

The Roman Concept of *lex contractus*

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I. Introduction

The four agreements grouped together in the justinianic scheme as “consensual contracts” have had a profound impact upon the development of law in Western Europe. Apart from providing the doctrinal foundations for much of modern commercial law, this category, encompassing the contracts of sale, letting and hiring, partnership, and mandate, also stands as a fitting testament to the sophistication of classical Roman law. Only consensus between the parties was required by law to produce any one of these contracts. Consensus could take many forms. It could either be achieved by oral agreement or by written declarations. Ultimately, though, the parties had to agree on a number of fundamental issues. Although classical Roman law strictly did not require the parties to record their agreement in writing, Roman legal sources indicate that this practice was adopted in many cases.

The relationship between the written record of the agreement and the consensus at the heart of the consensual contracts is a complex one. On a basic level, the record may be said to be the product (or written manifestation) of the consensus. Since consensus was not an abstract concept, but applied to certain essential aspects of the contracts themselves (the *essentialia*), it need not be mentioned per se, but could be inferred from the record itself. Written documents clearly had some evidentiary value and the way in which they were constructed and sealed appears to have been significant,¹ but the Roman jurists’ conception of the

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¹ E. A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), Chapter 8.

“contract” – i.e. the (mostly) written record of the agreement between the parties – is quite different from modern dispositive notions of contract. For one thing, the recording of the details of a commercial transaction, if undertaken at all, occurred in a rather random fashion with no discernible pattern. These written accounts – the closest Roman law ever came to a modern notion of a contract – will be the subject of this article. The scope of this investigation will be limited to one of the four consensual contracts: letting and hiring (*locatio conductio*).² The reasons for choosing this contract over the remaining consensual contracts are twofold. First, in letting and hiring, the written record fulfilled a special purpose. It recorded a temporary state of affairs (use and enjoyment of the leased object for a certain period of time in return for an agreed amount of rent) which did not result in the disposal of the object (like sale). In this respect, it is dogmatically closer to two of the other consensual contracts, mandate and partnership, both of which also refer to temporary arrangements. Secondly, letting and hiring (mainly contained in D.19.2 and augmented by imperial legislation in C.4.65) is the only one of the consensual contracts in which a number of verbatim quotations from these written records occur which can be compared to other epigraphically attested documents.

The argument will be developed in three stages. First, the issue of terminology will be examined. This will be followed by a survey of indirect references to records mentioned in juristic discussions on letting and hiring. In the next section, direct references will be examined and comparisons will be drawn with other epigraphically attested documents. Lastly, the findings of this article will be summarized and conclusions will be drawn.

II. Terminology

Modern surveys of the technical vocabulary of Roman law, such as Adolf Berger's *Encyclopedic Dictionary of Roman Law*, indicate that the term commonly used to describe the agreement in private law was *lex contractus*. According to Berger, this term: “applied to all transactions between private individuals with regard to par-

² On the social significance of letting and hiring in the Roman Empire, see P. Ørsted, *From Henchir Mettich to the Albertini Tablets – A Study in the Economic and Social Significance of the Roman Lease System (locatio-conductio)*, in J. Carlsen, et al., eds., *Landuse [sic] in the Roman Empire* (Rome 1994), 115–25.

ticular provisions of a specific contract.”³ Although this statement is broadly correct insofar as the Roman law of contract is concerned, the term does not appear in juristic discussions of letting and hiring.⁴ Rather, the jurists employed two terms, *lex locationis* and *lex conductionis*. The motivation for using two terms is uniquely Roman. *Locatio conductio*, as the terminology suggests, was a bilateral contract that generated rights and duties for both the *locator* and *conductor*. The Roman jurists reinforced the bilateral nature of the contract in their discussions of the *lex*. Thus, when the juristic text concerned the *conductor* or the legal point was argued from that perspective, the term *lex conductionis* was used.⁵ Conversely, when the legal text concerned the *locator* or his/her legal position, the term *lex locationis* appeared.⁶ The use of two terms should not be taken to mean, however, that two separate accounts of the agreement existed. The consensus underlying the contract of letting and hiring seemingly only admitted the existence of a single (sometimes written) record of the agreement, but the jurists felt it necessary to emphasize the bilateral nature of letting and hiring by using two distinct terms.

