Agreements on Release of Contractual Liability of Entrepreneurs in Russia and China

Svetlana Zimneva,

Tyumen State University (Tyumen, Russian Federation)

Xiao He,

Shanghai University of Political Science and Law (Shanghai, China)

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Abstract. This article is devoted to a comparative analysis of the provisions of the civil codes of the Russian Federation and the People's Republic of China regulating the conclusion of agreements on the release or limitation of civil liability. In the context of active trade and economic cooperation between Russia and China, the issues of proper fulfillment of contractual obligations by each of these partners are placed at the forefront of the negotiations. However, the parties may, by means of an agreement between them, provide for cases of exemption from liability in order to minimize their risks from entrepreneurial activity. The authors of this article explore the legal nature and conditions for the conclusion of such agreements, as well as examine the essence of agreements on the release or limitation of liability for an intentional breach of obligation or as a result of gross negligence. A comparative analysis of the provisions of Russian and Chinese civil law leads the authors to conclude that there is a significant similarity in the legal regulation of agreements on exemption from liability for breach of contractual obligations due to the influence of European civil law In addition, the limits of establishing contractual conditions regarding limitations and exemption from liability in accordance with the principle of freedom of contract are examined. Furthermore, the article discusses the recent changes and modifications to the civil laws of Russia and China. These improvements can be used by business partners of the Russian Federation and the People's Republic of China who are engaged in trade and economic cooperation with these countries when concluding and executing agreements. The results of this study can also be used to study the problems surrounding exemptions from civil liability in contractual obligations in order to further improve the legislation.

Keywords: exemption from liability; exclusion clauses; freedom of contract; breach of contract; fault; Russia; China.

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Introduction

In the modern world, citizens and organizations involved in entrepreneurial endeavors face a multitude of challenging situations, such as financial crises, international sanctions, pandemics and other uncertainties that cause doubts about the future. This causes difficulties in the execution of normal business activities, prompting entrepreneurs around the world to include provisions in agreements that limit or exempt them from liability for a breach of obligations. Put simply, with the help of such agreements, one of the parties tries to limit or eliminate its liability in the event of a breach of contractual obligations. On the one hand, such agreements serve to adequately allocate risks between the parties to the contract and thereby contribute to the reduction of procedural costs by establishing the amount of responsibility each party bears in the event of a breach in advance in the contract. On the other hand, such reservations are also fraught with socially harmful consequences since they can be used by the stronger party to exclude their responsibility to the weaker party, as a result of which the latter is left without any legal remedies.

In the legal systems of foreign states, there is also the possibility of formulating appropriate contractual terms, which in Anglo-American law are called exclusion clauses. These exception clauses are provisions in a contract specifically designed to exclude or limit the liability of the parties. For example, the principles of international commercial contracts (UNIDROIT Principles, 2016) also contain provisions on

exception clauses (Art. 7.1.6).[1] In Russia, these agreements (reservations) are expressly provided for by the Civil Code of the Russian Federation[2] (hereinafter the Civil Code of the Russian Federation). However, the nullity of a previously concluded agreement regarding the elimination or limitation of liability for an intentional breach of an obligation has already been established (item 4 of Art. 401 of the Civil Code of the Russian Federation).

It should be noted that the agreements (reservations) in question are used not only in domestic practice, but also in international trade practice.

Mutual trade between the Russian Federation and the People's Republic of China, which are members of such interstate associations as the BRICS and the Shanghai Cooperation Organisation, is increasing every year. In the first three months of 2023, trade between Russia and China increased by 38.7 percent (compared to the same period in 2022) and amounted to $53.84 billion.[3] Thus, as indicated by the available data, the number of international agreements concluded between countries is clearly increasing every year. In the future, an important task is to harmonize and unify the civil legislation of Russia and China.[4]

Chinese civil law has undergone major reforms in recent years. The new Civil Code of China adopted in May 2020,[5] includes the Book on Contract Law, which has led to significant changes in this important area of law. The Chinese Civil Code, like the Russian Civil Code, contains provisions for the invalidity of certain indemnity agreements. However, the norms enshrined in these codes on this issue only partly coincide with one another, with many differences between them. The foregoing only increases the relevance of a comparative legal study of the legislation of Russia and China on agreements that aim to eliminate or limit liability for breach of obligations.

The proposed scientific study will provide a detailed overview of the provisions of civil law that govern agreements between entrepreneurs regarding exemption from contractual liability. The Civil Codes of Russia and China are taken as the normative basis of the study. The purpose of this study is to conduct a comparative analysis of the civil legislation of Russia and China on issues related to the conclusion of

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1 Principles of International Commercial Contracts, UNIDROIT (2016) (June 2, 2024), available at https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Russian-bl.pdf.

2 Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. // Собрание законодательства РФ. 1994. № 32. Ст. 3301 [Civil Code of the Russian Federation (Part One) of 30 November 1994, Collection of Legislation of the Russian Federation, 1994, No. 32, Art. 3301].

