ABSTRACT OF A DISSERTATION THESIS

The objective of this dissertation thesis is to define the current state of the legislation regulating the contract on lease of the enterprise, its risks and imperfections and to suggest, *de lege ferenda*, a possible method of their solution from the legislatory, jurisprudential and practical perspective.

To fulfil such objectives, I have applied the methods of analysis and interpretation of the existing legislation, a comparison with historical legislation and with international law, and have assessed the relevant jurisprudential arguments.

The structure of this dissertation thesis is divided into the following areas: definition of the enterprise, legal provisions relating to the conclusion, modification and termination of the contract on lease of the enterprise and, finally, special cases of application of the contract on lease of the enterprise, e.g. in connection with insolvency, execution or public contracts etc.

I consider the following legal conclusions as basic findings and results of this thesis:

The enterprise

1. The definition of the enterprise as a collective thing is not perfected in Czech law, because the absence of the legal regime of a collective thing causes interpretation problems in assessing whether the rights and legal relations relating to a collective thing may also be applied, without a special legislation, to each component of a collective thing. In this respect, it is possible to recommend, *de lege ferenda*, establishing a definition of the collective thing.

2. Under Czech laws, the enterprise means the existence of legal relations to the enterprise as a collective thing; however, this does not automatically mean the existence of a legal relationship to each thing comprising a part of the collective thing. For instance, attaching a mortgage to an enterprise does not automatically mean mortgaging the individual things that are its parts. The legislation concerning crystallization of rights to a collective thing that would automatically pass, subject to the occurrence of certain legal facts, to an

individual thing comprising a part thereof, is insufficient, perhaps with the exception of the enforcement of a judicial decision by sale of the enterprise.

3. The legislation does not determine whether the enterprise is to be considered as a movable or an immovable thing. In this respect, I would support the definition of the enterprise as a movable thing and the application of legislation concerning immovable things to the immovable parts of the enterprise.

4. From the terminological aspect, the enterprise may be considered an object and not a subject of legal relations. In this sense, it can be recommended to unify the legal system of the Czech Republic and to enshrine a definite jurisprudential opinion which would contribute to the objectification of the enterprise in the eyes of the general public. This does not apply the state-owned enterprise and the national enterprise; however, such enterprises represent certain exceptions that have been overruled by further historical development and that only confirm the relevant rule.

5. I do not fully share the concept contained in the proposed re-enactment of the Civil Code, which introduces the term "plant" in lieu of the "enterprise", because I believe that such legislation would result in further uncertainties in the perception of the enterprise.

6. I consider the debate about potential existence of more enterprises owned by a single subject as overcome by the passage of time and by the legal practice. It is fully sufficient to distinguish between the enterprise and its part, where both the enterprise and its part may become objects of legal relations.

7. The practical problem of differentiating between an enterprise or its part on the one hand and a mere set of assets on the other hands has been resolved by the case law of the Supreme Court of the Czech Republic, which defines the enterprise or its part as such set of assets that is capable of separate existence and with respect to which separate accounts can be kept. *De lege ferenda*, it is

necessary to consider enhancing the rights of third parties to the detriment of parties to such contract if its object is so incorrectly defined.

8. The existing legislation defining the enterprise as a separate thing is based historically on the Austrian "General Civil Code", which was based in turn on the French Code Napoleon. German or British law perceives the enterprise differently, i.e. not as a thing in the legal sense, but factually as a sum of individual assets.

Legislation concerning lease of the enterprise

9. I believe that, from the perspective of private international law, the issue that is decisive for selection of the governing law is the location of the enterprise. In case of a virtual enterprise (the internet), I believe that Czech law should be applied to an enterprise that participates actively in the Czech market, i.e. is available from the territory of the Czech Republic to customers residing in the Czech Republic and the operator of the enterprise takes active steps towards execution of transactions in the territory of the Czech Republic.

10. Section 488c of Act No. 513/1991 Coll., the Commercial Code (hereinafter the "**CoC**") may be considered as a deficiency of the legislation governing the lease of the enterprise, due to its vague stipulation of the principle of subsidiarity of a contract on lease of a thing concluded under Act No. 40/1964 Coll., the Civil Code (hereinafter the "**CC**") to the contract type represented by the contract on lease of the enterprise as defined in the CoC. In my opinion, this provision may be interpreted in a manner allowing to apply corroboratively to the lease of the enterprise all CC's provisions concerning the lease contract, unless such application is excluded by the nature of the matter. Thus, it is possible to recommend, *de lege ferenda*, to return to the principle of the former draft of this legislation and to define that the provisions of the CC concerning the lease contract shall apply corroboratively, with the exception of certain provisions that cannot be applied. Hence, the discussion should focus on the inapplicability of Sections 668, 669, 671(1), 676, 677, 678, 680(3) and 685 et seq. of the CC.

11. Another deficiency of the relevant legislation consists in the fact that the legislator refers in a non-mandatory manner (specifically in Section 488h and 488i CoC) to a mandatory regulation, whereby it admits a debate as to whether it is possible to deviate from this principle or not. Although I believe that it is impossible to deviate from the principles to which these provisions refer, it is possible to consider *de lege ferenda* whether to expressly designate these provisions as mandatory.

