The East European tradition: application of boilerplate clauses under Russian law

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1 Introductory remarks

In line with the general topic of this book, the purpose of the present chapter is to ascertain to what extent different terms of a commercial contract based upon the concepts of Anglo-American law are compatible with Russian law, if the latter is applicable. This chapter focuses mainly on substantive law issues, leaving aside the issues of Russian private international law (PIL).[1]

Naturally, Russian law is influenced to a certain extent by the laws of other countries, Anglo-American law not being an exception. Contracts of finance lease, agency, franchise and entrusted management of property governed by the Civil Code of the Russian Federation (RCC) may be cited as examples. However, Russian legal rules dealing with such contracts are adapted to the continental law system, to which Russia belongs.

Another channel for such an influence is the international conventions in which Russia participates. The most notable example here is the 1980 United Nations (Vienna) Convention on Contracts for the International Sale of Goods ('CISG'). The impact of Anglo-American legal concepts can be traced in some provisions of the CISG. When the currently-in-force RCC was elaborated in the 1990s, the CISG was taken into account not only with regard to sales contracts, but also when drafting the general provisions of contracts.[2]

[1] The main body of PIL rules in Russia is found in Division VI (Articles 1186–1224) of the Civil Code of the Russian Federation (the RCC).

[2] See A. L. Makovskiy, 'The Influence of the 1980 Vienna Convention on the Development of Russian Law', in A.S. Komarov (ed.), *The Vienna Convention on Contracts for the International Sale of Goods. Practice of Application in Russia and Abroad* (Wolters Kluwer, 2007), pp. 123–131 (in Russian); M. I. Braginskiy, 'The 1980 Vienna Convention and the RCC', in M. G. Rozenberg (ed.), *The 1980 Vienna UN Convention*

Nevertheless, one has to admit that the degree of influence of Anglo-American legal concepts upon Russian law is rather limited and should not be overestimated.

The CISG applies to contracts for sale of goods between the parties whose places of business are in different states: (a) when the states are participants of it; or (b) when the rules of PIL lead to the application of the law of a state participating in the CISG (Article 1(1)). If Russian law is the applicable law by virtue of Article 1(1)(b), it entails the application of the CISG, which actually replaces the relevant provisions of the RCC, which could then be applied only subsidiarily. This holds true not only where the conflict of law rules point to the application of Russian law, but also where the parties agree to apply Russian law without expressly excluding the application of the CISG. Therefore, it should be borne in mind that Article 1(1)(b) of the CISG considerably widens the sphere of its application and respectively narrows the sphere of application of the relevant national law that is otherwise applicable, namely Russian law.[3]

The RCC has special provisions on the interpretation of a contract. According to Article 431, a court should first be guided by a literal meaning of a contract term, taking into account, if necessary, other terms of the contract and the sense of the whole contract. If the meaning of the contract term could not be thus established, then the real common will of the parties must be ascertained, taking into account the purpose of the contract and all associated circumstances.[4] However, Article 431 does not say what legal meaning should be attributed to the contract

on Contracts for the International Sale of Goods. The Ten Years of Application by Russia (Statut Publishing House, 2002), pp. 14–17 (in Russian).

[3] See M. G. Rozenberg, 'Application of the 1980 Vienna Convention in the Practice of the ICAC at the RF CCI', in A. S. Komarov (ed.), *International Commercial Arbitration. Modern Problems and Solutions* (Statut Publishing House, 2007), pp. 336–340 and the literature cited therein (in Russian). See also P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edn (Oxford University Press, 2005), pp. 15–40, 90–92.

[4] Article 431 of the RCC states:

> In the interpretation of the terms of a contract a court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of a contract, in case the term is not clear, shall be established by comparison with the other terms and the sense of the contract as a whole.
>
> If the rules contained in the first part of the present Article do not allow the determination of the content of the contract, the real common will of the parties must be ascertained, taking into account the purpose of the contract. In such a case all surrounding circumstances shall be taken into account, including negotiations and correspondence preceding the

term in situations where such a term is based upon the concepts of a foreign law. The problem here is to determine how the given term should be classified or qualified on the basis of the legal concepts or categories of the applicable law.