3 Товарооборот России и Китая вырос на 38,7 процента // РИА Новости. 13 апреля 2023 г. [*The Trade Turnover Between Russia and China Increased by 38.7 Percent*, RIA News, 13 April 2023] (June 2, 2024), available at https://ria.ru/20230413/tovarooborot-1864949487.html.

4 Sergey Marochkin & Yury Bezborodov (eds.), *The Shanghai Cooperation Organization: Exploring New Horizons* 262 (2022).

5 中国民法典 [Civil Code of China] (June 2, 2024), available at https://www.chinajusticeobserver.com/law/topics/civil-code.

agreements on the release or limitation of liability for a breach of obligations in business relations in order to make proposals for further improvements to the legal enforcement of these laws as well as for the effective application of provisions on exemption from liability in commercial relations.

To this end, this article is organized as follows: the first section examines the essence of agreements on the elimination or limitation of liability under the legislation of the Russian Federation based on an analysis of civil law, scientific doctrine and materials of law enforcement practice. The next section provides an analytical review of the provisions within Chinese civil law concerning the inclusion of an exclusion clause in a contract and the views of scholars and materials of Chinese jurisprudence on the application of exclusion clauses that aim to exempt parties from contractual liability are considered. The third section contains a comparative legal analysis of agreements on the release or limitation of liability in the civil laws of Russia and China. The final section presents the main conclusions and proposals of the authors. When writing this article, a combination of general scientific and specific scientific research methods were used, including the method of comparative law, to analyze the content of regulatory legal acts in Russia, China and other countries.

1. The Concept and Essence of Agreements to Eliminate or Limit Liability for Breach of Contract in Russian Civil Law

Russian contract law differs from the contract law of other countries, as noted legal scholar Christopher Osakwe points out, primarily in its philosophy of ensuring the fulfillment of promises, as well as in the noticeable influence of Roman private law on it.[6]

In the field of Russian law of obligations, one of the fundamental principles is the principle of freedom of contract. The freedom to determine the content of an agreement is often restricted by the establishment of prohibitions on concluding agreements that are contrary to the principle of good faith or public interest. Thus, due to the principles of fairness, reasonableness and good faith, the parties are not entitled to eliminate or limit liability for intentional breach of an obligation. Such an agreement that is concluded in advance is automatically considered void by virtue of paragraph 4 of Article 401 of the Civil Code of the Russian Federation.

The Russian doctrine defines civil liability as a means of protection against violations of civil law, which entails negative consequences for the violator in the form of either new or additional civil legal obligations.[7] As a general rule, in the event

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[6] Christopher O. Osakwe, *Modern Russian Law of Contracts: A Functional Analysis*, 24 Loy. L.A. Int'l & Comp. L. Rev. 113 (2002).

[7] *Братусь С.Н.* Юридическая ответственность и законность: (Очерк теории) [Boris S. Bratus, *Legal Responsibility and Legitimacy: (Essay on Theory)*] 175 (2001).

of a breach of contract, such as a failure to perform or improper performance, the debtor is liable to the creditor if there is fault. Furthermore, the party that violated the contract bears the burden of proving the absence of fault. As an exception to this rule, paragraph 3 of Article 401 of the Civil Code of the Russian Federation establishes stricter rules for liability for violation of an obligation arising from business contracts. These provisions are stated as follows:

> Unless otherwise provided by law or the contract, a person who has not fulfilled or improperly fulfilled an obligation in the course of entrepreneurial activity shall be liable, unless he or she proves that proper performance was impossible due to *force majeure*, that is, extraordinary and unavoidable circumstances under the given conditions.[8]

At the same time, the norm outlined in paragraph 3 of Article 401 of the Civil Code of the Russian Federation is optional: the parties can establish in the contract that *force majeure* circumstances are not the sole basis for exclusion of liability. Thus, by their agreement in the contract, the parties may completely release themselves from liability for an unintentional breach of an obligation, and they are not entitled to eliminate or limit liability for an intentional breach of an obligation by virtue of clause 4 of Article 401 of the Civil Code of the Russian Federation.

A number of Russian authors compare the agreements provided for by clause 4 of Article 401 of the Civil Code of the Russian Federation with the exclusion clauses existing in Anglo-American law.[9] As D.E. Bogdanov points out, exclusion clauses are terms of the contract aimed at excluding or limiting any liability or legal obligation that would otherwise arise.[10]

The positive and negative aspects of these reservations were clearly outlined by Ewan McKendrick. In his opinion, on the one hand, clauses that serve to exclude liability serve to adequately distribute the risks between the parties to the contract. Such clauses can reduce procedural costs by allocating the scope of responsibility between counterparties. On the other hand, such reservations are fraught with socially harmful consequences since they can be used by the stronger party to exclude their responsibility to the weak, leaving the latter without means of protection.[11] In countries that follow common law, exclusion clauses are usually included in standard

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8 Section 3 of Article 401 of the Civil Code of the Russian Federation.

9 John G. Shram, *Contract Law – The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas*, 28 U. Ark. Little Rock L. Rev. 279 (2006).

