GEPLAC ACTIVITIES

Development of Uniform System of Legal Concepts

DAVID KERESELIDZE*

The development of a uniform system of legal concepts is of vital importance in Georgia due to problems related to the application and enforcement of renewed legislation. Legislator's "communication" on understandable and, from the point of view of legal technique, precise language is a precondition to enhance the legal culture in the country.

Many attempts to introduce progressive legal institutions were not successful because of the nature of legislative techniques and existing concepts. Often laws, even those that have been based on international experience failed to attain the desired goals and only declared the will to establish certain legal institutions. Even this is a considerable step forward and now it comes to the improvement of technical inconsistencies.

Thus the activities concentrating on the development of a system of legal concepts is now a central part of GEPLAC's Workplan. Accordingly, the Georgian Law Review will include aspects of this for public discussion. As a starting point we consider issues related to one of the basic private law concepts – "the declaration of will".

1. The Concept of "Declaration of Will"

The institution of declaration of will (*declaratio voluntatis*) is one of the most important novelties introduced by the Civil Code of Georgia of 1997 (GCC). The heading of Title II of Book I GCC is "Transactions" though certain provisions of this Title often use the concept – "declaration of will".

The German and Soviet doctrines on transactions, the latter being essentially based on the German one, gave different answers to the question on the existence of the concept of declaration of will together with the concept of transaction. In Germany the concept of declaration of will is understood as a possibility of better settlement of certain issues (problems), related to the declaration of will in transactions.[1] The Soviet doctrine abandoned the concept of declaration of will and used phrases like "action, which declares a will".[2]

Article 50 GCC transposed the provision of Article 41 of the Civil Code of the Georgian SSR of 1963 with considerable changes. In the definition of the concept of transaction, the

---

* Deputy Director for Legal Issues of GEPLAC.

[1] E.g. see *Flume*, Allgemeiner Teil des Bürgerlichen Rechts, Bd. 2, Das Rechtsgeschäft, 1975, § 2 (3), 28.

[2] See: Article 42 of the Civil Code of Georgian SSR of 1963.

concept "declaration of will" substituted the phrase "an action of citizens and organisations". Subsequently, Article 50 GCC states: "A transaction is a unilateral, bilateral or multilateral declaration of will aimed at origin, alteration or termination of legal relations". The declaration of will is a compulsory element of a transaction.[3]

As a rule the legislator uses the concepts of transaction and declaration of will in one and the same meaning. When elaborating a specific provision, preference is given to the use of the concept of declaration of will in cases when it has crucial importance for a certain action or a rule of conduct (e.g. Articles 51 and 52 GCC). Cases are exempted when the law regulates a bilateral or multilateral transaction, where the declaration of two or more wills are necessary in order to make a transaction and when the declaration of only one will would result in no legal consequences.[4]

However, according to the definition of "transaction" given in Article 50 GCC the concepts of declaration of will and a transaction should not be used in the same way. A transaction is not every declaration of will, but the one which aims at the origin, alteration or termination of legal relations. Consequently, there should exist such a declaration of will, which does not aim at occurrence of some legal consequences. In this way the legislator deprives the concept of declaration of will of legal-technical meaning. It will become essential from legal point of view when it aims at occurrence of a legal consequence.[5]

In terms of comparison, under Article 3:33 of the new Dutch Civil Code a transaction is a will aiming at occurrence of a legal consequence (effects), which is manifested through the declaration.[6] The German Civil Code (BGB), used as a model for Georgian law, does not include the definition of transaction. Below are some observations made in the German doctrine and court practice:

"A transaction is a declaration of will. A will is declared to cause a legal consequence, and the legal system allows for occurrence of the above legal consequence to the extent it is desirable for the author of a transaction";[7]

"The essence of a transaction is manifested in the will aiming at causing a legal consequence";[8]

---

[3] See *Chanturia*, Introduction to the General Part of the Civil Law of Georgia, 1997, 330. For comparison see in German literature *von Tuhr*, Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, 2 (1), 1918, § 61 I, 399; *Coing*, Europäisches Privatrecht, Bd. 2, 19. Jahrhundert, 1985, § 44 II, 276; *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 22, RdNr. 5; *Medicus*, Allgemeiner Teil des BGB, 2002, § 21, RdNr. 244; *Palandt/Heinrichs*, Bürgerliches Gesetzbuch, 2003, Einführung vor § 116, RdNr. 1.

[4] Compare with regard to German law *Medicus*, Allgemeiner Teil des BGB, 2002, § 21, RdNr. 243.

[5] See *Chanturia*, Introduction to the General Part of the Civil Law of Georgia, 1997, 312; *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, 167.

[6] "Een rechtshandeling vereist een op een rechtsgevolg gerichte wil die zich door een verklaring heeft geopenbaard".

[7] *Windscheid*, Pandektenrecht I, § 69, Ziff. 1, cited according to *Flume*, Allgemeiner Teil des Bürgerlichen Rechts, Bd. 2, Das Rechtsgeschäft, 1975, §2 (5), 32.

