DAMAGE CONCEPTS IN FINNISH AND RUSSIAN BUSINESS CONTRACTS

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Työn nimi: Vahinkokäsitteet elinkeinonharjoittajien sopimuksissa Suomessa ja Venäjällä
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Tiivistelmä:

Tutkielmassa käsitellään ja vertaillaan sopimusoikeudellisia vahinkokäsitteitä liikesopimuksissa Suomessa ja Venäjällä.

Tutkielman metodeina ovat oikeusdogmatiikka ja oikeusvertailu. Oikeusdogmatiikan keinoin avataan ensin Suomen ja Venäjän vahinkokäsitteistö, minkä jälkeen oikeusvertailun keinoin käsitteistöjä vertaillaan. Oikeusvertailun tavoite on integratiivinen, kontradiktiivinen ja praktinen. Aineistona käytän kummankin maan tärkeintä oikeuskirjallisuutta, lainsäädäntöaineistoa ja tuomioistuinten ratkaisukäytäntöä. Koska oikeusjärjestykset rakentuvat myös erilaisista kielistä ja niiden ominaispiirteistä, tutkielman kieleksi on valittu suomen tai venäjän kielen sijaan englannin kieli mahdollisimman objektiivisen oikeusvertailun varmistamiseksi.

Tutkielman keskeisenä johtopäätöksenä voidaan todeta, että Suomen ja Venäjän sopimusoikeudellisessa vahingonkorvausjärjestelmässä on paljon samanlaisia piirteitä ja hyvin samanlaiset raamit. Näin on etenkin sopimusvastuun ja korvattavien vahinkojen osalta. Suuriakin teknisiä eroja on kuitenkin havaittavissa käsitteiden systematiikassa. Venäjällä tärkeimmät vahinkokäsitteet on määritelty laissa ja suomeksi käännettynä ne ovat menetykset tai tappiot, joihin sisältyvät alakäsitteinä reaalinen vahinko ja menetetty etu. Periaatteessa kaikki lain mukaan korvattava vahinko sisältyy näiden käsitteiden alle. Suomessa vahinkokäsitteitä ei ole yleisesti määritelty laissa. Tavanomaisesti puhutaan vahingosta, välittömästä ja välillisestä vahingosta. Suomessa on myös muita käsitteitä erilaisille korvauserille, joiden osalta on epäselvää, sisältyvätkö ne esim. välittömän tai välillisen vahingon käsitteiden alle. Suuria eroja voidaan siis havaita siinä, että minkä käsitteen alle mitkäkin vahingot tai kulut kuuluvat Suomessa ja Venäjällä. Näiden käsite-erojen tunteminen ei korostu ainoastaan Suomen ja Venäjän kansallisen oikeuden sääntelemissä sopimuksissa, vaan myös CISG:n sääntelemissä sopimuksissa, joissa kansallinen lainsäädäntö, ml. kansallinen käsitteistö, voi tulla toissijaisesti sovellettavaksi.

Eroja on myös siinä, miten kussakin maassa näitä sopimukseen kirjattuja käsitteitä tulkitaan. Kun Venäjällä sanamuodon mukainen lähestymistapa korostuu, tärkeämpää on se ”mitä on sanottu” kuin se ”mitä on tarkoitettu”, Suomessa korostuu sopimusosapuolten yhteisen tarkoituksen löytäminen. Tämä johtaa siihen, että kussakin maassa myös käsitteiden tulkitseminen voi olla erilaista ja ne voivat saada erilaisen sisällön.

Tutkielman tuloksia voi hyödyntää suomalaisten ja venäläisten yritysten välisten liikesopimusten laadintaan ja tulkintaan. Oikeiden käsitteiden käyttäminen liikesopimuksissa, ko. maiden käsitteistöjen erojen tunnistaminen ja niiden onnistunut tulkinta auttavat yrityksiä välttämään tilanteita, joissa sopijapuolet ymmärtävät sopimuksen sisällön kukin eri tavalla.

Avainsanat:

Suomi, Venäjä, Suomen ja Venäjän sopimusoikeus, vahingonkorvaus, välillinen ja välitön vahinko, menetys, tappio, reaalinen vahinko, menetetty etu, sopimuksen tulkinta, käsitteiden sisältö, oikeusvertailu, Finland, Russia, Finnish and Russian Contract law damage concepts, actual damage, lost profit, direct and indirect damage, indemnity, damages, compensation of losses interpreting of contract

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Abbreviations

CCRF	Civil Code of the Russian Federation
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
EU	European Union
KKO	Supreme Court of Finland
UNIDROIT Principles	Principles of International Commercial Contracts
SCARF	Supreme Court of Arbitration of the Russian Federation
SCRF	Supreme Court of the Russian Federation

1. Introduction

1.1. Topic and Background

During the last decade the trade of goods and services between Finland and Russia has followed various different trends. In 2012, after Russia joined the World Trade Organization, the trade of goods and services between Finland and Russia rose significantly, following a decrease in 2014 in connection with the economic sanctions against Russia, sanctions issued by Russia against foreign countries, decline in oil prices and decline of the rouble's value. However, after 2015 the trade has again started to revive, however, as this thesis is written in the year of 2020, the global pandemic's effects cannot be analysed fully herein. [1]

Despite that Finland and Russia are geopolitically neighbours and that there is also the border of the European Union and the Nordics between them, their societies and legal systems can be viewed as very dissimilar entities, although they might have chosen to enact certain type of similar norms. Thus, having knowledge of both countries' legal systems can turn out to be useful when participating in trade between the countries in question. United Nations Convention on Contracts for the International Sale of Goods (CISG) is often applied to the trade between these countries, which forms a certain common framework of norms. However, the understanding of the legal concepts, used within this framework, may differ between Finnish and Russian contract parties. The contract parties may happily walk out of the negotiations room, both parties thinking differently of the content they have agreed upon. In addition, CISG is not always applied in the contractual relationship of the parties and in some cases when it is applied, the national legislation may be applied as secondary source of law.[2] Thus, the knowledge of both countries' contract law systems can help the parties to efficiently conclude contracts without unnecessary confusion, which is why I have chosen the topic of this thesis to be examining the concept of damage and loss and other concepts in connection to them in Finnish and Russian contract law, which are important to understand

[1] UN Comtrade Database.
[2] See e.g. CISG articles 2-5 and II explanatory Note by the UNCITRAL Secretariat on the CISG Part one, Scope of application and general provisions.

when making cross-border contracts between Finnish and Russian companies or individuals.[3]

The question of this research is the following: *how to understand, define and interpret damage and loss related concepts in a commercial agreement regulated by Finnish or Russian contract law and what are the differences and similarities; and what should be taken into consideration when using these concepts in a contract?*

The comparative goal is integrative, contradictive and practical.[4] This includes finding differences and similarities in the damage concepts and their interpretation in compliance with Finnish and Russian contract law. The goal is also to help to understand how lawyers from both countries understand the meaning of these concepts from their point of view. Thus, the goal is to help Finnish and Russian individuals and companies to understand each other better regarding what certain damage concepts mean when conducting contracts. The interpretation of damage concepts will be examined excluding the consumer point of view focusing on professional commercial contracts. It shall be noted, that this thesis does not focus on contracts of a certain industry or on a certain contract type.

1.2. Methodology

The methods used in this research are the dogmatic and comparative method. According to Husa the dogmatic method is a legal research, which examines legal norms as insular and static norms that are in force in a certain area for a particular period of time.[5] As Husa's definition demonstrates, the dogmatic method is narrow and internal. It answers to the question how law should be interpreted and applied. Husa provides also another definition: it is normative systematizing and interpretative action.[6] On the other hand, the comparative method is not subject to generally accepted theoretical boundaries and it does not have an established terminology or generally established goals. From a broad perspective, comparative law can be considered as an academic practice examining societies its target

[3] Nysten-Haarala, ym. 2013, p. 11.
[4] For integrative, contradictive and practical comparing see Husa, 2013: p. 59-88.
[5] Husa, 1993: p.45.
[6] Ibid: p. 46.

being law as a normative phenomenon and comparison being a typical examinational approach for it, in which conclusions are made by finding differences and similarities.[7] The basic problem of a legal comparatist is often understanding the foreign legal system.[8] This is especially difficult if the researcher possesses major knowledge of only his or her domestic legal system. In this thesis the mentioned problem is tackled, firstly, by having the privilege of understanding the original languages of the both legal systems and secondly, by choosing the language of this thesis to be English in order to try to approach the legal systems from a neutral language.

In order to succeed in this research both methods are needed. The Finnish and Russian legal systems are examined independently using the dogmatic method to gather up the needed material for comparison. After the material is gathered and examined follows the next stage of the research in which the gathered material is compared using the comparative method. More specifically, the comparison is done mostly on the micro level, but the macro level is also used because it helps in understanding the micro level. Comparison is focused on the legal norms in force at the time of writing this thesis but in some occasions historical points are brought forward. Comparison is mostly bilateral between Russian and Finnish law, but a few points in connection to larger systems are brought up e.g. the legal families that the Finnish and Russian legal systems are connected to. Comparison is mostly horizontal as Russian contract law versus Finnish contract law, but certain vertical points regarding international law are brought forward. The comparison between the Russian and Finnish contract law cannot be deemed to be as between certain legal cultures or inside one, it includes both. Finland and Russia have several elements of Romano-Germanic law, but they also have several unique elements.[9]

1.3. Structure of This Thesis

This thesis starts with a short presentation of the legal families that the Finnish and Russian legal systems are mostly associated with, following with description of both countries' legal

[7] Husa, 2013: p. 28.
[8] Husa, 2013: p. 29.
[9] For the distinctions of the technical parts of comparing see Husa, 2013: p. 125-144.

systems as unique systems, following with presenting the both countries' approach to legal sources and their hierarchy. The macro level and the basics of the normative hierarchy are fundamental to understand in order to examine the micro level. These fundaments will be concluded in a brief comparison.

Furthermore, the contract interpretation rules of both countries are presented, which are closely related with the countries' approach to their legal sources and the hierarchy of them. After the interpretation chapter, the damage concepts and other concepts in close relation with them are examined from both Finnish and Russian perspective separately. This will be done by virtue of researching law, preparatory works and the established legal literature. It will also be examined, how these concepts have been approached in the legal practice of courts. The institution of compensation of losses, of which the concepts examined in this thesis are part of, will be presented shortly. Results of this research will be compared to find the differences and similarities in the both countries' conceptual system and to evaluate some of the possible reasons of these similarities and differences.

In the fifth chapter it will be explained how shall damage and other concepts in regard be interpreted and structured in business contracts. The results of this examination will also be compared.

2. Legal framework

2.1. Legal Families

2.1.1. Russian Legal Family

In comparative law the concept of *legal family* is often used.[10] According to Husa, it is used in connection to large structures of macro level comparative law and it can be exploited as a metaphor.[11] With the help of the legal family -concept, it is possible to discuss the relationship of different legal systems and different "family members" such as "sisters", "fathers" and "mothers" and other "family connections".[12]

The concept of legal family is therefore a practical tool for a comparatist, who tries to describe the differences and similarities of legal systems in an understandable way. Zweigert and Kötz divide legal families to Romanic, Germanic, Nordic and common law countries in addition with Far East, Islamic and Hinduistic families.[13]

Russian law and Russian contract law are often associated with the Romano-Germanic legal family. Its characteristics are large codifications which are primary in relation to other legal sources. Germanic and Romanic legal families can also be divided. In the Germanic legal family legal norms are codified in compliance with the pandectic system, in which norms are organised in a strict hierarchy, which divides the general and specific norms. In the Romanic legal family the structure of legislation is based on an institutional system without splitting the law into general and special parts. The Civil Code of the Russian Federation follows the Germanic structure of legislation.[14] It was structured mostly based on German, and partly on French, Soviet and post-Soviet Russian, English and Dutch legislative materials.[15]

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[10] Husa, Oikeusvertailu, 2013: p. 267. The concept is used in the most influential works of comparative law, such as Arminjon and others, 1950, after which the custom is pursued by Zweigert and others, 1998.
[11] Husa, Oikeusvertailu, 2013: p. 267.
[12] Ibid: p. 269.
[13] Regarding the criteria etc., see: Zweigert and Kötz, 1998: p. 67-73.
[14] Nysten-Haarala, 2013: p. 23.
[15] Sinjukov, 2010: p. 212.

However, unconditionally grouping Russia into Romano-Germanic legal family would be oversimplifying. According to Rasskazov, main differences between Russian and Romano-Germanic legal systems include the fact, that in the continental European countries the institute of private ownership and market economy have had much more time to form ideological, political, and legal paradigms, which is connected with the continental European countries having a deep foundation in democratic traditions and, finally, the differences in the legal culture.[16] Sinjukov states that the Russian legal system should not be associated with the Romano-Germanic legal sphere as a whole based merely on the characteristics of the legal sources that the Russian legal system contain.[17] Scholars have stated that the Russian borrowing of legislation from Romanesque and Germanic sources of civil law has happened without a broad reception of Roman legal culture and spirit.[18] Russian law has its own historical, socio-political, domestic, spiritual, national and multinational foundations and thus, it is unique in its own way despite that it interacts with other legal families.[19] It can also be categorised in its own category - the Slavic legal family, which is formed mainly by Russia and other eastern European countries and their tradition.[20]

According to Sinjukov, the specialities of Russian legal tradition that have a methodological significance for the analysis of Russian law, include the following. Firstly, strong statehood in which communication between Russian law and the state has been extremely important. Secondly, collectivism has played a big role in Russian economic progress e.g. the peasant community and agricultural cooperative and deeply moral forms of trust in field of entrepreneurship. Those were based on specific labour ethics, mutual assistance and traditions of local self-government. Thirdly, the formation of a special type of social status of the individual, which can be described by the dominance of collectivist elements of legal awareness and the non-rigidity of the lines of differentiation of the individual and the social state. Fourthly, the close connection of the traditional basis of law and the state with the specifics of the Orthodox branch of Christianity. Fifthly, The Slavic legal tradition is characterized by non-rationalism and non-formalism of legal thinking, cohesion of law and

[16] Rasskazov, 2013: p. 83-84.
[17] Sinjukov, 2010: p. 211.
[18] Sinjukov, 2010: p. 209.
[19] Sinjukov, 2010: p. 209-210.
[20] Sinjukov, 2010: p. 214.

morality and the impossibility of their separate existence, the significance of public justice, and the lack of autonomy of a professional legal corporation. A good example are legal proceedings, in which the Slavic legal consciousness considers fairly judging as judging on the grounds of subjectivity instead of an objective judgement also preferring the settlement of the parties.[21]

The previously presented characteristics of traditional Russian and Slavic legal system seem to be difficult to link with some parts of the text of the modern Russian legislation e.g. the Civil Code of Russian Federation (CCRF) and significant power of the central administration and the president of Russian Federation (role of the government, role of Moscow and federalism)[22]. Consequently, those characteristics shall be acknowledged when acting in the Russian legal field to avoid surprises. According to Sinjukov, the contrast between the characteristics of Slavic legal tradition and the current Russian normative system also explain the 'legal nihilism' of Russian citizen.[23] Legal nihilism can be described as a negative attitude towards law.

To conclude, despite that the e.g. the CCRF may seem relatively systematic and clear reminding a typical Central European legislation, there is a whole different tradition and consciousness behind it and that might be reflected in the legal thinking of Russian citizen.

2.1.2. Nordic Legal Family

Nordic laws have been influenced mostly by German law and unlike many continental laws, less by Roman law.[24] Despite that the Nordic law is not unambiguously been considered as a separate legal family, the leading legal comparatists have considered so for quite a long time.[25] Lando highlights that the uniting factors of Nordic law are, on one hand, legal

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[21] Sinjukov, 2010: p. 215-217.
[22] See e.g. Sinjukov, 2010: p. 347-362, author discusses the Russian way of being governed by law, p. 332-337, author describe the role of Moscow in affecting the Russian legal system, p. 362-376, author discussed the role of federalism in affecting Russian legal system.
[23] Sinjukov, 2010: p. 216.
[24] Lando, 2016: p. 14.
[25] See e.g. Lando, 2001: p. 11., Zweigert and Kötz., 1998, p. 63-73; Arminjon and others, 1950: p. 42–53. Cf.; Husa, 2011: p. 4-14, where author states, that Nordic law is not a major macro construction, but he does not deny that the Nordic legal family is an independent legal family and that it depends on what criterions a legal family is classified on; Björne, 2011: p. 480, where author states that dividing into Eastern and Western Nordic

mentality, which is connected with e.g. language, history and religion.[26] On the other hand, the Nordic legal systems are connected by the fact that they do not have a civil law codification, in which their national private law systems would be codified, which makes it differ from the Romano-Germanic legal family and, which on the other hand, makes it similar with the common law system. [27] Then again in the Nordics, the decisions of the highest court instances are not hierarchically in the highest position of legal sources as they are in common law countries. However, the decisions of the highest court instances can be exploited as a weaker source of law. Additionally, Nordic lawyers have for a relatively long while worked in cooperation in the field of legal doctrine, of which a major example is the assembly of Nordic lawyers in the year of 1872 from which onwards the Nordics have worked in a tight cooperation regarding developing their legal systems.[28] This cooperation has continued, the Nordic Sale of Goods Act, which is in force in Finland, Iceland, Norway and Sweden, being a good example thereof.[29]

Lando highlights also the Nordic lawyers' realistic approach to law.[30] Husa states that parliamentarism is a major similarity in the Nordics.[31] Mainly these reasons prove that the Nordic law hardly fits in the boundaries of Romanic, Germanic and common law legal families, to which it is still the closest equivalent to. And as the Nordics include several legal systems of each separate country, it is possible to view that they constitute their own legal family.

Finland belongs to the Nordic legal family.[32] The Nordic legal family is possible to further divide into slightly different eastern and western Nordic parts, of which Finland is closer to the eastern part as it is in many ways close to the Swedish legal system. This is because

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systems itself proves that the Nordic do not form a coherent entity; and Lando, 2016: p. 14: where author states that the Nordic laws form a family within the civil law system.

[26] Lando, 2001: p. 5-6. See also Lando, 2016: p. 22: where author describes also a common cultural heritage as a source of law in the Nordics.

[27] Ibid. s. 7.

[28] Ibid: p.7-8. See also Björne, 2011: p. 480-481, where author highlights the effect of Nordic lawyer assemblies.