10 *Богданов Д.Е.* Справедливость как основное начало гражданско-правовой ответственности в российском и зарубежном праве: дис. … докт. юрид. наук [Dmitry E. Bogdanov, *Justice as the Main Principle of Civil Liability in Russian and Foreign Law*, PhD Thesis] (2014).

11 Ewan G. McKendrick, *Contract Law* 225 (2007).

forms of contracts, which helps to reduce costs during negotiations, compared to in Russia, where both separate clauses of the contract and independent agreements as a whole can be devoted to this matter, and they are not restricted to standard forms. Thus, the purpose of the legal regulation of exclusion clauses is to ensure contractual fairness and fair liability for non-performance of contractual obligations.[12]

It should be noted that there is a difference between an elimination of liability and a limitation of liability agreement. The use of the term "elimination of liability" in section 4 of Article 401 of the Civil Code of the Russian Federation implies that the offense has been committed; in other words, the party has violated the terms of the contract. However, by virtue of a direct indication in the contract, a complete waiver of liability measures is established, i.e. an exemption from liability. In this sense, the term "elimination of liability" is identical to the term "exemption from liability" and duplicates its legal meaning.

In using the phrases "elimination and limitation of liability" in paragraph 4 of Article 401 of the Civil Code of the Russian Federation, the legislator combines the term "elimination" with the opposite term "limitation" of liability. The legal definition of the concept of "limited liability" can be found in paragraph 1 of Article 400 of the Civil Code of the Russian Federation, which defines it as the legally limited right to full compensation for damages. In most cases, the concept of "limitation of liability" is always present, albeit to a lesser extent, which distinguishes it from the concept of "exemption from liability." At the same time, the difference between the conclusion of an agreement on the elimination of liability and the conclusion of an agreement on the limitation of liability for an intentional breach of an obligation by virtue of paragraph 4 of Article 401 of the Civil Code of the Russian Federation is not important since the legal regime of both these agreements is the same.

The regime of the agreements under study is characterized by the following three important points:

First, this is the moment when the agreement was made. For instance, the Civil Code of the Russian Federation prohibits the conclusion of an agreement on the elimination or limitation of liability right before the commission of an offense.

Secondly, the agreement must clearly indicate the liability from which the parties to the obligation are exempt. The analysis of judicial practice shows that the courts often interpret the provisions of the agreement on the limitation or elimination of liability ambiguously.[13]

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12 Bogdanov 2014.

13 Постановление ФАС Волго-Вятского округа от 8 июля 2013 г. по делу № А79-11127/2012 // Судебные и нормативные акты РФ [Resolution of the Federal Antimonopoly Service of the Volga-Vyatka District of 8 July 2013 in Case No. A79-11127/2012, Judicial and Regulatory Acts of the Russian Federation] (June 2, 2024), available at https://sudact.ru/arbitral/doc/beulo5wEO1Vr/; Постановление Арбитражного суда Уральского округа от 4 июня 2015 г. № Ф09-2625/15 по делу № А71-7125/2014 // СПС «Гарант» [Resolution of the Arbitration Court of the Urals District of 4 June 2015 No. F09-2625/15 in Case No. A71-7125/2014, SPS "Garant"] (June 2, 2024), available at https://base.garant.ru/38686330/.

Thirdly, the Civil Code of the Russian Federation, in paragraph 4 of Article 401, establishes a ban on the conclusion of agreements that are specifically founded on the intentional violation of an obligation.

Deliberate breach of an obligation is a complex and problematic issue in Russian civil law. Guilt in the form of intent always entails responsibility. A deliberate violation of obligations implies a person's intention (intentional or unintentional) not to fulfill or improperly fulfill an obligation. Moreover, the inclusion in the contract of conditions (clauses) that exempt or limit a party from liability for an intentional breach of obligations, according to V.V. Baibak, not only encourages unlawful behavior but is abnormal, unfair and contrary to the foundations of morality and law and order; therefore, such conditions should not have legal force.[14] Indeed, such agreements do not contribute to the strengthening of contractual discipline and deprive the parties of the right to indemnification and the application of other measures of contractual liability.

The condition of intent in such agreements is usually determined by the possibility of including provisions in the contract that specify the maximum amount or term for calculating the penalty. In addition, any other deviation from the principle of full compensation for losses, including compensation for only actual damages without considering lost profits, is also taken into account.

According to paragraph 7 of the Resolution titled "On the Application by the Courts of Certain Provisions of the Civil Code of the Russian Federation on Liability for Breach of Obligations," an agreement concluded in advance on the elimination or limitation of liability does not exempt a party from liability for an intentional violation of an obligation (para. 4 of Art. 401 of the Civil Code of the Russian Federation).[15] Based on this, we can conclude that if the agreement itself is void, then the parties are neither limited nor exempt from liability for intentional breaches of obligations. This means that a debtor's exemption from liability is inadmissible only once intent is proven.

