purchases the leasing object only in its own interests. Accordingly, it should be recognised that even though there are elements of authorisation perceptible within the financial leasing agreement, nevertheless, these are only of „background significance" and these cannot be regarded as providing grounds to concur with the opinion of Prof. *Dr.Dr.h.c.mult. C.W.Canaris*.

4. Depending on their contents, the German Supreme Court classifies financial leasing agreements both as non-typical rent/hire, as well as purchase agreements of a physical item. However, the stance of the German Supreme Court cannot be regarded as being such which should be followed. In its judgement, dated April 5, 1978, and in subsequent judgements the German Supreme Court's finding that financial leasing agreements should be qualified as hire even when the lessee receives the right to purchase the leasing object (arguing such a stance on the grounds that, irrespective of the purchase option provided for, the agreement is mainly compatible with the field of hire rights and the rights in the future to use a purchase option do not change the existing legal situation, which is characterised by the transfer of the item into use and which is not characterised by an obligation to issue the ownership rights which are necessary for a purchase) is subject to criticism, because, like *Dr.iur. P.Plathe*, this provides for an overly narrow range of financial leasing agreements that are qualified as the purchase of a physical item.

5. In legal science, an opinion is represented that financial leasing provisions with which the liability of the lessor towards the lessee regarding shortcomings in the item subject to the lease agreement is eliminated should be considered to be unjust (this opinion is also represented among others by: Prof. *Dr.iur. V.Emmerich*). There is also an opposing opinion that the relevant provisions regarding the elimination of liability shall not be recognised as being unjust, provided that the lessor has transferred all of its rights to present direct claims to the supplier on the basis of a letter of authorisation or cession to the lessee (this opinion is also represented among others by: Prof. *Dr.iur. D.Reinicke*, Prof. *Dr.Dr.h.c.mult. C.W.Canaris*, Prof. *Dr.iur. C.Tiedtke* and Prof. *Dr.iur. M.Lieb*).
The author of the thesis does not concur with any of the opinions, believing that the transfer of all claim rights against the supplier to the lessee is desirable only in regard to the first of the two pre-conditions, in order that the contractual provision regarding the elimination of the relevant liability should not be recognised as being unjust and accordingly as invalid following a request from the consumer-lessee. In regard to the second pre-condition which provides for the complete elimination of all liability on the part of the lessor towards the consumer-lessee regarding shortcomings in the item that is the leasing object, it should be recognised that prior to the signing of the supply agreement, the lessor must have discussed the final edition of the supply agreement with the lessee and that it must have received the agreement of the lessee regarding the aforementioned final edition. This stance is justifiable on the basis that the rights which the lessor issues to the lessee (i.e., the rights of the lessor arising from the supply agreement) are narrower than those rights of the consumer-lessee (accordingly as purchaser or as lessee) that are prescribed in the Civil Law and the Consumer Rights Protection Law and that the restriction of the consumer's rights against the consumer's will is not permissible.

6. In legal science, there is an opinion which argues that financial leasing provisions which eliminate the liability of the lessor towards the lessee regarding the supply of the leasing object shall be considered to be unjust (this opinion is represented by among others: Prof. *Dr.iur. Dr.rer.pol. C.T.Ebenroth*, Prof. *Dr.iur. F.Graf von Westphalen*, Prof. *Dr.iur. D.Reinicke* and Prof. *Dr.iur. C.Tiedtke*). Likewise, there is an opinion which argues that the relevant provisions