[29] Lando, 2016: p. 25.

[30] Lando, 2001: p. 8-9. See also Lando, 2016: p. 23-24.

[31] Husa, 2011: p. 10.

[32] E.g Nysten-Haarla, 2013: p. 77.

Finland was a part of the Swedish Kingdom for a long time and when Finland passed on to be an autonomic part of the Russian Empire, Finland kept its Swedish laws enacted.[33]

2.2. Legal Sources and Hierarchy of Norms

2.2.1. In Russia

The legal sources in Russian legal system are written norms and customary law.[34] It has to be stated that customary law's significance is very low. In compliance with Article 15 of the Russian Constitution the universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be applied, and if they contradict with the CCRF, the international treaties shall prevail. When focusing on contract law it shall be borne in mind that also a contract itself is considered as a legal source as it regulates the relationship between the parties.[35] In addition, courts' legal practice plays an important role, despite that court decisions in Russia are not formally considered as a legal source.[36] Also, customs are recognized as a legal source in article 5 of the CCRF. Civil law doctrine is not a binding legal source in Russia.[37]

The fundamental rules regarding legal sources and norm hierarchy are stated in Article 71 of the Russian Constitution, which regulates that the civil law is the subject of exclusive federal competence,[38] and in Articles 15 and 76 of the Russian Constitution, that confirm the primacy of the Russian Constitution and the laws that have been legislated in the order of legislating constitutional norms in relation to other federal laws,[39] and in Article 3 of the CCRF, which has 7 sections that describe the primariness of certain norms.

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[33] Lando, 2001: p. 6.
[34] Nysten-Haarala, 2013: p. 32.
[35] Ibid.
[36] Suhanov, 2015: p. 84. See also Nysten-Haarala, 2013: p. 23: author states that as courts' legal practice has gained importance it helps to adapt a more common ground for applying legal norms in the Russian legal system.
[37] Suhanov, 2015: p. 86.
[38] Suhanov, 2015: p. 92.
[39] Nysten-Haarala, 2013: p. 34.

The most important norm is the Russian civil legislation. It can be divided into three groups by their legal force[40] followingly: 1) federal laws; 2) decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation; and 3) regulatory legal acts of other executive bodies e.g. ministries and departments of the Russian Federation.[41]

Russia is an active player in the international economic cooperation and has participated in numerous international treaties,[42] which as previously mentioned are a binding legal source in Russian civil legislation. An important international treaty that Russia has signed is the CISG, which regulates the international trade of goods. Furthermore, Russia participates in many other international treaties and as well recognizes certain recommendations such as the International Rules for the Unified Interpretation of Trade Terms (INCOTERMS) published by the International Chamber of Commerce (ICC), which are applied if they are referred to in a contract.[43]

The first group consists of the CCRF and federal laws adopted in conformity with it and they are referred as "*laws"* in Article 3 of the CCRF. Decrees of the President of the Russian Federation and resolutions of the Government of the Russian Federation are referred as "*other legal acts"* in Article 3 of the CCRF and they may not be in contradiction with the *"laws"*. Finally, in compliance with section 7 of Article 3 of the CCRF the regulatory legal acts of other executive bodies shall not be in contradiction with *"laws"* and *"other legal acts"*.

Various articles of legislation have a clause that states "*unless otherwise stipulated by an agreement*", which indicates that the norm is non-mandatory. Consequently, these norms can be bypassed with an agreement. When the contract parties have exploited this right, those non-mandatory legislation bypassing contract terms are considered as a binding norm in the contractual relationship between them and those contract terms have a place in the hierarchy of norms, which is between the mandatory and the non-mandatory norms (Article 421 of the CCRF).

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[40] Suhanov, 2015: p. 92-93.
[41] Ibid.
[42] Braginskij and Vitrjanskij, 2011: p. 45.
[43] See e.g. Braginskij and Vitrjanskij, 2011: p. 45-48.

Custom, regulated in Article 5 of the CCRF, is considered as a normative source as long as the custom is not contradicting to the provisions of legislation or to the agreement, obligatory for the participant in the given relationship, as it is stated in the Article. Braginskij states that custom is a rule of conduct based on the duration and frequency of its application. It can be described as what everyone has always done.[44] Suhanov states that the custom must be sufficiently defined in its content and widely used in property turnover, primarily in entrepreneurial, mentioning as an example the tradition of fulfilling certain contractual obligations. It can be also considered as a kind of non-mandatory rule of law, applied in a subsidiary manner.[45] If the contract provision has not been defined by the parties or by the non-mandatory norms, the corresponding provisions shall be defined by the customs, applicable to the relationships between the parties, what leads to custom being placed after non-mandatory norms in the hierarchy of norms (par 5. Article 421).

The normative power of courts' judgements in the Russian legal system has been a slightly difficult subject in the past years. Like mentioned previously, in legal literature it has been stated that they are not formally recognized as a legal source.[46] Until the year 2014 the plenary decisions of the Supreme Court of Arbitration of Russia, it being the most important forum regarding contractual questions, were considered binding on the grounds of clause 2 of Article 13 of the Federal Constitutional Law of April 28, 1995 No. 1-FKZ *"On Arbitration Courts in the Russian Federation"*.[47]

In 2014 the Supreme Court of Arbitration of Russia was merged into and under the jurisdiction of the Supreme Court of Russia. Thereafter, the previously mentioned Article was abolished, which resulted in adopting a new law - the Federal Constitutional Law dated February 5, 2014 No. 3-FKZ *"On the Supreme Court of the Russian Federation"* and it defines the power, the formation and activities of the new Russian Supreme Court.[48] Its paragraph 1 of part 3 of Article 5 states that the SCRF in plenum *" - - provides the courts with clarifications on issues of judicial practice in order to ensure uniform application of the legislation of the Russian Federation*" and the Presidium of SCRF *"- - secures the*

[44] Braginskij and Vitrjanskij, 2011: p. 63.
[45] Suhanov, 2015: p. 89.
[46] See footnote 17.
[47] See Suhanov, 2015: p. 85-86.
[48] See Borisov, 2015: p. 40-41.

authority to consider certain issues of judicial practice" (paragraph 7, Part 1, Article 7). Also, the Constitution of Russian Federation Article 126 states that the SCRF *"- - gives explanations on issues of judicial practice"*. This regulation does not directly imply that the decisions made by Plenum or Presidium of SCRF are to be considered as precedents, but it certainly indicates that the decisions shall be taken in consideration when applying law. As Kornev states, the plenary decisions by SCRF contain provisions of interpretations clarifying and specifying the regulation of the legislator and that these interpretations have a normative nature.[49] In addition, the SCFR itself gives directions on how to apply its interpretations in court practice,[50] and also in case of changes in legislation and judicial practice, the SCRF makes relevant amendments to the decisions in a timely manner,[51] which also indicates its important role as a legal source at least in a guiding way. Danieljan states that plenary decision of the SCRF by their legal nature are normative and subordinate in nature, and in effect, acting as secondary sources of law.[52] Thus, the previously presented view is what the plenary decisions of SCRF shall at least be considered as a legal source, when e.g. examining subject of this thesis i.e. interpreting contract concepts.

Suhanov states that the civil law doctrine is not a source of law. It can be used by a judge as a guideline to form an opinion or become the basis of proposals for amending the legislation, but it does not have a direct legal significance and is not binding.[53]

To conclude, the legal sources of Russian civil law can be listed in the following order starting from the primary source:

1) The Constitution of the Russian Federation,
2) universally recognized norms of international law and international treaties and agreements of the Russian Federation (mandatory),
3) mandatory legislation
    a. The CCRF and federal laws in compliance with it,
    b. Decrees of the President of the Russian Federation,

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[49] Kornev, 2016: p. 117-118.
[50] Postanovlenie Plenuma Verhovnogo Suda Rossijskoj Federacii ot 19.12.2003 g. N 23 g. Moskva O sudebnom rešenii, par. 4.
[51] Danieljan, 2018: p. 4.
[52] Ibid.
[53] Suhanov, 2015: p. 86.

   c. Resolutions of the Government of the Russian Federation,[54]
   d. regulatory legal acts of other executive bodies e.g. ministries and departments of Russian Federation,
4) the terms of the contract,
5) non-mandatory legislation, and
6) the custom of the contract parties. [55]

In addition, and subsidiary to the previous listing, the decisions made in Plenum and Presidium of the SCRF should be considered as an unformal source in the least manner. Also, the civil law doctrine can be taken into consideration when applying norms as an unbinding source.

2.2.2. In Finland

In Finland the legal sources have traditionally been divided into *strongly binding*, *weakly binding* and *allowed*. Legislation and customary law form the strongly binding sources, of which the customary law's significance is very low, preparatory legislative works and the legal practice of courts form the weakly binding sources and legal doctrine, general legal principles, moral, realistic arguments form the allowed.[56] In modern Finnish doctrine of legal sources, alongside the Constitution, the fundamental rights, the human rights and EU law can be added on the highest level of norm hierarchy.[57] In addition, the role of international treaties is important despite that they do not become binding as they are written in the treaties,[58] but they are implemented through national law.

The strongly binding legal sources are mandatory in a manner, that when conducting a judicial decision, failure to apply a strongly binding legal source can result in a neglect of a duty. The weakly binding sources are important for the credibility of the resolution because when they are not referred to in a resolution, when it could have been done, the decision can

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[54] See Nysten-Haarala, 2013: p. 35. Author states that the resolutions of the Government of the Russian Federation can be implemented on the grounds of a Decree of the President of the Russian Federation.
[55] See: Mozolin, 2015: p. 33-37, author presents the points 1-3 of the list. The content of brackets, separation of mandatory and non-mandatory norms and 4-6 are added.
[56] Karhu, 2003: p. 792-793.
[57] Ibid. p. 794.
[58] Karhu, 2003: p. 794.

be criticized and disputed in an appellative court instance, which can lead to revision of it. The allowed sources of law, on the other hand, can be ignored without the need of rationalizing.[59]

When limiting the scope into just contract law, Hemmo presents the hierarchy of norms as following:

1) mandatory legislation,
2) contract terms,
3) established practice of the parties,
4) the customs of the trade of the industry, and
5) non-mandatory legislation.[60]

The constitution of Finland is on the highest level of the legislation and the norm hierarchy. As mentioned, on the highest level of norm hierarchy is also EU law. Finland is an EU Member State. EU law is primal[61], direct[62] and effective[63] law in the member states of the EU. Direct legal effect concerns regulations, and in certain cases, the articles of the main EU treaties, the regulation and decisions of the EU organs, main principles and the treaties that the EU has participated in.[64] Thus, the EU law is also on the highest level in the Finnish norm hierarchy as stated before. In addition, as EU can be part of international treaties, those treaties can be seen on a higher level in the norm hierarchy than the EU law.[65]

After the Constitution, on the legislative level, there are the laws and regulations (of Council of the State or ministries) and after those, other legal rules.[66] The basic general law is the Contracts Act (228/1929) and important special laws include the Sale of Goods Act (355/1987) and the Code of Real Estate (540/1995). The contractual legislation is mostly non-mandatory and supplementary in relation to the common will of the contract parties.[67] However, it shall be noticed that certain effective legal principles are solely codified in acts

[59] Karju, 2003: p. 792.
[60] Hemmo, 2006, ebook.
[61] On the grounds of 6/64 Flaminio Costa v ENEL and 106/77 Simmenthal.
[62] On the grounds of 26/62 Van Gend en Loos.
[63] See Ojanen 2016 p. 103, principle of effectiveness described in detail.
[64] Ojanen 2016 s. 73.
[65] Karttunen and others, 2017: p. 44.
[66] Karhu, 2003: p. 794.
[67] Nysten-Haarala, 2013: p. 78.

and when those acts, e.g. the Sale of Goods Act, by virtue of a duly clause is excluded from a contractual relationship by the parties to the contract, it does not result in the fact that those principles codified in the act would also be excluded from the contractual relationship even though they are written in the excluded non-mandatory act.[68]

Next in the hierarchy of norms, after the mandatory legislation and the contract terms, there is the established practice of the contract parties. It is the practice, that the parties to a contract are applying in their contractual relationship without having agreed upon it by virtue of a written contract. In addition, even if the content of the contract conflicts with the practice but the practice has been ongoing for a long time, it may change the contract terms. However, this requires evidence that may be hard to provide compared to a written contract.[69]

In the norm hierarchy, after the practice of the contract parties, there is the custom of the trade in the relevant industry sector. If the custom is generally established and followed within the regarding industry, it will gain the position of a legal source. If the contract parties do not want to follow the custom of the trade of the industry, that they are acting within, they shall state it in the contract between them in order to avoid confusion and risk of a dispute.[70]

The preparatory works of the Finnish legislation have the force of a weaker source of law (*heikosti velvoittava*). They are available for the public and they are often used to support the interpretation of the law. The legal practice of courts serves the same function. By the legal practice of the courts is usually meant the resolutions of the highest courts of Finland i.e. the Supreme Court of Finland and the Supreme Administrative Court of Finland. Despite that in Finland the lower court instances are not obliged to follow the practice of the highest court instance, like in common law systems, the resolutions of the highest instance do have a significant influence[71] as a legal source. It is also necessary to follow the practice of the highest courts to some extent due to the fundamental right of requirement of equal treatment before the law.[72] The resolutions of the Court of Justice of the European Union also need to be taken into consideration when resolving matters that are under the jurisdiction of the EU

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[68] See Wilhelmsson, 2006: p. 28-29.
[69] Hemmo, 2006: Chapter 3.
[70] Ibid.
[71] Karttunen and others, 2017: p. 36. The right to equal treatment before the law is stated in the article 6 of the Finnish Constitution.
[72] Ibid.

law.[73] The allowed legal sources, of which the most common is the legal doctrine, are an optional tool to use when forming legal argumentation. In some occasions, legal doctrine of the Nordic countries, other than Finland, has been used in legal argumentation when resolving issues regarding interpretation of Finnish law.[74]

The non-written legal principles play an important role in the Finnish contract law system as they affect the applying of the law and legal thinking regarding private law and contract law. [75] They include the principles of contractual freedom, *pacta sunt servanda*, reasonableness, loyalty and protection of the weaker party. These principles are part of the general doctrines (*yleiset opit*) of the Finnish contract law and they are used as supplementary tools for the interpretation of law and contracts.[76]

The Finnish legal sources may be difficult to put into a clear order of hierarchy. Scholars have presented their own views of the legal source doctrine and they can sometimes be contradicted with each other.[77] However, it is important to understand that the legal sources in Finland can work in a dynamic way supplementing each other. The legal principles of contract law presented earlier supplement the more concrete norms of law and direct the decision making into a certain direction while the concrete rules are more unconditional and clear.[78]

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[73] Ibid.
[74] Nysten-Haarala, 2013: p. 83.
[75] Ibid: p. 84.
[76] Ibid, see also Hemmo, 2003a: p. 48-66, author lists basic principles for the use of argumentation within the contract law sphere. According to him, those principles are: *pacta sunt servanda*, common intent of the parties to the contract, requirements of the parties to contract, loyalty, prohibition of abuse of rights, economical rationality and the fundamental rights.
[77] See e.g. following articles: Karhu 2003, Nuotio 2004 and Syrjänen, 2009.
[78] Viljanen and others: chapter I, section 3, Yleiset periaatteet, Varallisuusoikeudelliset periaatteet, säännöt ja periaatteet.

2.3. Contract Law Framework

2.3.1. Russian Contract Law

Like in many other continental European legal systems Russian law is divided into private and public law, of which the previous is based on private interests and the latter public interests.[79] Private law governs relationships between individuals.[80] Russian private law is regulated not only with mandatory norms but also with non-mandatory norms, which are applicable only when the subject is not otherwise regulated by law or by an agreement, and also with subsidiary norms.[81] Civil law reflects the rules of private law providing citizens protection from government interference and allows them a wide self-regulation opportunity regarding property and non-property relations between each other, which constitutes the basis of the private law.[82]

Braginskij states that contract law can be referred to as an institution of a special part of an examined branch. Contract law is a part of civil law and legislation regarding contracts is part of civil legislation.[83] The general norm for contract law is the CCRF, which has its own sections for general rules of contract law and specific rules for different types of contracts. CCRF's Section III is headlined as *"The General Part of the Law of Obligation"* and it has a subsection specifically for general rules regarding contracts headlined *"Subsection 2. The General Provisions on the Contract"*. Section IV, which is also the start of part two of the CCRF is headlined *"Particular Kinds of Obligations"*, as it regulates specific types of contracts. This thesis will be focusing mainly on the CCRF and particularly on its Section III as it regulates the general rules regarding contractual liability and compensation of losses.

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[79] Suhanov, 2015: p. 56.
[80] Ibid.
[81] Ibid.
[82] Suhanov, 2015: p. 56 and 58-60. See also Belov, 2016: p. 64: author states that despite that the civil law regulates the relationships between individuals, it does not indicate that individual relationships are regulated exclusively by civil law.
[83] Braginskij and Vitrjanskij, 2011: p. 34. See also Nysten-Haarala, 2013: p 32: author states that contract law does not form an independent branch neither in the Russian legal system nor in the Russian civil law system.

2.3.2. Finnish Contract Law

As mentioned previously, Finnish law is not codified. Thus, all the effective norms and principles are not written in a codification or in any legislation for that matter. Many different acts from different times are in power, some of which are very old and partly abolished. By glancing at the text of the law one may find the Finnish contract law confusing.

However, the Finnish contract law forms its own branch of law and has a traditional doctrine. It is part of private law and it is an important part of property law,[84] and thus, directed by the same principles used in property law. As stated, its main act is a general law i.e. the Contracts Act (228/1929). Since it was enacted, the Nordic countries also started developing their modern unified legal culture in the area of property law.[85] The Contracts Act contain provisions on the conclusion, authorization and invalidity of the contract and, since 1983, a general provision on the mediation of unfair contract terms,[86] that are the base norms of Finnish contract regulation. However, the norms regarding contract interpretation are mainly principles that can be derived from e.g. resolutions of the Supreme Court of Finland (KKO) and the norms regarding compensation of losses can be found written in non-mandatory general legislation of trade (Sale of Goods Act), special legislation or in no legislation at all, when again, the general principles regulate the matter. In Finnish contract law it is crucial to examine the system as a whole of which the written law is merely a part of.