Also, paragraph 3 of clause 3 of the referenced resolution explicitly states that the absence of intent is proved by the person who violated the obligation (cl. 1 and 2 of Art. 401 of the Civil Code of the Russian Federation). For example, in justifying the lack of intent by the debtor, whose liability has been eliminated or limited by agreement of the parties, evidence may be presented that the debtor showed at least a minimum degree of care and discretion in the performance of the obligation.

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[14] Договорное и обязательственное право (общая часть): постатейный комментарий к статьям 307–453 Гражданского кодекса Российской Федерации / отв. ред. А.Г. Карапетов [Artem G. Karapetov (ed.), *Contract and Obligation Law (General Part): Article-by-Article Commentary on Articles 307–453 of the Civil Code of the Russian Federation*] (2017).

[15] Постановление Пленума Верховного Суда Российской Федерации от 24 марта 2016 г. № 7 «О применении судами некоторых положений Гражданского кодекса Российской Федерации об ответственности за нарушение обязательств» // Бюллетень Верховного Суда РФ. 2016. № 5 [Decree of the Plenum of the Supreme Court of the Russian Federation No. 7 of 24 March 2016. On the Application by the Courts of Certain Provisions of the Civil Code of the Russian Federation on Liability for Breach of Obligations, Bulletin of the Supreme Court of the Russian Federation, 2016, No. 5].

Thus, in this decision, the Plenum of the Supreme Court of the Russian Federation took a very strict approach, requiring the debtor to prove the absence of intent. At the same time, the Plenum of the Supreme Court of the Russian Federation interprets intent as not representative of "the minimum degree of care and discretion in the performance of obligations."[16] It should be recalled that in Russian civil law there is such a thing as a presumption of guilt. According to paragraph 2 of Article 401 of the Civil Code of the Russian Federation, the absence of guilt is proved by the person who violated the obligation. That is to say, parties who violate the obligations stipulated in an agreement are considered guilty until they prove their innocence. In turn, the Plenum requires that the debtor indicate the absence of intent, and in fact, the law does not define the concept of "intention"; additionally, there is no definition of the concept of "negligent." Thus, in effect, the Plenum of the Supreme Court of the Russian Federation has established its own definition of the concept of intent.

Without going into details of the ongoing legal scientific discussion regarding the definition of the concept of "intent," since this is a matter for a separate study, we note that most researchers who have studied various aspects of guilt indicate that the concept of intent is unthinkable without its psychological aspect, namely the awareness of one's illegal behavior or intentional behavior for the purpose of non-performance or improper performance of obligations.[17] At the same time, according to V.V. Baibak, the application of the legislative definition of guilt, which involves assessing the behavior of the debtor in order to determine whether or not to take due care and diligence measures, does not quite fit with such a form of guilt as "intent." It turns out that, nevertheless, in many cases of determining intent, the courts are forced to assess the psychological aspects of the offender's behavior.[18] However, it is extremely difficult to determine the psychological attitude of the debtors, who are also legal entities, in relation to their unlawful behavior in the event of a violation of an obligation.

In turn, the above-mentioned definition of intent, given by the Plenum of the Supreme Court of the Russian Federation ("... at least a minimum degree of care and discretion was shown in the performance of an obligation"), rather reveals such a form of guilt as gross negligence.[19]

It should be noted that in the Russian legal literature, it is proposed to expand the prohibition contained in paragraph 4 of Article 401 of the Civil Code of the Russian

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16 Decree No. 7 of 24 March 2016, *supra* note 15.

17 *Брагинский М.И., Витрянский В.В.* Договорное право: Общие положения [Mikhail I. Braginsky & Vasily V. Vitryansky, *Contract Law: General Provisions*] 261 (2003).

18 Karapetov (ed.) 2017.

19 *Зимнева С.В.* Соглашения об устранении или ограничении ответственности за умышленное нарушение обязательств: теория и правоприменительная практика // Юридические исследования. 2017. № 3. С. 39–51 [Svetlana V. Zimneva, *Agreements on the Elimination or Limitation of Liability for Intentional Breach of Obligations: Theory and Law Enforcement Practice*, 3 Legal Res. 39 (2017)].

Federation to the limits of gross negligence. Thus, for example, N.P. Korshunova advocates that an agreement concluded in advance on the elimination or limitation of liability for intentional breach of an obligation or breach of an obligation as a result of gross negligence be declared null and void. According to this legal scientist, such a rule would be more effective for civil circulation because, in particular, it would contribute to a fair distribution of the risk of adverse consequences between the parties to the contract.[20]

This proposal seems disputable to us due to the lack of definitions of the concepts of the various forms of guilt within Russian civil law, which in turn will entail additional difficulties for law enforcement practice, because the determination of the degree of negligence in each individual case falls within the realm of judicial discretion. However, the main argument in favor of the introduction of a legislative ban in Russia on the exclusion or limitation of contractual liability caused as a result of gross negligence is, in our opinion, the unjustified restriction thereby of the principle of freedom of contract. As N.P. Korshunova herself admits,

> Such an innovation needs a careful weighing of the interests of the parties to the contract in order to be able to recognize the admissibility of such a further restriction of freedom of contract.[21]

Thus, Russian civil law has yet to make a final decision on this issue, taking into account the existing forms of guilt and the principle of freedom of contract.