The use of the term *lex* to describe the agreement between the parties is significant. It is a ubiquitous term capable of both specialist and general meanings in Roman law. A distinction is conventionally drawn between the use of the term *lex* in Roman public law (*lex publica*) and in private law (*lex privata/lex dicta*).⁷ This article will focus mainly on the latter category. Although the etymology of the word *lex* remains uncertain, it has been sug-

³ A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia 1953), s.v. *Lex contractus*. According to the older view, the term *lex* was used in a non-technical manner to refer both to the entire agreement and the individual clauses contained therein: see P. W. de Neeve, *Colonus: Private Farm-Tenancy in Roman Italy during the Republic and Early Principate* (Amsterdam 1984), 5. The more recent view (id., 5–6) is that written contracts were sometimes referred to using the term *forma*. This seems possible, but the textual evidence is too slight to draw any firm conclusions; see, e.g., G.3.147, J.3.24.3, D.19.2.21.1, D.24.3.7.3.

⁴ It occurs in a single text: C.4.65.19.

⁵ Compare, e.g., C.4.65.6, D.19.2.15.1, D.19.2.25.3, D.19.2.55.2, D.50.8.3.2.

⁶ Compare, e.g., D.17.2.77, D.19.2.9.3, D.19.2.61 pr.

⁷ For a detailed survey of the meaning of this term, see G. Wissowa and W. Kroll, eds., *Pauly's Real-Encyclopädie der classischen Altertumswissenschaft* 24 [neue Bearbeitung] (Stuttgart 1924), s.v. *Lex*. See more recently H. Cancik and H. Schneider, eds., *Der neue Pauly: Enzyklopädie der Antike*, 7 (Stuttgart/Weimar 1996–2002), s.v. *Lex*.

gested that it refers, in an abstract sense, to a “state of being.”⁸ More specifically, a *lex* has been defined as an agreement which binds one legal subject to the will of another.⁹ Whether the practice of using a *lex* had its origin in public law (the *leges censoriae* relating to *munera* or *ultra tributa*), need not detain us here. Suffice it to say that letting and hiring in Roman private law probably borrowed many of its conventions (and legal rules) from lease in public law.¹⁰ It is unlikely that the debate concerning the origins of the law of letting and hiring will ever be resolved, since no example of such a “censorial contract” has survived.

According to Roman law, the parties to a lease only had to reach agreement on three major issues (the object of the lease, the rent and how it would be paid, and the term of the contract).¹¹ This means that a lease could be created with relative ease and with virtually no formality. According to Ulpian’s famous statement in D.16.3.1.6, contracts *accipiunt legem ex conventione*.¹² The meaning of the term *conventio* is the crux of the statement.

⁸ Wissowa and Kroll (note 7), s.v. *Lex*.

⁹ See T. Mayer-Maly, *Locatio Conductio: Eine Untersuchung zum klassischen römischen Recht* (Munich/Vienna 1953), 107, and the discussion there.

¹⁰ See U. von Lübtow, “*Catos Leges Venditioni et Locationi Dictae*,” *Eos*, 48 (1956), 241–54. The origins of this contract remain controversial. T. Mommsen, “Die römischen Anfänge von Kauf und Miethe,” *ZSS (RA)*, 6 (1885), 260–75, argued that *locatio conductio* in Roman private law arose from the emulation by individuals of censorial lease contracts. Kaser, on the other hand, suggested that the origins of this contract may lie in *clientela*: M. Kaser, *Das altrömische Ius* (Göttingen 1949), 297. Free day-laborers were in a quasi-servile state of dependency in relation to their patron. As these workers became more socially independent, this relationship was transformed into a consensual contract founded on *bona fides*. Kaufmann provides a comprehensive summary of recent views on this matter: H. Kaufmann, *Die altrömische Miete* (Cologne 1964), §§ 1–5, 6–27. Watson, supporting Mommsen’s hypothesis, postulates that *locatio conductio operis* was probably the earliest form of letting and hiring in Roman private law to be distinguished, followed by *locatio conductio operarum* and *locatio conductio rei*: A. Watson, *The Contract of Mandate in Roman Law* (Oxford 1961), 9–10 (and also A. Watson, *The Law of Obligations in the Later Roman Republic* (Oxford 1965), 100–101). For an alternative view, see recently, R. Yaron, “Im Dickicht der *Locatio-Conductio*,” in W. Ernst and E. Jakab, *Usus Antiquus Juris Romani: Antikes Recht in lebenspraktischer Anwendung* (Berlin/Heidelberg 2005), 205–17.