2.3.3. CISG and the National Legislation

Finland and Russia have both ratified the CISG. It is applied to cross-border sale of goods agreements between entities of which at least one has ratified the CISG and whose business locations are in different states. However, it is non-mandatory and can be waived off. In practice, it is common for contract parties to deviate from the CISG provisions e.g. in respect of damages or other consequences of breach of contract.[87]

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[84] Viljanen and others: chapter I, section 2, Varallisuusoikeuden ominaispiirteet, Lainsäädäntö.
[85] Viljanen and others: chapter I, section 2, Varallisuusoikeuden ominaispiirteet, Pohjoismaisuus.
[86] Viljanen and others: chapter I, section 2, Varallisuusoikeuden ominaispiirteet, Lainsäädäntö.
[87] Sandvik and Tulokas-Sisula, 2013: p. 47-48.

Subsidiary application of national law can also take place when applying the CISG. According to its Article 7 Section 2, subsidiary application of national law that is determined by virtue of the rules of private international law is possible when the matter in question is not governed by the CISG or the matter cannot be settled in conformity with the general principles of the CISG.

Some scholars also state, that judges may allow their own 'home' national background law to influence the interpretation of the CISG and that in that case, it is assumed in good faith that the use of the terms words in the CISG corresponds to their use in national law.[88]

It can be concluded that despite that the CISG is applied to a large number of cross-border sale agreements, the national law also can in different ways affect the contractual relationship. This thesis focuses specifically on the application of Finnish and Russian national contract laws.

2.4. Conclusions and Comparison

Both the Finnish and Russian systems are often associated with the Romano-Germanic legal family. However, both systems have their own specialities that also deviate them from the Romano-Germanic legal family. A material difference is that in the Nordics, including Finland, there is no codifications, whereas in Russia there is. The Finnish contract law has been developing in cooperation with other Nordic Countries while the CCRF has been mostly adapted from Germany.

There is also difference in traditions of the two countries. While in Finland contract law has been developing in more 'stable' conditions where parliamentarism, market economy and individual rights have steadily been the fundaments of the society, in Russia the tradition is very different as the socialistic Soviet Union stopped existing relatively not so long ago. Consequently, the Russian contract law has had less time for adaption and amending than the Finnish contract law. This may also explain the relatively rapid amending that is being executed in the CCRF.

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[88] Sandvik and Sisula-Tulokas: p. 54.

Regarding the hierarchy of norms, one of the significant differences is that Finland is under the EU law jurisdiction, while Russia is not. Otherwise, from the fundamental parts, the hierarchy of norms is mostly similar i.e. the legislation is the primary source of law, as it is typical in Romano-Germanic systems, with some detailed differences. Especially from the contract law perspective there are differences in the hierarchy of norms. Whereas in Russia mandatory legislation and the written contract terms and conditions are in important position, in Finland the importance of legislation is relatively low, and in addition to written contract terms and conditions, also the established practice between the parties and the custom of the trade of the industry are important of which both have less importance in Russia.

The existence or non-existence of codifications can be seen well especially regarding the contract law framework of the countries. While the Russian contract law has been regulated in detail by the CCRF and other legislation, in Finland the norms of contract law are derived not only from the legislation but also from customs and court practice and they are often summarized and developed further by the legal literature.

As stated, both countries have ratified the CISG. In both countries the national contract regulation differs from the CISG in their own ways.

3. Interpretation of Contracts

3.1. In Russia

The CCRF regulates directly how a contract shall be interpreted. Specifically, it regulates how a judge shall interpret a contract in case the counterparties to the contract have brought a dispute of the terms of the contract to litigation. It is directly applied only in the case of litigation. Thus, all contract interpreters and drafters are guided by the rules of this article, whether there may never be a dispute whatsoever between the counterparties.

The interpretation article shall be applied only to a legally binding contract.[89] Russia has relatively strict mandatory requirements of contract forms for various different contract

[89] Braginskij and Vitrjanskij, 2011, p. 269.

types,[90] that are important to adhere to because if they are contravened, a contract will not be legally binding and then, consequently, the interpretation article cannot be applied, which would leave the counterparties without legal protection.

3.1.1. Article 431 of the CCRF

Article 431 of the CCRF regulates interpretation of contract in two paragraphs, of which the first is primal and represents the literal interpretation. The second paragraph regulates the secondary approach, which is finding the common will of the contract parties. Article 431 of the CCRF states:

"ГК РФ Статья 431. Толкование договора

При толковании условий договора судом принимается во внимание буквальное значение содержащихся в нем слов и выражений. Буквальное значение условия договора в случае его неясности устанавливается путем сопоставления с другими условиями и смыслом договора в целом.

Если правила, содержащиеся в части первой настоящей статьи, не позволяют определить содержание договора, должна быть выяснена действительная общая воля сторон с учетом цели договора. При этом принимаются во внимание все соответствующие обстоятельства, включая предшествующие договору переговоры и переписку, практику, установившуюся во взаимных отношениях сторон, обычаи, последующее поведение сторон."

The Russian approach of regulating contract interpretation represents the theory of the will expression,[91] which can be derived from the first clause of the article.[92]

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[90] Nysten-Haarala, 2013: p. 167.
[91] See e.g. Čerdancev, 2003: p. 320, for how Russian literature views and separates the theory of will and theory of will expression.
[92] Braginskij and Vitrjanskij, 2011: p. 269. See also Čerdancev, 2003: p. 320-321: author has more mild approach stating that the CCRF article 431 does not give literal interpretation and therefore theory of will expression a nature of peremptory approach.

3.1.2. Literal Interpretation

The first clause of the article also defines the basis of the Russian contract interpretation, which is the literal contract interpretation.[93] Čerdancev further divides the first paragraph of Article 431 into two parts, where the first clause reflects literal interpretation and the second clause systematic interpretation.[94] The literal interpretation means that the court evaluates the text of a contract from an objective point of view, taking into account the generally accepted semantics of words and expressions. Therefore, the court must determine the meaning of the contract wording based on the meaning of the corresponding words and expressions that have become established in the business turnover or in a certain sector of the market. The context of a contract must also be considered, as any fragment of wording is possible to define only by placing this fragment in the context of the entire text, what reflects the systematic interpretation. If the meaning of the words can be determined by virtue of these rules, the interpretation process should be concluded and court should not try to deviate from this meaning for the sake of assumptions about a different meaning the parties might have put into the contract wording.[95]

Braginskij states that in the Russian approach, what was said is more important than what was meant,[96] which may to some extend be the principal rule as the SCARF has also confirmed the strict literal contract interpretation in various cases.[97] E.g. in one case a telegram and a letter could not prove that the parties to a contract had agreed upon something outside of the contract wording as the court stated that the letter and telegram did not include a clear and certain expression of will.[98]

Deviating from the literal meaning of the words and expressions is possible only if they are unclear, following that the literal meaning of the words will be determined by way of comparing them with the other terms and with the purpose of the contract as a whole.[99]

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[93] Čerdancev, 2003: p. 331.
[94] Čerdancev, 2003: p. 331.
[95] Karapetov, 2017: p. 936.
[96] Braginskij and Vitrjanskij, 2011: p. 269.
[97] See: Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii. 1996. no. 7. S. 33 and Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii. 1997. no. 6. p. 45.
[98] Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii. 1996. no. 1. p. 73.
[99] Braginskij and Vitrjanskij, 2011: p. 269.

Braginskij states that for contract interpretation key point is to evaluate the legal nature of the contract from which the questions of will expression are dependant of,[100] and which the SCARF has also confirmed.[101] Using the systematic method, the court examines the wording from a reasonable outside observer point of view and tries to determine the meaning deducing it from an analysis of the entire contract as a whole and its nature still, however, without exploiting any material other than the text of the contract.[102]

3.1.3. Common Will

Only if a contract cannot be interpreted with the tools of the first paragraph of the article, the second part shall be applied, which is about finding the common will of the parties.[103] The common will of the parties does not mean the will of the parties subjectively but their common will, which is determined examining the purpose of the agreement.[104] The common will shall be found by considering all the corresponding circumstances, not only those that are listed as an example in the article, which are the negotiations, correspondence, the practice in the relationships between the parties.

"*Negotiations*" mean oral negotiations and can be taken into account only if the contract does not require a written form while "*correspondence*" means a contract party's position written on a paper from which the contract party's will can be assessed.[105] "*The practices in the relationships between the parties*" mean the circumstances that allow to conclude how the parties understood some of the conditions in contracts previously binding the parties. The concept of "*customs of business turnover*"[106] is used in the sense of the Article 5 of the

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[100] Braginskij and Vitrjanskij, 2011: p. 271.
[101] See Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii. 1996. no. 1. p. 34–35 and p. 48.
[102] Karapetov, 2017: p. 939.
[103] Čerdancev, 2003: p. 321: author states that while the first part of the CCRF 431 mainly but not absolutely leans towards the theory of will, the second part expresses theory of expression of will. See also Čerdancev, 2003: p. 331: author states that the finding of common will reflects functional interpretation and taking into account "*All the corresponding circumstances*" as the article states, reflects historical approach to the interpretation.
[104] Braginskij and Vitrjanskij, 2011, p. 270.
[105] Ibid.
[106] During the reformation of the CCRF in 2012-2015 the concept of "custom of business turnover" regulated by Article 5 was amended into just "custom". However, as the concept "custom" includes various types of custom it also includes the custom of business turnover, which still plays the most important role regarding contract law, since contracts are mostly used for business transactions.

CCRF and the "subsequent behaviour" of the parties means various kinds of actions (or abstinence from actions), from which certain conclusions can be drawn.[107]

Braginskij has also outlined that a court shall interpret ambiguous contract terms against the drafter of those terms,[108] which has also been confirmed by the SCRF.[109] However, the use of the principle of *contra proferentem* is allowed only when the methods of interpretation specified in Art. 431 of the Civil Code of the Russian Federation, did not lead to the determination of the meaning of the disputed condition.[110]

3.1.4. A More Flexible Approach?

The Russian legal practice has also shown signs that in some situations it can be more flexible regarding written forms and literal interpretation of contracts.[111] In a relatively new resolution The SCRF has outlined that in literal interpretation the meaning of words and expressions in the contract is determined by taking into account their generally accepted use by any participant in civil turnover acting reasonably and in good faith (this complies with the CCRF paragraph 5 of Article 10 in accordance to which "*[t]he fairness of participants in civil law relations and wisdom of their actions shall be presumed*", and paragraph 3 of Article 307 which regulates that parties of obligatory relationships shall act in good faith), unless another meaning follows from the business practice of the parties and other circumstances of the case. Also, the terms shall be interpreted in such a way to prevent any

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[107] Braginskij and Vitrjanskij, 2011: p. 271.
[108] See Braginskij and Vitrjanskij, 2011, p. 270-271. Also, Čerdancev, 2003: p. 335.
[109] Postanovlenie Plenuma Verhovnogo Suda RF ot 25.12.2018 N 49 "O nekotoryh voprosah primenenija obŝih položenij Graždanskogo kodeksa Rossijskoj Federacii o zaključenii i tolkovanii dogovora": par. 45, and Postanovlenie Plenuma VAS RF ot 14.03.2014 N 16 "O svobode dogovora i ee predelah" par. 11.
[110] Karapetov, 2017: p. 941.
[111] See e.g. Vestnik Vysšego Arbitražnogo Suda Rossijskoj Federacii, 2000, no. 3, p. 34: Priloženie k informacionnomu pis′mu Prezidiuma Výššij arbitrážnyj súd Rossíjskoj Federácii ot 24.01.2000 N 51: Court stated that, in a case regarding a building contract, that the absence of "technical documents", which in accordance with article 743 of the CCRF describe the subject of a building contract, and which therefore in accordance with the CCRF article 740 contain what can be deemed essential terms of a building contract, and which therefore in accordance with the CCRF article 432 is a requirement for conclusion of a contract, should not result the contract to be considered as non-concluded, as the parties to contract among other factors prior to the conclusion of the contract, had the customer familiarized with a typical sample of the contract subject. Consequently, this indicated that the parties had in fact determined the subject of the contract, despite the fact that the "technical document", if the CCRF norms are interpreted literally and narrowly, could be considered as a requirement for concluding a building agreement. See also Socuro, 2008: p. 39: author considers that the previous court case is resolved in the right way.

party to the contract from taking advantage of its illegal or unfair behaviour, which complies with the clause 4 of Article 1 of the CCRF. The interpretation should neither lead to such an understanding of the terms, which the parties could obviously not have in mind.[112]

In the presented resolution, the SCRF does not quite clearly express that the literal interpretation is primal to the systematic interpretation but instead mentions them in a more parallel way, regarding the first paragraph of the article 431 of the CCRF. In addition to that, the SCRF even mentions (before clearly referring to the second paragraph of the Article 431 of the CCRF, which in compliance with the text of the Article 431 is clearly secondary to the first paragraph) that the interpretation of the terms is carried out taking into account the purpose of the contract and the essence of the legislative regulation of the corresponding type of obligations.[113] The manner in which SCRF expresses the guidance regarding the article, could be interpreted that the SCRF has taken a somewhat softer approach to the relatively strict literal interpretation tradition in the Russian contract law.[114]

In general, the SCRF has stated that if the court interprets the terms of a contract taking into account the specifics of the particular contract, it can apply both interpretation methods directly established by the Article 431 of the CCRF, other legal acts arising from customs or business practice, and other approaches to interpretation.[115] This statement does not put the methods in any order of importance, which the law does.

Above mentioned conclusions made by the SCRF and scholars may be considered expressing a more flexible view in respect to the literal contract interpretation. However, some of these SCRF's rules may prove hard to apply as they can be relatively widely interpreted e.g. the ruling about what the parties obviously could not have in mind, which is subjective and may be hard to prove in practice.

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[112] Postanovlenie Plenuma Verhovnogo Suda RF ot 25.12.2018 N 49 "O nekotoryh voprosah primenenija obŝih položenij Graždanskogo kodeksa Rossijskoj Federacii o zaključenii i tolkovanii dogovora": par. 43.
[113] See Postanovlenie Plenuma Verhovnogo Suda RF ot 25.12.2018 N 49 "O nekotoryh voprosah primenenija obŝih položenij Graždanskogo kodeksa Rossijskoj Federacii o zaključenii i tolkovanii dogovora": par. 43.
[114] See also Karapetov, 2017: p. 938, author states that due to principle of absurdism, in which court should have the right to use a lower method of the hierarchy of interpretation methods if the higher method (literal interpretation) lead to an absurd conclusion.
[115] Ibid. par. 46.

Compared to the SCRF and Braginskij and Vitrjanskij, Čerdancev presents a more specific 13-step-list of rules of contract term interpretation.[116]

3.2. In Finland

There are only a few provisions of law in connection with the contract interpretation norms in the Finnish legislation. The principles of contract interpretation have mainly been developed without enacting laws, although, the legislation have had some indirect impact to certain interpretation rules, but instead, the legal practice of courts has been in a significant role,[117] as well as the legal doctrine. The legal doctrine has not provided a clear step-by-step system for interpreting contracts,[118] however, certain guidelines have been established.

Hemmo divides the methods of contract interpretation into two main groups based on what kind of interpretation material is exploited and what are the goals of the interpretation. The first group of interpretation methods comprise the contract party orientated interpretation, in which the contract interpretation focuses on the content of the contract, other material of written form, the behaviour of the contract parties and clarification of their intents.

The second group of contract interpretation methods is the aim orientated interpretation. For these contract interpretation methods, it is typical that they contain a beneficial element for the method exploiting contract party.

While the contract party orientated interpretation focuses on confirming the kind of content for the contract, that reflects the intention of the contract parties, the aim orientated interpretation directs the content of the contract in a direction, that is often beneficial for only the exploiting contractual party. The usual order to apply these methods is to firstly seek resolution from the contract party orientated interpretation and secondly from the aim orientated interpretation.[119]

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[116] Čerdancev, 2003: p. 332-335.
[117] Hemmo, 2003a: p. 577.
[118] Annola, 2016: p. 2.
[119] Hemmo, 2003a: p 602-603.