A similar issue arises in the sphere of PIL, where it is called the problem of characterisation and is known to be a fundamental problem. The core of the problem is that the terms used in a conflict-of-law rule may be understood quite differently from country to country, and a proper interpretation of the term becomes essential for the determination of the applicable law. The problem of characterisation is specifically addressed in some national laws[5] and there exists abundant literature on the subject.[6]

Once the applicable law is determined, the meaning and legal effect of a particular contractual term is to be established on the basis of the legal concepts or categories of the applicable law.[7] In contrast with the issue of characterisation in PIL, the problem of proper determination of the effect of contractual terms inspired by foreign law on the basis of Russian substantive law is not adequately studied in Russian doctrine. The existing literature on comparative law, specifically in Russia, does not help much. This literature focuses on a comparison between the legal concepts and rules of different countries, whereas in a given case the task is to determine how certain contractual terms are compatible with the national law in question. The fact that those contractual terms also find their basis in law (though a foreign one) does not overshadow the

> contract, the practice established in the mutual relations of the parties, the customs of commerce, and the subsequent conduct of the parties.

See Peter B. Maggs and Alexei N. Zhiltsov (eds. and translators into English), *The Civil Code of the Russian Federation*, parallel Russian and English texts (Norma Publishing House, 2003). Further, the translation of the RCC made by these authors is used.

[5] E.g., see Article 1187 of the RCC, 'Characterization of Legal Concepts in the Determination of the Applicable Law'. See, inter alia, L. Collins LJ, C. G. J. Morse, D. McClean, A. Briggs, J. Harry and C. McLachlan (eds.), *Dicey, Morris & Collins on the Conflict of Laws*, 14th edn, 2 vols. (Sweet & Maxwell, 2006), vol. I, pp. 37–52 and the literature cited therein.

[6] See, inter alia, Collins *et al.*, *Dicey, Morris & Collins*, vol. I, pp. 37–52 and the literature cited therein.

[7] This approach is widely shared by Russian scholars. See M. M. Boguslavskiy, *Private International Law*, 6th edn (Norma Publishing House, 2009), pp. 113–115 (in Russian); V. P. Zvekov, *Conflict of Laws in Private International Law* (Wolters Kluwer, 2007), pp. 180–190 (in Russian); and V. A. Kanashevskiy, *Foreign Economic Transactions: Substantive and Conflict of Laws Regulation* (Wolters Kluwer, 2008), pp. 165–166 (in Russian).

situation that here the task is to juxtapose the contractual terms (a category quite different from legislation) and the law.

The mere fact that certain contractual terms are based on foreign law concepts unknown to Russian law obviously does not mean that their legal force is not recognised *per se*. According to Article 6(1) of the RCC, if civil law relations 'are not directly regulated by legislation or agreement of the parties and there is no custom of commerce applicable to them, then civil legislation regulating similar relations (analogy of statute) shall be applied to such relations, if it does not contradict their nature'. Article 6(2) of the RCC provides further guidance. If it is impossible to resort to the analogy of statute, 'the rights and obligations of the parties shall be determined proceeding from the general principles and sense of civil legislation (analogy of law) and the requirements of good faith, reasonableness, and justice'. It should be added that the application of the analogy of statute or the analogy of law could be quite a difficult task from a practical point of view, with a result which is hard to foresee.

Under Article 1(2) of the RCC, the parties 'are free in the establishment of their rights and duties on the basis of contract and in determining any conditions of contract *not contradictory to legislation*' (emphasis added). According to Article 422(1), 'a contract must comply with rules obligatory for the parties established by a statute and other legal acts (imperative norms)'. Subject to those mandatory rules, 'the terms of the contract shall be determined at the discretion of the parties' (Article 421(4)).

Therefore, as a minimum test, contractual terms should not contradict the mandatory rules of Russian legislation. Russian law, judicial practice and doctrine do not recognise such a phenomenon as a self-regulatory contract being totally detached from the mandatory provisions of the applicable law.