12. The lessee has to be an entrepreneur registered in the Commercial Register, who holds the relevant business authorization; otherwise the contract is null and void. The legislation does not define any clear consequence of the situation where the lessee loses such business authorizations or is deleted from the Commercial Register during the existence of the lease contract. I believe that such fact does not mean that the contract is null and void from the outset, since the lessee is not obliged, in my opinion, to operate the enterprise. However, if the non-operation of the enterprise could cause detriment to the enterprise, the lessor or the lessee should have the right to withdraw from the contract on the lease of the enterprise.

13. In the case that a party to the contract is a subject organized under the law of the Czech Republic, the mandatory provisions of part two of the CoC shall apply to the validity of the contract on lease of the enterprise, particularly Sections 67a, 193, 196a et seq. These provisions shall not apply to foreign persons.

14. A contract on lease of the enterprise may be considered as a concentration of competitors pursuant to the Act on Protection of Economic Competition and the Council Regulation No. 139/2004.

15. In case of lease of the enterprise, the lessee assumes receivables and payables, but not the payables to the state, namely tax, social security and health insurance payables, since such payables do not form a part of the enterprise but belong directly to the entrepreneur who has let the enterprise.

16. In case of the execution of a contract on lease of the enterprise, the employees have to be notified of such lease and this matter has to be discussed with them.

17. It is disputable whether the lessee or even the lessor may terminate the contract on lease of the enterprise in case of a change of the ownership of the enterprise. I believe, however, that neither the lessee nor the lessor can terminate the lease in case of change of the enterprise without threatening or prejudicing rights of third parties.

18. In case of transfer of rights and obligations under the contract on lease of the enterprise, i.e. a change of the lessee, it is necessary to comply with all legal procedures and particulars applying to the execution of a contract on lease of the enterprise.

19. I believe that it would be appropriate to limit automatic renewal of the contract on lease of the enterprise pursuant to Section 488f of the CoC for a period for which the contract on lease of the enterprise has been concluded to a period clearly defined by the law, as stipulated in the CC.

20. The fact that Section 488g (3) of the CoC does not stipulate the duty to conclude an agreement on consideration as a prerequisite for transfer of the ownership of things defined by kind from the lessee back to the lessor after the termination of the lease of the enterprise may be considered as the legislator's omission. It can be recommended that the legislator stipulates this duty in the law, as well as the rule that if no such special agreement has been concluded, such price is deemed to be the common price.

21. The lessor's liability for obligations of the leased enterprise vis-à-vis creditors is not limited, which is unusual in comparable foreign legislation. It has to be considered whether to limit the lessor's liability by the value of the leased enterprise.

Special cases of lease of the enterprise

22. Leasing of the enterprise is permissible, but would represent a combination of the contract on sale of the enterprise and the lease of the enterprise, which will be more difficult to apply in business practice.

23. The law does not prohibit the application of the contract on lease of the enterprise as a tool for the debtor's reorganization in case of insolvency. At the same time, it is possible to consider the lease of the enterprise as a temporary instrument used by the insolvency trustee in turning the estate into money. In case of declaration of insolvency over the assets of a party to the contract on lease of the enterprise, the trustee may rescind the contract on the lease of the enterprise. However, the other party may not exercise such right.

24. In case of execution of assets of the lessor under the contract on lease of the enterprise, carried out by sale of the enterprise, the contract on lease of the enterprise does not terminate automatically; however, an administrator of the enterprise shall be appointed to exercise the ownership rights to the enterprise in lieu of the lessor. Such administrator may dispose of the enterprise, of its parts and of its individual components.

25. A bank may conclude a contract on lease of the enterprise only with the consent of the CNB. In case of forced administration of a bank, such contract on lease of the enterprise may be concluded by the administrator with CNB's consent. To conclude the contract on lease of the enterprise also in case of insurance companies; however, in case of declaration of forced administration of the enterprise, the law does not allow to the administrator to conclude such lease.

26. The state as the lessor may conclude a contract on lease of a public enterprise through its organizational component (branch of the state). A state-owned or a national enterprise may not be a party of the contract on lease of the enterprise.

27. The contract on lease of the enterprise shall terminate by expropriation of the enterprise.

28. The contract on lease of the enterprise may become an instrument for the fulfilment of qualification prerequisites with regard to a tender for a public contract.

29. If a contract concluded under a tender for a public contract is a part of the enterprise, such contract may not pass to the lessee under the contract on lease of the enterprise, even with the contracting party's consent, with the exception of internal restructuring of a holding.

Accounting and tax aspects

30. As regards the accounting perspective, I consider as a deficiency the absence of an express provision allowing the lessee to amortize intangible assets owned by the lessor, although it is permitted by the interpretation of the law. *De lege ferenda*, it is possible to suggest the incorporation of a non-mandatory provision with such effect in the law.

31. If the assets are depreciated by the lessee, the lessee may not include in its expenses the entire rent amount but only its proportionate part.

32. From the VAT perspective, the contract on lease of the enterprise appears as a sum of partial lease and purchase contracts with VAT being applied to each relevant operation under applicable laws.

These conclusions represent suggestions for discussion, not a strict dogma. Arguments relating to each conclusion are parts of the dissertation thesis.