3.2.1. Contractual Party Orientated Interpretation

The contractual party orientated interpretation has two main alternatives. Firstly, the subjective approach, which reviews how parties to a contract (or a party to a contract) have *de facto* understood the content of the contract. Secondly, in the objective approach, the material produced by the contractual parties is exploited to find out how a hypothetical rational interpreter would have understood the contractual material. The relation of subjective and objective interpretation often appears in practice as a question of, with what grounds is it possible to deviate from the common meaning of the contract wording. When both parties have the same subjective interpretation, the situation is usually non-problematic. However, when those interpretations deviate, an objective approach may be required to resolve the conflict.[120]

The contractual party orientated interpretation focuses on the written material produced by the contract parties and on the mutual behaviour of the contract parties. If an interpretation option that results in determining the common intention of the contract parties is available, it bypasses all other interpretation material, even the written contract,[121] i.e. it is hierarchically the primary interpretation principle.[122] Important basis for interpretation, however, is the contract wording, but also other written and oral expressions, that have been expressed in order to enter into the agreement reflecting the intention of the contract parties, can be taken into account.[123] The more clear the wording of the contract is, the more difficult it is to be bypassed with other interpretation material.[124] The diligence of the contract preparation shall also be taken into consideration. When the contract has been formed by professionals and as a result of detailed negotiations, the wording of the contract is harder to

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[120] Hemmo, 2003a: p. 604-605.
[121] Saarnilehto, 2009: p. 149.
[122] See Annola, 2016: p. 167 and Saarnilehto 2009: p. 149.
[123] Hemmo, 2003a: p. 604 and 607. See also e.g. KKO 2001:34, where the court states: "*However, in interpreting the contract, account must be taken not only of the wording of the contract but also of any other interpretative material relevant to the content of the contract".* Regarding the interpretation material see Hemmo, 2003a p. 583-601, where the author presents different types of interpretation materials such as the contract itself, materials from the negotiations, the earlier established practice between the parties, the customs of the trade of the industry and the actions of the parties to contract after the contractual relationship has ended.
[124] Annola, 2016: p. 169 and Hemmo, 2003a: p. 608.

bypass, especially when the parties have defined meaning of certain words or concepts themselves. [125]

When interpreting the contract wording, it is preferable to start interpretation from a single term of the contract individually, which represents the literal interpretation. [126] When interpreting a singular expression, also the contractual environment, i.e. the sentence or the condition as a whole or the contractual entity as a whole or the activity the contract is connected to, can be exploited for evaluating the meaning of the expression, [127] what represents the systematic interpretation.[128] The literal and the systematic interpretation can be used simultaneously and they can supplement each other.[129]

When not defined by the contractual parties, the words of the contract shall be given the common meaning used in the relevant language, and when the result still remains unclear, the help of dictionary can be used.[130] The common meaning of contract wording can be bypassed when the contract parties have used expressions that are used in certain special fields of industries, e.g. technology or law related terms. If a concept or other expression is defined in legislation in connection to a special industry or other sphere, the legal definition is usually applied.[131]

A party to the contract can also argue against the wording of the contract claiming that the wording conflicts with the common intention of the contract parties. This can be successfully accomplished by exploiting the contextual interpretation method. [132] However, it would require solid proof from the claiming party as the wording of the contract has a strong presumptive status indicating what was the common intention of the contract parties.[133]

The views on the common intention of the contract parties can also be in conflict at times, therefore resulting in that one of those views should be chosen as primary. Again, what was

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[125] Hemmo, 2003a: p. 608. See also KKO 1996:19, where the court ruled that just the choosing of the word "repay" instead of "pay" determined to whom a certain sum of monetary assets belonged.
[126] Annola, 2016: p 172. and p. 174-175.
[127] Hemmo, 2003a: p. 609.
[128] See Annola, 2016: p. 186-189.
[129] Annola, 2016: p. 186.
[130] Hemmo, 2003a: p. 608.
[131] Hemmo, 2003a: p. 610-611.
[132] See Annola, 2016: p. 215-216.
[133] Hemmo, 2003a: p. 623-624.

written in the contract can contradict with what a party to contract assumes the intention of the contractual parties to be. In this situation, the party arguing against the literal interpretation of the contract can invoke to the first paragraph of Section 32 of the Contracts Act from which can be derived, that an expression, erroneously included in the contract wording, can be bypassed.[134] However, as the section states, it can be applied only if the other party to contract was aware about the failure in the expression of the intention.[135] The established contractual practice can also direct the result of the interpretation by bypassing a contradicting intention of the other party to contract.[136] Furthermore, an unreasonable intention in relation to the circumstances can be bypassed.[137]

3.2.2. Aim-Orientated Interpretation

If the interpretation based on the intention of the contract parties and the contract wording does not clarify the content of the contract, the aim-orientated interpretation shall be used. The first option is to interpret the contract in compliance with the spirit of the legislation and the second option is exploit the political interpretation rules such as *in dubio contra proferentem*[138], interpretation in accordance with statutory standards,[139] *de minimis* rule, rule of ordinariness, rule of reason (or rule of equity), rule of effectivity (or legitimacy rule)[140] and narrow interpretation, of which the rule of *contra proferentem* has significant relevance in practice.[141] Hemmo states that the usual order for applying these methods is that, firstly shall be applied the method complying with the spirit of the law and *contra proferentem* and if these two rules cannot be applied, then the rest of the mentioned aim-orientated methods shall be applied.[142]

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[134] Hemmo, 2003a: p. 625.
[135] Hemmo, 2003a: p. 625-626.
[136] Hemmo, 2003a: p. 628. See also KKO 1995:171, where court ruled that not expressing intention contradicting with the established contractual practice resulted in declining the contractor's intention.
[137] Hemmo, 2003a: p. 630. See also KKO 1996:83, where court ruled that buyers could not be granted price reduction by appealing that the property was not suitable for an all-year accommodation as it was mentioned in the presentation that the property was sold as a vocational accommodation.
[138] Or *in dubio contra stipulatorem*.
[139] Including non-mandatory legislation. See Hemmo 2003a: p. 634-637.
[140] See e.g. The Principles of European Contract Law Article 5.106.
[141] Hemmo, 2003a: p. 632-633.
[142] Hemmo, 2003a: p. 633.

Interpreting the contract in compliance with the spirit of the legislation means that the non-mandatory legislation can provide guidelines for interpretation when other interpretation methods do not help. This tool has more interpretational value when the contract, that is subject to interpretation, is more standardly used and not too individual, e.g. a corporate acquisition.[143] In compliance with the rule of *contra proferentem*, if a condition included in the contract is unclear, it shall be interpreted to the detriment of the party to contract that has drafted it.[144] It shall be noted, that if the condition is ambiguous in the contract wording, but other material can be interpreted to supplement the ambiguous term and result in a certain clearer interpretation, the rule may not be possible to apply.[145] In addition, applying the rule of *contra proferentem* requires that its applying party is *bona fide* i.e. the party to the contract has truly relied on its interpretation.[146]

According to the *de minimis* rule, the interpretation result, that is favourable for the obligated party, shall be chosen.[147] Consequently, this method can be applied mostly on one-way obligatory contracts.[148] In compliance with the rule of ordinariness, interpretation resulting the most common outcome shall be applied, which relates to the fact that established contractual practice is recognized as a legal source in the Finnish contract law.[149] According to the rule of reason, the most reasonable or fair interpretation shall be applied, what is connected with the principle of balance of the contract[150].[151] According to the rule of effectivity, if there is an alternative interpretation that would lead to the invalidity of the contract or its term, interpretation that results in validity of the contract or its term shall be applied.[152] The narrow interpretation shall be applied to certain conditions that promote merely the interest of the other party to contract and it is often connected with conditions

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[143] Hemmo, 2003a: p. 636.
[144] Hemmo, 2003a: p. 638. This principle has been introduced in the Finnish legal practice in the 1970's: KKO 1974 II 17 and KKO 1978 II 126 and is still recognized as a principal rule, see KKO:2016:10 par. 26.
[145] Hemmo, 2003a: p. 644. See KKO 1990:99, where the condition in the contract text was unclear but other materials and a witness regarding the contract negotiations resulted in the condition being clear enough as per court.
[146] Hemmo, 2003a: p. 647.
[147] Hemmo, 2003a: p. 647.
[148] Hemmo, 2003a: p. 649.
[149] Hemmo, 2003a: p 650, see also p. 592-595.
[150] See KKO 1997:130, where court ruled out the other contractual party's interpretation because it would have resulted in unbalance of the performance of the duties.
[151] Hemmo, 2003a: p. 651-652.
[152] Hemmo, 2003a: p. 652-653.

limiting liability of the other party to the contract.[153] This method can be applied to the conditions that are clearly exceptional, and that are in significant contrast with non-mandatory legislation and the contractual practice.[154]

[153] Hemmo, 2003a: p. 653-654. Also, the Supreme Court of Finland has mentioned this method in resolution KKO 1992:178, where the court states that disclaimer conditions shall be interpreted narrowly, especially if they are drafted by a contractual party alone.
[154] Hemmo, 2003a: p. 655-656.

4. Damage Concepts

4.1. In Russia.

4.1.1. Forms of Contractual Liability

In Russian contract law compensation of losses is a form of contractual liability. To understand what the concept ‘losses’ or ‘damage’ comprise, it is necessary to acknowledge the other forms of contractual liability that are excluded from the concept of losses or damage.

What has been considered as a form of contractual liability has varied in Russian legal literature. Ioffe states that forms of liability for violation of obligations, in addition to compensation for losses, are payment of liquidated damages, loss of deposit and various sanctions applied in certain types of obligations.[155] The latter form of liability can mean for example a situation where a shipment is shipped before it’s payment, when the supplier may require that the customer must first set aside the sum of the payment using a letter of credit and only then the goods shall be shipped.[156] Puginskij divides the forms of liability to compensation of losses, liquidated damages, measures regarding confiscation and other non-typical forms of liability.[157]

In modern Russian contract law literature Vitrjanskij and Braginskij recognize only two forms of contractual liability, which are compensation of losses and liquidated damages. From which the latter, in the form of a pecuniary obligation is considered as another independent form of liability that consists of the annual interest for fulfilling a pecuniary obligation, which is included in Article 395 of the CCRF.[158]

The Article 401 of the CCRF regulates the Russian approach to the grounds of responsibility for the violation of the obligation. The infringing party can avoid responsibility, in most

[155] See Ioffe, 1975: p. 98
[156] Ioffe, 1975: p. 98-99. This is view is supported also in the earlier Soviet Union literature, see Sadikov, 1957: p. 51.
[157] Puginskij, 1984: p. 137.
[158] Braginskij and Vitrjanskij, 2011: p. 641.

cases,[159] only if it proves that the proper discharge has been impossible because of a force-majeure, i.e., because of the extraordinary circumstances, which were impossible to avert under the given conditions. At the end of the article there are specifically stated some situations that cannot be used as grounds to avoid the liability in this manner. Thus, the Russian approach to the grounds of liability is similar to control liability that is adopted in the CISG and Finnish contract law.

4.1.2. Compensation of Losses and Concepts in Regard

The general form of contractual liability is the compensation of losses, while the other forms of liability are applied in certain cases provided by law or contract. [160] Regarding what the concept of 'damage' or 'losses' comprise, second section of the article 393 points to article 15 for the definition. Instead of utilizing one single concept of e.g. 'damage', the CCRF uses several different concepts for it. To present the differences between these concepts and at the same time to avoid confusion it is necessary to establish a corresponding English word for each one of them. The concept of *'убыток'* which is transferred into English more closely to *'loss'* (hereinafter '*убыток'* shall be referred to as '***Loss** or **Losses***').[161] Losses are the negative consequences caused by unlawful behaviour to the property of the victim.[162] What separates Losses from other forms of compensable subjects, is that Losses are a consequence of an offense.

Vitrjanskij states, that the concept of Loss shall be distinguished from concepts of *'вред'* and *'ущерб'*.[163] *'Ущерб'* can be transferred to English as damage, harm, injury, lesion, loss (hereinafter *'**Damage**').*[164] *'Вред'* can be transferred to damage, harm, injury or wrong (hereinafter '***Harm**').*[165] In addition, closely to the previous, the terms expenses (*расходы*) and expenditure (*издержки*) are used.[166] The translations are not perfect and they are

[159] See e.g.: Nysten-Haarala, 2013: p. 66-67.
[160] Braginskij and Vitrjanskij, 2011: p. 641.
[161] Levitan, 2014: p. 490.
[162] Ioffe, 1975: p. 100.
[163] Braginskij and Vitrjanskij, 2011: p. 642.
[164] Levitan, 2014: p. 496.
[165] Levian, 2014: p. 346.
[166] Sadikov, 2009: p. 51.

presented only to help the motivation of the difference of these concepts, which will be presented hereinafter.

Dodonov and others state that in the legal literature, judicial and arbitration practice Harm and Damage are most often regarded as synonyms. Vitrjanskij states that Damage and Harm are usually used, firstly, to indicate one of the conditions of civil liability or one of the elements of a civil offense, and secondly, when analyzing legal relations related to tort obligations.[167] In other words they mean a negative effect to something. Monetary value of Harm or Damage is called Losses.[168]

It shall be noted, that moral Harm (*моральный вред*) shall be separated from the concept of Losses in contractual relationships. Compensation for moral Harm is regulated in the CCRF article 151 and it cannot be applied on the grounds of a contract and its obligations. Instead the basis of the mentioned responsibility is the fact of causing citizen physical or mental suffering and the Harm and the compensation for it is determined by court and cannot be determined by individuals' contract.[169] Thus, misusing the concept of Harm in Russian contracts could mislead the interpretation towards the wrong concepts, which is why the parties should be aware of all the Russian concepts of 'damage' to avoid confusion and losing of rights in case of a dispute.

In Russian legal literature Losses have also been defined e.g. as a monetary value of Damage that is caused by the unlawful actions of one person to the property of another person.[170] Vitrjanskij states that this definition works in relation to situations where e.g. Losses is equal to the loss occurred by the creditor of property as a result of the debtor's failure to fulfil a contractual obligation. However, it does not cover the cases where a debtor violates a contractual obligation and the violation did not cause Damage to the property of the creditor, but it deprived him of the opportunity to receive the income on which he relied.[171] There is also several other opinions on the concepts of damage.[172] The various takes and different

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[167] Braginskij and Vitrjanskij, 2011, p. 642. See also Sadikov, 2009: p. 52, where the author states associating Harm only with delict is not correct as it is used in insurance agreements and gifts and p. 59, where the author states Harm can also be a compensable loss in contractual relationship.
[168] Stepanov and others, 2015: p. 34. See also Dodonov and others, 2001: p. 92 and 582.
[169] Braginskij and Vitrjanskij, 2011, p 631.
[170] Novickij, 1950: p. 365.
[171] Braginskij and Vitrjanskij, 2011: p. 642.
[172] E.g. see Malein, 1968: p. 91.

views by Russian legal scholars on these concepts inevitably lead to conclusion that definition of these concepts has been and still may not be clear to all in the legal practice.[173]

The CCRF uses the mentioned concepts in a certain way that shall be examined. In the CCRF Actual Damage is considered as one of the components of Losses, while, in any other meaning the concept of Damage is practically not used in the CCRF.[174] As for the concept of Harm, the scope of its application is limited to the norms of non-contractual liability and regarding question of Harm as a condition of liability, the CCRF prefers to refer to the consequences of violating an obligation like in Article 333.[175]

4.1.3. Principles Connected to the Concept of Losses

Article 15 of the CCRF is a general norm that defines the concept of Losses in Russian civil law. It is based on the principle of full recovery of Losses, which has traditionally been an effective principle in Russian contract law.[176] However, the full recovery of Losses can be partly bypassed pursuant to the Article 15 of CCRF: *"- - full recovery of the losses - -, unless the recovery of losses in a smaller amount has been stipulated by the law or by the agreement"*. Thus, it is non-mandatory and the principle of freedom of contract surpasses the principle of full recovery of Losses in Russian contract law in addition with certain situations that are regulated by other laws. It is important to notice that this article is a general rule and it regulates all cases concerning compensation of losses, both based on law (non-contractual liability) and contracts (including different contract types that are under special regulation), except those regulated by the norms of special law.

The full recovery of the Losses means that the creditor should be in the same position in which the creditor would be if the debtor fulfilled the obligation properly, which requires compensation to the creditor for Actual Damage caused by the violation obligations and for the lost profits, and it also means, that the compensation shall be adequate putting the creditor

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[173] See also Braginskij and Vitrjanskij, 2011: p. 643: author states that e.g. in documents that define principles of contracts there is not always made enough difference between Losses, Damage and Harm and they are even often used as synonyms or to complement each other. Therefore, each time it is necessary to find out the true meaning the use of one or another concept, if, of course, it has any legal significance.
[174] Braginskij and Vitrjanskij, 2011: p. 643.
[175] Ibid.
[176] Braginskij and Vitrjanskij, 2011: p. 643-644.

into appropriate position in which the creditor does not receive more compensation than it is necessary i.e. not to receive more than the creditor would have received if the obligations were fulfilled appropriately, which is ensured with the CCRF Article 393 as it regulates that when defining the content of Losses, the price of goods, services or labour that shall be taken into account is the price that existed in the moment and place when and where the obligation should have been fulfilled, Article 394 as it regulates that compensation for Losses shall be proportioned with a possible liquidated damages and Article 395, that regulates that Losses and interest for illegal using of others monetary assets shall also be proportioned.[177]

However, previously mentioned articles may not be enough to ensure that the creditor would not in some cases be put into a better position that the creditor would be in if the obligations were fulfilled properly. The creditor could argue that various different reasons could lead to widening the content of the creditor's claim for Losses beyond the limits of the actual or real damage that the creditor has experienced. As Vitrjanskij states, there is no common norm that defines the limits of the amount of damages. This is save for the relatively new amendment to Article 393 of the CCRF, paragraph 5, which states that the amount of losses to be compensated shall be established with a reasonable degree of reliability. However, CCRF's article 10 prohibits abuse of law which can prohibit creditor claiming for damages beyond reasonable limits, which of course can be considered as abuse of law and article 1102 prohibits unjust enrichment according to which if an individual or entity gains property at the expense of another entity or individual without the grounds established by law, the gainer is obligated to return the property. Thus, in compliance with article 1102 the creditor who claims for compensation of Losses beyond reasonable limits, could be considered trying to gain property unjustifiably at the expense of another entity or individual.[178]

When defining the concept of Losses, these articles play an important role as they demarcate a framework thereto. They give the concept of Losses a limit that cannot be surpassed, which gives the contract parties certain safety in situations where the parties themselves have not defined the concept of Losses in the contract. The situation would be a lot different without this framework as in the case of a claim for compensation of Losses issued by the creditor,

[177] Braginskij and Vitrjanskij, 2011: p. 646-647.
[178] Braginskij and Vitrjanskij, 2011: p. 649.

the creditor could demand high amounts of compensation that would be surprising and damaging for the debtor.

4.1.4. Losses

The Article 15 of the CCRF include two parts. Firstly, the expenses that a party, whose rights have been violated, has made or will have to make to restore the violated right, loss or damage to its property (Actual Damage), and secondly, unreceived profits, which this party would have derived under the ordinary conditions of the civil turnover, if its right was not violated (lost profit).[179]

The Actual Damage includes expenses for the restoration of a violated right (including future expenses) and loss or damage to property, and 'property' shall be interpreted broadly in compliance with Article 128 of the CCRF.[180] In case of a non-discharge of an obligation, non-mandatory Article 397 of the CCRF furthermore specifies that the creditor is entitled for compensation of necessary expenses and other Losses due to a replacement performance either by virtue of creditors own work or by the help of a third party. This is a general rule and it is specified in different types of contracts e.g. in purchase and sale regulation Article 475 of the CCRF. Sadikov divides Actual Damage to 1) bereavement and damage to property 2) payments to third parties and 3) a decrease in the economic indicators of the creditor. A common example of what could be claimed as Actual Damage is a decrease in the value of property due to its partial shortage, damage, markdown due to poor quality or other defects of manufactured goods or services rendered. The payments to third parties are commonly connected to malfunction of the debtor of forfeit and loss, repayment of interest on a loan taken, as well as administrative and legal payments to financial and customs authorities caused by an offense and also necessary wages for employees and other payments in case of production downtime due to non-compliance with deadlines. As a decrease in economic indicators can be included a decrease in the quality of the suffering party's product. These exemplary losses may be deemed to be included in Actual Damage and therefore in Losses. However, in order the claim to be successful, it must be proven that there is a causality

[179] Braginskij and Vitrjanskij, 2011: p. 654.
[180] Sadikov, 2009: p. 62.

between the offense and the alleged damage incurred, which will be determined by the court. Some of these examples have been resolved by the supreme courts, as it will be presented further in this thesis, but many remain unsolved.[181]

The loss of profit is viewed to be a difficult part of the Losses to determine.[182] In addition to Article 15, Section 4 of Article 393 regulates lost profit as it states that when defining the lost profit, the measures, taken by the creditor to derive it, and the preparations, made for the same purpose, shall be considered. What lost profit includes is not defined in the legislation specifically. Sadikov states that, in legal literature contradicting views are presented and legal practice does not provide a clear answer to what type of loss shall be considered as lost profit. He suggests that the concept of lost profit should be understood broadly and that as a guideline, for determining the circle of unearned revenues recovered as a part of lost profits, can serve the rules of the Accounting Regulation (PBU 9/99)[183] of the Ministry of Finance of the Russian Federation, in which income is defined as "*an increase in economic benefits resulting from the receipt of assets (cash, other property) and (or) repayment of obligations, resulting in to increase the capital of the organization, with the exception of contributions of participants*". He states that practice of the highest court instance is highly needed in this question.[184]

It shall be also highlighted that, separately from the concept of lost profits, profits gained by the breaching party can be compensated as Article 15 of the CCRF regulates that *"If the person, who has violated the right of another person, has derived profits as a result of this, the person, whose right has been violated, shall have the right to claim, alongside with the compensation of his or her other losses, also the compensation of the missed profit in the amount not less than such profits."*.