Russian law imposes certain general restrictions aimed at a proper exercise of civil law rights. Those restrictions are laid down in Article 10 of the RCC.[8] It prohibits abuse of a legal right in any form. The concept of

[8] Article 10 of the RCC, entitled 'Limits of Exercise of Civil-Law Rights', runs as follows:

1. Actions of citizens and legal persons taken exclusively with the intention to cause harm to another person are not allowed, nor is abuse of a legal right allowed in other forms.
   Use of civil-law rights for the purpose of restricting competition is not allowed, nor is abuse of one's dominant position in the market.
2. In case of failure to observe the requirements provided by Paragraph 1 of the present Article, the court, commercial court, or arbitration tribunal may refuse the person protection of the rights belonging to him.

abuse of rights is rarely applied by Russian courts. The current legislation does not establish a formal general requirement to act in good faith, though it is set forth in certain specific instances.[9] In practice, a rather broad notion of the prohibition of abuse of a legal right somehow partly compensates for the relatively limited ambit of the good faith requirement.[10] The proposed reform of the Russian civil legislation envisages a considerable enlargement of the ambit of the good faith requirement as a general overriding principle applicable both when a contract is being negotiated and after its conclusion.[11]

The answer to the issues considered herein might depend upon a number of factors. The specific circumstances of a particular case are one of the most important factors of that sort. The degree of acquaintance of a particular law-applying body with the relevant foreign legal concepts or categories might also come into play.[12]

The foregoing general starting considerations are better understood when applied to particular contractual terms, which are dealt with below.

2 Some particular contract clauses[13]

2.1 Entire agreement

Similar clauses are frequently encountered in contracts entered into by Russian parties and normally do not create serious problems. The issue

3. In cases when a statute places protection of civil-law rights in dependence upon whether these rights were exercised reasonably and in good faith, the reasonableness of actions and the good faith of the participants in civil legal relations shall be presumed.

[9] E.g., according to Article 53(3) of the RCC, 'a person who, by virtue of a statute or the founding documents of a legal person, acts in its name must act in the interests of the legal person represented by him in good faith and reasonably'.

[10] See Informative Letter of the Presidium of the RF Supreme Arbitrazh Court, dated 25 November 2008, No. 127, entitled 'A Review of the Practice of Application by Arbitrazh Courts of Article 10 of the Civil Code of the Russian Federation'. Arbitrazh courts are specialised state commercial courts which, in spite of a misleading similarity of the name with commercial arbitration bodies, should not be confused with the latter. Informative letters of the Supreme Arbitrazh Court are regarded as a summary of good judicial practice and are normally followed by lower commercial courts.

[11] See *The Concept of Development of the Civil Legislation of the Russian Federation* (Statut Publishing House, 2009), pp. 30–31. The concept was adopted by the RF President on 13 October 2009 and is being implemented now.

[12] This, in turn, is linked with the frequency of dealing with international commercial transactions by such a body. The most experienced in the field in Russia is the International Commercial Arbitration Court ('ICAC') at the RF Chamber of Commerce and Industry ('CCI') with nearly eighty years of practice and a considerable case load.

[13] For the text of the clauses analysed here, see the introduction to Part 3 of this book.

that does arise is whether prior negotiations, representations, undertakings and agreements could still be taken into account when interpreting the contract irrespective of the express provision that they are superseded by the contract.

Article 431 of the RCC[14] does not exclude this possibility, namely when the literal meaning of contractual terms is not clear and there is a need to ascertain the real common will of the parties. According to the language of Article 431(2), in such a case, all surrounding circumstances should be taken into account, including, inter alia, negotiations and correspondence preceding the contract and the practice established in the mutual relations of the parties.

The wording of the contractual clause limits the possibility of relying upon prior negotiations, representations, undertakings and agreements. Yet the possibility to take them into account, in my view, is not completely ruled out. This might be true where they do not contradict the terms of the contract and help to establish the real common will of the parties, which would otherwise remain obscure. In other words, prior negotiations, representations, undertakings and agreements might be of relevance to the extent that they make it possible to ascertain the meaning of the terms of the existing contract. There may be no other way for a court to achieve a satisfactory result. However, much depends upon the circumstances of a particular case.

2.2 No waiver

The Anglo-American legal concept of a waiver is not recognised by Russian civil law.[15] From the point of view of Russian law, one could regard as superfluous the contractual provision that a failure by a party to exercise a right or remedy the party has under the contract does not constitute a waiver thereof. According to the general rule of Article 9(2) of the RCC, even a waiver by persons to exercise rights belonging to them should not entail the termination of those rights, unless otherwise stipulated by statute.

[14] Cited in note 4 above.

[15] This concept is embodied in Article 4 of the 1993 Russian Law on International Commercial Arbitration, which is completely identical to Article 4 of the UNCITRAL Model Law on International Commercial Arbitration. However, it covers a distinct and limited area of international commercial arbitration. It may be noted in general that the 1993 Russian Law closely follows the UNCITRAL model.

