Advances
2026, Vol. 7, No. 3, pp. 69–74
https://doi.org/10.11648/j.advances.20260703.13

Research Article

Risk Allocation as an Important Function of Law

Dina Vladimirovna Lubyagina*

Department of Entrepreneurial and Corporate Law, O.E. Kutafin Moscow State Law University, Moscow, Russian Federation

Abstract

This article examines various doctrinal approaches to risk allocation, and also analyzes trends in legislative regulation and the specifics of law enforcement practice in this area. The distributive function of civil law is examined in the context of the possibility of regulating civil law relations by distributing risks among their participants in a manner that maximizes the fairness and minimizes the burden on the parties. Despite the long history of risk theory in economics, insufficient attention has been paid to the study of the legal category of "risk" in law. Apparently, this is why a unified concept for the application of risk in legal relations and methods for its equitable distribution remain absent. Based on this study, the author concluded that the criterion for risk allocation could be based on whether a party to the legal relationship has the ability to achieve its goals (its interests) directly or indirectly through its own power. If a party to the relationship has the ability to achieve its goals directly, without the assistance or mediation of anyone else, the risks should be borne by that party. If the goals are achieved indirectly, the risks, unless otherwise provided by the contract, should be borne by the party who undertakes to act (conditionally) as an intermediary (through whose direct power the actions are carried out) in achieving those goals.

Keywords

Distributive Function of Civil Law, Risk Allocation, Risk

1. Introduction

This article examines various doctrinal approaches to the allocation of risks and the analysis of the tendencies of legal regulation and features of approaches in law enforcement practice to the issue of risk allocation. In conjunction with the possibility in the sphere of civil relations regulation to allocate risks between the parties so that the burden of bearing them will be the fairest and least burdensome for the subjects, a distribution function of civil law was revealed. The distribution function of civil law; distribution of risks; risk.

One of the main goals of civil law is to maintain the stability of civil transactions, which can be achieved, among other things, by adequately regulating the distribution of risks (the burden of bearing the negative consequences of risk), i.e., by creating favorable conditions for economic activity.

Unlike certain branches of law that merely establish the limits of acceptable risk (e.g., criminal law (Article 41 of the Criminal Code of the Russian Federation) or labor law (Article 239 of the Labor Code of the Russian Federation)), civil law is designed to distribute risks between parties to legal relations, which naturally raises the question of the criteria and methods of such distribution. We believe it is obvious that, in

*Correspondence: Dina Vladimirovna Lubyagina (Lubyagina.di@yandex.ru)

Received: 6 July 2026; **Accepted:** 31 July 2026; **Published:** 9 September 2026

the sphere of regulating civil legal relations, civil law can distribute risks among their parties in such a way that the burden of bearing them is as fair as possible and less burdensome for the parties. In this sense, it can be recognized that civil law performs an important distributive function, since, depending on the distribution of the risk of non-performance, one party will bear only the costs without any fair compensation, while the other party will be exempt from such costs. Thus, in our opinion, civil law, in addition to its generally recognized functions - regulatory and protective - is called upon to perform the function of risk distribution. Indeed, M. M. Agarkov's assertion that the idea of risk is constantly present in civil law is absolutely correct. In most cases, this idea, which underlies civil legal relations, is not externally expressed, but is quite easily detected in a number of norms [1]. Accordingly, the need to determine who should bear the burden of risk is also essential in the regulation of civil law relations, if not one of the primary ones. In our opinion, the following argument can be made in favor of the primacy of this function. The subject matter of civil law is property relations, as the most important fundamental social relations. At the same time, all property relations are potentially inherent in the risks of property loss, etc. That is, it can be said that potentially all property relations presuppose the possibility of losses as an integral part of these relations. Based on the fact that civil law regulates property relations as the most voluminous part of social relations, it cannot fail to regulate the potential for property losses.

2. Main Part

According to the Civil Code of the Russian Federation, a certain pattern of risk allocation can be observed. In absolute legal relationships, risks are generally borne by the right holder, that is, the person entitled to extract useful properties from the thing (the authorized person). This rule is evident both in the example of the risk of accidental loss and damage to property (Article 211 of the Civil Code of the Russian Federation) and in other articles of civil law.