Concepts in connection with compensation of Losses are widely used in the CCRF and in other legislation.[185] In addition to Losses, Actual Damage and lost profit, other terms are

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[181] Sadikov, 2009: p. 101-111.
[182] Sadikov, 2009: p. 64
[183] Prikaz Minfina Rossii ot 06.05.1999 N 32n (red. ot 06.04.2015) "Ob utverždenii Položenija po buhgalterskomu učetu "Dohody organizacii" PBU 9/99" (Zaregistrirovano v Minjuste Rossii 31.05.1999 N 1791).
[184] Sadikov, 2009: p. 115-122.
[185] See Sadikov, 2009: p. 50, where author states that in some parts the terminology is not used consistently.

also used around the civil law such as Harm, Damage (not Actual Damage), expenses and expenditures.[186] In some parts of the law is vainly stated e.g. "compensation for expenses and other Losses" as the Losses already do include necessary expenses, but on the other hand the term is used to regulate certain expenses for a party to contract to bear, which is outside of the institution of compensation of Losses.[187] The term expenditure is less used in the legislation and is used mostly separately from the institution of compensation of Losses, as it often describes costs not connected with a violation.[188] A separate concept of compensation is also used in the CCRF, e.g., in Article 1252, where it is stated that instead of compensation of Losses, the right holder can claim for compensation, which is a separate concept from the institution of compensation of Losses.

As in Russian legal practice and legal literature the concept Losses have also been divided into direct and indirect Losses, of which only the former is subject to compensation as per Russian law.[189] Abova and others state that direct Losses that are subject to compensation are a result of violating an obligation and they include compensation for Actual Damage and lost profits.[190] Thus, under this assumption direct Losses is what is included in defining the concept of Losses in the CCRF Article 15. Vitrjanskij would avoid dividing the concept of Losses into direct and indirect Losses as the latter is not even considered as Losses. He prefers using the single concept of Losses, which contain Actual Damage and the lost profits, while using concepts of direct and indirect Losses would only lead to confusion.[191] However, the modern Russian legal literature speaks in favour of this dividing and it is used in Russian contracts,[192] which could mean that eventually the legislation might also notice it in the future or at least the courts could comment it in their resolutions.[193]

As Sadikov concludes, the inconsistency in the terms of the Russian civil legislation in the terminological designation of losses is not only due to miscalculations when drafting the

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[186] Sadikov, 2009: p. 51.
[187] Sadikov, 2009: p. 53-54.
[188] Ibid: p. 54.
[189] See e.g. Abova and others, 1996: p. 590. See also Sadikov, 2009 p. 74-75: where author states that the separation of Losses to direct and indirect lacks stable court practice and clarity in legislation.
[190] Abova and others, 1996: p. 590.
[191] Braginskij and Vitrjanskij, 2011: p. 655.
[192] See Sadikov 2009: p. 75 and 78.
[193] It shall be noted that separation of direct and indirect damage have already been in a rather special legislation in Russia, in the Code of Domestic Water Transport of the Russian Federation, in article 143.

laws, but also to the peculiarities of the unusually rich Russian language which has an established and habitual usage. In commercial relations, it is customary to use the term Losses, but during transport operations - Damage to the cargo; in case of Damage to health - causing Harm; in case of additional cash payments - expenses.[194]

4.1.5. Losses Resulting from the Occurrence of the Circumstances Defined in a Contract

In 2015 the CCRF was amended with Article 406.1., which regulates compensation for the losses resulting from the occurrence of the circumstances defined in a contract. Its first paragraph states that "*[t]he parties to an obligation, while exercising business activities, may provide in the agreement made by them the duty of either party to compensate for the property losses of the other party resulting from the occurrence of the circumstances determined in such agreement which are not connected with the violation of an obligation by a party thereto - - . The agreement made by the parties shall fix the rate of compensation for such loses or a procedure for its calculation.*"

Firstly, it shall be pointed out that in the Russian qualified version of the article text, the concept of Losses (убытки) is not used. Instead, 'потери' is used, of which English translation is losses. However, to avoid confusion, потери shall be referred to as "Costs" hereinafter.

The article regulates compensation for Costs that are not arising from violation of the contractual obligation by the other party.[195] The contract parties can determine themselves in what situations the other party shall be reimbursing the Costs for the suffered party despite that it was not the other party's fault. Thus, the article provides the contract parties an opportunity to go beyond the Russian institute of compensation of Losses regulated in the CCRF in order to split risks in connection with their contractual relationship.[196] Karapetov states that in commercial contractual practice this kind of arrangement often can be described by the English term 'indemnity', but he highlights that it does not mean that the Russian

[194] Sadikov, 2009: p. 56-57.
[195] Karapetov, 2017: p. 738.
[196] See ibid: p. 738-739, author explains how the mentioned article can be used in splitting risks and compares it to certain types of insurance etc., and ibid: p. 742.

institution of compensation of Costs is an absolute analogue of the English institute of indemnity.[197]

As one may ask, why does the legislator need to enact the mentioned article, when the content of it could have been derived from the fundamental principle of freedom of contract? Karapetov states that the legislator would not need to do it if the principle of freedom of contract was fully applied in Russia, which it is not, because while carving its way out of the past Soviet times where elements of planned and prohibitive legal ideology were imminent, Russia have had some difficulties. Thus, the legislator has seen it necessary to directly confirm the legality of this arrangement while at the same time regulating some of its nuances[198].[199] This again highlights the importance and primary nature of written federal legislation in Russia.

These Costs can be, as the Article 406.1. provides a few examples: "- -*the losses caused by the impossibility to execute the obligation, the claims raised by third persons or the state power bodies against a party or a third person cited in the contract etc*. - -". Karapetov also provides numerous examples, e.g. a transaction of a controlling stake at a company, in which the seller would guarantee to cover Costs related to presentation of tax claims to the company whose shares he acquired for the period preceding the alienation of corporate control.[200]

The article 406.1. may be deemed an optional possibility for the contract parties to extend the concept of Losses. However, it is not so. The compensation of Costs in accordance with article 406.1. of the CCRF shall be carefully separated from compensation of Losses in compliance with the article 393 of the CCRF as the article 406.1. clearly states that it shall only be applied to compensation of Costs that are not connected with the violation of an obligation by a party. As Karapetov states, the conditions for compensation for Costs are included in the contract to cover those Costs that are not covered by the general or special rules on contractual liability.[201] Thus, the institute of compensation of Costs is different and

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[197] Ibid: p. 739.
[198] Section 2-5 of the Article 406.1. of the CCRF.
[199] Karapetov, 2017: p. 741.
[200] See ibid: p. 739-741, author provides many examples regarding commercial transactions.
[201] Karapetov, 2017: p. 742. See also Postanovlenie Plenuma Verhovnogo Suda RF ot 24.03.2016 N 7 (red. ot 07.02.2017) "O primenenii sudami nekotoryh položenij Graždanskogo kodeksa Rossijskoj Federacii ob otvetstvennosti za narušenie objazatel′stv" par. 15.

regulated by different norms than the institution compensation of Losses, but it is a helpful parallel tool to the compensation of Losses for a contractual party.

4.1.6. Abstract and Concrete Losses

Russian legal literature recognizes the concepts of abstract and concrete Losses, which can be derived from the CCRF.[202] Before the year 2015 the only article regulating what is known as abstract Losses in Russian contract law was the Article 524 of CCRF, which is still effective. However, the Article 524 only regulates the contracts of delivery, but in Russian legal literature e.g. Vitrjanskij has stated that in the case of the article 524 analogy of law may be possible in accordance with the analogy of law Article 6 of the CCRF.[203]

In 2015 the CCRF was amended with Article 393.1, which regulates compensation of Losses in case of termination of a contract due to failure or improper performance by the debtor. It is similar to the Article 524, but the new Article is a general norm concerning all contracts. The article regulates that compensable Losses consist of concrete Losses, which include the difference in the price of the terminated violated contract and the specific transaction replacing it and abstract Losses, which include the difference between the price of the terminated violated contract and the average market price for a similar product, job or service.[204]

The concept of abstract and concrete Loss can be parallel to Actual Damage and lost profit, depending on who claims to be compensated for such Losses. For example, if the supplier was forced to sell the product at a price lower than the price terminated by the buyer, this difference is can be considered lost profit.[205]

Even before the CCRF was amended with the mentioned article, the result following from applying it may have been derived from the analogy of article 524 or from the principle of full compensation of losses, which has traditionally been recognized as an effective principle

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[202] See Braginskij and Vitrjanskij, 2011: p. 659-661.
[203] Braginskij and Vitrjanskij, 2011: p. 661.
[204] Karapetov, 2017: p. 649.
[205] Karapetov, 2017: p. 651-652.

in Russian contract law,[206] but the legislator explicitly saw it necessary to include it in the CCRF, what proves that the legislator indeed wanted to clearly widen the concept of Losses.

4.1.7. Losses in Legal Practice

In Russian courts' practice there are plenty of resolutions in which court interprets what does the concept of Losses include and exclude. Like previously stated, the Russian court decisions are not formally considered as precedents, but they play an important role as lower court instances refer to the resolutions of highest instance, particularly to the plenary decisions. In this part I will present the practice of high importance regarding how the Russian courts interpret Losses.

The SCRF has stated in its presidium approved review of judicial practice that a distribution network may recover Losses in the form of administrative fines for the sale of substandard food products from suppliers of such products.[207]

In the following exemplary cases the highest court instances of Russia have specified what does Actual Damage regulated by Article 15 of the CCRF consist of. In plenary decision dated 23.6.2015 the SCRF states that in case a damage has occurred or is occurring, if new materials are used or will be used to eliminate the damage to the property by the offended party, the corresponding expenses are fully included in Actual Damage of the offended party except for the cases established by law or contract.[208] Regarding insurance reimbursements, Actual Damage can consist not only of the repair and spare parts but also of the depreciation of the commodity due to premature deterioration of the commodity, according to the plenary SCRF.[209] In a case regarding leasing agreement, the Presidium of the SCARF stated that

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[206] Braginskij and Vitrjanskij, 2011, p. 643.
[207] "Obzor sudebnoj praktiki Verhovnogo Suda Rossijskoj Federacii N 4 (2019)" (utv. Prezidiumom Verhovnogo Suda RF 25.12.2019) par. 41.
[208] Postanovlenie Plenuma Verhovnogo Suda RF ot 23.06.2015 N 25 "O primenenii sudami nekotoryh položenij razdela I časti pervoj Graždanskogo Kodeksa Rossijskoj Federacii" par. 13. See also Postanovlenie Konstitucionnogo Suda RF ot 10.03.2017 N 6-P "Po delu o proverke konstitucionnosti stat′i 15, punkta 1 stat′i 1064, stat′i 1072 i punkta 1 stat′i 1079 Graždanskogo kodeksa Rossijskoj Federacii v svjazi s žalobami graždan A.S. Arinušenko, G.S. Beresnevoj i drugih" par. 5, the Constitutional Court of Russian Federation has also taken this position.
[209] Postanovlenie Plenuma Verhovnogo Suda RF ot 26.12.2017 N 58 "O primenenii sudami zakonodatel′stva ob objazatel′nom strahovanii graždanskoj otvetstvennosti vladel′cev transportnyh sredstv" par. 37.

Actual Damage consists of the costs of acquiring the leased asset.[210] In a case regarding investment in securities the SCARF has outlined that the amount of monetary compensation payable upon redemption of a share represents Actual Damage, not loss of profits.[211]

The highest court instances have also defined in some cases what does the concept of lost profit comprise of. First and foremost, as the lost profit is an abstract loss it can be calculated only approximately. Thus, the SCRF has stated in a plenary decision dated 23.6.2015 that as the calculation is usually approximate and probabilistic, this circumstance in itself cannot serve as a basis for a denial of a claim, in other words, the approximation is enough for the party seeking compensation for Losses.[212] In a plenary decision the SCRF has stated also, that regarding clause 4 of Article 393 of the CCRF, when evaluating the amount of lost profit including measures taken by the creditor to receive the lost profit and the preparations made for this purpose, the creditor is not only entitled to present evidence of the measures and preparations for receiving it but also any other evidence of the possibility of extracting it. The court also provides an example of this. Also, the debtor is not deprived of the right to provide evidence that the loss of profits would not have been received by the creditor.[213] The SCARF has stated that in case of a leasing arrangement the lost income not received from the leased asset is deemed lost profit.[214]

In court practice it has been confirmed that in case of a breach of contract and insufficient delivery the costs for acquiring a substitutive product or service can be considered as Losses when claiming for damages.[215]

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[210] Postanovlenie Prezidiuma VAS RF ot 12.07.2011 N 17748/10 po delu N A60-46065/2009-SR.
[211] Postanovlenie Prezidiuma VAS RF ot 30.11.2010 N 8907/10 po delu N A40-106944/09-57-509.
[212] Postanovlenie Plenuma Verhovnogo Suda RF ot 23.06.2015 N 25 "O primenenii sudami nekotoryh položenij razdela I časti pervoj Graždanskogo Kodeksa Rossijskoj Federacii" par. 14.
[213] Postanovlenie Plenuma Verhovnogo Suda RF ot 24.03.2016 N 7 (red. ot 07.02.2017) "O primenenii sudami nekotoryh položenij Graždanskogo kodeksa Rossijskoj Federacii ob otvetstvennosti za narušenie objazatel′stv", par 3.
[214] Postanovlenie Prezidiuma VAS RF ot 12.07.2011 N 17748/10 po delu N A60-46065/2009-SR.
[215] See e.g. Informacionnoe pis′mo Prezidiuma VAS RF ot 25.07.2000 N 56 "Obzor praktiki razrešenija arbitražnymi sudami sporov, svjazannyh s dogovorami na učastie v stroitel′stve" par. 10 and Opredelenie Konstitucionnogo Suda RF ot 06.06.2002 N 115-O "Ob otkaze v prinjatii k rassmotreniju žaloby graždanki Martynovoj Evgenii Zaharovny na narušenie ee konstitucionnyh prav punktom 2 stat′i 779 i punktom 2 stat′i 782 Graždanskogo kodeksa Rossijskoj Federacii" par. 4.

The Presidium of the SCARF has outlined that a person who has paid compensation for moral Harm is entitled to recover this amount as Losses from the counterparty who improperly performed obligations.[216]

The SCRF has outlined that the indexation, regulated by Article 208 of the Code of Civil Procedure of the Russian Federation, of awarded monetary amounts is aimed at reimbursing financial losses from inflation, not Losses.[217] The Presidium of the SCARF has outlined that despite a party to contract had untimely paid seller for goods causing the seller harmful tax consequences, the costs of those tax consequences cannot be considered as Losses.[218] According to the Presidium of the SCARF, the contractors debt to third parties involved by the contractor is not Actual Damage and not subject to recovery if, under the contract, the contractor is not entitled to bring them without the knowledge of the customer.[219] According to the ruling of the Judicial Collegium on Economic Disputes of the SCFR Losses do not include expenses on payment of a fine for non-fulfillment of a buyers legal requirement on a voluntary basis.[220] The SCRF has determined that costs of expertise in order to successfully defend from a claim are compensable Losses.[221]

There are some issues regarding which the Russian court practice is ambiguous. One of these is the question of can the value-added tax be included in the structure of Losses. The Judicial Collegium on Economic Disputes of the SCFR has stated that the value-added tax cannot be included to Losses if it is tax deductible.[222] However, some of the appellate courts have not followed this approach and have stated that it can be included because it is not prohibited by the legislation.[223] The courts' practice regarding this particular question serves also as an

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[216] Postanovlenie Prezidiuma VAS RF ot 18.05.2011 N 16777/10 po delu N A82-14922/2009-8.
[217] Opredelenie Sudebnoj kollegii po graždanskim delam Verhovnogo Suda RF ot 27.06.2017 N 77-KG17-14.
[218] Postanovlenie Prezidiuma VAS RF ot 18.03.1997 N 3787/96.
[219] Postanovlenie Prezidiuma VAS RF ot 30.05.2000 N 8079/99.
[220] Opredelenie Sudebnoj kollegii po èkonomičeskim sporam Verhovnogo Suda RF ot 17.04.2017 N 306-ÈS16-16450 po delu N A12-38063/2015.
[221] Opredelenie Verhovnogo Suda Rossijskoj Federacii no. 306-ÈS17-7311 Moskva 31.8.2017.
[222] See: Opredelenie Sudebnoj kollegii po èkonomičeskim sporam Verhovnogo Suda RF ot 13.12.2018 po delu N 305-ÈS18-10125, A40-52603/2017, where the Judicial Collegium on Economic Disputes of the SCFR endorses the following decision of the Presidium of the SCARF: Postanovlenie Prezidiuma Vysšego Arbitražnogo Suda Rossijskoj Federacii ot 23.07.2013 N 2852/13, where the court the same view.
[223] Postanovlenie Arbitražnogo suda Vostočno-Sibirskogo okruga ot 29.09.2016 N F02-5359/2016 po delu N A19-19074/2015. See also: Postanovlenie Arbitražnogo suda Central′nogo okruga ot 15.10.2019 N F10-4800/2019 po delu N A08-10722/2018 and Apelljacionnoe opredelenie Sverdlovskogo oblastnogo suda ot 07.12.2018 po delu N 33-21219/2018, the courts have the same view.

example of how in the Russian legal system the decisions of the supreme court are not recognized as precedents and the legislation is supreme in comparison to them, even though courts of lower instances often follow the practice of the supreme courts.