Thus, for example, even if a party exercises its right with a considerable delay, this usually does not lead to relinquishment of the right. The claim may be time-barred, but that is another matter.

2.3 No oral amendments

The clause stipulating that no amendment of the contract will take effect unless it is done in writing fully corresponds to Russian law. Article 162 (3) of the RCC contains a mandatory requirement that a foreign economic transaction should be made in writing. The violation of this requirement renders the transaction invalid, and such a transaction is void. To ensure the application of this rule, Article 1209(2) of the RCC provides that Russian law shall govern the form of a foreign economic transaction in which at least one of the parties is Russian.[16]

There is no legal definition of a foreign economic transaction. For practical purposes, it would be enough to say that international commercial contracts between Russian and foreign parties fall under this category.

The written-form requirement is equally applicable to any amendments and supplements to such contracts. This requirement is strictly followed by Russian state courts and arbitral tribunals sitting in Russia.[17]

2.4 Conditions

The concept of fundamental breach is embodied in Article 450(2) of the RCC. Fundamental breach of a contract by a party entitles the other party to rescind the contract. Under Russian law, the same remedy is also available to the aggrieved party in other cases, as provided by statute or contract.

The wording of the contractual clause may be different. It may be stipulated that certain obligations are regarded by the parties as fundamental and any breach thereof should amount to a fundamental breach of the contract. The contract may simply state that in the event of a breach of certain obligations by a party, the other party is entitled to

[16] Some eminent Russian scholars regard Articles 162(3) and 1209(2) of the RCC as overriding mandatory provisions with extra-territorial effect (see Boguslavskiy, *Private International Law*, pp. 131 and 298; Zvekov, *Conflict of Laws*, pp. 294–295; and others).

[17] See M .G. Rozenberg, *International Sale of Goods. Commentary to Legal Regulation and Practice of Dispute Resolution*, 3rd edn (Statut Publishing House, 2006), pp. 64–77 (in Russian).

terminate the contract. The effect would be the same as where a commercial contract provides for the possibility of rescinding the contract unilaterally, no matter how substantial the breach is. The freedom of the parties' will is respected, unless it otherwise follows from statute or the nature of the obligation (Article 310 of the RCC).

If, under the circumstances, a party attempts to rescind the contract despite such a remedy being manifestly disproportional to the consequences of the breach, the opposite party might rely in its defence upon the prohibition of abuse of a legal right set forth in Article 10 of the RCC (see above).

2.5 Liquidated damages

In Russian practice, contractual clauses providing that, upon a failure of performance by one party, that party is obliged to pay an agreed sum to the other party are very common. International commercial contracts concluded by Russian entities with foreign companies do not constitute an exception in this regard.[18] As is well known, the legal concept of agreed and liquidated damages in English law and American law is not identical to the legal concept of penalty in continental laws, including Russian law.

Irrespective of the existing differences, the concept of agreed and liquidated damages is more similar to the concept of penalty in Russian law than to any other concept of that law. Consequently, the relevant contractual clause would normally be interpreted as a penalty clause under Russian law. A penalty is defined in Article 330(1) of the RCC as 'a monetary sum determined by a statute or a contract that the debtor must pay to the creditor in case of non-performance or improper performance of an obligation, in particular in case of a delay in performance'. Like the position of English law and American law, it is further added that when claiming payment of a penalty, the creditor does not have a duty to prove that he or she sustained losses.

Another alternative is to qualify such a clause as a provision specifying the amount of *damages* to be paid in case of a breach of an obligation. Russian law does not prohibit the parties from reaching such an agreement. As stated in Article 15(1) of the RCC, an aggrieved person is

[18] Very often, such contracts made in two languages use different legal terms to designate the said sum: agreed and liquidated damages in English and penalty ('neustoika') in Russian, thus creating some additional uncertainty.

entitled to full compensation of the damages suffered, unless a statute or a contract provides for a lesser amount of compensation. However, under Russian law, damages should be proved. The author is of the opinion that, in contrast with a penalty clause, the use of the adjectives 'agreed and liquidated' before the term 'damages' is not sufficient to abolish the requirement to prove the damages (see Article 330(1) of the RCC cited above). Therefore, the qualification of the clause as the damage clause under Russian law would defeat one of the main purposes of the clause, i.e., to relieve the creditor of the obligation to prove damages, which may be quite a difficult task. That is why, in my view, the analysed alternative is not a proper option.