¹¹ See B. W. Frier, *Landlords and Tenants in Imperial Rome* (Princeton 1980), 60–63, 141–42.

¹² *Ulpianus libro trigensimo ad edictum. Si convenit, ut in deposito et culpa praestetur, rata est conventio: contractus enim legem ex conventionem accipiunt.*

Ulpian used this phrase frequently, mostly in the sense of “agreement.”¹³ His statement should therefore be translated as “contracts receive their *lex* from agreement.” Although Ulpian’s comment was not made in the context of letting and hiring, there is nothing to suggest that it was restricted to a specific context. In fact, it could quite happily be applied to letting and hiring. Once the parties had reached agreement on the essentials, augmented by any pacts denoting deviations, it became a *lex*. In other words, the agreement between the parties concerning the essentials of the lease generated a “law” between the parties which had to be followed. Said “law” could be reduced to writing, but Roman law did not require this.

The fact that the lease obtained its “law” *ex conventione* has given rise to an interesting debate concerning the origin and function of this “law.” Since the practice of using a *lex* in private law leases was in all likelihood derived from public law leases where the censor assigned public works contracts to contractors who had succeeded in an auction process, it has been argued that the *lex* was in fact an expression of the control by the *locator* over the object (usually) by virtue of his ownership.¹⁴ Opponents of this view have pointed out that letting and hiring was a consensual contract and that agreement must have formed the basis of the *lex*.¹⁵ It seems plausible that a middle ground may be achieved by looking at the historical evolution of letting and hiring. Little is known about the origins and early history of letting and hiring. It may well be that the contract started out as something other than a consensual contract (e.g. a real contract) based loosely on a censorial model. Thus, in the early history of this contract, it may well be that the term *lex* encompassed a sense of control/domination. In time, however, letting and hiring came to be associated with consensus and this element became more important. Thus, the *lex* as an expression of dominance was replaced by one of agreement between the parties. It cannot be denied, for example, that vestiges of the earlier meaning of the term remained embedded in the law of lease. In classical Roman law, the *locator*, as the owner of the object of the lease (in most cases), was still in a stronger bargaining position than the *conductor* and

¹³ There are thirty-eight references to Ulpian using the word *conventio* in the Digest. See, e.g., D.18.1.2.1 for the primary sense in which Ulpian used this term.

¹⁴ See Mayer-Maly (note 9), 107, and the discussion there.

¹⁵ Id.

could potentially have manipulated the terms of the lease in his favor. It should not be forgotten, however, that the Roman law of letting and hiring also amply protected the interests of *conductores*.¹⁶

III. Indirect references

The terms *lex locationis/conductionis* appear in a number of legal texts collected by Justinian's commission to form D.19.2 and C.4.65, the two titles on letting and hiring. These texts, when read together, provide some (but not much) information about the scope and function of the *lex* in the context of letting and hiring. It is interesting to note that the term *lex conductionis* occurs more frequently than its counterpart. There may be a number of reasons for this, but on balance it seems most likely that it was merely an unintended consequence of the selection procedures of Justinian's commission. It seems highly unlikely that any other significant conclusion could be reached, e.g. that more legal texts would have been written from the perspective of the *conductor*, the more vulnerable party to the contract, whose circumstances would have generated more legal disputes than that of the *locator*.