Since the principle of freedom of contract does not exclude, when applying it, the need to follow the requirements of good faith, reasonableness and fairness, the court must proceed from the balance of interests of the parties when considering disputes arising from agreements on the elimination or limitation of liability for breach of obligation. Agreements provided for by paragraph 4 of Article 401 of the Civil Code must be assessed by the court for possible abuse of civil rights, since the party with a stronger negotiating position at the stage of concluding a contract can limit or exclude its liability for non-performance or improper performance of contractual obligations. As rightly noted by D.E. Bogdanov, in view of the fact that "a strong entrepreneur can dictate his will to the weak with impunity," in order to overcome such a dictate, it is necessary to change the ideological platform of Russian civil law. As a result, it is imperative to revise the basic principles of civil law, in particular the principle of freedom of contract in order to expand the court's ability to intervene in contracts and prevent the inclusion of unfair conditions.[22]

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[20] *Коршунова Н.П.* Обстоятельства, освобождающие от ответственности за нарушение договора: дис. … канд. юрид. наук [Natalia P. Korshunova, *Circumstances Exempting from Liability for Breach of Contract*, PhD Thesis] 79 (2007).

[21] *Id.*

[22] Bogdanov 2014.

In countries that follow the common law system, mechanisms have been put in place to enable courts to enforce equality of arms. Thus, the Anglo-Saxon courts actively use the method of "interpretation of the contract" in order to protect the weak party that entered into the contract and agreed to unfavorable conditions as a result of certain circumstances. This method allows courts to interpret exception clauses in favor of the weaker party. In cases where the preparation and signing of the contract took place under the control of one of the parties, the courts, in order to protect the weaker counterparty, resort to the rules of the opposite interpretation of the terms of the contract.[23]

Thus, Russian legislation prohibits the establishment of agreements in advance that aim to eliminate or limit the liability of the parties in the contract for intentional breach of an obligation. These agreements are unfair and deprive the parties of the right to compensation for damages as well as the application of other measures of responsibility.

2. The Concept and Essence of Agreements on Exemption from Liability for Breach of Contract in Chinese Civil Law

On 1 January 2021, the Civil Code of China came into force (中国 民法典, hereinafter the Civil Code of the People's Republic of China or PRC). It is the first and much long-awaited Civil Code of the People's Republic of China, representing a century of codification efforts.

The fundamental principles of civil law are set forth in Book I of the Civil Code of the People's Republic of China. The principle of freedom of contract is not directly enshrined in the Civil Code of China, and instead, follows from the general principle of voluntariness (Art. 5 of the Civil Code of the PRC) in the event of the emergence, change or termination of civil law relations.

As noted researcher and author Bing Ling notes, fixing the fundamental principles of civil law only in Book I of the Civil Code of the PRC in the interests of a legislative economy is regrettable, since, in his opinion, the careful formulation of these principles in contract law, as well as the repetition of these principles in the context of contractual relations could potentially provide for the possibility of a special interpretation and application of these principles within treaties.[24]

In addition, numerous Chinese authors draw attention to the fact that the principle of freedom of contract was not explicitly formulated in Chinese law prior to this time. In particular, unlike Russian civil law, neither the General Part of Civil Law of the PRC of 2017 (repealed) nor the PRC Law on Contracts of 1999 (also repealed) contained a separate article on freedom of contract. This is not surprising, since Chinese contract

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[23] Bogdanov 2014.

[24] Bing Ling, *The New Contract Law in the Chinese Civil Code*, 8(3) Chinese J. Comp. L. 558 (2020).

law, which was in force until 1999, did not explicitly recognize freedom of contract as a principle underlying contract law. This is also because, in a centrally planned economy, the principles of freedom of contract are practically nonexistent and therefore not applied. However, with the recent development of a market economy in China and the adaptation of Chinese contract law to it, the increasing role of civil law contracts and the assertion of freedom of contract as a fundamental principle of contract law in China have been the subject of much discussion.[25] In spite of this, the principle of freedom of contract is not explicitly included in the Chinese Civil Code. Instead, the Chinese concept of freedom of contract is built around three principles that embody its building blocks: the principle of equality, the principle of voluntariness and the principle of good faith, i.e. *pacta sunt servanda*.[26]

The legal regulation of contractual obligations today occupies an important place in Chinese civil law. This is due to the role and significance of contracts, primarily in the regulations of relations that involve the participation of entrepreneurs. Book III, titled "Treaty" (民法典 第三 编 合同), of the Civil Code of the People's Republic of China, consists of three parts: "General Provisions," "Typical Contracts" and "Quasi-Contracts." In China, civil liability is a legal consequence of a violation of civil obligations by a subject of civil law, an important system for protecting civil rights.[27] Provisions on contractual liability are found in Part One of Book III of the Civil Code of the People's Republic of China and in Chapter VIII, "Liability for Breach of Obligations."