[8] See Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Bd. 1, 1888, 126; *Mugdan* (Hrsg.), Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Bd. 1, 1899, 421.

"Pursuant to the provisions of the General Part of German Civil Code the declaration of will is the expression of will, which directly aims at occurrence of a legal consequence; it reveals the will a legal consequence to occur, or the will aimed at establishment, substantial alteration or termination of legal relations".[9]

If we insert the definition of "declaration of will" in Article 50 GCC instead of the term itself, the deficiency of the provided definition of "transaction" becomes apparent. According to the wording of the Law a transaction is the "declaration of will", i.e. "expression of a will which directly aims at occurrence of a legal consequence", "which aims at origin, alteration or termination of legal relations". It is obvious, that when the legislator used the concept "declaration of will", he already referred to the condition that a will (and not the declaration of will) should aim at the occurrence of a legal consequence. Subsequently, its additional highlighting is a deficiency from legal technique point of view and above all, in essence is the declining of the meaning of the institution of "declaration of will".

The legislator did not take account of one essential condition when giving the definition of a transaction: in Article 50 GCC the concept of declaration of will is used when it actually means only a "will" or "an action, which declares a will". When defining a transaction it is necessary to state that "a transaction is a unilateral, bilateral or multilateral declaration of will", without any additional clause. The concept of "declaration of will" already implies the will to cause a legal consequence as a subjective, psychic condition and the objective statement of this will (to cause a legal consequence).[10] One can speak about the declaration of will when these two compulsory elements are present.

Furthermore, it would also be legally reasonable for emphasis to be placed on the action, which declares the will, aiming at occurrence of a legal consequence (origin, alteration or termination of legal relations). Such a provision is included in Article 41 I of the Civil Code of Georgian SSR and post Soviet Codes.[11] In this case, the concept of "declaration of will", which is implied in the action concerned, may be understood as identical to the concept of a transaction.

Consequently, the declaration of will is a will aiming at the occurrence of a specific legal consequence, stated in such a manner as to be understood (by a recipient or a third person) as a will for a legal consequence to occur. Furthermore, a declaration of will (in the case of necessity, together with the declaration of other will or some other action equalled to the former from legal point of view) is a transaction. This circumstance was not duly

---

[9] See The Decisions of Federal Court on Civil Cases (Entscheidungen des Bundesgerichtshofes in Zivilsachen, BGHZ), Neue Juristische Wochenschrift (NJW), 2001, 289, 290.

[10] See *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, Article 50, 166-167. Compare in German literature *Palandt/Heinrichs*, Bürgerliches Gesetzbuch, 2003, Einführung vor § 116, RdNr. 1 ff.

[11] E.g. See Article 153 of the Civil Code of Russian Federation and Article 289 of the Civil Code of Armenian Republic. Exempted is Article 324.1 of the Civil Code of Azerbaijan Republic, which was elaborated similarly to the Georgian Code.

accounted for during the elaboration of Article 50 GCC. As a result, the concept of declaration of will failed to acquire the implication of a legal-technical concept.

2. Receivable Declaration of Will and the Institution of "Reaching the other Party"

The title of Article 51 GCC is The Validity of Unilateral Declaration of Will. Thus the emphasis is incorrectly drawn to a "unilateral" declaration of will.[12] The institution of "reaching the other party" by a declaration of will is of no less importance for bilateral or multilateral declarations of will i.e. transactions. Respectively, the legislator ought to mention the effectiveness of a receivable declaration of will in the title, i.e. to the condition directly regulated by this Article ("declaration of will, which should be received by the other party...").

The legislator elaborated Article 51 I CCG on the grounds of § 130 I 1 BGB and at the same time, aimed at the simplification and sophistication of the wording of the German provision. Namely, he tried to laconically state the fact, that a receivable declaration of will is effective from the moment of its "reaching" the addressee (recipient). He was right when rejecting the emphasis made in § 130 I 1 BGB on not-present persons ("when it is pronounced in his absence"). Any declaration of will pronounced with regard to any present or not present person equally requires its reaching the other party, provided it is a receivable declaration of will.[13] In such cases only the mode of reaching differs and respectively, the necessary preconditions that are conditioned by the period of time between the pronouncement of will and its receipt by the other party.[14]

However the vague title and the absence of a special term for the institution of "reaching the other party" complicate a correct understanding of Article 51 I CCG. It would be preferable to explain the essence of the institution of "reaching the other party" with the help of the following wording: a receivable declaration of will becomes effective once it comes to recipient's own sphere of influence[15] in such a manner, that the latter acquires the actual possibility of becoming familiar with its content in an ordinary course of things.[16]

---

[12] With regard to an opposite opinion see *Chanturia*, Introduction to the General Part of the Civil Law of Georgia, 1997, 318, where the author refers to the abstract from *Flume*, where the latter naturally considers, that any declaration of will should be expressed with regard to somebody and states that the difference from the point of view of receivability is important only in relation to unilateral transactions. (*Flume*, Allgemeiner Teil des Bürgerlichen Rechts, Bd. 2, Das Rechtsgeschäft, 1975, § 11 (4), 138 f.). Compare also *von Tuhr*, Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, 2 (1), 1918, § 61 III, 427 ff., where the wording directable (*richtungsbedürftig*) is considered to be more presice.