regarding the elimination of liability are to be recognised as being unjust, provided that the lessor has transferred the right to request the supply of the leasing object directly from the supplier on the basis of a letter of authorisation or cession to the lessee (this opinion is also represented by among others: Prof. *Dr.iur. M.Lieb* and Prof. *Dr.Dr.hc H.J.Sonnenberger*).
The author of the thesis concurs with the opinion that financial leasing provisions which eliminate the liability of the lessor to the lessee regarding the supply of the leasing object shall be considered to be unjust (and accordingly shall be regarded as being invalid on the basis of a request from the consumer-lessee), and believes, that argumentation in favour of this opinion can be augmented with the following arguments.
1) A lessee has no special means with the assistance of which to stimulate the relevant supplier to perform the delivery, whereas the relevant factor with which the lessor can stimulate the supplier is payment for the item that is the leasing object.
2) As a professional, the lessor must act cautiously, carrying out payment regarding the leasing object only after the actual delivery of the item in question or protecting itself in another way.
3) Such a position has another positive effect – the lessor is encouraged to act as scrupulously and wherever possible to observe the interests of the lessee.

7. In conformity with the prevailing opinion in legal science, the imposition of leasing agreement provisions regarding the accidental destruction and damaging of the leasing object on a lessee is not recognised as being unjust. However, when it comes to the issue regarding the fairness of such provisions which impose a counter-performance risk on the lessee, there is discord among legal scientists. Legal scientists, Prof. *Dr.iur. Dr.rer.pol. C.T.Ebenroth*, Prof. *Dr.Dr.hc H.J.Sonnenberger*, Prof. *Dr.iur. D.Reinicke* and Prof. *Dr.iur. C.Tiedtke* believe that the imposition of a counter-performance risk on the lessee is not to be considered as being unfair. However, in contrast, Prof. *Dr.iur. F.Graf von Westphalen* and Prof. *Dr.iur. V.Emmerich* - believe that the imposition of a counter-performance risk on the lessee is to be considered as being unfair.
The author of the thesis acknowledges that in regard to financial leasing agreements, which are qualified as purchase agreements, the imposition of the risk regarding the accidental destruction and damaging of the leasing object, as well as the risk of counter-performance on the lessee arises from Article 2023 of the Civil Law and therefore in regard to the relevant financial leasing agreements, there is no necessity to evaluate the fairness of the imposition of such a risk on the lessee.
In regard to a financial leasing agreement, that is qualified as a hire agreement, the author of the thesis has evaluated a whole range of arguments which have been employed in legal doctrines to argue that the imposition of the relevant risk of on the lessee is just, and has justified why each of the arguments specified in the said legal doctrines does not withstand criticism. Even though, referred to individually, each of the arguments referred to in legal doctrines can be judged critically, when one considers all the evaluated arguments as a common body, it can be recognised that they provide sufficient justification for the imposition of the risk related to the item that is subject to the leasing agreement and counter-performance on a lessee. The author of the thesis concurs with the position represented by Prof. *Dr.iur. Dr.rer.pol. C.T.Ebenroth*, Prof. *Dr.Dr.hc H.J.Sonnenberger*, Prof. *Dr.iur. D.Reinicke* and Prof. *Dr.iur. C.Tiedtke*, provided that the following conditions are observed:
1) a lessee must not be subjected to an obligation to remunerate the share of profits due to the lessor in the event of the unexpected destruction of the leasing object;
2) a lessor may not graft from resources received by way of insurance compensation or by other unjust means;
3) a lessee must bear the related risks only in regard to the time during which the leasing object is located in the possession of the lessee.

8. The opinions of legal scientists also differ on the question regarding the fairness of the imposition of the supplier's performance capability on the lessee. The position that imposition of the relevant risk on the lessee can be regarded as being fair is supported by among others legal scientists such as Prof. *Dr.Dr.h.c.mult. C.W.Canaris*, Prof. *Dr.iur. M.Lieb* and *Dr.iur. J.Basedow*, whereas, the opposite opinion is held by a number of others including Prof. *Dr.iur. F.Graf von Westphalen*, Prof. *Dr.iur. C.Tiedtke* and Prof. *Dr.Dr.h.c. W.Flume*.
Evaluating the principal arguments with which legal scientists justify the fairness of imposing the relevant risk on a lessee, the author of the thesis arrives at the conclusion that all the arguments evaluated do not withstand criticism and concurs with the belief that the imposition of the supplier's performance capability on a lessee can be considered to be unjust. Accordingly, following a claim from the consumer-lessee the relevant unjust provisions can be recognised as being invalid.