Legal texts mentioning the *lex conductionis* provide the following information. First, the tenant was legally bound to observe the terms of the *lex*.¹⁷ The *lex* also provided the tenant with certain rights and, if these were infringed, provided grounds for the *actio conducti*, which in certain cases could give rise to the termination of the lease and in others to claims for *id quod interest*.¹⁸ The *lex* took on the appearance of a fixed entity for a specific contract only, but it was capable of legal interpretation.¹⁹ Said interpretation had to occur within certain parameters. Thus, for example, earlier contracts concerning the same object could not be used as evidence for interpreting the terms of later contracts.²⁰ Furthermore, acts by one or more landlords in contravention of

¹⁶ See Frier (note 11), Conclusion.

¹⁷ C.4.65.6.

¹⁸ See D.19.2.15.1 for the grounds on which the *actio conducti* could be instituted.

¹⁹ See D.19.2.13.10 and D.19.2.24 pr. In both these texts, the noun *lex* is used with the verb *comprehendere* (to understand), which suggests an examination and interpretation of the provisions of the contract by a jurist or someone learned in legal interpretation.

²⁰ D.50.8.2 pr.

the *lex* or of local custom could not be used as precedent to modify the *lex*.²¹

Since the term *lex locationis* occurs less frequently in juristic discussions on letting and hiring, a small number of conclusions can be drawn from the small number of texts on the matter. First, like the *conductor*, the *locator* was seemingly obliged to observe the terms of the *lex*, although none of the legal texts state this explicitly. Secondly, the *lex* could be written or unwritten.²² Finally, a large number of the texts on the *lex locationis* concern the interpretation of provisions included in a *lex*.²³ Although this may be significant in itself, it may well be that the reality has been distorted by the efforts of Justinian's compilers.

The static nature of the *lex* raises an important point. Since the *lex* was based on consensus between the parties – it generated a “law” between them – it had to remain fixed (though subject to interpretation) in order to satisfy the continuous requirement of consensus upon which the contract was founded. It may also have been that the notion of good faith underlying this type of agreement required the *lex* to remain static, as explained in a single text from Justinian's Institutes.²⁴

Two further points deserve mention. First, the issue of whether the *lex* had to be reduced to writing does not appear to have been at the forefront of juristic discussion on letting and hiring in the Digest. Most legal texts are ambiguous as to whether the contract under discussion had been written down and there is but a single text in which explicit mention is made of it.²⁵ It may well be asked how the terms of the *lex* would have been proven in a court of law if it had not been reduced to writing, but this question cannot be definitively answered given the paucity of evidence. In all probability *fides* played a dominant role in this case.²⁶ Furthermore, the legal texts do not explain the relation-

²¹ C.4.65.19.

²² See D.19.2.29 for an example of a written public law lease.

²³ See, e.g., D.19.2.24 pr., D.19.2.29, D.19.2.29.

²⁴ J.3.24.5. Compare von Lübtow (note 10), 422–41.

²⁵ C.4.65.9. It may well be that legal practice and legal theory diverged on this point. While the *lex* was commonly recorded in writing, Roman law did not place great legal prominence upon the written document and it therefore did not attract much juristic attention.

²⁶ Compare D.19.2.24 pr.: “nam fides bona exigit, ut arbitrium tale praestetur, quale viro bono convenit.” See also D.5.8.3.2: “explorata lege conductionis fides bona sequenda est.” and J.3.24.5: “si quid in lege praetermissum fuerit, id ex bono et aequo debet et, si quid in lege prae-

ship between the *lex* generated between the parties and the larger context of the law of letting and hiring. Assuming that the parties had consulted a jurist or someone knowledgeable about the law when drawing up their *lex*, it would have conformed to the legal rules governing the contract of letting and hiring. With that said, however, there is evidence that the *lex* between the parties did not have to embody the entire lease and that conditions implied *ex lege* could have applied to an individual lease without the parties explicitly mentioning them in their *lex*.²⁷

IV. Direct references

Direct references to the *lex locationis/conductionis* fall into two categories. On the one hand, Roman jurists cited provisions contained in written lease agreements when arguing a specific point (usually one of legal interpretation). These texts presumably provide a verbatim account of the wording of the provision.²⁸ On the other hand, a small category of epigraphically attested *leges* exist which provide a more extensive account of the provisions contained in a lease.²⁹ As far as the former category is concerned, it is highly unlikely that “standardized wording” or “contractual conventions” existed given the relative ease with which a lease could be created and the small number of *essentialia* that the parties needed to agree on in order to satisfy legal requirements. With that said, though, it is possible that the form/style of the wording used may provide some indication of the type of document examined by the jurists.³⁰

One of the earliest epigraphically attested *leges* is the contract for the building of a wall in the town of Puteoli from 105

termisum fuerit, id ex bono et aequo praestare.” Compare von Lübtow (note 10), 377–441.