The practice is also ambiguous in relation to shared-equity construction. In a Determination of the Judicial Collegium for Civil Cases of the SCRF has outlined that in case of a delay in the builder's transfer of the shared construction object and the participant is forced to invoke to a substitutive rental housing, the participant is entitled to compensation for those costs as Losses.[224] However, appellative instances have denied the suffered party's right for the previously mentioned if they have a permanent registered address for living.[225] If those courts of lower instances strictly followed the guidance of the previously mentioned Determination of the Judicial Collegium for Civil Cases of the SCRF, they may have had ruled otherwise, even though the fact that permanent address in a housing indicates that the suffered party does not need to invoke to a rental housing.

4.1.8. Recap

To summarize the Russian damage concept examination the following shall be noted. In Russia the general form of contractual liability is the compensation of damages. What do the compensable damages comprise of is defined directly in the CCRF with the following concept structures. Upon breach of an obligation, Loss (*убыток*) is compensable according to the Article 15 and 393 of the CCRF. It includes Actual Damage (*реальный ущерб*) and lost profit (*упущенная выгода*).

Losses, Actual Damage and lost profit are concepts defined by law and they shall be separated from other descriptive or other legal damage related concepts, previously presented in this chapter, and not mixed with them.

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[224] Opredelenie Sudebnoj kollegii po graždanskim delam Verhovnogo Suda RF ot 19.12.2017 N 18-KG17-239.

[225] See e.g. Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 02.10.2018 po delu N 33-42035/2018, Apelljacionnoe opredelenie Samarskogo oblastnogo suda ot 11.10.2018 N 33-12355/2018 and Apelljacionnoe opredelenie Sankt-Peterburgskogo gorodskogo suda ot 28.11.2017 N 33-24016/2017 po delu N 2-1305/2017.

Actual Damage is, according to law, the expenses that a party, whose rights have been violated, has suffered or will have to suffer to restore the violated right, loss or damage to its property. In legal literature Actual Damage has been divided into 1) bereavement and damage to property, 2) payments to third parties and 3) a decrease in the economic indicators of the creditor. Lost profit, according to law, is unreceived profit, which the suffered party would have derived under the ordinary conditions of the civil turnover, if its right was not violated. Russian court practice has furthermore defined in more detail what should be included in the Actual Damage and lost profit but some of this practice is ambiguous as presented earlier.

In the legal literature, there are also some established damage concepts that are not directly stated in the legislation. E.g. concrete Losses, which include the difference in the price of the terminated violated contract and the specific transaction replacing it and abstract Losses, which include the difference between the price of the terminated violated contract and the average market price for a similar product, job or service. These concepts can be parallel to Losses, Actual Damage and lost profit and they can be used for describing or structuring of contract terms, preferably not solely, but e.g. to support describing the contractual liability of the parties.

In the Russian legal literature, the concepts of direct and indirect losses are a disputed subject. As they are not used in the Russian legislation (almost at all) and the separation of Losses to direct and indirect lacks stable court practice and clarity in legislation, their usage under Russian law can cause confusion. However, they have been used in practice and what seems to be undisputed, is that it follows from the Russian law that the indirect losses would not even be part of compensable Losses. In contracts, the legal concepts, i.e. Losses, Actual Damage and lost profit should preferably be used instead.

The indemnity-like institution of compensation of Costs (*nomepu*), also amended to the CCRF (Article 406.1), is also to be separated from the institution of damages and its concepts, which shall be kept in mind when these arrangements are agreed upon. As stated, in commercial contractual practice this kind of arrangement often can be described by the English term ‘indemnity’, but it does not mean that the Russian institution of compensation of Costs is an absolute analogue of the common law institute of indemnity.

Regarding damages the principle of full compensation of Losses is applied, unless otherwise stipulated by the contract. It means that the property of the creditor should be in the position in which the creditor would be in case the debtor fulfilled the obligation properly.

Damages are subject to some limits also. Article 10 of the CCRF prohibits abuse of law which can prohibit the creditor from claiming for damages beyond reasonable limits, which of course can be considered as an abuse of law. Article 1102 of the CCRF prohibits unjust enrichment according to which if a party gains property at the expense of another party without the grounds established by law the gaining party is obligated to return the property.

4.2. In Finland

4.2.1. Forms of Contractual Liability

In the Finnish legal system liability is divided into tort liability and contractual liability. The compensation of losses can be considered as the cornerstone of the contractual liability.[226] The institute of compensation of losses is connected to other legal remedies in the contract law system. Buyer's statutory remedies according to the Sale of Goods Act include, in addition to compensation of losses, the right to withhold performance according to the contract, the right to require remedying the defect or to deliver substitute goods, to require a reduction in the contract price, to declare contract avoided or other termination of contract. These remedies are alike with the remedies provided by CISG subject to CISG does not exploit the division into direct and indirect damage.

In Finnish contract law, compensation of losses is usually the only remedy that can provide compensation for additional costs and indirect losses for the suffered party and in that case the other remedies are not in a primary position. Non-statutory remedies such as liquidated damages, guarantees, warranties, return of goods, indemnity, price reduction or avoidance, if agreed upon, can also affect the possibility to claim for damages. Their usage can be exclusive or additional to statutory remedies. There are no general norms regulating the

[226] Hemmo, 2003b: p. 219.

contractual liability and there are significant differences between the norms applied to different types of contracts. [227]

Liability for damages under the contractual liability arises commonly on grounds of either the so-called "control liability" or negligence. The liability provisions in several acts regulating contractual relationship are based on "control liability" (*kontrollivastuu*) and the related distinction between direct and indirect damage. Control liability is derived from the CISG and it is also implemented in the Finnish Sale of Goods act according to which the buyer is entitled to compensation of losses that he suffers because of the seller's delay in delivery, unless the seller proves that the delay was due to an impediment beyond his or her control which he or she could not reasonably be expected to have taken into account at the time of the conclusion of the contract and whose consequences he or she could not reasonably have avoided or overcome.

In various other laws, such as the Code of Real Estate, liability is based on negligence (*tuottamus*) and no distinction is made between direct and indirect types of losses. Contractual liability can also be based on other types of liability such as strict liability, but the types of liability are not covered by this thesis.[228]

4.2.2. Compensation of Losses and Concepts in Regard

Finnish legislation does not contain a general norm that regulates all types of contracts. There are provisions on contractual liability in the Commercial Code (355/1987), as well as in several special legislation, such as the Residential Lease legislation, the Employment Contracts Act, the real estate legislation and the transport legislation. However, in contracts where the parties thereto are viewed as equal, these acts are mostly non-mandatory. Also, several types of contracts that are important in commercial field are excluded from the legislation and depend on the general principles of contract law.[229]

Regarding compensation of losses, the basic concept in Finnish language in '*vahinko*', the English translation thereof being damage or loss. While there is only one word for damage

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[227] Viljanen and others: chapter IV, section 13, Yleistä, Suhde muihin oikeuskeinoihin.
[228] Hemmo, 2006: Chapter 8, Vahingonkorvausvastuu, normipohja.
[229] Hemmo, 2006: Chapter 8, Vahingonkorvausvastuu, normipohja.

or loss, there are, however, conceptually different types of losses recognized by the contract law system. Losses can be divided into different classes (*vahinkolajit*): the losses or damage suffered by a person (*henkilövahinko*), [230] damage done to tangible object (*esinevahinko*) and property damage (*varallisuusvahinko*). When damage done to a person or to a tangible object is to be compensated, the norms and principles in chapter 5 of the Tort Liability Act (412/1974), which is the general law regulating the tort liability, can be applied.[231] These damage classes do not play an important role in contractual liability, and Tort Liability Act is not applicable in contractual liability.

Furthermore, damage can be material or non-pecuniary as well as direct or indirect. Uncertainties regarding different damage classes in contractual liability are predominantly connected with the status of different types of non-pecuniary damage. In contract law the attention does not tend to be concentrated on non-pecuniary interests.[232] The damage to be eligible for compensation in different situations is often defined by using the mentioned classifications and other contractual liability principles.[233]

4.2.3. Principles Connected to the Concept of Damage

As the laws merely reflect the principles and concepts of Finnish contract law, the legal literature plays an important role in systematizing the concept of damage and principles related to it. When damage to a person or to a tangible asset (material damage) occurs, it is called real damage (*reaalinen vahinko*) in Finnish legal literature and its financial effect is ought to be neutralized with the compensation of losses, while at the same time damages may not exceed real damage (principle of forbiddance of enrichment by virtue of damages)[234]. In Finnish contract law the concept of real damage is not needed to be separated from financial damage. In order to the damage to be compensated it needs to be measured, which is conducted by presenting a hypothetic chain of events in which the creditor would

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[230] Damage suffered by a person can be eligible to compensation on the grounds of both tort and contractual liability. See e.g. KKO 1998:80, where court approved claim for damages on the grounds of contractual liability.
[231] Viljanen and others: chapter IV, section 13, Korvattavat vahingot, vahinkolajit.
[232] Viljanen and others: chapter IV, section 13, Korvattavat vahingot, vahinkolajit.
[233] Hemmo, 2003b: p 250-251.
[234] Hemmo, 2003b: p. 265.

have been satisfied and comparing it to the occurred chain of events. This method is called the difference doctrine (*differenssioppi*) and its goal is to find and measure the damage in a monetary form.[235]

Difference doctrine is connected to positive and negative interest. Positive interest asks the question in what financial state the creditor would have been in if the contractual liabilities were duly fulfilled in accordance with the contract and then by virtue of compensation of losses the creditor is to be placed into that position (the principle of full compensation of losses). The negative interest asks the question what financial state the creditor would have been in if the contracting parties would not have started to engage into the agreement and then by virtue of compensation of losses the creditor is placed into that position. The basis of compensation of losses is the positive interest and negative interest is used usually in situations when the damage is related to ending of negotiations (*culpa in contrahendo*) and when the liability is based on a void contract. The question of whether the creditor can itself decide to choose using negative or positive interest, is unclear in the Nordic contract law.[236]

4.2.4. Losses

The concept of damage or loss is also generally not defined in the Finnish legislation and therefore the previously mentioned principles are important to understand when defining the concept of damage. The legal doctrine of tort law (*vahingokorvausoikeus*), which examines the legal norms in connection with compensation of losses,[237] has developed certain definitions for the concept of damage. Damage is usually defined as a difference between two different courses of events, which are the expected hypothetic course of events and the occurred course of events. Damage is the extraction or difference between these courses of

[235] Hemmo, 2003b: p. 256. This method has been also used by the Finnish Supreme Court in case KKO 1994:98, where the court calculated the damage by comparing the catch of a properly working fish cage from two weeks to the cage that was broken. It was discovered that the broken cage was to a certain amount short, which the court considered, after calculating the monetary value of the fish, to be the damage.
[236] Hemmo, 2003b: p. 260-262.
[237] Hemmo, 2002: p. 11.

events.[238] More simply put, damage can be defined as unexpected change inflicted by an external matter, what is to be considered as unfavourable for the injured party.[239]

As mentioned, when damage occurs to a person or to a tangible asset, it is defined as real damage in Finnish legal literature, and it is not separated from financial damage as the basis in evaluating the damage is to measure the financial benefits that the creditor did not receive, which the creditor was entitled to receive.[240] However, the term of real damage is not used in court practice while it is mostly used for systematizing purposes in the doctrinal study. Regarding compensation of losses in the scope of contractual liability the division of direct and indirect damage is more relevant.[241]

4.2.5. Direct and Indirect Loss

In general, both direct and indirect damage are subject to compensation.[242] However, in Finnish contracts the compensation of indirect damage is often ruled out in the terms of the contract and due to adjustment of an unreasonable condition and predictiveness reasons.[243] Thus, direct and indirect damage need to be defined (if not already defined by the contract parties themselves).

When the common sale of goods acts were drafted in the Nordics, the "control liability" model used in the CISG was considered to be too strict, which was resolved by damage being divided into direct and indirect of which only the direct damage was subject to compensation on the grounds of "control liability" per the Nordic sale of goods acts.[244] Consequently, the first appearance of direct and indirect damage in the Finnish legislation was in the Sale of Goods Act.[245]

One of the important compensable damage types is the price difference between the replacement purchase price and the agreed purchase price. The direct damage, due to breach

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[238] Ståhlberg and Karhu, 2013: p. 9.
[239] Ibid.
[240] Hemmo, 2003b: p. 259.
[241] Hemmo, 2003b: p. 255.
[242] Hemmo, 2003b: p. 273.
[243] Hemmo, 2003b: p. 273.
[244] Sandvik, 2014: p. 672.
[245] Hemmo 2003b: p. 272-273.

of an agreement, can be compensated with the price difference between the replacement purchase and the purchase price agreed upon or if the injured party is the seller, between the price of selling the product to a third party and the price agreed upon. This type of compensation does not always require the replacement purchase or sale to *de facto* occur. In this case the compensation is the price difference between the price that the replacement purchase or sale could have been done for and the price agreed upon. This is called the abstract compensation of the price difference price.[246]

According to preparatory works of the Sale of Goods Act, direct losses include losses that are conventional in both quantity and quality in connection with the relevant breach of contract.[247] Indirect damage is defined in the Sale of Goods Act Section 67 as costs due to reduction or interruption in production or turnover; other loss arising because the goods cannot be used as intended; loss of profit arising because a contract with a third party has been lost or breached; loss due to damage to property other than the goods sold; and other similar loss that is difficult to foresee, of which the last clause concludes, that the list of variants of indirect damage is not an exhaustive list. The section states also, that loss incurred by the injured party for mitigation of loss not covered by the previously listed cases shall not be considered indirect loss. In unclear cases the damage is presumed to be direct.[248]

The preparatory works of the Finnish Sale of Goods Act present the main exemplary types of direct and indirect losses. Direct damage can include the following:1) the costs incurred to the suffering party due to breach of contract. Those can be e.g. telephone, mail and travel expenses; 2) in case defected goods, the costs of examining the goods and evaluating the effects of the defect; 3) in case annulment of purchase on the buyer's initiative due to breach of contract e.g. the duties, taxes and charges paid by the buyer; 4) the costs of buying goods in replacement; 5) the difference between the purchase price and the price of the replacement goods and, respectively, the other way around; 6) when resulting from buyer's breach of contract the seller has to sell the goods for a lower price than the price agreed upon, the difference between the agreed price and the price the seller sold the goods to a third party for and, also; 7) the difference between the purchase price and the market price in case the

[246] See Hemmo, 2003b: p. 278-282.
[247] HE 93/1986: p. 41.
[248] KKO:2014:61: par. 9 and HE 93/1986: p. 41.

replacement goods are not bought or the goods are not sold to a third party; 8) the costs and other expenses due to the contract, but which have become useless as a result of the breach of the contract e.g. the costs incurred by the injured party in concluding and performing a contract that has since been terminated e.g. the costs of preparing tenders; 9) cost of delivery incurred by the buyer, when the seller was unable to deliver the goods for the carrier. Leasing costs of the replacement goods incurred by the offended party. Internal costs incurred by the offended party due to breach of contract.[249]

Indirect damage can include the following: 1) the employment costs that the suffering party is obligated to discharge; 2) increasement of employment costs e.g. rising of wages; 3) the licensing costs of intellectual property rights that the buyer is obligated to discharge, regardless of the volume of production; 4) the costs due to decline in production due to replacement goods of lower quality than those the seller was supposed to deliver; 5) losses of goodwill; 6) when the buyer has hired staff to use an ordered machine, the wage costs over the delay period occurred since the agreed delivery date; 7) costs for paying liquidated damages based on a contract with a third party in the event of a delay; 8) damage caused by a defect in the goods to property other than the goods itself can also be compensated as indirect damage; 9) costs of mitigating damage are also subject to compensation in a way that it must not lead to improvement of the aggrieved party's right to compensation due to the measures taken.[250]

The division of direct and indirect damage according the Nordic sale of goods acts has been criticized quite a lot by Nordic scholars in the legal literature.[251] Furthermore, the distinctions between direct and indirect damage in the preparatory works have also been criticized.[252] However, on a hierarchically higher level of legal sources, this separation in general has later been adopted and endorsed by the Supreme Court of Finland[253] and the legislator[254] despite the criticism, which leads to the conclusion that the separation of direct and indirect damage is here to stay, at least, for some time. However, it shall be noted that

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[249] HE 93/1986: p. 42.
[250] HE 93/1986: p. 42-43.
[251] See e.g. Sandvik, 1999: p. 43-44 and Wilhelmsson, 2006: p. 30.
[252] See e.g. Hoppu, Esko, 1988, p. 57 – 58.
[253] See e.g. KKO:2014:61 par. 17. and KKO:2017:74 par: 8-12.
[254] E.g. in Consumer Protection Act (38/1978), Housing Transactions Act (843/1994) and Information Society Code (917/2014).

probably because of the criticism, the Supreme Court of Finland does consider alternative views than those presented in preparatory works of the Sale of Goods act despite that, the court may eventually end up in the same conclusion as outlined in the preparatory works.[255] Thus, it would not be a surprise if the court would apply also contradictory ruling regarding the statements in the preparatory works.

The distinction between direct and indirect damage, however, is still not defined in the general legislation. This brings up the question of possible analogy of the Sale of Goods Act regarding the concepts of direct and indirect damage. Because of the previously mentioned criticism, some scholars do not believe that the analogy of the mentioned distinction in other types of contracts is possible.[256] However, it may as well be possible. The principles concerning the sale of movable property have already been considered a model for other contract law in the past and it has been considered that these principles can in many respects be extended to other agreements, especially in the context of exchanges, which was also considered when the Sale of Goods Act was in preparation.[257] Thus, the possibility of the analogy should at the least be considered.[258]

4.2.6. Profit, Benefit, Cost of Remedying and Care Taking

In addition to damage, eligible for compensation on the grounds of contractual liability may be profit, maintenance costs, interest and costs related to debtor's breach of obligation to compensate the costs of repair.[259] The content of these concepts are not generally defined in any general norm and their content needs to be evaluated separately in each situation. In some cases, the help of special legislation and legal practice can be exploited.

