

MISTAKE AS TO THE IDENTITY OF A CONTRACTING PARTY – HISTORICAL ORIGINS AND CONTEMPORARY EXPRESSIONS*

ERRO SOBRE A IDENTIDADE DAS PARTES NA RELAÇÃO CONTRATUAL: ORIGENS HISTÓRICAS E NORMATIVIDADE MODERNA

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Abstract: The contract is the most prevalent institution for private autonomy implementation. As known, any agreement relies on mutual consent. However, sometimes there are some cases when exterior will does not coincide with the internal readiness or the will of the parties: This is caused by various objective and subjective factors. Therefore, this is the vivid example of insufficient will. If so, the agreement designed in such a framework is a “voidable transaction”. The basis for such an agreement is, in this case, the contractor taken by mistake. According to the general explanation, this kind of a mistake is real when the actual contractor (the one to be authorized to be as one of the parties) is a different person and not the one to be considered as the truly willing one. The goal of the article is to consider the mistake relevant to contractors through the historical background and show this freedom, which is inherent to the current law regulating the issue concerned.

Keywords: Lack of Will. Voidable Contract. Types of Fundamental Mistake. Mistake as to the Identity of a Contracting Party.

Resumo: O contrato é a instituição mais relevante para a implementação da autonomia privada. Como se sabe, qualquer acordo depende de consentimento mútuo. No entanto, por vezes, existem alguns casos em que a vontade exteriorizada não coincide com a real intenção ou vontade das partes: Isto é causado por vários fatores subjetivos e objetivos. Portanto, este é o exemplo vivo de manifestação defeituosa da vontade. Se assim for, o contrato realizado em tal perspectiva é um “ato jurídico anulável”. A base para tal declaração, nessa hipótese, é o erro na manifestação da vontade. De acordo com o entendimento aceito, este tipo de erro ocorre um quando um dos contratantes (o único que poderá figurar como parte) é uma pessoa diferente e não aquele que se considera capaz de expressar a vontade válida. O objetivo deste artigo é fazer um análise do erro subjetivo em relação aos contratantes em uma perspectiva histórica sobre a liberdade de contratar, tendo como foco a legislação regulatória em vigor.

Palavras-chave: Defeito na manifestação de Vontade. Contrato anulável. Espécies de erro essencial. Erro sobre a identidade de uma Parte Contratante.

To Err is Human”¹

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¹Errare Humanum Est – this well-known Latin phrase belongs to Hieronymus: Kapanadze N., Kvachadze M. (Comps.), Georgian-Latin Dictionary, Tb., 2008, 29 (In Georgian).

1. INTRODUCTION

The reforms of Georgian law guaranteed the private autonomy of the parties², which gives hand for the civil participants to perform any action non-restricted by law, including those, which are not directly foreseen by law.

The party agreement is the most prevalent means for autonomy implementation³. Any agreement relies on mutual consent. However, sometimes there are some cases when exterior will does not coincide with the internal readiness or the will of the parties, – caused by various exterior factors and their influence proper. Therefore, this is the vivid example of insufficient will.⁴ Based on insufficient will, the agreement designed in such a framework is called a “disputed agreement”.

The basis for such an agreement might be the contractor taken by mistake. According to the general explanation, this kind of a mistake is vivid when the actual contractor (the one to be authorized to be as one of the parties) is a different person and not the one to be considered as the truly willing one⁵.

The mistake is not an alien phenomenon even in the criminal law⁶. Specifically, in the course of action, they speak about the mistake, when the wrong concept originated in the perpetrator’s mind concerns the object of the action or appropriate identifiable (or related) specifications. At this time, it is important to determine whether the criminal act could have taken different legal qualification had the concept originated in the perpetrator’s mind have been appropriate to reality.⁷

In the code of Georgian Law in 1964 (of Georgian Soviet Republic at that time), – later Soviet Code – agreement designed mistakenly was dedicated only one legal norm (paragraph 55), in which they spoke about the agreement designed according to the misleading circumstance, its cancelation and the legal impact that followed. What about the very circumstance in which the mistakenly chosen person could have been indicated, and who

² Zoidze B., Reception of European Private Law in Georgia, Tb., 2005, 284 (In Georgian).

³ Chanturia L., General Part of the Civil Law, Tb., 2011, 290 (In Georgian).

⁴ See *ibid.* 360; at the same time see Zoidze B., Commentary on Georgian Civil Code, Vol.1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 166 (In Georgian).

⁵ Khubua G., Totladze L. (Eds.), Comprehensive Legal Vocabulary, Berliner Wissenschafts-Verlag Publishers, Berlin, 2012, 575 (In Georgian).