²⁷ See P. J. du Plessis, “Between Theory and Practice: New Perspectives on the Roman Law of Letting and Hiring,” *Cambridge L.J.*, 65 (2006), 423–37.

²⁸ It should be mentioned, of course, that the Roman jurists probably would not have quoted the entire provision when discussing a specific point. Only the operative part which formed the basis of the legal conundrum would have been quoted.

²⁹ I have restricted my investigation to Roman leases from the pre-classical and classical period. Greco-Egyptian leases and specialized forms of agricultural tenancy appearing in the late Empire have been excluded from this discussion on the grounds that they are *sui generis*.

³⁰ See D. Daube, *Forms of Roman Legislation* (Oxford 1956), 1–4.

BC.³¹ Although this “document” falls within the ambit of public law, because it records a contract between the representative of a local town council and a private contractor, there are sufficient similarities with lease in private law to justify a comparison. This inscription is described as a *lex* and contains detailed information about the parties, the parameters and standards of construction, as well as the sureties to the agreement. It is a close approximation of the actual (oral or written) agreement between the parties, though probably not the contract itself.³² An interesting linguistic feature of this contract is the language used to describe the contractor’s contractual obligations. These were written in a formal style using a version of the future imperative (*-tol-tote*), though it is clear that the inscription was created after the completion of the building work.³³ Not only is this style reminiscent of the Twelve Tables, but it is also traditionally reserved for Roman legislation.³⁴ Thus, for example, the epigraphic record of the Pu-teoli building contract states:

Qui redemerit, praedes *dato* praediaque *subsignato* duumvirum arbitrato . . .³⁵

The contractor shall provide sureties and register their estates as security at the prerogative of the *Duumviri* . . .

It is possible (and indeed likely) that the formal style used in this “document” may be explained in terms of its public law nature and its form as an official inscription recording the completion of a municipal building project. The question remains, however, whether this style was limited to public law documents or

³¹ For a discussion of this contract, see P. J. du Plessis, “The Protection of the Contractor in Public Works Contracts in the Roman Republic and Early Empire,” *JLH*, 25 (2004), 287–314. I have purposely omitted the agrarian contracts mentioned by Cato in the mid-second century BC, since these demonstrate the law of letting and hiring in its infancy when sale and lease were not yet clearly separated. The linguistic style used in these contracts is also quite telling as it also mimics the language of Roman statutes. Compare von Lübtow (note 10) generally.

³² Du Plessis (note 31), 292.

³³ See Daube (note 30), Chapter 6, esp. 92–94.

³⁴ XII Tab. 1.1: “Si in ius vocat, *ito*, ni it, *antestamino*; igitur (im) *capito*.” M. Crawford, ed., *Roman Statutes*, 2 (London 1996), 578. On the language of the Twelve Tables, see id., 571, where it is noted that the future imperative was the standard form of expression. Compare von Lübtow (note 10), 244–45.

³⁵ C. G. Bruns and O. Gradenwitz, *Fontes Iuris Romani Antiqui*, 1, 7th ed. (Tübingen 1909), 374.

whether the same style of language was used in documents wholly governed by Roman private law. The answer to this question is seemingly provided by a text of the jurist, Alfenus Varus (first century BC). Digest 19.2.30.3 records a provision in a contract for the construction of a house. It is a private document with no discernible public law element.

Qui aedem faciendam locaverat, in lege dixerat: “quoad in opus lapidis opus erit, pro lapide et manupretio dominus redemptori in pedes singulos septem dabit.”

A man had leased out the building of a house on the following terms: “To the extent that stone is needed for this job, the owner will pay to the contractor seven per foot for his stone and remuneration.”

