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Non-fault Liability, *Force Majeure* and Losses in the Most Recent Legal Acts of the Supreme Court of the Russian Federation

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Liability is a monetary compensation for any loss incurred by another person in the strictest and most accurate sense of the word. Since the time of the Roman Empire, there has been a widespread principle that a person is obligated to reimburse another person for any loss of property, first, when he or she has caused such loss and, second, when such loss has occurred through his or her fault. Fault has become a measure of liability for damage suffered under a contract or any other injurious act beyond the scope of a contract. The contrary was equally true: if a loss was caused unintentionally or without neglect, it was incurred by the sufferer without any resulting legal effect. After all, people should deal with their woes themselves and bear the burden of their own risks, however heavy or fatal!

The technological and industrial evolution and the emergence of machines have necessitated adjustments to the origination of fault as a condition of liability because it appeared that any unforeseen industrial or transport accident with no perceived negligence on the part of the causer but with the resulting injuries or property losses did not require the causer to reimburse for those injuries or losses. A rule of presumption of fault was introduced, but it was not sufficient. Then, during the rapid development of economic relations in the 19th century, serious-minded law theorists raised their voice to say that the origination of fault should be eliminated as a condition for the mitigation of another person's sufferings and losses. Instead, they proposed the so-called "principle of submission" that was based on the following ethical maxim: "Let the causer be at no fault, the sufferer is even more at no fault." Despite that, the fight between the two fundamental theories has resulted in a compromise called "no-fault liability," i.e. liability for an unforeseen harm caused by a source of increased danger for business people.

There is a need to legislatively and doctrinally determine the actual meaning of fault. What form should it take? As carelessness inherent in an average person or as anything else? During the Soviet era, civilians tended to say, quite originally though, that fault as a legal concept could not be averaged but should be individualised and subjectified as far as possible. According to the theory that dominated in the USSR, fault is a mental attitude towards an action taken and its effects. That principle was immanent to the Soviet society since it allowed penetrating into the thoughts of every defaulter and finding out the differences, including the identity of a person: his or her educational level, the extent to which he or she could or could not be guided by some ideological preferences, etc. In other words, an intellectual element was to be taken into account.

This doctrine, which was certainly useful in criminal proceedings, subsequently appeared to be useless for civil law, and the civil law reform saw a return to the principle of conditionally objective fault that sounds

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as follows: a person should be found at fault unless he or she has exhibited the degree of care and caution he or she was expected to exhibit due to the nature of his or her obligation and the terms of the transaction to which he or she was a party and has done his or her best to duly meet that obligation. The Supreme Court's interpretation vivified the seemingly calmed-down polemics regarding fault-based liability and brought the principle of fault back into the sphere of legal relationship arising out of the loss caused by an infringement of trademark rights irrespective of the parties involved.

By operation of law, business entities bear no-fault liability for loss claims. The Supreme Court's rulings (e.g., No. 12651 dated 15 October 2015) say such no-fault liability can only be caused by an intent or negligence. That interpretation deviates from the underlying legislative principle and seems to constitute a new approach to extrapolating fault conditions to business people. That new approach is unsound, unlike the corporate fault-based liability which stems from the Constitutional Court's construction that no exercise of corporate rights constitutes a business activity.

Liability for an accident or unforeseen event irrespective of the prescribed degree of care expected to be exhibited by a debtor or harmdoer is closely related to the notion of *force majeure*, which is essentially an unforeseen circumstance that is extraordinary by its nature according to the applicable doctrine. The general rule is as follows: those persons bearing no-fault liability may not be held liable for any *force majeure* circumstances such as natural calamities, mass disorders, man-made disasters, etc.

There are different ways to define *force majeure*. Under the Russian law, *force majeure* exists if the following two criteria are met: the things that occur should be both extraordinary and unavoidable. However, the Russian law does not require such things to constitute an event but uses the term "circumstance" instead. This wording is of great practical importance as it increases the number of those potential situations where a default is caused by various manifestations of *force majeure*, including governmental actions.

The Supreme Commercial Court of the Russian Federation has updated the definition of *force majeure* and given it a doctrinal explanation. In its latest Review No. 7, the Supreme Court has also taken a new creative approach: if any *force majeure* circumstance occurs, the lender may withdraw from the contract due to the loss of interest (see Clause 9 of the relevant Supreme Court's Plenary Resolution). It might seem that the logic behind this new rule is understandable: what is the use of waiting for the cessation of a *force majeure* circumstance if the lender is no longer interested in meeting its contractual obligations and may release the debtor from its temporarily frozen obligations by a simple notice? But it's not all that simple. This formula is neither apt nor operating as it could entail chaos with any manifestation of *force majeure*. Why? Because the rule of *clausula rebus sic stantibus* applies to *force majeure* under a contract. This rule is expressed in Article 451 of the Russian Civil Code, which provides that a contract that is affected by any circumstances, including, of course, *force majeure*, may be terminated by a court concurrently with the determination of the other effects in this extraordinary event. Many contracts that usually establish mutual obligations are suspended from being performed due to some *force majeure* circumstances. There are no pure debtors or pure lenders under any contract as the parties always owe something to each other at every given time during their mutual performance. If a *force majeure* circumstance occurs and the relationships between the parties are somehow suspended, the debtor under a major obligation who is simultaneously a lender under a minor one that had almost been met by the time when such *force majeure* circumstance occurred, may withdraw from the contract and, thereby, terminate it. Therefore, this formula is dangerous, non-viable and, as previously said, threatens to paralyse property transactions as a result of the temporary effect of any *force majeure* events.

The Supreme Court has set the new unprecedented rule that any party should be released in advance from liability for any losses caused by negligence by referring to Article 401.4 (concerning the nullity of a release from liability for malicious harm) and Article 421.4 (concerning the right of the parties to make findings contrary to a discretionary rule) of the Russian Civil Code. By doing so, the Supreme Court ignored the principle prohibiting any contractual release from liability or waiver. This undoubted novelty

is quite debatable. It is unlikely that the legislators wanted to say that no contract may provide for a preliminary release from liability for any losses. In Clause 1 of the same Article, they only permitted the grounds for damage to be changed (such as inadvertence and/or intent as well as the existence or lack of fault). This is a striking example of the establishment of a new precept of law that is not contained in the Russian Civil Code and even contradicts it.