⁶ Regarding the concept of the mistake in current Georgian Criminal Law, see Turava M., Criminal Law, General Part, Vol.1, The Essence of the Crime, Tb., 2011, 512-514 (In Georgian); also – the Criminal Law (of the same author), The Review of the General Part, 9th ed., Tb., 2013, 156-157 (In Georgian); Gamkrelidze O., The Interpretation of Georgian Criminal Law (as of February 5, 2013), 3rd Rev. Ed., in: The Problems of the Criminal Law, Vol.3, Tb., 2013, 331 (In Georgian).

⁷ See Vessel J., BoilkeV., General Part of the Criminal Law: The Crime and its Structure; Tbilisi University Press, Tb., 2010, 140- 141 (In Georgian).

acted in the mode of this discrepancy, the code chose to indicate nothing. We cannot say the same about the Georgian Civil Code of 1997 (later – active code), which paid considerable attention the cases (agreements) designed by mistake and possible legal ways to fix it. Particularly, it would thoroughly list those cases of mistake, which give the person the right to dispute the contract. This is signified by the fact according to which Georgian legislature had the possibility to consider those successful cases achieved by legislature of foreign countries.

Truly, the cancelation of a disputed contract was not given in such a nice legal clarity as in the current, legal code of Georgia. Particularly it concerns the issues of mistakenly taken parties⁸. As it looks from the preparatory documents, the law itself was based on the gains of comparative law and found its own style⁹. During the codification of the disputed contracts, the commission applied to various levels of legislature, including the Anglo-Saxon Law¹⁰.

The goal of the article is to consider the mistake relevant to contractors through the historical background and show this freedom, which is inherent to the current law regulating the issue concerned.

2. MISTAKE AS TO THE IDENTITY OF A CONTRACTING PARTY, AS THE BASIS OF VOIDABILITY ACCORDING TO THE ROMAN LAW

The Roman law saw the mistake (error¹¹) as the discrepancy¹² between the human concepts and reality, his will and the representation of the one.

True, Romans did not have the error related theory, but still they could recognize the legal impact of such a mistake, namely the recognized the agreement either as disputed or canceled.¹³

⁸ Zoidze B., Reception of European Private Law in Georgia, Tb., 2005, 237 (In Georgian).

⁹ Knieper R., Methods of Codification and Concepts of the Transitory Period Societies (Regarding the Case that of Georgia), in: The Legal Reform in Georgia, Materials of International Conference Held in Tbilisi on May 23-25 in 1994, Tb., 1994, 185 (In Georgian).

¹⁰ Zoidze B., Reception of European Private Law in Georgia, Tb., 2005, 348-349 (In Georgian). The norms of Anglo-Saxon Law regarding agreements are part of Law of Contract. Whatever the case, the jurisprudence of those counties recognizes the importance of the mentioned institution: *Chanturia L.*, Introduction to the General Part of the Civil Law (Comparative-Legal Research Regarding Certain Specifications of the Post-Soviet Law), “Statute” Publishers, MSK, 2006, 229 (In Russian).

¹¹ Interpretation of the Latin term see *Dumesnil J.B.G.*, Latin synonyms, with their different significations, and examples taken from the best Latin authors, Printed for G. B. Whittaker etc., London, 1819, 227, <<http://ia600502.us.archive.org/19/items/latinsynonymswit00garduoft/latinsynonymswit00garduoft.pdf>>, [28.03.13].

¹² See *Yakovlev B.H.*, Roman Private Law and Modern Civil Code of Russia, “Wolters Kluwer” Publishers, MSK, 2010, 429 (In Russian).

According to the Roman law, the factual mistake related to the contractor's mistake, his personality or qualities (error in persona¹⁴). This mistake was given the meaning only in cases when, based on the general character of the contract, personal qualities of the party mattered. For example, if the mistake was considered the personal quality related to the installment related payments, it was considered as minor once the payment was performed in cash. In the other case, the agreement was considered valid regardless the errors present in the party's personality. In the first case, the seller had the right to dispute.¹⁵

It should be noted that according to the Ulpian's comments, all traditional categories of mistakes are represented (except for the "err in persona"). However, this omission is quite normal because during the purchase this mistake is rarely heeded¹⁶. What about case, which is considered as a mistake by the modern lawyers ("inter praesentes" – direct meeting of the parties), it is not mentioned at all. According to Bookland, "The existence of a mistake in human personality is out of question at the moment when the parties directly design the agreement". "Truly, it is quite suspicious that when agreed with Balbus about the purchase, I can cancel the contract only if I thought him be Titus (who I was recommended¹⁷)". During any agreements regarding the purchase, it does not matter whether the agreement was designed directly or by distance, the purchase-agreements, which yield the problems related to identity, are quite rare.¹⁸

Therefore, if the party was not caused any harm and she received the amount (gain) agreed by the contract, little attention had been paid whether the very person participated as the other party, who could have been initially thought to be the one. Mostly, it concerned the minor trade. On the other hand, the mistake could not have been totally excluded, just like the possible negative impact and the cancelation of the contract.¹⁹

¹³ See *Yakovlev B.H.*, Roman Private Law and Modern Civil Code of Russia, "Wolters Kluwer" Publishers, MSK, 2010, 429 (In Russian); review of the contract mistakenly designed – according to the Roman Law, see *Chanturia L.*, Introduction to the General Part of Georgian Civil Code, Tb., 1997, 368 (In Georgian).