Before comparisons can be drawn, a few remarks on the provenance of this text are required. It is taken from Alfenus Varus' third book of his Digest epitomized by the third-century jurist, Paul. Given the secondhand nature of this reference, it may be argued that there is no way of verifying whether the wording of the text is that of Alfenus Varus himself or a paraphrase by Paul. With that said, however, there is no evidence to substantiate this assertion. The standard edition of the Digest by Mommsen-Krueger does not suggest alternative readings of the text, nor is there any other evidence that the style of wording was altered by Paul in this text. Thus, accepting that the wording in D.19.2.30.3 is indeed that of Alfenus Varus himself, a few conclusions may be ventured. First, it seems that the earlier public law “document” from Puteoli employed a formal style evocative of the language of legislation to describe the contractor's obligations, while the private law document cited by Alfenus Varus used everyday informal language. There may be a number of reasons for this. It could, for example, be argued that the stylistic difference between the wording of the Puteoli “document” and the quote from Alfenus represents a change in “fashion” in Roman contract drafting, but given the short period of time which elapsed between the creation of these two documents and the absence of any other evidence of a change in drafting style, this seems implausible.³⁶ Another piece

³⁶ A counter argument could of course be raised that Alfenus Varus was referring to a very old contract of lease which used outdated language. While this is a fair point, there is nothing in the context of the legal text to suggest that the jurist was concerned with a historical curiosity.

of evidence refuting this suggestion is a text by Ulpian from the third century AD in which the Puteoli style is still in evidence.³⁷ The only plausible explanation is that public law leases had to conform to certain stylistic requirements, while leases governed by Roman private law did not.

Another text by Alfenus Varus (D.19.2.29) refers to a contract between a state representative and a lessee of public land. The land in question comprised woodland and the contract regulated the tenant's permitted use of it:

In lege locationis scriptum erat: "redemptor silvam ne *caedito* neve *cingito* neve *deurito* neve quem cingere caedere urere *sinito*."

A lease clause stated: "The lessee of public land shall not fell nor bark nor burn the woodland, nor allow anyone to bark or fell or burn."

As with the previous text by Alfenus Varus, a few remarks on the provenance of this text is required. It is taken from the seventh book of Alfenus' Digest. Unlike the previous text, however, this section of Alfenus' work was not epitomized by Paul and it may therefore be stated with a degree of certainty that the wording and the style are those of the original author. As in the previous text, the use of formal language is noteworthy. As the context suggests, D.19.2.29 is concerned with a lease governed by public law.³⁸ Again, it seems that this written lease had to conform

³⁷ Compare D.19.2.11.1, discussed below. A similar counter argument could be raised that Ulpian may have been referring to an old contract which used archaic language. However, since the text in which Ulpian's statement occurs does not appear to be dealing with an antiquated rule of law, and since Roman law forbade the use of old contracts of lease to interpret new contracts concerning the same object of lease (see note 20), this seems implausible.

³⁸ The context of this contract is noteworthy. The ownership of woods is a matter not overtly discussed in juristic writing, but it seems that woods could be privately owned (e.g. D.41.2.3.14) or owned by the state (e.g. D.43.24.7.8). The primary reason (apart from the stylistic elements) why it is proposed that the context of D.19.2.29 is a lease governed by public law is the use of the word *redemptor*. This term had a technical meaning in public law contracts, while in contracts governed by private law, the term *conductor* was used more frequently: see S. D. Martin, *The Roman Jurists and the Organization of Private Building in the Late Republic and Early Empire* (Brussels 1989), 52 n.36. Compare D.19.2.30.3, quoted above, where the term is generally used in a contract governed by private law to mean builder/contractor: see Martin, 52–62.

stylistically to the language used for these types of documents. This is the only explanation which fully accounts for the use of the future imperative in this clause.