Risk allocation in the sphere of relative legal relationships is somewhat more varied. Generally, as has been established, modern approaches to understanding this issue are based primarily on the contractual method of risk allocation. This involves either risk allocation by the parties themselves under a contract (e.g., Article 669 of the Civil Code), or the transfer of risk to a third party who assumes this risk for a fee (insurance), again based on an agreement. However, in the absence of an agreement, or if the contract is declared invalid for any reason, neither legislation nor judicial practice generally provide a method for its distribution. There are a few exceptions to this rule, where the law imperatively establishes cases in which the risk is assigned to a specific person or a clearly defined circle of persons. For example, it is stipulated, although this can be interpreted very ambiguously, that the risk of changing circumstances in contractual relations, according to paragraph 2 of Article 451 of the Civil Code of the Russian Federation, falls on the interested party. For example, the risk of accidental loss or accidental damage to property is borne by the owner in accordance with Article 211, by the pledger as the owner in accordance with Article 344, or by the lessee in accordance with Article 669 of the Civil Code of the Russian Federation. The specific person to whom the risk is assigned is also defined by Articles 82, 87, and 96 of the Civil Code of the Russian Federation. In a contract for work, both parties to the contract bear the risks (Article 705, paragraph 7 of Article 720, Article 741). For example, the risk of performance of an obligation to an improper party is generally borne by the debtor under that obligation (Article 312 of the Civil Code of the Russian Federation). However, the distribution of these same risks in securities-based obligations, from which the debtor releases itself by performing them to a formally legitimate (even if improper from a substantive legal perspective) creditor, is characterized by certain specific features. Obligations that have been assigned (cessioned) also have specific performance features.

However, the author believes that the application of individual institutions of contractual or property law is insufficient or, in some cases, completely unacceptable from a fairness perspective for the purposes of resolving a specific contractual situation involving risks.

It is not without reason that many scholars have sought and continue to seek ways to distribute risks. Admittedly, views on the appropriate risk allocation criteria—either general for all obligations or specific for each—vary. Some scholars (V.V. Rovny, B.L. Haskelberg) proposed focusing on the need to identify the primary risks encountered, such as the risk of accidental loss or damage to property, the impossibility of fulfilling an obligation, etc.—and considered it necessary to develop specific allocation rules for each, without, however, proposing any general criteria. It must be said that this is precisely the path currently followed by civil legislation. An analysis of the provisions of the Civil Code reveals that risk is used in several different interpretations with respect to various types of legal relations, in particular, property relations (Articles 211 and 280 of the Civil Code of the Russian Federation), obligatory relations (Articles 19, 312, 343, 344, 382, 451 of the Civil Code), etc. Another group of scholars adheres to the view that it is necessary to develop unified criteria for risk allocation (M. M. Agarkov, D. A. Arkhipov, A. Yu. Bushev, H. Ketz, R. Kuter, K. Ott, R. Posner, E. Rosenfield, J. Triantis, and others).

Risk allocation theory initially arose from the need to regulate economic processes by identifying possible methods and legal models of behavior and was initially developed in Anglo-American law. Currently, risk allocation in this legal system is defined as a method (technique) by which the risk of harm (loss, damage) is distributed between the victim and the perpetrator (allocates the risk between the person who suffers it and the loss) [2]. However, there have been many approaches. R. Saleil once put forward a theory of risk as the basis of legal liability, determining that legal liability is essentially a consequence of the risk borne by the person who suffered the damage. In his theory, R. Saleil paid the least attention to the consideration of guilt and causality, in contrast to the classical approaches of tort law. Although this theory did not become dominant in law, it nevertheless found its followers. In particular, the Canadian scholar A. Ripstein, developing the views of R. Saleil, believed that the risk should lie with the person who created the danger of its occurrence (the "owner" of the risk). He also considered the action that led to the creation of the danger to be unlawful. By limiting the distribution of risks to the parties to a tortious legal relationship (the localization principle), A. Ripstein ignored the fact that risks can arise from random events, as well as the fact that risky situations can be created not only by illegal but also by entirely legal and socially beneficial activities. Nevertheless, the view that tort law serves the function of risk allocation is often upheld in modern doctrine.