Article 577 of the Chinese Civil Code states the following general rule on contractual liability:

> Where a party fails to perform his contractual obligation or his performance does not conform to the agreement, he shall bear default liability, such as continuing to perform his obligations, taking remedial measures, or compensating for losses.

At the same time, the condition of liability for non-fulfillment of obligations, among other conditions, is usually agreed upon and included by the parties in the content of the contract (Art. 470 of the Civil Code of the PRC).

A number of Chinese legal scientists have acknowledged this imperfection of legislative regulation in relation to liability for breach of contract. For instance, according to Yuan Zhonghua, such imperfections lead to contradiction and confusion

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25 Ling 2020.

26 Nicole Kornet, *Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and Standard Form Contracts*, Maastricht European Private Law Institute Working Paper No. 2011/06 (2011).

27 关于《中华人民共和国民法典（草案）》的说明 [Wang Chen, *Note to the 'Civil Code of the People's Republic of China (draft)'*] (June 2, 2024), available at http://www.npc.gov.cn/npc/c30834/202005/50c0b507ad32464aba87c2ea65bea00d.shtml.

of norms and are clearly manifested in Article 577 of the Civil Code of the People's Republic of China, which states that the variability of the legal consequences of an offense might vary significantly from case to case. This article enshrines the right to claim compensation for damages caused by breach of contract, but it does not explicitly contain the element of "guilt" in its normative expression. The fact is that the absence of fault is not recognized as a basis for exemption from contractual liability; thus, the principle of strict liability applies here.[28]

In addition to statutory liability for breach of contract, the parties may also agree to pay a certain amount of liquidated damages to the other party when one of them breaches the contract, depending on the severity of the breach. They may additionally agree on a methodology for calculating the amount of damage caused by a breach of contract. These rules are also found in the civil law of some foreign countries, for example, the United States and England.

The Civil Code of the People's Republic of China also contains articles on standard and exception clauses. According to Article 496 of the Civil Code of the People's Republic of China, standard clauses are conditions that are formulated in advance by one of the parties to the contract for their repeated use and are not subject to negotiation by the other party.

Furthermore, Article 497 of the PRC Civil Code declares a standard clause invalid if it falls under any of the invalid circumstances provided for in Part 3 of Chapter VI of Book I as well as Article 506 of the Civil Code of the People's Republic of China (exclusion clause).

An exclusion clause is a clause agreed upon by the parties to a contract that excludes or limits the future liability of one or both parties. The law treats the validity of exclusion clauses differently depending on the circumstances. In general, Chinese law recognizes the validity of exclusion clauses defined by the parties, provided that they are based on the free will of the parties and are not against the public interest. However, the law prohibits an exclusion clause that violates the principle of good faith and the public interest, since this would not only lead to the abuse of the liability exclusion clause but also cause serious damage to the interests of one of the parties to the contract.[29]

Moreover, according to Article 506 of the Civil Code of the People's Republic of China, an exculpatory clause in a contract that exempts parties from liability for the following acts listed below is considered invalid:

• causing physical injury to the other party; or

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[28] 袁中华. 违约责任纠纷之证明责任分配—以《民法典》第 577 条为中心 //法 学 2021 年第 5 期) [Yuan Zhonghua, *Distribution of the Burden of Proof in Disputes over Liability for Breach of Contract – with an Emphasis on Article 577 of the Civil Code*, 5 Jurisprudence (2021)].

[29] 向平律师. 合同中的哪些免责条款属于无效条款 [Wang Tao, *Which Exclusion Clauses are Invalid*] (June 2, 2024), available at https://www.66law.cn/laws/124887.aspx.

• causing losses to the other party's property intentionally or due to gross negligence.

It should also be noted that standard terms subject to the provisions of Article 506 of the Civil Code of the People's Republic of China are void even if one party has notified the other party of their inclusion in the contract.

An indemnity clause, as Yang Lixin points out, refers to a clause in a contract in which two parties have previously agreed to indemnify each other for any possible future damages.[30]

Within the meaning of Article 506 of the Civil Code of the People's Republic of China, the condition on release from liability in the contract is characterized by three main factors: (a) the condition for release from liability is based on the terms of the contract; (b) the release clause must be made explicit and specified in the contract; (c) the release clause is exempt from liability and is binding on both parties. As a result, this article of the Civil Code contains the grounds for invalidating the conditions for exemption from liability. The exclusive exemption clause in the contract is further divided into two parts: the exemption clause for physical harm and the liability for property damage. Moreover, according to Part 2 of Article 506 of the Civil Code of the People's Republic of China, a pre-agreed condition of an agreement on exemption from liability for property damage is invalid if the property damage to the other party is caused intentionally or due to gross negligence.

Thus, two forms of fault are stipulated in Chinese law, namely intent and gross negligence, which render the exemption clause invalid.