The next group of documents to record the terms of a contract in some detail is concerned with the letting and hiring of warehouses.³⁹ There are two types of documents in this group. First, there are those agreements which were wholly private. Prime examples are TPSulp 45 and 46 recording the lease between a *horrearius* and *conductor* relating to grain stalls.⁴⁰ Both of these documents are described in their margins as *chirographa* (documents written in the hand of the slaves acting on behalf of the parties). They contain statements covering all the *essentialia* required by law (the object of lease, the amount of rent and how it would be paid, and the term of lease – somewhat obliquely: until the loan had been repaid). With that said, it seems unlikely that these documents constituted the *lex* of the agreement. For one thing, they are never described as such. Moreover, they can only really be understood when read in conjunction with the epigraphically attested *leges horreorum*.⁴¹ Although these are not directly related to the *Sulpicii* tablets, they contain a number of legal rules central to the letting and hiring of warehouses. It seems reasonable to deduce that similar *leges* must have existed for the warehouses mentioned in the *Sulpicii* tablets. The *chirographa*, which only contained the bare *essentialia* necessary to render the lease legally valid, and the epigraphically attested *leges*, together constituted the *lex* governing the contract.⁴²

The style of language used in these documents yet again proves central to the main argument proposed in this article. The informal style found in private leases is visible in the two *chirographa* from the *Sulpicii* archive.

TPSulp 45, pag. 5, ll. 3–8. Diognetus C(aii) Novi Cypaeri servus scripsi iussu Cypaeri domini mei coram ipso me locasse Hesycho Ti(berii) Iuli Augusti l(iberti) Eueni ser(vo) horreum

³⁹ These documents have been comprehensively discussed in Du Plessis (note 27), 423–37.

⁴⁰ See G. Camodeca, *Tabulae Pompeianae Sulpiciorum (TPSulp.)*: *Edizione critica dell'archivio puteolano dei Sulpicii*, 2 (Rome 1999), 122, 125.

⁴¹ S. Riccobono, et al., eds., *Fontes Iuris Romani Anteiustiniani*, 3 (Florence 1943), 455–56, 457.

⁴² Du Plessis (note 27), 433–34.

duodecimum in horreis Bassianis publicis Puteolanorum mediis,

I, Diognetus, slave of Gaius Novius Cypaerus, have written with the authorization of my master Cypaerus and in his presence that I let to Hesychus, slave of Tiberius Iulius Evenus, freedman of Augustus, stall 12 on the middle floor of the Bassian Public Granaries of the Puteolans,

TPSulp 46, pag. 5, ll. 3–7. Nardus P(ublii) Anni Seleuci servus sc[ri]psi coram et iussu Sel[eu]ci domini mei, [q]uod is negaret se litteras scire, m[e] locasse C(aio) Sulpicio Fausto horreum vicensimum et sextum, quod est in praedis Domitiae L[e]pidae B[a]rbatianis superioribus,

I, Nardus, slave of Publius Sulpicius Seleucus, have written in the presence of and with the authorisation of my master Publius Annius Seleucus, because he says that he is illiterate, that I let to Gaius Sulpicius Faustus grain-stall 26, which is in the upper storeys of the Barbatians in the estates of Domitia Lepida,

These two documents were composed by the slave scribes of the respective contracting parties and, while it is clear that they were careful to establish the authority with which the transactions had been concluded for reasons of contractual liability, there is no evidence of a particular formal style being adopted.⁴³

The two epigraphic *leges* governing the letting and hiring of warehouses present more of a challenge. It has thus far been argued that leases governed by public law conformed to certain stylistic conventions (the use of the future imperative). However, the two epigraphically attested *leges* concerning the letting and hiring of warehouses do not appear to have used this formal style.

Quisquis in his horreis conductum habet, elocandi et [substituendi ius non habebit. Invectorum in haec horrea cu]stodia non praestabitur.⁴⁴

Whosoever has rented something in those granaries shall not have the right to sublet or to substitute. Custodial liability

⁴³ Compare generally J. A. Crook and J. G. Wolf, *Rechtsurkunden in Vulgärlatein aus den Jahren 37-39 N.Chr.* (Heidelberg 1989) on the language used in these tablets.

⁴⁴ *FIRA*, 3 (note 41), 455–56.

will not be assumed in respect of goods brought into this granary.

