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Matters Relating to Improvement of Russian Civil Legislation on Losses

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The concept of liability is pivotal for any branch of legal regulation and for the law *per se*.

The legal scholars attending this Forum are certainly aware that the notion of jurisprudence came into being a long time ago. The Laws of the Twelve Tables came down to us from the bygone years of the Roman Empire. In Russia, we may recall the Law Books of Ivan III and Ivan the Terrible, the Statutes of Peter the Great, and the Civil Law Codes of Catherine II. First and foremost, all those law books called upon the liability of wrong-doers. The primary aim of the old regulatory rules was to take the edge off the motivation for personal revenge that provoked internecine feuds, disturbed proper administration and dismantled the state mechanism. Save for corporal punishment, the liability for personal insult or recusancy was imposed as a fine payable to the sufferers and their relatives or to the state treasury. Yet another and, perhaps, the most important task of imposing fines was the retribution for apostasy.

However, developing property relations and expanding trade coupled with rapidly advancing crafts and extensive building construction, particularly in the military sphere, brought to life another type of liability called "compensation of losses". The old legal tool found a new application as it began to deal with recovery of pecuniary losses and undertaking remedial actions.

Despite its importance and dominating position, the so-called "award for harm and losses" was only prescribed in mere three clauses of the general provisions and elsewhere in the casuistic statutes on sanctions for personal insult, such as the massive Volume X of the Code of Laws of the Russian Empire (consisting, all in all, of 2,334 articles). At the same time, it did not explain the term "losses". There was a theoretical mentioning of it as loss of property and things sued in tort but not recovered. But such division was known as early as in Roman law (*Damnum emergens et lucrum cessans*). It gave a strong impetus to development of the concept of losses, because the remedial function of compensation was understood not only as recovery of losses, but also as an award of expected profit.

A comprehensive description of losses was first presented in the new Civil Code which was adopted in 1994 to pave the way for the widescale national codification in Russia. A detailed explanation of losses was contained in just one article of the Code, i.e. Article 15 of Section I (General Provisions), which formulates as follows: "A person whose right is violated shall be entitled to demand full recovery of the losses inflicted upon him, unless recovery in a smaller amount is provided for by law or contract."

Then goes the classification. Losses are understood as those expenses which the victim made or will have to make to restore his violated right, as well as the loss of or damage to his property, and any lost revenues. The next paragraph says that lost profit may be a result of the unjust enrichment of the delinquent.

On 8 March 2015, Article 393 of the Civil Code asserting liability for losses due to failure to perform obligations was revised to include an additional clause providing for a comprehensive and universal

remedy to ensure full compensation of losses. It postulates that "any other remedy available to the creditor for infringement of his rights shall be without prejudice to him to demand a remedial action from the debtor to settle the losses."

The notion of the economic substance of losses is introduced to explain that full recovery means that the creditor shall be put in the position he or she would have been had the obligation been duly fulfilled. The preparatory actions are described and evaluated as the profit expected but not received, which is part of the losses suffered. The legal criterion of guilt is stipulated when awarding losses, and a reservation is made obviating the need to know the exact amount of such losses. One may think that the statutory framework, once described in great detail in such fundamental legislative act as the Civil Code, has been fully established and would require no further revision or restatement. And that the baton would now be passed to legal practitioners. However, the well-developed economic relationships and ever-changing standards call for new improvements.

1. The Russian legislation lacks a universal approach to the legal regulation of losses (*disertus est absentis*). The legal norms of "guilt" and its presumption, as well as the principles of credibility, proportionality and reasonableness of assessment of the amount of compensation to be awarded in satisfaction of the claim are stipulated in Chapter 25 of the Civil Code of the Russian Federation (General Provisions for Liability) last revised on 8 March 2015. No such provisions are included in Section I of the Civil Code, which gives occasion to speculate on different approaches to compensation of losses due to failure to perform obligations and other violations of the civil legal rights of the owner, right-holder etc. under Article 15 of the Civil Code. We believe that Article 15 should be complemented with the new statutory norms elaborating on the legal prerequisites for recovery of losses. The general principles should be uniform *ipso jure*.

2. In some cases, the legal provisions of the effective Russian civil laws relating to losses lack a systematic approach to their description and evaluation, as well as to explaining the preconditions for, and exemption from, the obligation to compensate, the reduction of the amount of recovered losses, and its correlation with any other consequences in civil tort. All these provisions are presented in Chapters 2, 25 and 60 and in Part IV of the Russian Civil Code. The lawmaker tried to override the existing imperfections of the legal regulations (*vacuum jus*) which fail to treat the relationships in question in a consistent manner, but it resulted, among other things, in the appearance of a triplicated definition of *vis major* in the Civil Code (Articles 202, 401 and 1250). Therefore, it would make sense to include the aforementioned provisions in Chapter 2 of the Civil Code immediately after the legal norms relating to the right to compensation of losses, their composition and amount.