9. As legal literature testifies, there is discord among legal scientists regarding how the cancellation of a supply agreement affects financial leasing agreements. One group (including among others Prof. *Dr.iur. F.Graf von Westphalen* and Prof. *Dr.iur. V.Emmerich*) believes that as a result of the cancellation of the supply agreement, a financial leasing agreement always loses the foundation of its related transaction retroactively starting from the day on which the leasing agreement was entered into. A second group (including among others Prof. *Dr.Dr.h.c.mult. C.W.Canaris* and Prof. *Dr.iur. M.Lieb*) believes that financial leasing agreements should be adapted to the new situation rather than being cancelled with retroactive force. Moreover, there is a third group that believes that financial leasing agreements may be cancelled from the moment that notice is give thereof (*ex nunc*) rather than with the power of renewal of the previous situation (*ex tunc*). Partly agreeing with each of the opinions and critically assessing the attribution of any opinion to all cases, the author of the thesis believes that legal consequences should be differentiated depending on whether or not the relevant financial leasing agreement is to be qualified as a hire agreement or as a purchase agreement, as well as depending on whether the leasing object has or does not have the status of an fungible property.
If a leasing agreement is qualified as a purchase agreement and the leasing object does not have the status of an fungible property or the lessee expresses no desire to afford it such a status, in such cases the cancellation of the supply agreement shall be considered as the basis *eo ipso* for the loss of the foundation for the leasing agreement transaction *ex tunc* retroactively starting from the day on which the leasing agreement was entered into. The loss of the transaction foundation *ex tunc* is justified in that the lessee has the purpose of not only using the specific leasing object, but also acquiring it in ownership at the end of the leasing term. In cancelling the supply agreement, the purpose of the leasing agreement is irrevocably rendered unattainable.
If a leasing agreement is qualified as a purchase agreement and the leasing object is an fungible property or it receives the status of being such subject to a manifestation of will on the part of the lessee, in such cases the opportunity to adapt the leasing agreement to the relevant situation shall be assessed first of all (with the lessor transferring an equivalent item which has been acknowledged as such to the lessee in place of the original leasing object) doing everything to retain the same level of power of the leasing agreement in question. Only then, if the delivery of an equivalent item is not possible for some reason, shall it be recognised that the basis for the leasing agreement transaction founders *ex tunc*.
If a leasing agreement is qualified as a hire agreement and the leasing object does not have the status of an fungible property or the lessee expresses no desire to afford it such a status, then in such a case the cancellation of a supply agreement cannot be regarded as the basis for the foundation of the leasing agreement transaction to founder *ex tunc*. The purpose of a leasing agreement, which is classifiable as a hire agreement is the use of the leasing object. During the

period of time in which the lessee uses the leasing object successfully, the purpose of the leasing agreement is fulfilled. The purpose of the agreement is not attained only from that moment when the use of the leasing object is prohibited. Bearing in mind, the nonfungible property status of the leasing object, in this case it is most justifiable to apply the provisions of Part 2 of Article 2168 of the Civil Law. In other words, one can see that the right of the lessor has expired which gave the lessor ownership of the leasing object, as a result of which the leasing agreement concludes naturally. In such cases, leasing agreements do not conclude *ex tunc* and with the instigation of retroactive force, but rather *ex nunc* in regard to the future.
If a leasing agreement is qualified as a hire agreement and the leasing object is an fungible property or it receives the status of being such subject to a manifestation of will on the part of the lessee, in such cases the opportunity to adapt the leasing agreement to the relevant situation shall be assessed first of all (with the lessor transferring an equivalent item which has been acknowledged as such to the lessee in place of the original leasing object) doing everything to retain the same level of power of the leasing agreement in question. Only then, if the delivery of an equivalent item is not possible for some reason, shall it be recognised that the provisions of Part 2 of Article 2168 of the Civil Law shall be applied accordingly.