Another method of risk allocation was proposed by T. Hand and became known as the "Hand formula." According to this approach, all financially unfavorable consequences arising from a risk should be borne by the party that could most effectively and cost-effectively prevent its occurrence. This approach is also evident in a theory widely accepted in the West, which adopts economic feasibility as the criterion for risk allocation. The main postulate of this theory is that "risk should be assigned to those who can, through their actions and measures, if not eliminate, then at least mitigate the consequences of the risk's occurrence" [3].

The problem of risk allocation was also developed in French theory. The renowned French theorist F. Ewald, in his works [4], defined risk as a category that is quantitatively and statistically determined, and expressed the opinion that it is possible to predict the likelihood of corresponding risks occurring in the future based on statistical data on relevant facts that occurred in the past. Defining risk as the result of collective generation (everyone is a risk generator) and defining risk as a social rather than individual phenomenon by nature, while, admittedly, ignoring the significance of random events, Fr. Ewald considered insurance the most acceptable method of risk distribution.

At one time, it was precisely with the goal of minimizing risks that society was "invented." By uniting into society, humanity sought to more effectively protect itself from external dangers. As K.V. Sergeev writes: ".the original purpose of the 'invention' of society was to minimize the vital risks for its members. But nothing is perfect, and society itself, based on its own logic, turned out to be a new source of risk" [5]. K. V. Sergeev makes an interesting observation, identifying a certain cyclicality in the minimization and maximization of risks at different periods of societal development. At the same time, any society always strives to minimize risks, which is natural. How can this cyclicality be explained? The explanation lies in the social model built within a given society. If a society prioritizes satisfying the interests of the individual and is composed of "individuals-personalities," then the desire will be to minimize personal risks. If, however, a society is composed of "individuals-groups," and common interests are prioritized, subsuming the interests of individuals, then risks for the individual will be maximized in order to minimize risks for the group. This observation can form the basis for analyzing legal regulation and developing a legal system for risk regulation, including risk distribution. It can be said that one of the main factors influencing the risk regulation model in law is the priority of the individual or the priority of public interests, whereby the interests of the individual are subsumed within the interests of the group. An illustration of this approach can be found in the theory of risk allocation, which was first proposed in Soviet legislation by Ya. M. Magaziner.

Ya. M. Magaziner, in his "universal" concept [6], considered risk allocation as a means of ensuring certain interests of participants in the turnover, taking into account the policies of the ruling class, "a social amendment in the interests of the ruling class" [7]. According to the author, risk allocation in a capitalist society was characterized by him as spontaneous, while under a socialist system it was based on planning.

Modern approaches to understanding this problem are based primarily on the contractual method of risk allocation. For example, A. S. Vlasova distinguishes a contract and security for the fulfillment of obligations as civil law methods of regulating entrepreneurial risk [8]. This author generally proceeds from the understanding of risk as a manifestation of the complete freedom of the subject, which is consistent only with contractual regulation. For example, A. S. Vlasova notes that "before the recognition of freedom of choice, there was no scientific knowledge about risk; The term “risk” arose only with the realization of true freedom by man and the acceptance by the subject of the uncertainty of the future and the multiplicity of choices” [9-11] D. A. Arkhipov also believes that a contract is a means of economically efficient risk distribution, and risk distribution is a function of a contract, as well as a certain principle that should be an effective legal norm [10]. Moreover, different opinions are expressed regarding what can serve as a criterion for risk distribution. For example, D. A. Arkhipov, analyzing the criteria for distributing contractual risks, indicates that the main such criteria are fairness and economic efficiency. Considering economic efficiency as a principle, D. A. believes that the risk should be borne by the party to the contract that has the ability to prevent the occurrence of adverse consequences, including such measures as an increased degree of care and prudence. In the event of the inevitability of negative consequences of the risk, they should be borne by the party that is able to compensate for the adverse consequences with lower costs [11]. In his opinion, economic efficiency is a universal criterion for distributing contractual risks, "which should be used unless there are compelling arguments against it, for example, when the result is unfair or does not align with the internal logic of the legal structure"[12].

Another point of view found in the doctrine is related to the need to assign risk at the statutory level if this is necessary to protect particularly significant interests protected by law (socially significant interests). For example, the opinion that risk allocation should be based on a socially significant interest is expressed by O. S. Grinchuk [13], A. G. Martirosyan [14, 25], and others. Seeing the observance of socially significant interests as the primary purpose of law, R. Saleil at one time even defined the very concept of subjective right as "power placed at the service of socially significant interests and activated by autonomous will" [15]. He also stated that only a being with an autonomous will capable of exercising power aimed at achieving recognized social interests can be a subject of law.