3. One of the major functions of the civil law is to reinstate the property status (*integratio*) and grant protection of legitimate business expectations. Pursuant to Article 15(1) of the Russian Civil Code, no exclusion of liability in the form of compensation of losses shall be allowed. However, the amount of such liability may be reduced by law or contract. The widespread interpretation of Article 401(4) of the Civil Code expressly provides for elimination of guilt as a ground for liability, even due to gross negligence, by agreement of the parties. We believe that such interpretation is based on the abrogation of legal relationships (*interpretatio abrogans*). Article 15 of the Civil Code lays down the absolutely basic legal norms. Article 401(4) defines more specifically one of the forms of invalidity of such reservations presuming that any transaction may be challenged, which is a new principle set down in the Civil Code. It now says that "any preliminary agreement on eliminating or limiting the liability for an intentional violation of the obligation shall be null and void", but should be complemented with the words "or challengeable if due to a violation through negligence".

4. Unlawfulness (*actiones contra legem*) understood as the failure to abide by the applicable legal norms, whether they are provided for by the laws, habits and local usages of, or treaties with, any

other country, is the most frequent, but not essential, prerequisite for asserting liability for losses. Such prerequisites may appear as a result of accepted risk or stem directly from a legislative ruling. The logic of business regulation gave rise to contractual relations where liability is not dependent upon guilt or unlawfulness, but has a casual link with the amount of compensation for the losses of a business representative or service provider payable when its contactor, principal or customer has and enjoys the right to withdraw from the agreement (Articles 978(3), 782(2) etc. of the Russian Civil Code). The Supreme Court might adopt a generalised liability clause excluding unlawfulness by reference to *de lege lata*, which is well known to exist in the Russian Air Code providing for compensation for loss of luggage by the air carrier (Article 118(3)). Pursuant to Article 1064 of the Russian Civil Code, compensation for harm and even losses (see Article 1082) caused by lawful actions may be stipulated by law. But this norm is only contained in Chapter 59 of the Civil Code dealing with civil tort. It is necessary that Article 15 of the Civil Code should also be complemented with a similar clause reading as follows: "To the extent permitted by this Code, any losses resulting from lawful actions shall be compensated to the person whose right has been violated."

5. Controlling persons entrusted with formalised and actual administrative powers of varying importance shall be held liable *pro rata* to the extent of their guilt. A dedicated amendment must be introduced into Article 53.1(2) of the Russian Civil Code stipulating that the liability of culpable senior executives and decision makers controlling a business company in administration shall be guilt-based and conditional upon the losses suffered by such company and its failure to satisfy the creditors' claims, rather than upon the requirements to act "conscientiously" and "reasonably" (which may more likely be attributed to legal ethics) set forth in the current version of the Code, because the existing legal norm is inconsistent with the principle of guilt-based liability in non-business relations contemplated by Article 401(1) of the Civil Code.

6. The right of financial claim (financial *rerum*) is a universal tool fostering the healthy and dynamic development of property and trade relations. Due to the economic functions of money and the existing tendency towards its devaluation, full recovery should be ensured by judgment of *quod recuperet* in respect of the losses existing not only at the date of adjudication, but also at the anticipated date of enforcement. Explicit directives of the supreme judicial authorities are much needed here, but up till now we have not seen any adequate guidance on their part. Article 308.3 of the Russian Civil Code only provides for compensation for late enforcement of a judicial act, but says nothing of losses.

Some of the proposed amendments go back to the well-known conflict of the principles of guilt-based and no-guilt liability where compensation of losses plays a significant part. Responding to the industry growth the principle of causing was adopted in the USSR before the 1930s. Later, it was only applied to settle disputes arising from the harm caused by hazardous activities. In all other cases, *culpa* was the prerequisite for satisfaction of claims. To meet the needs of the developing economy, the legislators had to take a new turn to prescribe no-guilt liability in business property relationships. The concept of guilt was given a separate treatment to become a factor of the amount of pecuniary compensation in some specific cases provided by law, such as imposing penalties on controlling persons or compensating for moral damage or jointly caused harm. Being an objectifying notion, *culpa* must be recognised as an essential precondition for unlawfulness and further extension of liability for lawful actions, from liability in tort to direct liability by operation of Article 15 of the Russian Civil Code. At the same time, any prior release from guilt-based liability shall not be tolerated and such reservation must be enshrined in law. Moreover, it must be applied on a wider scale irrespectively of *culpa* when a person bears a certain risk or such risk is imposed on him. Thus, the proposed amendments have been influenced by the principle of causing and an increasing role of guilt in determining if the action is unlawful and assessing the amount of losses.

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