Profit (*tuotto* or *voitto*) can be subject to compensation as received or lost profit. According to Section 67 of the Sale of Goods Act, damage consists of lost profit, of which as an example can be presented a hypothetical case: when the buyer has at the negotiation stage ordered a

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[255] See e.g. KKO:2014:61: par. 12-16.
[256] See Wilhelmsson, 2006: p. 30, where author states that analogue of the dividing concepts probably cannot be applied. Regarding Sweden, see e.g. Ramberg and Herre: Köplagen 2013, p. 39.
[257] Wilhelmsson, 2006: p. 28.
[258] For a more detailed analysis of the analogy and applicability of the concepts of the Sale of Goods Act, see Hemmo, 1994: p. 287-291.
[259] Hemmo, 2003b: p. 220.

special device from the seller to fulfil obligations of another contract, and if the seller delays delivery, the buyer's contract with a third party expires, which results in lost profit.[260]

On the grounds of Section 65 of the Sale of Goods Act, if the contract is declared void, the buyer must compensate to the seller for any profit he has derived from the goods. In this occasion, the profit is resulting from the buyer's own actions, which can consist of e.g. dividend payment or descendant of an animal.[261] Furthermore, in compliance with the previously mentioned section, *any other benefit* (*hyöty*) derived from the goods must be compensated reasonably, which widens the subject of compensation.

The costs of having a defected product remedied can be subject to compensation (On the grounds of paragraph 3 of Section 34 of the Sale of Goods Act). This includes also the transportation costs required for remedying the defect. Moreover, costs necessary for preserving the goods at the expense of the other party can be subject to compensation (based on the Section 75 of the Sale of Goods Act).

In some cases, damage and other concepts can overlap. According to section 67 of the Sale of Goods Act, lost profit is considered as indirect damage in which case damage consist of indirect damage and indirect damage consist of lost profit. The presented systematization of concepts by the Sale of Goods Act can be exploited when interpreting also other types of contracts as the Sale of Goods Act is considered as a model or guideline in the contract law to a certain extent.[262]

Despite that these forms of compensation are captioned with different concepts than the concept of damage (even though they sometimes also overlap with it), they are closely tied to the institution of compensation of losses and when those concepts are used or interpreted, they are directed by the norms of the institution of compensation of losses. It is, however, important to know these concepts separately. Although compensation, according to the Sale of Goods Act, may be provided in the form of care taking costs, compensation for the costs of remedying, a price reduction and damages, the injured party cannot claim compensation for the same part of the damage sum on several different grounds, e.g. if the suffered party

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[260] HE 93/1986, p, 128.
[261] HE 93/1986, p, 120.
[262] Wilhelmsson, 2006: p. 28.

has been compensated for the care taking costs it cannot claim for damages anymore.[263] However, sometimes the same claim can include different grounds for compensation for different parts of the sum that is claimed for.

4.2.7. Indemnity

As Finnish contract law is heavily based on the principle of freedom of contract it has been possible to use indemnity clauses, a foreign invention of the common law countries, in Finnish commercial contracts. As Thorpe and Bailey describe it, "*[a]n indemnity is an undertaking by one party to meet a liability which would otherwise fall on the other"*.[264] The party who undertakes to take responsibility is called an indemnitor and the beneficiary is called indemnitee. For example, an indemnitor may take the responsibility for the costs of a possible future claim for direct damages addressed to indemnitee. Obviously, when indemnity clauses are used under the jurisdiction of Finnish contract law, the norms of Finnish contract law, such as norms regarding reasonableness, are applied on it despite that it is invented within a foreign legal family.

Compartmentalization of indemnity clauses into Finnish legal system is hard because the indemnity clause often creates a number of issues related to the contractual relationship. It may dictate on quality requirements for performance and it may act as a guarantee commitment resembling a guarantee and extending liability. It also may guide the resolution of a conflict with a third party or specify the conditions for terminating the contract.[265]

When indemnitor's promise to compensate, e.g. costs of a claim for damages from a third party to the indemnitee, realises, the compensation will be made strictly according to what the indemnitor and the indemnitee have agreed upon in the contract, as the indemnification institute is not regulated by the Finnish contract law. Thus, in order to successfully form an indemnity clause, it can be achieved by making the clause clear enough and using the right concepts in it. Consequently, using the right concepts regarding contractual liability, such

[263] HE 93/1986: p. 44.
[264] Thorpe and Bailey, 1996: p. 92.
[265] See Hemmo, 2007: p. 4-5.

as, compensation of losses (direct or indirect), profit or other type of costs, of which the indemnitor takes the responsibility, is highly important.

4.2.8. Losses in Legal Practice

In Finland there are also some important resolutions by the Supreme Court regarding what can be included in damage concepts. Especially there are important resolutions in connection with direct and indirect damage.

In a relatively new resolution KKO:2017:74 the court based its decision on the preparatory works[266] of the Sale of Goods Act in a case regarding product damage, which usually is not subject to compensation according to the Sale of Goods Act, except in certain situations. In this case, contaminants in a fuel oil that was sold had damaged engines of tractors. In its resolution KKO considered the damage incurred by the buyer to be indirect damage on the grounds of Section 64 of the Sale of Goods Act. In addition, the laboratory costs, spent on evaluating these costs, were also considered as indirect damage.[267]

In another case, the KKO ordered the seller to compensate costs, as an indirect damage, incurred by the buyer as a result of the buyer being forced to pay a penalty for late delivery to a third party. The court ruled the damage as indirect because a penalty paid for a third party is, according to KKO, difficult to foresee.[268]

In a case regarding costs arising from evaluating the damage, the KKO ruled that those costs of litigation connected to the defect of the product are to be considered as direct damage as they are costs arising from evaluating the damage.[269]

In a case regarding delivery of train wheels, the court rules several costs as direct damage. The court mentions as an example, that the contracting party suffers direct damage, when the agreed performance is not received or when the value of the performance is lower than intended. Furthermore, the court states that direct damage can include e.g. costs for ordering a replacing performance and the costs connected to the ordering of the replacing

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[266] HE 93/1986 s. 128.
[267] KKO:2017: 74: par. 10-12.
[268] KKO:2014:61: par. 17.
[269] KKO:2012:101 par. 9-10.

performance. These costs can be predicted as they are connected to the purchase price. On the other hand, the court states, that indirect damages are hard to predict. In this case the court ruled the costs of ultrasound examination, tools, laboratory tests and inter-company (of the suffering party) assessment as costs arising from evaluating of the defect in the goods, and costs, for the replacement of wheels on axles and the machining of replacement wheels and cost of changing wheelsets to wagons at a separate rate, as costs arising from the replacement of the defected product and therefore all of these costs as direct damage. Moreover, the court ruled that costs, arising from the fact that the wheels could not be used for as long as the suffering party could reasonably have required under the terms of the order contract, are to be considered as direct damage, because it can be concluded, that the product is not as valuable as it was meant to be.[270]

It can be concluded, that the KKO often leans to the rule of predictability when dividing damage to direct and indirect. This rule can be subject to various interpretations and gives the judge a relatively wide discretionary power. It is, however, based on some basic rules of experience, and thus it cannot be bended excessively.

In a case regarding damage incurred by a shareholder of a company in the form of decline in the company's share value resulting from intentional malpractice and breach of the Articles of Association and the Limited Liability Companies Act by the company's CEO and members of the Board, the court exploited the concepts of direct and indirect damage. As the direct damage was incurred by the company, the indirect damage was incurred by the shareholder of the company.[271] It is worth noting that in this case the court uses the concept of direct and indirect damage in a damages case in the sphere of the Limited Liability Companies Act, in which the differentiation between direct and indirect damage is not made.

Regarding including value added tax into damages, the court has stated that where the amount of the claim is based on a value added tax transaction, the VAT component is not compensable damage if the injured party has deducted or could deduct the amount of VAT paid from state tax.[272]

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[270] KKO:2009:89: par. 10-12.
[271] KKO:2000:89.
[272] KKO 1999:6, see also KKO:2019:57, where value added tax was included in the compensation of losses.

Also, in a previously mentioned case of KKO, the court ruled that damage done to a person were compensable on the basis of contractual liability.[273]

4.2.9. Recap

To summarize the Finnish damage concept examination the following shall be noted. In Finland the cornerstone of contractual liability is the compensation of damages. There is no general legislation in Finland that regulates damages and concepts in connection to it. Also, when commercial contracts are in question, they are often entered into between equal parties i.e. commercial entities and that results in that almost all the special legislation is dispositive and can be bypassed with an agreement. In these situations, it is important to remember, that some norms that are included in these laws have the nature of a valid legal principle, and that they cannot be bypassed by merely waiving off e.g. the application of Sale of Goods Act to a contract.

Due to non-existence of a general legislation, the Finnish damage concepts are also not generally defined by law. The legal literature plays an important role in systematizing the concept of damage and principles related to it. The basic concept in Finnish language in 'vahinko', the English translation thereof being damage or loss. In commercial contracts, the division of direct and indirect damage is important. Compensation of indirect damage is often excluded from the contractual liability.

Direct and indirect losses are relatively widely defined in examples in the Sale of Goods Act and its preparatory works and in court practice. It is unclear if analogy of the Sale of Goods Act is possible in respect of contract types, as it has been disputed in the legal literature. For some parts and in some situations it may be possible. The most important element that deviates indirect and direct damage is that damage that is difficult to foresee, is often deemed indirect damage. According to the legal literature, in unclear cases damage is presumed direct.

In Finland there are also other concepts for describing certain compensable monetary sums. These are profit, maintenance costs, interest and costs related to debtor's breach of obligation

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[273] KKO:1998:80.

to compensate the costs of repair. If contract parties want to avoid confusion and the contract being not too open for interpreting, it is always recommendable to use descriptive clauses with precise concepts when e.g. defining damage or structuring contractual liability in a contract.

Finnish laws do not regulate indemnity. However, indemnity-like arrangements can also be used in Finnish contracts. When drafting indemnity clauses, the objects of indemnification should be carefully described, which also includes using the precise concepts, in order to avoid the risk of the rule of unreasonable condition being applied to the indemnity clause or the arrangement being hard to interpret, in which case there is no legislation to specify it.

In Finland damages are mostly compensated in accordance with the principle of positive interest. Positive interest asks the question in what financial state the creditor would have been in if the contractual liabilities were duly fulfilled in accordance with the contract and then by virtue of compensation of losses the creditor is to be placed into that position, which also exemplifies the principle of full compensation of losses.

4.3. Comparing the Russian and Finnish Concepts

In both countries the institution of compensation of losses plays a key role in contractual liability. Both countries recognize also other types of liability such as liquidated damages, which can be used additionally and along with compensation of losses as remedies in case the contracting parties have agreed so. Regulation of compensation of losses, including definitions of the concepts used in the systems is different in Russian and Finnish systems. While the Russian system has mandatory and non-mandatory general legislation, the CCRF, regulating all contracts in addition with special legislation also in the CCRF and other legislation, Finland has no general legislation regulating the contractual liability. Instead, Finnish contractual liability and institution of compensation of losses and its concepts are regulated by e.g. the fundamental principles that are systematized in the legal doctrine.

Regarding the principles behind the norms of the institution of compensation of losses, there are similarities and differences. Both countries recognize the principle of full compensation of losses unless otherwise agreed between the contracting parties. However, despite that it is closely connected to positive interest (or value of the performance), the Russian law and

established legal literature do not discuss it and if the matter is mentioned, it cannot be stated that this principle is approved by the scholars,[274] which is strange because at the same time those same scholars describe the principle of full recovery of Losses as that the property of the creditor should be in the state or position in which it would have been if the debtor fulfilled the obligation properly. The Finnish legal literature has for long time accepted the positive interest principle. Also, the difference doctrine, which is discussed in Finnish legal literature is not discussed in mainstream Russian legal literature. The principle of unjust enrichment restricts the amount of compensable damages in both countries. However, in Russia it is derived indirectly from general rules of the CCRF, the Articles 10, 393, 394, 395 and 1102, while in Finnish doctrine it is mentioned as a separate principle.

The institution of compensation of losses and its principles, in general, are much alike in Russia and Finland, despite that there are certain formal differences. This can be to some extent explained by the fact that both systems have origins from the same Romano-Germanic legal families. Also, the fact that the Russian legal doctrine does not, as consistently as the Finnish legal doctrine, recognize the principles behind its legislation, may be because Finland has been developing these principles in cooperation with the other Nordic countries for a long time, while Russia has undergone the Soviet times of socialism, and only in the 1990's enacted its market economy suitable Civil Code, which is mostly following the German and other more recent European Civil Codes. Thus, the principles behind the law have not had much time to be developed in the legal doctrine. However, the law reflects the principles and it is possible to conclude that the Finnish and Russian approach to compensation of losses does not have fundamental differences.

On a more detailed level, when it comes to concepts, language and technical constructions of the law, there are significant differences in the Finnish and Russian systems. The concepts in connection to compensation of losses are used differently and they are defined differently. There are also words or concepts of which the other system does not have a corresponding equivalent.

In the Russian compensation of losses system, the concept of Losses is the most important damage related concept. It is defined in law and it is divided to Actual Damage and lost

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[274] See e.g. Braginskij and Vitrjanskij, 2011: p. 613.

profit. It is used constantly around the Russian legislation when regulating the compensable damage. It is understood as a monetary measurement of the cause of damage and its English translation is loss. In Finnish, the translation of loss, in this sense, would be "*tappio*",[275] which is rarely used when defining compensable damage. It is not conceptualized like it is in Russian legislation or legal doctrine. Instead, the closest concept to Losses in the Finnish system is damage (*vahinko*). It is not defined in legislation and its doctrinal definition is merely theoretical. However, it is common to divide damage into different categories and some of these categories have a more practical meaning in commercial contracts, especially, direct and indirect damage.

Regarding costs arising due to a third party, in the Finnish system e.g. lost income or profit due failed or neglected performance or other costs arising from disturbances in contractual relationship with a third party is considered to be indirect damage, while in the Russian system those could be included in Losses and in what is described as lost profit in Article 15 of the CCRF "*unreceived profits, which this person would have derived under the ordinary conditions of the civil turnover*". Furthermore, while in the Finnish system costs arising from disturbances in contractual relationship with a third party, e.g. costs of paying liquidated damages, can be considered as indirect damage, those costs would be considered as Actual Damage in the Russian system. Also, in the Russian system costs arising from payments to certain public entities such as administrative and legal payments to financial and customs authorities are also considered a part of Actual Damage arising from payments to third parties, while in the Finnish system, in case of annulment of purchase on the buyer's initiative due to breach of contract, these costs could be considered as direct damage. There are, however, exceptions e.g. the SCARF has outlined that tax costs due to seller's untimely payment cannot be considered as Losses. Wages for employees and other payments in case of production downtime due to non-compliance with deadlines are also considered as part of Actual Damage in the Russian system, while in the Finnish system they are often considered as indirect damage.

Furthermore, while per the Finnish Sale of Goods Act costs due to reduction or interruption in production or turnover are considered indirect losses, in the Russian system it can be

[275] See Ståhlberg and Karhu, 2013: p. 10, where author describes loss (*tappio*) in Finnish contract law.

argued to be part of Actual Damage. In the Russian system also a decrease in economic indicators is a part of Actual Damage. This could be e.g. a decrease in the quality of the suffering party's product while in the Finnish system this could be considered, in compliance with the Sale of Goods Act, as indirect damage due to damage to property other than the goods sold.

Both legal systems recognize the norm, that in case profits are gained by the breaching party, they can be compensated. In the Russian system this is separately stated in Article 15 of the CCRF and in the Finnish system it is regulated in the Sale of Goods Act and in legal literature in other types of contractual relationships.

Regarding compensation of price difference between the agreed price and the price of replacement purchase or the market price of replacement purchase there are also conceptual differences. In Russian legal literature the price difference between agreed purchase and replacement purchase has been called concrete Loss and price difference between agreed purchase and market price of a replacement purchase an abstract Loss,[276] while in the Finnish legal literature the latter is referred to as abstract price difference compensation.[277] In the Finnish literature this kind of compensation has been discussed separately as well as in Russia this kind of compensation rule was introduced separately in the CCRF as a general norm in 2015.

While in the Finnish system there are several concepts used separately from damage e.g. profit, maintenance costs, costs of care taking and costs of remedying the defected product in Russian system these concepts are more often included under the main concepts used in legislation i.e. Losses, Actual Damage and lost profit. However, in the Finnish system those concepts can overlap with e.g. direct or indirect damage, when e.g. indirect damage can include lost profit. This can, however, be confusing and create risks for a party to contract that is aware only of the most common concepts, like direct and indirect damage, in the Finnish system, as they may not be included in direct or indirect damage if not specifically included in the contract terms or definitions, while in the Russian system it is safe to use the concepts in Article 15 of the CCRF as they include all the costs compensable in compliance

[276] Braginskij and Vitrjanskij, 2011: p. 661.
[277] Hemmo, 2003b: p. 278.

with the Russian legislation, despite that there are certain questions regarding the damage related concepts used in the CCRF,[278] but as the Russian legislator has defined the most important damage concepts and almost successfully used them throughout the whole CCRF, it seems like the legislator has recognized the problem of what is considered to be a relatively rich Russian language, and simplified it by systematizing the main concepts and including all compensable damages into the three different concepts. Somehow, the Finnish system has not been successful in systematizing the concept of damage (loss) when examining the respective legal literature.

Recently, in 2015, Article 406.1. of the CCRF was enacted regulating an indemnity-like institution. What may be claimed by virtue of this article, the legislator named Costs (*nomepu*), which separates it from the institution of compensation of Losses and its concepts. Indemnity clauses have also been used in the Finnish contractual practice, but it is hard to find an own place or category for indemnity in the Finnish contract law system as it is connected to so many aspects of the Finnish contract law. There is also no clear concept for what may be claimed from indemnitor by virtue of indemnity clause, but it may be referred to as costs of something, regardless, those costs should be defined clearly in the contract to avoid confusion when and if the indemnity clause materializes.