10. Two differing opinions are represented in legal science in regard to the question of the fairness of such a contractual provision that provides for the right of the lessor to request the immediate payment of all future leasing payments from the lessee in the event of a payment from the latter party being overdue. Thus, for example, Prof. *Dr.iur. J.Quittnat* represents the opinion that the relevant provision can be considered to be just, whereas, for example, Prof. *Dr.Dr.hc H.J.Sonnenberger* and Prof. *Dr.iur. F.Graf von Westphalen* represent the opinion that the relevant provision is to be considered unjust.
Weighing up the various opinions, it should be recognised that the opinion in conformity with which, the relevant provision is considered to be just can be supported in regard to such financial leasing agreements that are qualified as purchases. The prevailing argumentation in legal science in favour of this opinion can be augmented with the contention that in the case of financial leasing agreements that are qualified as being purchase agreements, leasing payments shall also partially be conducted as payment for the item that is the leasing object. The lessor carries out its part of the transaction (the transfer of the relevant item to the lessee) in advance, therefore crediting the lessee. If the lessee significantly delays the performance of the relevant leasing payment, the lessor may lose interest in continuing the agreement to provide credit to the lessee. Moreover, in individual cases, the further provision of credit may be risky. In order to discipline the lessee and not to subject the lessor to unreasonable risk, it can be recognised that a provision providing for the issue of the right to a lessor to demand the immediate payment of all outstanding future payments is not to be considered as being unfair.
In regard to financial leasing agreements that are qualified as hire, it should be recognised that the relevant provision can be seen to be unjust in the event that the advance leasing payments requested are applicable to a period of time that is longer than 6 months. Such a stance can be justified in the case referred to in Article 2142 of the Civil Law whereby an hire is entered into for a year or more and payments for the said hire have to be performed every six months up front. If more than six months remain until the conclusion of the leasing agreement, then the following question arises – what is the justification for imposing an obligation upon a lessee to pay for the use of the item in question for such a long period in advance? Answering this question, we conclude that a request for the immediate payment of all future payments that are due would only be permissible in circumstances in which the lessor has no other legal means of protection in regard to the specific case in question. However, since the lessor also has access to other means of legal protection, a provision providing for the request for immediate payment of all future leasing payments leasing is clearly recognisable as being unjust. Therefore, in

regard to the consumer-lessee, following a claim from the lessee the relevant provision shall be recognised as being invalid.

10. Translating Article 1065 of the Civil Law using the method of grammatical, teleological and historical interpretation, the author of the thesis arrives at the conclusion that Article 1065 of the Civil Law is only applicable to cases in which a special relationship of trust exists between the owner of the relevant item and the recipient of that item that are not possible in cases which are dominated by a relationship where the onus is placed on good/service – money relations. Accordingly, in the event that the lessee has illegally sequestrated the item that is the leasing object and which does not belong to him or her, it shall be recognised, that in conformity with the Civil Law, the lessor is entitled to request the return of leasing object employing a property claim from any third person, including from an good faith purchaser.

11. Bearing in mind that the protection of any such good faith purchaser against a property claim vis-à-vis an item that he or she has acquired without remuneration is not provided for either by the majority of legislation in states belonging to the continental European legal system, nor by Anglo-Saxon law and, furthermore, bearing in mind that the regulation prescribed in Article 1065 of the Civil Law on this aspect does not conform to the 'theory of minor evil' observing the example set by the French Civil Code; Article 1065 of the Civil Law ought to be augmented with the provision whereby the owner of the leasing object should receive the right to buy out that subject from an good faith purchaser for that price for which the good faith purchaser in question has acquired the item in question.

Riga, December 20, 2006

Lauris Leja