However, opposing opinions have also been expressed. For example, G. A. Gadzhiev believes that: "It is unlikely that legal norms concerning the protection of the weaker party in economic relations can be derived from the obligations inherent in a welfare state" [16].

Law enforcement practice also demonstrates its understanding of risk distribution. In particular, Resolution No. 16 of the Plenum of the Supreme Arbitration Court of the Russian Federation dated March 14, 2014, adhering to the postulate that one of the main problems addressed by civil law is the protection of the weaker party in a contractual obligation, formulates provisions according to which a formal deviation from one of the main principles of civil law—the equality of participants in civil legal relations—is permitted. Indeed, sometimes the only way to ensure a balance of interests may be to "equalize" the parties to a property transaction by establishing for the weaker party an initially different, special condition for participation in civil law relations: granting the weaker party a set of additional rights, imposing additional obligations on the stronger party, limiting the liability of the weaker party, and, conversely, increasing the liability of the stronger party. However, some in the literature argue that, contrary to the view of some civil law scholars, the protection of the weaker party in a contract cannot be considered an exception to the principle of formal equality [17], and that it is unacceptable to regard such concepts as legal equality in civil law and the equality of the parties to a contract (obligation) as identical. At one time, the renowned scholar F. K. Savigny also noted that in an obligation, the parties are not equal [18].

Indeed, among the diversity of civil law contracts, it is unlikely to find obligations in which the parties would be equal in the scope of rights, obligations, and responsibilities. Recognizing that protecting the weaker party contradicts the principle of formal equality of the parties would essentially make it impossible to create various contractual structures, which in turn would mean abandoning the civil-law regulation of social relations. In our view, on the contrary, protecting the weaker party allows for the formal equality of the legal status of the parties in various contracts. This protection can be achieved through the establishment of various mechanisms. One of these, in our opinion, should be a mechanism for establishing the obligation of the stronger party to bear the burden of risk. This implies the need to determine who can be recognized as the "stronger party" in legal relations. Academic literature and judicial practice primarily analyze the issue of determining who can be recognized as the "weaker party." True, one might assume that recognizing one party in a legal relationship as the weaker party automatically entails recognizing the counterparty as the stronger party. However, is this indisputable? Proposing to consider the degree of control over the manifestation of risky circumstances as the criterion for risk allocation, A. Yu. Bushev defines the stronger party as the party with greater control. "The party with greater control," writes A. Yu. Bushev, "is recognized as the stronger party, and therefore imposing additional costs on it is fair" [19].

However, it is necessary to determine which participant may be considered the weaker party and what criteria may serve to protect the weaker party.

It is quite obvious that it would be inappropriate to identify the weaker party in each specific case, either based on a specific contractual model, given the multiplicity of such contracts, or taking into account the possibility of concluding unspecified contracts. However, it should be noted that legal literature contains opinions adhering to precisely this approach. For example, A. F. Pyankova writes: "Contractual relations are characterized by significant diversity, including the heterogeneity of the participants in such relations. Therefore, it is inappropriate to rigidly establish a single criterion for the 'weakness' of a party to a contract - the balance of contractual capabilities should be determined in relation to the specific situation" [20]. A. V. Ulyanov expressed an interesting, but controversial, point of view on the basis for establishing the protection of the weaker party. Having defined the weaker party as a party whose interests are violated by an imbalance in the scope of rights, obligations, and liabilities under the contract in favor of the other party, leading to the failure to achieve the purpose (cause) of the contract, he proposes that the criterion for the "weakness" of this subject be the impossibility of realizing its interests due to the failure to achieve the purpose of the relevant contract. Accordingly, in his opinion, "the purpose of the contract acts as a civil law construct that makes it possible to identify the weaker party in the contract and legally substantiate the legal protection of this subject of the contractual legal relationship" [21]. Rejecting the need to achieve "ephemeral public goals" as a justification for the protection of the "weaker party," he proposes to proceed from the essence of the legal relationship, which presupposes the observance of the interests of the subjects. As a clear example of his assertion, this author cites Constitutional Court Rulings No. 713-O-P and No. 714-O-P of July 3, 2007, which stated that limiting the rights of security holders pursues the legitimate goal of achieving the general interest of an open joint-stock company, which is the effective management of the company. A. V. Ulyanov expresses hope that this approach to protecting the weaker party will be adopted by judicial practice in the area of contractual relations. However, in our opinion, this approach is highly questionable. For example, it can be assumed that, in the context of a contract between a natural monopolist and a consumer, the purpose of the contract would likely have been achieved even without establishing the criterion of consumer "weakness."