[*Quae in his horreis i]nvectora inla[ta importata erunt, horreario pig]nori erunt d[onec satis ei factum non sit aut pensi]o solvatur.*⁴⁵

Whichever goods brought into those granaries shall be pledged to the manager of the granary as long as a guarantee has not been given or the rent has not been paid.

The reason for this apparent aberration may in fact be related to the ubiquitous use of the term *lex*. The two inscriptions cited above – though described as *leges* – fulfilled a singular purpose.⁴⁶ Unlike the epigraphic inscription recording the completion of a building contract in Puteoli, these *leges* did not record the agreement between the owner of the warehouse and the primary tenant who rented the entire warehouse with a view to sublet spaces in it at a profit. Rather, these inscriptions were produced as a *result* of the contract between the owner of the warehouse and the primary tenant. These “charters” (for want of a better term) were designed to provide customers with information about their rights and duties when renting space within the warehouse and therefore seem to have operated largely in the private sphere (warehouse manager – clients). This may explain the everyday language used.

The final example of a contractual term explicitly mentioned in the course of a juristic discussion comes from a text by the jurist Ulpian (third century AD). Although the statement was made in the context of urban lease, it is impossible to establish the specific context in which it was made, since no *leges* from this area of the law of letting and hiring has been preserved:

D.19.2.11.1. Si hoc in locatione convenit “ignem ne habeto” et habuit, tenebitur etiam si fortuitus casus admisit incendium, quia non debuit ignem habere.

If the parties agreed in the lease “that he not have a fire” and he had one, he will be liable even if a fortuitous mishap allowed the conflagration to occur, because he should not have had a fire.

⁴⁵ *FIRA*, 3 (note 41), 457.

⁴⁶ Du Plessis (note 27), 433.

The use of the formal style suggests that Ulpian was referring to a contract of letting and hiring governed by public law. However, since no examples of these contracts have been preserved, it would be futile to speculate about the matter.⁴⁷

V. Conclusions

This article investigated the concept of *lex contractus* in one of the consensual contracts in Roman law. The aim of this investigation was to establish its nature and function within the context of the Roman law of contracts. The following conclusions were drawn. The Roman jurists used two terms, *lex locationis* and *lex conductionis* to refer to the consensus over the *essentialia* required by law for the lease to be valid. These two terms, seemingly referring to the same entity, were used to enforce the bilateral nature of the contract of lease. Indirect references to the *lex* in the context of juristic discussions of letting and hiring provided the following information. It showed that once the parties had agreed upon the essentials, the *lex* became a fixed entity that could not be altered, although legal interpretation of its provisions seems to have been permitted. This static nature of the *lex* was most probably necessitated by the continuing requirement of consensus underlying the contract of lease. Whether the *lex* had to be in writing remains unclear. Roman law certainly did not require it and, given the uncertain evidentiary value of written documents in the classical period, there is every reason to suspect that some leases were not reduced to writing. While this would have made issues of proof more complicated when a dispute arose, there is too little information to speculate as to how this legal conundrum would have been resolved. At most, it may be hypothesized that *fides* would have played a dominant role in the latter case. Direct references to the *lex* either through verbatim quotations taken from juristic discussions on letting and hiring or from epigraphically attested documents also provided new insights. They demon-

⁴⁷ Compare P. J. du Plessis, "Janus in the Roman Law of Urban Lease," *Historia*, 55 (2006), 48–63. It may well be that an arrangement similar to those evidenced in the letting of spaces within a warehouse also applied to tenement buildings. The tenant would have received a small chirograph setting out the basis of the contract between him and the manager of the tenement, but the detailed rules of law applicable to the tenement at large and governing all leases would have been displayed in an inscription of some sort. Unfortunately, no evidence in support of this has survived.

strated that, though the *lex* was a static entity, it need not be contained in a single “document.” It could be spread out over a number of “documents” (e.g. chirographs and inscriptions) as long as these sustained the consensus upon which the agreement was founded. This uniquely Roman perspective on the notion of the consensual contract is distinctly summed up in a statement by Gaius: “quia in huiusmodi rebus consensus magis quam scriptura aliqua aut solemnitas quaeritur.”⁴⁸

⁴⁸ Gaius Inst. Epit. 2.19.13.