Chinese civil law, as a general rule, does not differentiate between the different levels of liability depending on the form of guilt of the offender. Both the *tortfeasor* who acted intentionally (or unintentionally) and the party who caused the corresponding property damage through negligence are obliged to fully compensate for the damage.

In the Civil Code of the People's Republic of China, liability for breach of contract arises in the event of non-performance or improper performance of the contract. Contractual liability is expressed in terms of compensation for losses, the collection of a penalty or interest among other forms of compensation. At the same time, the Civil Law of the PRC is characterized by the fact that to a lesser extent it takes into account the form of guilt of the offender. For example, Article 120 of the PRC Law on Contracts of 1999 (repealed) made no reference to the form of guilt of the offender and only mentioned that in case of a violation of the contract by both parties they are obliged to bear responsibility in proportion to their respective degrees of guilt but did not mention the form of guilt of the offender. Article 592 of the current Civil Code of the People's Republic of China establishes a new rule: if both parties violate

[30] **国民法典**释义与案例评注：**合同**编 [Yang Lixin, *Interpretation of the Chinese Civil Code and Commentary on Case Law: Making a Contract*] (2020).

the contract, each party bears the corresponding responsibility. Moreover, in the event that the failure of one party to fulfill its obligations causes losses to the other party, and the fault of the other party also happens to contribute to the occurrence of such losses, the amount of compensation may be reduced accordingly. However, it should be noted that according to Article 506 of the Civil Code of the People's Republic of China, the Chinese legislator takes into account the forms of guilt of the offender, intent and gross negligence without disclosing their concept or how they are understood.

Chinese courts are particularly attentive to clauses expressly providing for the exclusion or limitation of liability (for example, clauses in insurance contracts that exclude or limit the insurer's liability). This is because during the process of concluding a contract, one of the parties may use its advantages and require the other party to include an unreasonable provision in the contract in order to release the former party from liability, which in turn largely deprives the parties of expressing their intentions freely. Meanwhile, it is much more difficult to identify provisions that indirectly constitute an exclusion or limitation of liability.[31] For example, in a dispute between Su Moumou and Foshan Nanhai Wanda Plaza Co. over whether the waiver clause in an addendum to a sales contract was invalid, the court held that the content of the addendum was in line with house buying customs. Since the defendant did not raise the question of the liability of the plaintiff or relieve himself of liability, the court concluded that the exclusion of a liability clause was valid and dismissed the claim.[32]

Thus, the adoption of the current Civil Code in China marked the completion of the complex process of civil codification. Book III of the Civil Code of the People's Republic of China establishes a self-sustaining system of contract law, addressing the issues of the 1999 Contract Law. Violation of contractual obligations is subject to civil liability. Furthermore, the new Civil Code of China contains provisions that prohibit the inclusion of conditions in the contract releasing parties from liability for causing physical harm and damage to the property of the other party intentionally or through gross negligence (exception clauses). Such agreements are considered invalid under the new Civil Code.

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[31] 王天凡：《民法典》第496条（格式条款的定义及使用人义务南京大学学报（哲学·人文科学·社会科学））2020年第6期 [Wang Tianfan, *Civil Code Article 496 (Definition of Standard Terms and User Obligations)*, 6 Journal of Nanjing University (Philosophy, Humanities, Social Sciences) (2020)].

[32] 《民法典》合同编第506条条文释义与案例评注 [Interpretation of Article 506 of the Civil Code and Comments on Cases] (June 2, 2024), available at https://www.sohu.com/a/577251997_121355943.

3. Comparative Legal Analysis of Agreements on Exemption or Limitation of Liability for Breach of Obligations: Perspectives for Russia and China

Taking into account the increased trade turnover between Russia and China, as well as the number of contracts concluded between the two countries, it is necessary to present some comparative observations regarding the limitations of the terms of the agreement on liability release. First of all, attention should be paid to the issues of concluding a contract and the freedom of the parties in determining the terms of their contract.

In Russian civil law, the principle of freedom of contract has been enshrined in Article 421 of the Civil Code of the Russian Federation since 1994. The article is called "Freedom of Contract." The essence of this principle is that citizens and legal entities are free to conclude a contract. In other words, the parties themselves determine the form and terms of the contract; this is the stage at which freedom of contract is manifested. Coercion to conclude a contract is not allowed, except in cases where the obligation to conclude a contract is provided for by law or a voluntarily accepted obligation.

The principle of freedom of contract as an independent principle was not included in the new Civil Code of the People's Republic of China; rather, it is applied on the basis of the provisions of the principles of equality, voluntariness and *pacta sunt servanda*. Chinese scholars consider this a critical omission compared to the 1999 Contracts Law (repealed), which listed the full list of the six fundamental principles of contract law.[33] As author Hao Jiang points out, the main reason for the problems in enforcing the existing civil norms arises not only from legislative methods but also from the Chinese economic structure and state ownership.[34]

Thus, Chinese contract law also recognizes freedom of contract as a fundamental principle underlying contractual relations, even though to a lesser extent than Russian law. However, it is possible that ongoing structural changes in the Chinese economy, as well as doctrinal innovations, will necessitate the recognition of the independence of the principle of freedom of contract in the Chinese Civil Code.