Another criterion justifying the need to protect the weaker party is the economic inequality of the parties. As early as 1999, the Constitutional Court of the Russian Federation, in a number of its decisions, used the concept of an economically weaker party [22] in relation to a bank deposit agreement, meaning a citizen-consumer of services. As explained in this Resolution, a citizen is an economically weaker party and therefore requires special protection of his or her rights. This, in turn, entails the need to limit the freedom of contract for the other party. A similar position was expressed in Resolution No. 16 of the Plenum of the Supreme Arbitration Court of March 14, 2014, "On Freedom of Contract and Its Limits." According to this approach to law enforcement practice, an economically weaker party should be understood as one who is opposed by an entity possessing significantly greater economic power. In particular, a weaker party may be a consumer [23], a citizen-depositor under bank deposit agreements [24], or a minority shareholder [25]. Based on the content of the aforementioned resolution, the weaker party should be considered a non-professional counterparty opposing an entrepreneur professionally engaged in a particular activity. In the context of the securities market under study, when providing a financial service, the consumer of such service should definitely be considered the weaker party to the contract, if only because the majority of contracts concluded in the securities market are adhesion contracts (investment fund management agreements, securities purchase agreements, trust management agreements, etc.). Given that the investor in this case is deprived of the opportunity to participate in drafting the terms of the contract and is forced to rely entirely on the good faith of the other party, their rights require additional protection.

The Russian Civil Code abounds with contracts that, without naming the weaker party, nevertheless grant one party a special legal regime providing additional benefits and additional protection (in the broad sense) in the obligation. A citizen's participation in any commercial contractual relationship involving equal professional entrepreneurs automatically eliminates the need for preferential legal regulation for the "weaker" party. However, there are exceptions, such as a contractual agreement, which also provides the manufacturer-entrepreneur with benefits dictated by the nature of the activity.

3. Conclusion

Summarizing the analysis of the presented provisions, we believe that the criterion for risk allocation could be considered to be distribution depending on whether a party to the legal relationship has the ability to achieve its goals (its interests) directly or indirectly through its power to achieve these goals. If a party to the relationship has the ability to achieve its goals directly, without the assistance or mediation of anyone, the risks should be borne by it. If the goals are achieved indirectly, the risks, unless otherwise provided by the contract, should be borne by the party who undertakes to act (conditionally) as an intermediary (through whose direct power the actions are carried out) in achieving these goals by the party to the relationship.

Abbreviations

RF	Russian Federation
Civil Code of the RF	Civil Code of the Russian Federation
VAS RF	Supreme Arbitration Court of the Russian Federation

Author Contributions

Dina Vladimirovna Lubyagina: Conceptualization, Formal Analysis, Investigation, Methodology, Validation, Writing – original draft

Conflicts of Interest

The author declares no conflicts of interest.

References

[1] Agarkov, M. M., "Bearer Securities," in "Essays on Credit Law," edited by A. E. Worms. Moscow, 1926, p. 52.

[2] Black's Law Dictionary, Eighth Edition, Editor in Chief Bryan A. Garner. Published by West, a Thomson business. 2006, p. 1353.

[3] Agarkov, M. M. "Bearer Securities" in Agarkov, M. M. "Selected Works on Civil Law" in 2 volumes. Moscow, 2002, Vol. 1., p. 122.

[4] Ewald, Fr. "L'Etatprovidence." 1986. "Insurance and Risk" in The Foucault Effect: Studies in Governamentality. Ed. by G. Burchell, C. Gordon, and Pmiller. 1991, p. 265.

[5] Sergeev, K. V. "What Cannot Be Spoken About.": The Phenomenon of "Unspoken Demands" and Social Risks in Modern Society. Polis Magazine, 2023, No. 4, p. 35.