Under English law and American law, when a contractual clause provides for payment of a sum which is manifestly excessive and unreasonable, it is then regarded as a penalty and is unenforceable. As follows from the above, in Russian law, the term 'penalty' has a broader and more neutral meaning, and denotes the clause as such, irrespective of whether the sum due is grossly excessive or not. Under Russian law, the clause providing for payment of a disproportionate sum is not void. However, a court has the right to reduce the penalty if the sum subject to payment is clearly disproportionate to the consequences of violation of an obligation (Article 333 of the RCC). The court could also exercise this power where the respondent does not make such a request. Article 333 of the RCC is a very important rule aimed at safeguarding the principle of the compensatory nature of liability for violation of obligations.[19] This very principle is characteristic of English law and American law.

One of the most notable differences of the Russian law approach to such clauses is that, as a general rule, the actual sum of compensation is not limited to the agreed sum. According to Article 394(1) of the RCC: 'If a penalty is provided for non-performance or improper performance of an obligation, then losses shall be compensated in the part not covered by the penalty.' The parties to an international commercial contract may provide otherwise in their agreement. Does the use of the English terminology 'liquidated damages' exclude the possibility of claiming damages? The answer is linked to the two alternatives to qualifying the clause (see above). I am inclined to answer the question in the negative. It could be recommended to the parties to expressly provide in their contract that a

[19] See also Informative Letter of the Presidium of the RF Supreme Arbitrazh Court, dated 14 July 1997, No. 17, entitled 'A Review of the Practice of Application by Arbitrazh Courts of Article 333 of the Civil Code of the Russian Federation'.

claim for damages is ruled out, in order to achieve the same result as where English law or American law is applied.

2.6 Sole remedy

Russian law permits the inclusion of sole remedy clauses in commercial contracts (see, in particular, Articles 15, 394, 397, 397 and 400 of the RCC). Hence, such a contract could provide for the payment of a certain amount as the sole remedy in case of a breach. Even if the aggrieved party is able to prove that the breach has caused much more substantial damage than the agreed sum, the liability of the debtor would be limited to the agreed amount. As expressly stated in Article 394(1) of the RCC, a contract may provide that recovery only of a penalty but not of losses is allowed.

However, it should be borne in mind that 'an agreement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is void' (Article 401(4) of the RCC). This is a mandatory requirement applicable to all obligations. It should be added that Article 10 of the RCC, which prohibits the abuse of a legal right, might also be applicable if the clause is manifestly unfair.[20]

2.7 Subject to contract

It is often the case that prior to concluding the main contract, the parties sign certain documents aimed at facilitating the reaching of a final agreement. The name of such documents might be different (a letter of intent, a memorandum of understanding, a protocol of negotiations, etc.). When determining whether these documents are binding on the parties, it is not their title but the contents showing the parties' intent that is of primary importance.

Under Russian law, the parties are free to enter into a preliminary contract whereby they have, in the future, a duty to conclude the main contract on the terms provided for by the preliminary contract (Article 429 of the RCC). The preliminary contract creates legal obligations and entails liability in the event of its breach.

[20] See note 8 above. See also Kanashevskiy, *Foreign Economic Transactions*, p. 166; O. N. Sadikov, *Damages in the Civil Law of the Russian Federation* (Statut Publishing House, 2009), pp. 133–157 (in Russian).

Suppose that the parties executed an instrument specifying that the failure to reach a final agreement will not expose any of them to liability. What happens if one party never really intended to enter into a final agreement and used the negotiations only to prevent the other party from entering into a contract with a third party? Russian law does not have specific provisions in this regard. The well-known Russian scholars arrive at the conclusion that the liability in such a case could be based on the general rules of the law of torts (Articles 1064–1083 of the RCC). The aggrieved party might also rely upon Article 10 of the RCC, which prohibits the abuse of a legal right in any form.[21] As stated above, the future reform of the Russian civil legislation envisages the application of the principle of good faith to the relations of the parties at the precontractual stage (see Section 1 above).

2.8 Representations and warranties

It is impossible to find direct general legal equivalents in Russian law to the notions of representations and warranties in English law and American law. Still, in certain particular instances, some equivalents could be found. The most notable examples in this regard are Article 470, 'Guarantee of Quality of the Goods', and Article 722, 'Guarantee of Quality of the Work', of the RCC. Normally, clauses providing for representations and warranties are not found in domestic commercial contracts in Russia, one notable exclusion again being provisions concerning the guarantee of quality of goods and works.