¹⁴ See *Sanfilippo C.*, A Course of Roman Private Law, "Beck" Publishers, MSK, 2002, 67 (In Russian).

¹⁵ *Novitski I.B.*, Roman Law, "Wolters Kluwer" Publishers, MSK, 2009, 161 (In Russian). Regarding this issue, see also *Baron I.*, System of Roman Civil Law, Book One, "Legal Centre Press" Publishers, St. Petersburg, 2005, 160 (In Russian); *Dozhdev D.V.*, Roman Private Law, "Infra-M"; "Norma" Publishers, MSK, 1996, 139 (In Russian).

¹⁶ *Zulueta F. De*, The Roman Law of Sale, Clarendon Press, Oxford, 1957, 25, as cited in: *MacMillan C.*, Mistakes in Contract Law, Hart Publishing, Oxford, 2010, 17.

¹⁷ *Buckland W.W.*, A Textbook of Roman Law from Augustus to Justinian, Cambridge University Press 3rd ed., Cambridge, 1963, as cited in: *MacMillan C.*, Mistakes in Contract Law, Hart Publishing, Oxford, 2010, 17.

¹⁸ *MacMillan C.*, Mistakes in Contract Law, Hart Publishing, Oxford, 2010, 17.

¹⁹ See *McKeag E.C.*, Mistake in Contract: A Study in Comparative Jurisprudence, Studies in History, Economics and Public Law, Vol. XXIII, No. 2, The Columbia University Press, New York, 1905, 167, <<http://archive.org/download/mistakeincontrac00mckerich/mistakeincontrac00mckerich.pdf>>, [28.03.13].

3. REGULATION OF CONTRACTS DESIGNED BY THE MISTAKEN IDENTITY IN THE SOVIET CODE

As mentioned in the introduction, there was only one norm in the Soviet Law dedicated to the correction of this mistake. Specifically, it was paragraph 55, according to which “agreement designed and influenced by substantial discrepancy, could be considered as invalid by the party who was acting under the very influence of this discrepancy”. What about the fact, specifically what this discrepancy could be, the law have no further clarification about it. Thus, the mistake in the contractor’s personality represented as the ground for the legal qualification, was not represented as such. However, for the practice the cancelation of such contracts could not be considered as uncommon.

The term “discrepancy” (or error) had been used in different meanings in Soviet Code. If a person knew several issues (facts) based on which he (she) had to design a contract, made unwise or unreasonable decisions, people in this case used to say that the person “made a mistake” (that another action would have been more appropriate). This kind of mistake had nothing to do with the error or discrepancy, which had been indicated in the appropriate paragraph of the Soviet Law. Discrepancy, as a technical term, which used to present one of the reasons for dispute (or claim to cancel it) meant that while implementing it, the party was guided or misled by the wrong circumstances, not related to the reality proper. Thus, the lack of knowledge for the real circumstances was considered along with the party’s wrong perception.²⁰

In its narrow meaning, “discrepancy” meant the situation, when a person (without any intention or influence (contrary by the contract designed through fraud) developed wrong perceptions or when certain circumstance was unknown to him (her) and the one, based on this misperception, used to display the will, which would not have been displayed had such kind of circumstance have not existed at all. The discrepancy of this kind could have been related, for example, to the contractor’s personality.²¹

As the law considered discrepancy as the bases for the cancelation of the contract, and this approach on the other hand should the foundations of firm business relations, the term “discrepancy” should have been outlined by legal framework. Discrepancy could have been claimed as the true reason for the contract cancelation only in special cases. However, the code did not indicate which these cases could have been, which gave the court the

²⁰ *NovitskiI.B.*, Transactions, Limitation, “Gosizdat” Publishers, MSK, 1954, 102 (In Russian).