[6] Magaziner, Ya. M. "Soviet Business Law." Leningrad: Publication of the Student Mutual Aid Fund. F. Engels Leningrad Institute of National Economy, p. 290.

[7] Magaziner Ya. M. Soviet Business Law. Leningrad: Published by the Student Mutual Aid Fund. Leningrad Institute of National Economy named after F. Engels, p. 290.

[8] Vlasova A. S. Civil Law Means of Regulating Entrepreneurial Risk // Notary. 2007. No. 5. SPS "Consultant Plus".

[9] Vlasova A. S. Risk as a Feature of Entrepreneurial Activity. Abstract of a Cand. Sci. (Law) Dissertation. Moscow, 2009.

[10] Arkhipov D. A. Contract as a Means of Economically Efficient Risk Allocation // Corporate Lawyer. Moscow: Wolters Kluwer, 2007. No. 1, p. 35.

[11] Arkhipov D. A. Legal Criterion for Allocation of Contractual Risks in Civil Law: Abstract of a Cand. Sci. (Law) Dissertation. Moscow, 2011.

[12] Arkhipov, D. A. Allocation of Contractual Risks in Civil Law. Moscow: Statut, 2022, p. 99.

[13] Grinchuk, O. S. Current Issues in Risk Theory in Civil Law// Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia. 2014. No. 2, p. 208.

[14] Martirosyan, A. G. Methods of Risk Allocation in the Civil Law of the Russian Federation// Modern Law. 2012, No. 4, p. 25.

[15] Pavlov, V. P. Problems of Ownership Theory in Russian Civil Law. Moscow, 2000, p. 59.

[16] Opinion of Judge G. A. Gadzhiev of the Constitutional Court of the Russian Federation regarding the Resolution of the Constitutional Court of the Russian Federation dated December 20, 2011, No. 29-P. https://www.consultant.ru/document/cons_doc_LAW_123851/030b8c166b4edc3369ceeb74441cb98b2799a64a/

[17] Braginsky, M. I., Vitryansky, V. V. Contract Law. Book One. General Provisions. Statute. Moscow, 2005, p. 792.

[18] Savigny, F. K. Law of Obligations / Translated from German by N. Mandro, V. Fuchs. Moscow, 1876, p. 5.

[19] Bushev, A. Yu. Fundamentals of Risk Management in Law//Arbitration Disputes. 2008. No. 3. SPS ConsultantPlus.

[20] Pyankova, A. F. Small Business Entity as a Weaker Party in a Contract // Business Security. 2012, No. 3, p. 29.

[21] Ulyanov, A. V. Legal Basis for Protecting the Weaker Party in a Contract//Journal of Russian Law, 2013. No. 8, p. 30.

[22] Resolution of the Constitutional Court of February 23, 1999 No. 4-P.

[23] Rulings of the Constitutional Court of the Russian Federation of October 13, 2009 No. 1214-O-O and of September 29, 2011 No. 1113-O-O.

[24] Ruling of the Constitutional Court of the Russian Federation of February 23, 1999 No. 4-P.

[25] Rulings of the Constitutional Court of the Russian Federation of July 3, 2007 No. 713-O-P and of July 3, 2007 No. 714-O-P, Ruling of the Constitutional Court of the Russian Federation of January 28, 2010 No. 2-P.

Biography

Dina Vladimirovna Lubyagina — dotsent Moskovskogo gosudarstvennogo yuridicheskogo universiteta imeni O. Ye. Kutafina. V 1999 godu ona poluchila uchenuyu stepen' kandidata yuridicheskikh nauk, a v 2011 godu yey bylo prisvoyeno uchenoye zvaniye dotsenta. Ona zanimala dolzhnosti zaveduyushchey kafedroy i dekana yuridicheskogo fakul'teta, a takzhe prepodayet v vedushchikh issledovatel'skikh rossiyskikh vuzakh. Dina Vladimirovna uchastvuyet v mnogochislennykh mezhdunarodnykh konferentsiyakh. Sfera yeye nauchnykh interesov okhvatyvayet sferu grazhdanskogo i predprinimatel'skogo prava, voprosy investitsionnoy deyatel'nosti i rynka tsennykh bumag.