[13] See in German literature *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 8; *Palandt/Heinrichs*, Bürgerliches Gesetzbuch, 2003, § 130, RdNr. 13 f.

[14] See in German literature *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 8.

[15] German law makes use of "sphere of power" (*machtbereich*) or "discretionary power" (*Verfügungsgewalt*). Compare *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, Article 51, 171, which also uses the word "power".

[16] Compare *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, Article 51, 171. For comparison in German law see BGHZ, NJW, 1965, 965, 966; 1979, 2032, 2033 and the Decisions of Federal Labour Court (Entscheidungen des Bundesarbeitsgerichts, BAG), NJW, 1984, 1651. Compare also *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 17.

Consequently, the receivable declaration of will shall be considered effective from the moment, when a recipient should have become familiar with its content with due consideration of the ordinary circumstances (operation of postal service, working hours, etc.). It does not matter whether the latter actually gets familiar with it or not.[17]

Such a regulation evenly distributes the risks related to the delivery of the declaration of will between a declarer of will and its recipient: the declarer of will decides on the mode and medium of delivery of a will and bears the risk of its non or delayed reaching the addressee. The recipient bears the risk of non or delayed familiarisation with the content of the declaration of will, which has come to his own sphere of influence.[18]

Therefore, similar to German one, the Georgian legislator supported the theory of "reaching the other party".[19] Other post Soviet states rejected the introduction of the concept of declaration of will and consequently never regulated its reaching the recipient as a condition of its effectiveness. Exempted is Article 325 of the Civil Code of Azerbaijan Republic, which transposes Article 51 GCC nearly without any changes, including its title.

3. Revocation of the Declaration of Will

Similar to § 130 I 2 BGB Article 51 II GCC regulates the possibility of avoiding the occurrence of legal consequences[20] caused by reaching the addressee by the declaration of will through the latter's "revocation". However, the respective wording of the GCC – "The declaration of will shall not be considered effective if the other party rejects it in advance or contemporaneously" – does not sound convincing.

To the extent that Georgian law does not employ any adequate concept for the "revocation" of the declaration of will, the essence of Article 51 II GCC, regulating this institution remains unclear. The use of such words, as "rejection" or "statement of rejection" cause some ambiguity as it may be inferred from the comment on this Article: "Though the fact of reaching the addressee by a declaration of will makes the latter effective, this does not mean, that the addressee is obliged to receive it. Pursuant to Part 2 of this Article the other party is able to invalidate the declaration of will if he rejects it in advance or contemporaneously. The offeror should have analogous right".[21]

Actually, the purpose was to regulate by Article 51 II CCG the right of revocation of a declaration of will, regulated by § 130 I 2 GCC, which may invalidate a pronounced

---

[17] BAG, NJW, 1984, 1651.
[18] See *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, 1996, § 26 IV, 356; *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 17.
[19] With respect to different theories on the effectiveness of (receivable) declaration of will see *Medicus*, Allgemeiner Teil des BGB, 2002, § 22, RdNr. 268 ff. Compare *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, Article 51, 170.
[20] E.g. in unilateral or in the case of acceptance in a bilateral transaction this will be the origin of obligation, while in the case of offer in a bilateral transaction – "binding with an offer".
[21] *Zoidze*, Commentary to the Civil Code of Georgia, Book I, 1999, Article 51, 172.

declaration of will, which has not reached a recipient and consequently has not become effective yet, through another unilateral receivable declaration of will. It is mandatory for the addressee of a declaration of will to receive the revocation before or together with the receipt of the former. In this case, there is no interest worthy of protection on the part of the addressee, in accordance with which the declarer of a will would have been bound by will declared by him.[22]

At the same time the moment of reaching the first and second (revocation) declaration of will and not the moment of getting knowledge of their content is decisive.[23] Consequently, the revocation, which has reached the other party together with the first declaration of will shall be effective even when the addressee of the declaration of will first becomes familiar with the first declaration of will, and vice versa, delayed revocation shall not be taken into account even in case the addressee of the declaration of will becomes familiar with it even before getting familiar with the first declaration of will.[24]

---

[22] See in German literature *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 44 f.; *Medicus*, Allgemeiner Teil des BGB, 2002, § 23, RdNr. 297 ff.; *Palandt/Heinrichs*, Bürgerliches Gesetzbuch, 2003, § 130, RdNr. 11 .

[23] Comp.: BGHZ, NJW, 1975, 382, 384.

[24] See in German literature *Larenz/Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 1997, § 26, RdNr. 45; *Medicus*, Allgemeiner Teil des BGB, 2002, § 23, RdNr. 300; *Palandt/Heinrichs*, Bürgerliches Gesetzbuch, 2003, § 130, RdNr. 11 with further references. Compare also Article 9 of the Law on Obligations (*Obligationenrecht*) of Switzerland.