The clauses analysed under this heading often vary considerably in substance. Sometimes they are formulated in such a way that one may even doubt whether they have any legal effect under Russian law at all. Not being in a position to examine each and every clause of this kind, the discussion here will be limited to a more general legal assessment.

The legal effect of the clauses in question depends upon whether they may be qualified as an obligation. The obligation may arise from a contract and from other grounds provided by the law (Articles 8(1)

[21] M. I. Braginskiy and V. V. Vitrianskiy, *Contract Law*, Book 1, 2nd edn (Statut Publishing House, 1999), pp. 229–239 (in Russian). See also A. N. Kucher, *Theory and Practice of the Pre-Contractual Stage: The Legal Aspects* (Statut Publishing House, 2005), pp. 29–31, 210–296 (in Russian). Article 10 is reproduced in note 8 above.

and 307 of the RCC). The substance and the language of the clause may count in order to determine the existence of the obligation.

Two situations should be distinguished further in case of a breach by a party of the representations and warranties having legal effect. First, when the contract remains valid, the aggrieved party is then entitled to damages and other available remedies (Articles 15, 309–310, 393–396 and 453(5) of the RCC). Secondly, when the contract is invalid, this generally entails restitution (Article 167)[22] and the application of the rules on unjust enrichment (Articles 1102–1109).

Two more articles of the RCC dealing with specific grounds of invalidity of a transaction are directly relevant: Article 178 on the invalidity of a transaction made under the influence of misapprehension;[23] and Article

[22] Article 167 of the RCC runs as follows:

1. An invalid transaction does not entail legal consequences other than those that are connected with its invalidity and is invalid from the time of its making.
2. In case of the invalidity of a transaction, each of the parties has the duty to return to the other everything received under the transaction and in case of the impossibility of returning what was received in kind (including when what was received consisted of the use of property, work done, or services provided) to compensate for its value in money, unless other consequences of the invalidity of the transaction are provided by a statute.
3. If from the content of a voidable transaction it follows that it may only be terminated for the future, the court, declaring the transaction invalid, shall terminate its effect for the future.

It should be pointed out that the RCC does not envisage the application of the law of torts in such cases. As a general rule, this code makes it possible to claim full compensation for harm from the tortfeasor.

[23] Article 178 of the RCC states:

1. A transaction made under the influence of a misapprehension having a substantial significance may be declared invalid by a court on suit of the party that acted under the influence of the misapprehension.

   A misapprehension has a substantial significance if it is with respect to the nature of the transaction or of the identity or other qualities of its subject that significantly reduce the possibility of using it for its purpose. A misapprehension concerning the motives of the transaction does not have a substantial significance.
2. If a transaction is declared invalid as made under the influence of a misapprehension, the rules provided by Paragraph 2 of Article 167 of the present Code shall be applied correspondingly.

In addition, the party on whose suit the transaction was declared invalid shall have the right to claim from the other party compensation for the actual damage caused to it if it proves that the misapprehension arose due to the fault of the other party. If this is not proved, the party, on whose suit the transaction was declared invalid, shall be obligated to compensate the other party on its demand for the actual damage caused to it, even if

179, which envisages in particular invalidity of a transaction made under the influence of fraud.[24] Under these articles, the aggrieved party may seek from the other party not only a restitution of everything received by the latter under the transaction, but also a recovery of actual damage. However, a recovery of lost profit is not allowed.

It is widely recognised in Russian legal literature that a misapprehension and a fraud may take place both in an active manner (i.e., by making misleading and false statements) and in a passive manner (i.e., by a failure to disclose certain facts).[25] In line with this approach, according to my analysis, even if a contractual list of representations and warranties does not provide some information, this in itself would not serve as a bar for a court to declare the transaction invalid due to being made under the influence of misapprehension or fraud. Thus, though the legislation does not expressly establish that the parties are obliged to inform each other about all relevant material facts concerning the conclusion of the contract, such a duty may be drawn from Articles 178 and 179 of the RCC.[26]

2.9 Force majeure *and hardship*

Russian law bears express provisions dealing with these legal categories (Articles 401(3),[27] 416, 417 and 451 of the RCC). *Force majeure* clauses

the misapprehension arose due to circumstances not depending upon the misapprehended party.