The freedom to conclude contracts in the vast majority of countries is limited by law, most often through the introduction of prohibitions on the conclusion of agreements that are contrary to the principle of good faith or the public interest. In the same vein, the Civil Code of the Russian Federation establishes a ban on pre-concluded agreements that eliminate or limit liability for intentional breach of an obligation. The Civil Code of the People's Republic of China also contains a similar

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[33] Ling 2020.

[34] Hao Jiang, *The Making of a Civil Code in China: Promises and Perils of a New Civil Law*, 95 Tulane L. Rev. 777 (2021).

provision prohibiting the conclusion of such agreements (Art. 506). However, there are considerable differences in the wording of the compared Chinese and Russian norms. The key difference, first of all, is that, in addition to recognizing such agreements as invalid, the Civil Code of the PRC also provides for a form of guilt referred to as gross negligence for an intentional violation of obligations.

The distinction between these two forms of guilt indicated above lies, in fact, in the intentions of the perpetrator, or more precisely, what is legally referred to as gross negligence, which is defined as "behavior of extreme gravity, bordering on the offense and indicating the inability of the debtor to fulfill the obligation to fulfill the contract."[35]

Agreements exempting a party from liability for gross negligence are not possible under Russian law. This principle is based on encouraging the debtors to exercise a minimum degree of care and discretion in the fulfillment of their legal obligations. The Supreme Court of the Russian Federation has established an undeniable rule requiring the parties' to exercise a reasonable amount of diligence, regardless of any contractual limitation of liability for gross negligence. Thus, the court has assigned contractual liability for gross negligence even more priority than freedom of contract. Consequently, the *de facto* Supreme Court of the Russian Federation supplements clause 4 of Article 401 of the Civil Code of the Russian Federation with the statement that, by agreement, it is impossible in advance to release or limit liability not only for intentional breach of an obligation but also for gross negligence. We cannot agree with this position, since *de jure* there is no such provision in Article 401 of the Civil Code of the Russian Federation.

The comparative legal analysis of the provisions of Russian and Chinese civil law on exemption from liability by virtue of an agreement showed that the content of Article 506 of the Civil Code of the People's Republic of China on the conclusion by parties of agreements on exemption from civil liability by parties is quite similar in content to paragraph 4 of Article 401 of the Civil Code of the Russian Federation. The main differences in the norms being compared are only in the forms of guilt and in the fact that Russian law incorporates agreements on the release or limitation of liability, while Chinese law solely addresses release agreements.

Thus, this comparative analysis of the provisions of Russian and Chinese civil law allows us to conclude that, despite a few variations, there is a significant similarity in the legal regulation of agreements on exemption from liability for breach of obligation.

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[35] Aurélien Bamdé, *Les clauses limitatives et exonératoires de responsabilité: régime juridique*, Le Droit dans tous ses états, 16 November 2019 (June 2, 2024), available at https://aurelienbamde.com/2019/11/16/les-clauses-limitatives-et-exoneratoires-de-responsabilite-regime-juridique/.

Conclusion

The legal orders of both Russia and China recognize the need to prohibit the conclusion of agreements that exempt entrepreneurs from liability for an intentional breach of an obligation (by way of exclusion clauses) prior to their execution. Such agreements should be aimed at ensuring the stability of business activities and establishing a balance of interests among the parties to the obligation.

A comparative legal analysis of indemnity agreements and their consequences showed that in each state the legislation and legal doctrine have their own specific features. The Civil Code of the People's Republic of China establishes the invalidity of agreements that seek to exempt parties from liability, not only for intentional violations but also for acts of gross negligence. In contrast, Russian civil law doctrine proceeds from the premise that if parties are able to limit virtually all liability, including liability for damages caused by their gross negligence in an ordinary contract, then such provisions will be used as a means to eliminate all potential liability and reduce the motivation of entrepreneurs to exercise reasonable precautions. In our opinion, the inclusion in the Russian Civil Code of a provision that allows for the possibility of a ban on the conclusion of agreements on exemption from civil liability as a result of gross negligence should require separate consideration by the legislator, taking into account China's experience with legal regulation in this matter.

The improvement of the civil law framework for the application of exclusion clauses in contracts, as well as the efforts of the Russian and Chinese scientific and expert communities and the business community, will all contribute towards harmonizing and unifying the civil legislation of Russia and China.

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Information about the authors

Svetlana Zimneva (Tyumen, Russian Federation) – Associate Professor, Department of Civil Law Disciplines, Tyumen State University (38 Lenina St., Tyumen, 625000, Russian Federation; e-mail: s.v.zimneva@utmn.ru) – **corresponding author**.

Xiao He (Shanghai, China) – Senior Lecturer, Shanghai University of Political Science and law (7989 Wai Qing Song Rd., Qingpu District, Shanghai City, 201701, China; e-mail: hexiao@shupl.edu.cn).