It can be concluded that there are significant differences between the Russian Actual Damage and lost profit and the Finnish direct and indirect damage. However, there are less differences on the "higher level of spectating" as when examining what is a compensable damage and what is not. The similarity is explainable as the Russian civil law is following the continental European legal systems.[279] However, when drafting contracts between Russian and Finnish contracting parties, it shall be carefully studied what is the distinction between Losses (Actual Damage and lost profit) as well as direct and indirect damage, when operating with these concepts and structuring contractual liability. And this shall be done despite the fact that the concept of direct and indirect damage has to some extent been recognized in Russian contract law. However, it cannot be relied on, as the Russian legislator and courts have, with merely a couple of exceptions, applied only Losses, Actual Damage and lost profit in their

[278] See Sadikov, 2009: p. 56.
[279] Braginsij and Vitrjanskij, 2011: p. 656.

resolutions. The differences in the content of these concepts may be explained by linguistic choices of legislation. When the Russian legislator chose to use loss as the primary concept, it naturally includes all the monetary losses that are a consequence of damage, for example it can include also lost income and profit. This would be possible to be included in literal meaning of loss "*tappio*", but it is not natural for the literal meaning of damage "*vahinko*". Also, an argument can be made that as the Finnish and Russian contract law have been developing separately, the concepts developed their own ways for a long time resulting in different interpretations in detailed and technical parts.

5. Damage Concepts in Business Contracts

In this chapter I will present how to construct and interpret the concept of Losses in compliance with Russian and Finnish contract law by systematizing each stage of the interpretation and outlining what interpretation sources are used in each different stage of interpretation. At some stages certain recommendations will be pointed out regarding what to take into consideration when drafting or interpreting a contract. These recommendations are given to highlight the peculiarities of the Russian and Finnish contract law and they are meant especially for international players dealing with contracts regulated by Finnish or Russian law. The legal systems will also be compared.

5.1. The Russian Approach

When interpreting damage concepts in a contract, the interpreter should examine what the contracting parties themselves have defined, [280] which can usually be found in the definitions of the contract and in the terms of the contract. Contracting parties often modify contractual liability. Damage concepts can be used for this by exploiting and modifying damage concepts to meet the contracting parties' own needs. This is usually done by establishing limits for compensation for Losses, excluding the right of recovering certain components of Losses, e.g. Actual Damage and the lost profit, that in accordance with the general rule of the CCRF would be subject to compensation or by agreeing upon exceptional liquidated damages.[281] The concept of abstract and concrete Losses can also be used for this purpose.[282] Liability can also be extended by the contract. As the Russian contract law is highly dependent on written law, these rights can be derived from the following articles of the CCRF: 421 (freedom of contract), 15 (limiting amount of Losses by contract), 394 (liquidated damages), 400 and 401 (limiting the scope of liability and the responsibility for violation of an obligation). In addition, the above presented institute of compensation of Costs can be added to the agreement to supplement the institution of compensation of Losses (Article 406.1. of the CCRF).

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[280] Čerdancev, 2003: p. 332.
[281] Karapetov, 2017: p. 696.
[282] See Karapetov, 2017: p. 651-652.

There are certain limits to the rights regarding the freedom of contract. Firstly, liability for an intentional violation of the obligation cannot be limited *ex ante* (the CCRF Article 401). Secondly, some of the basic principles of the Russian civil law including ensuring the restoration of violated rights and judicial protection (Article 1 of the CCRF) cannot be fully bypassed with an agreement i.e. the parties cannot be fully released from the liability for violation of the contract.[283] As the SCRF has stated a contract is void if it contradicts the essence of the legislative regulation of the corresponding type of obligation.[284] Thus, the contract drafting parties shall be careful and not try to excessively limit the liability or content of Losses in order to not to disregard the basic principles of compensation of Losses. In order to manage the risk, they could turn partially to using the system of compensation of Costs (Article 406.1 of the CCRF), which can be a helpful tool for construing and balancing the liability in the contractual relationship. Thirdly, the contract parties cannot bypass mandatory legislation.[285]

If the contracting parties have stipulated contractual liability and defined the concepts in regard themselves and they are not in contradiction with the previously mentioned exceptions to the freedom of contract, those stipulations upon being materialized are subject to previously presented rules for interpretation of contracts. As the earlier presented Russian contract interpretation emphasizes literal interpretation, the contracting parties shall pay attention to the wording they use, especially so, if they choose to step outside the contractual liability system of the Russian civil law, and even more so, if the contract is drafted in a foreign language e.g. English. If the wording regarding the concepts is unclear, it shall be interpreted against the drafting party. If the parties have not defined the meaning of the chosen terms and concepts, the content of the concepts shall be sought from their legal definitions in the Russian civil law,[286] which are written in general or special laws and furthermore specified by the highest court instance's resolutions as presented earlier in this

[283] See Braginskij and Vitrjanskij, 2011: p. 761. and Sadikov, 2009: p. 37.
[284] Postanovlenie Plenuma Verhovnogo Suda RF ot 24.03.2016 N 7 (red. ot 07.02.2017) "O primenenii sudami nekotoryh položenij Graždanskogo kodeksa Rossijskoj Federacii ob otvetstvennosti za narušenie objazatel′stv": par. 6.
[285] Nysten-Haarala, 2013: p. 39.
[286] Čerdancev, 2003: p. 332.

thesis. Consequently, if the definitions are not clear enough the legal definitions will take place.

Concepts that are used in legal systems outside Russia, may not be recognized in the Russian civil law. A good example is using concepts of direct and indirect Losses, which the Russian civil law does not recognize. As presented above, Russian civil law recognizes the concept of Losses (*убытки*) which includes Actual Damage (*реальный ущерб*) and lost profits (*упущенная выгода*) in addition to the separate institute of compensation of Costs (*потери)*. To avoid confusion, a foreign contract party drafting the contract should compare the concept of its own legal system to the concepts of the Russian legal system and use the Russian concepts that correspond to concepts of his own system, if the contract is regulated by Russian law.

When the meaning of the legal definition of the Russian law is given to a concept, the interpretation shall be started from the dogmatic examination of the law with the help of the practice of the highest court instances and the civil law doctrine as earlier presented in the chapter 4.1. in this thesis, however, keeping in mind, that in Russia none of the previously mentioned are formally legally binding, but they can be helpful.

It seems that in Russian contract law it would be difficult to use foreign structures of concepts. Despite Russian civil law being to some extent non-mandatory, it is unclear at some points, whether the law can be bypassed or not; especially difficult it is when measuring the limits of contradiction with the essence of the legislative regulation, which is not allowed. It can be concluded that this is a relatively significant limitation of the freedom of contract and it is important to keep it in mind in order to succeed in drafting and interpreting contracts regulated by Russian law.

5.2. The Finnish Approach

When interpreting or defining damage concepts in a contract regulated by Finnish law, the basis of all is a relatively wide freedom of contract. Commercial contracts are rarely regulated by law, and even if they are, the legislation can be completely non-mandatory. The freedom is, however, between certain boundaries directed by the Finnish contract law principles. Nevertheless, the mentioned provides the contract parties a relatively large

operational environment to agree upon the definitions of concepts and the system they are used within.

Damage concepts are often used for limiting contractual liability. This can be done e.g. by defining the compensable damage or the maximum amount of compensable costs arising from it.[287] Compensable damage can also be divided into previously presented different types of damage (*vahinkolajit*) and agreeing that some of them will not be compensable. In addition, some concepts established in practice, that are connected to damage, e.g. like profit, maintenance costs, interest and costs related to debtor's breach of obligation and costs of repair, may be used to clarify what shall be compensable in the contractual relationship. The most common structure is that the liability for indirect damage (*välillinen vahinko*) is waived off resulting that only direct damage (*välitön vahinko*) is compensable.[288] If indirect damage is not further defined it includes at least the lost income due failed or neglected performance or other costs arising from disturbances in contractual relationship with a third party.[289] When defining contractual liability and the concepts in connection to it, there are some restrictions. Firstly, the risk of unfairness shall be considered. If a contract term is too unreasonable for one of the contract parties this term can be amended for reasons of equity or declared invalid by the court. However, in commercial contract between professional entities this is rarely possible. Secondly, a term limiting liability for damage inflicted by gross negligence or for an intentionally inflicted damage, is invalid.[290] The liability can also be extended by using indemnity clauses. When using indemnity clauses, which can lead to especially to unfairness, by restricting the widening of the liability of the other party to contract by e.g. clearly using concepts of different types of damage, the risk of unfairness of the indemnity clauses can be minimized.

If the contract parties have themselves defined the contractual liability and the concepts in regard, and those definitions are not in contradiction with the previously mentioned exceptions to the freedom of contract, those definitions are subject to previously presented contract interpretation rules. The primary goal in contract interpretation is to discover the

[287] Hemmo 2005, p. 245.
[288] Hemmo 2005, p. 246.
[289] Ibid.
[290] Hemmo, 2005: 252-254.

common intention of the contract parties. However, in professional commercial contracts, a written contract is hard to bypass but it is possible. When interpreting what parties have meant by concepts included in the contract in addition to the rule of unclear condition, principles of the contract law and realistic arguments can play an important role. Arguments that support the common will of the contract parties are often successful, and also economic points of view like e.g. the party that is more "suitable" to take the liability for certain damage can be argued to be the right party to take the responsibility of the risk.[291] Also if the contract term defining damage concepts is unclear, the *contra proferentem* rule (*epäselvyyssääntö*) can be used by the party that did not draft the term in question.

When it is not possible to determine what the contract parties have intended to mean with the concepts in the contract based on the interpretation material, the parties can turn to their older contracts, and after that, to the customs of the industry they are operating within. If the concepts remain unexplainable, the definitions of legislation may be used. However, like previously presented, e.g. the possibility to exploit legal definitions of direct and indirect damage of the Sale of Goods Act can be difficult when interpreting other contract than the contracts of sale of goods. Trying it is always allowed, but the result is highly unclear. It may, however, be the only option in some situations, and if so, the definitions shall be examined as presented in the chapter 4.2. of this thesis. Despite that there are some widely established concepts in the Finnish contract law, there are no restrictions to use foreign or otherwise different concepts. If this is done, however, the parties should carefully define those concepts as they cannot be defined by the Finnish contract law.

Interpreting concepts in compliance with Finnish contract law can be a relatively flexible process as there are no strict step-by-step rules how to construct interpretation as long as the common intention of the parties is determined. The Finnish system can also turn out to be relatively hard to understand as there is no general legislation providing the main norms in a certain hierarchy. A good example is the division of direct and indirect damage in the Sale of Goods Act. It seems that the scholars do not accept the system, and even some of the Nordic countries (Norway) have stopped using it. The Finnish court still does apply this division of direct and indirect damage but it also deems necessary to "prove" the usage of it

[291] See Hemmo 2003a: p. 58.

by arguing in the motivations of its resolutions that the court has taken into account the criticism of the scholars, which makes the legal status the Sale of Goods Act's approach "shady" as a legal source. Also, even the scholars do not know if the system of direct and indirect damage can be applied to other types of contractual relationships. This "shadiness"[292] leaves a lot room for discretional power[293] for those interpreting these concepts as they can compete by merely presenting more credible arguments of which objectively is hard to choose which one leads to the legally correct resolution.

5.3. Comparing the Systems of Contractual Liability

In the both countries contractual freedom being one of the base rules of their civil law systems, the parties can define the concepts themselves, which is usually done to modify the balance of the parties' contractual liability, with some exceptions in both systems. While in Finland it is often done by excluding the indirect damage of the compensable damage, in Russia it is done by excluding parts of compensable Losses i.e. lost profit or Actual Damage or by excluding abstract Losses of the compensable Losses. In the Finnish system there are also various other established concepts that can be used for the same purpose e.g. profit, maintenance costs, costs related to debtor's breach of obligation and costs of repair, and care taking costs. In the Russian system many of these are already under the three main concepts, while in Finland it is not entirely clear.

There are restrictions and limitation on operating with these concepts and modifying contractual liability in both systems. Firstly, both countries have some mandatory legislation that cannot be bypassed. While in Russia most important restrictions to contractual freedom is clearly regulated in the CCRF or they can be derived from it, in the Finnish legislation there are almost none of mandatory legislation, but instead there are some important principles that cannot be bypassed, e.g. fundamental principles regarding compensation of losses which despite that they are written in e.g. the Sale of Goods Act cannot be bypassed even if the non-mandatory Sale of Goods Act is waived off the agreement. Relatively the

[292] See Hemmo 2003b: p. 63-65, 578 and 637, where author also states that is not always clear choice of e.g. interpretation method or legal sources and that there is a lot room for discretion for the decision maker.
[293] See Hemmo 2003a: p. 65-66.

same principle applies to the Russian system as from the Article 1 of the CCRF can be derived that some of the basic principles of the Russian civil law, including ensuring the restoration of violated rights and judicial protection, cannot be fully bypassed with an agreement i.e. the parties cannot be fully released from the liability for violation of the contract. In the Finnish system the rule of unfair condition (Section 36 of the Finnish Contracts Act) is also significant in limiting the freedom to agree on too unreasonable conditions. However, this rule is hard to apply to commercial contracts made by professional entities and the rule is open to various interpretations. As what is reasonable, is often compared to what the non-mandatory legislation regulates. This Finnish rule is comparable to the Russian rule applied by the SCRF that contract is void if it contradicts with the essence of the legislative regulation (of the) corresponding to the type of obligation. In both countries the term restricting the compensation of losses done intentionally is void. However, in the Finnish system restricting compensation of losses caused in gross negligence is also invalid. Also, in Russian system it is clarified that the restriction is invalid only if it is agreed upon *ex ante*. There may not be a real difference as in under Finnish system it is also possible to agree after the occurred damage that some of the compensation will not be claimed.

In both countries the liability can be extended by indemnity clauses. However, as the Article 406.1. of the CCRF is clearly separated from the other institutions in the CCRF, it seems that there are no principles restricting the agreement upon very unreasonable conditions for the other party, when compared to the Finnish system this would be not possible as the rule of unreasonable condition would eventually be applicable. In respect to drafting indemnity clauses, as the Russian system clearly separates the concept of Losses from concept of Costs, the concept of Costs shall be used when referring to the indemnity-like institution of the Article 406.1 of the CCRF, while under Finnish system choosing the concept is not the priority but choosing the right concepts for the costs that the indemnitor shall indemnify is more important as in Finnish system there are several of them as presented earlier.

In conclusion, structuring the concepts and contractual liability regarding compensation of losses is mostly similar according to both countries' systems and their restrictions to it are also much alike.

When the agreed terms of contractual liability and concepts in regard are to be realized they will be interpreted. While under the Finnish system the main goal is to find the common

intention of the contract parties, the Russian system strictly leans on to the literal contract interpretation with no additional interpretation material. However, under the Finnish system, when commercial contracts are done by professional entities there must be a solid reason for bypassing the contractual text even though it is possible. Thus, when being under the jurisdiction of the Finnish system, it shall be kept in mind that all the material, from which the common intention of the contract parties could be found, may be taken into consideration when interpreting the contract. When interpreting a contract under the Finnish interpretation rules, there are several different interpreting methods of which the interpreter can choose. The usual order to apply these interpreting methods is to firstly seek resolution from the contract party orientated interpretation and secondly from the aim orientated interpretation methods, of which, in some cases, *contra proferentem* and interpretation that prioritize the interpretation closer to the standard of legislation, may be a stronger argument.[294] This is completely differently in the Russian system where the Article 431 of the CCRF dictates the clear interpretation order.

The definitions of damage concepts are often sought from the non-mandatory legislation in the Russian system. In the Finnish system this is also done, if it cannot be determined based on the other interpretation materials of the parties, their older established contract practice and by examining the customs of the industry the contract parties are operating in. The question of how the definitions of the concepts are understood has been presented earlier in this thesis. The clear difference regarding this between the two countries is that Russian civil law provides a general norm regulating all types of contracts, also the ones not regulated by a special legislation, while in Finland there is no such written norm. The Sale of Goods act may, to some extent, be used for this purpose, but it's fitness for usage in other than sale of goods contracts still remains unclear and it is definitely not usable to all types of contracts. Thus, the Finnish system leaves more room for argumentative usage of the fundamental contract law principles and argumentation in overall. However, as presented, when taking into account the new court practice, Russian system may be applying a less strict approach to the interpretation rules.

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[294] Hemmo, 2003a: p. 603.

6. Conclusion

The Russian and the Finnish systems are much alike when considering what damage is compensable. The differences are found mostly in the style of conceptualization of certain types of costs arising from the occurred damage. When interpreting these concepts, there is a significant difference as the Russian approach is strongly literal, while in Finland finding the common intention plays a more important role. Unlike in Finland, in Russia it is more important "what was said" instead of "what was meant". While the CCRF includes almost all the most important rules regarding damage concepts, using them and interpreting them, the Finnish contract law is mostly non written.

Those are the most important findings of the formal research. However, when dealing with the legal systems of these countries in real life, especially with the Russian legal system, there is also the informal part and it may prove to be significant. As discussed in the chapter on legal families, Russia has adopted an enormously large entity of legislation, which has been implemented hierarchically in an almost unquestionable position. Because the legislation has been adopted from a foreign continental European legal culture, it may be strange for Russians in some ways. While in Russia the legislation is strictly logical and formal, the real-life practice may not always be. This may be the case, especially, in a business-relationships in which the contractual relationship may be merely a formality. When negotiating and drafting a contract with Russian partners, advanced technical and tactical contractual skills are important but even more important may turn out be understanding the fundamental cultural Russian institutions like soul (*душа*), truth (*правда*) and friendship (*дружба*). By this I do not mean that networks would not play an important role also in Finland, but in Russia they often are more important.

While Finnish contract law has developed within a longer time period into a clearer direction without drastic changes in society such as switching from radical socialism to very liberal market economy, Russian contract law has had a bumpy ride. Russian lawyers and legal scholars are working hard on adapting the continental European style of legislation as the CCRF is not only just enacted but it has also been constantly amended, the last relatively big reformation of the CCRF being implemented in 2013-2015. It will be interesting to see how this system will be adopted by the Russian society. In Finland, too, there are some challenges in the future. Will there ever be a common Nordic or European civil or contract law

codification? It seems, that at least something new is needed, as some scholars say that the Nordic Sale of Goods Act from 1987 was considered a failure regarding some parts.