[24] Article 179 provides in the relevant parts for the following:

1. A transaction made under the influence of a fraud . . . may be declared invalid by a court on suit of the victim.
2. If a transaction is declared invalid by a court on one of the bases indicated in Paragraph 1 of the present Article, then the other party shall return to the victim everything it received under the transaction and, if it is impossible to return it in kind, its value in money shall be compensated. Property received under the transaction by the victim from the other party and also due to it in compensation for that transferred to the other party shall be transferred to the income of the Russian Federation. If it is impossible to transfer the property to the income of the state in kind, its value in money shall be taken. In addition the victim shall be compensated by the other party for the actual damage caused to him.

[25] See Braginskiy and Vitrianskiy, *Contract Law*, pp. 813–815; Kucher, *Theory and Practice of the Pre-Contractual Stage*, pp. 228–239, 244–246 and the literature cited therein.

[26] Kucher, *Theory and Practice of the Pre-Contractual Stage*, p. 235.

[27] Article 401(3) of the RCC states: 'Unless otherwise provided by a statute or the contract, a person who has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless he proves that proper performance became impossible as the result of *force majeure*,

are often inserted into commercial contracts signed by Russian companies. To the extent that the above provisions are of a non-mandatory character (actually most of them), parties could depart from them in their contracts. However, this does not mean that the contract clauses automatically become the only applicable regulation, but rather that they should be interpreted and applied within the framework of the governing law. The parties are free to establish in their contract an exhaustive list of *force majeure* circumstances, thus assuming liability if events not mentioned in the clause occur.

It may be added that if a contract makes reference to circumstances beyond the party's reasonable control that it could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have avoided or overcome, the effect of such circumstances comes very close to the CISG, in which Russia participates (see Section 1 above). Such a clause also corresponds in principle to the definition of *force majeure* in Article 401(3) of the RCC. Hence, such a clause would be unlikely to create practical difficulties.

When the parties provide that events beyond their control relieve them of liability, they agree upon less stringent requirements to be applied since, under Russian law, *force majeure* is defined as 'extraordinary circumstances unavoidable under the given conditions' (Article 401 (3) of the RCC). Such a provision could give rise to some questions. Much depends upon the wording of the particular clause. If a contractual provision is qualified as the *force majeure* clause, then the specific circumstances mentioned therein should meet the legal criteria of *force majeure*.[28]

As a general legal rule, a person bears liability in the event of fault (intent or negligence) unless a statute or contract provides other grounds of liability (Article 401(1) of the RCC). In commercial relations, parties bear liability irrespective of their fault and are relieved of liability in the event of *force majeure* (Article 401(3)). This is an important exclusion from the above general rule. Since the above rule is of non-mandatory nature, the parties could provide in their contracts for liability in case of fault. If a contractual clause provides that events beyond the control of

i.e., extraordinary circumstances unavoidable under the given conditions. Such circumstances do not include, in particular, violation of obligations by contract partners of the debtor, absence on the market of goods necessary for performance, nor the debtor's lack of the necessary monetary assets.'

[28] See Rozenberg, *International Sale of Goods*, pp. 341–346; Kanashevskiy, *Foreign Economic Transactions*, pp. 169–173.

one party relieve it of liability, such a clause could be interpreted as an agreement on liability in case of fault. Then a party who violated an obligation must prove an absence of fault to be relieved of liability.[29]

Russian law allows transactions made on a condition (Article 157 of the RCC). According to Article 157(2): 'A transaction shall be considered made on a condition subsequent, if the parties have placed the termination of rights and duties in dependence upon a circumstance with respect to which it is unknown whether it will occur or not occur.' It could be argued that a certain circumstance not meeting the requirements of *force majeure* is to be regarded in appropriate instances as a condition subsequent. The legal consequence of an occurrence of such a circumstance is the termination of the transaction.

To sum up, the mere fact that a specific circumstance does not meet the criteria of *force majeure* does not necessarily mean that an occurrence of such a circumstance would not relieve the party from liability, as other concepts might turn out to be applicable.

[29] 'A person is recognized as not at fault, if with the degree of care and caution that was required of him by the nature of the obligation and the conditions of commerce, he has taken all measures for the proper performance of the obligation' (Article 401(1), the second passage).