²¹ See *ibid.* 103.

possibility to qualify each case according to the individual specifications given. According to the doctrine, the most appropriate approach should be developed from the fact that in the Soviet Law the scrupulous regulation of particular cases was not given at all. However, it was never denied that some general, guiding regulations dedicated to the issue could have been quite useful and would help the court to meet the facing challenges.²²

The issue of these norms translated into the fact according to which a person could have been given the possibility withdraw from the contract designed by mistake but at the same time the interests of another party kept heeded because the other one did not and could not have known that the first one was guided by misconceived circumstances.²³

If one of the parties was guided by erroneous circumstances but the second one could notice it but for the reasons of bias did not reveal them to the one and tried to gain on it so as the opportunity had not been missed, in this case there would be not foundation to protect the interests of such a party while the cancelation of the contract could not have been a surprising fact for him (her). The party who could notice the mistake but still came up with the readiness to design this agreement, should have known from the very start that sooner or later the discrepancy would have been exposed to the light and the issue of the cancelation of the contract would have been raised. Thus, the person who could notice the mistake but did not reveal him (her) the true state of affairs, was considered as dishonest (perpetrator of the fraud) for what the one could not be considered worthy for the legal protection once the agreement hailed to be canceled.²⁴

While determining the discrepancy, the issue for some criteria to be defined was actual. Specifically, whether some criteria or requirements were due to be followed or whether the ruling be maintained on certain circumstances, which were the bases for the contract agreement, were those to be considered.²⁵

When discrepancy was the case, specifically how honest of a concrete contract related behavior, the Soviet Law mostly tended to the principle according to which certain behavior from one the parties should have been considered, for example how the person could have acted; what circumstance should have been mostly paid attention to; what could have been considered as substantial, etc. The overall evaluation of the case should have been fully

²² See *ibid.* 103-104.

²³ See *ibid.* 104.

²⁴ See *ibid.* 104-105.

²⁵ See *ibid.* 105.

based on objective (and not abstract) criteria, however, certain specifications of the case should have necessarily considered as a must.²⁶

While applying a norm, the very discrepancy should have been considered, what for the concrete circumstance and for the specific person had a critical role – not according to her whim, specific taste, but because of concomitant circumstances. Thus, the issue of discrepancy should have been ruled based on specific circumstances of the case, the evaluation of which should have been carried out honestly and wisely. At the same time, wide differentiation was not to be excluded; quite contrary, the status and appropriate specification of the party should have been paid attention to, the character of her activity, the nature of dispute, etc.²⁷

4. VOIDABLE CONTRACTS REGULATED BY THE CURRENT LAW

According to the current law the norms regulating the contract, influenced by the German law, were allocated to the general part subjugated to the logic by which primarily expressed will should have been set and then determined in the ongoing legal circumstances.²⁸

A party without expressing the will is not able to receive the legal result²⁹. As expressing the will carries such a meaning, certain criterion should be maintained so as it stays valid while legal relationship is being analyzed, changed or announced as suspended. The quality by which the will is expressed in such a way is called the validity of the will expression.³⁰ The valid expression of the will depends on various circumstances called the legal terms of the contract.³¹ In case of the disputed contract the term of agreement validity is threatened, which should have been guaranteed by the principle according to which the parties' interests should have been protected³². Therefore, with the appropriate legal foundation present, the expression of the will can be questioned and held as canceled.³³ One of the reasons can be called the lack of the will.

²⁶ *Novitski I.B.*, Transactions, Limitation, “Gosizdat” Publishers, MSK, 1954, 106 (In Russian).

²⁷ See *ibid.*

²⁸ See *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 235-236 (In Georgian).

²⁹ *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 166 (In Georgian).

³⁰ *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 292 (In Georgian).

³¹ See *ibid.*, 293.

³² *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 50, Tb., 1999, 196 (In Georgian).

³³ See *ibid.*, Article 50, 166.

The contract designed based on the lack of the will can be qualified differently by the current law. One group of such contract is considered as canceled from the very start and does not yield legal results, while the other group encompasses disputed agreements, the cancelation of which depends on the level of dispute from the authorized parties.³⁴ The agreement designed by mistake, along with those contracted by threat of fraud, are parts of this second group. They represent the most prevalent disputed contracts; therefore, so much attention is paid from the legislature, which result in a separate chapter of the code.³⁵

Generally, the principle of free agreement design means the fact according to which a party can freely choose the most appropriate contractor. This is another representation of the will. The existing law guarantees representation of the free representation of the real will from the subject.³⁶ The free character of the contract exists in the legal framework of the contract proper. Therefore, the law protects the party who contracted the agreement being herself the victim of fraud, threats, enforcement and other influences of the kind.³⁷ Thus, the right for dispute can be viewed as representation of the private autonomy.³⁸

5. PLACE OF THE MISTAKENLY CONTRACTED AGREEMENTS IN THE FRAMEWORK OF EXISTENT LAW

During the codification of the contract, made by mistake, the commission did not imitate those countries in whose civil codes the foundation for dispute is considered along with the law related to the agreements proper.³⁹ If we consider the fact, by which the main body enjoys considerable advantage in view of the fact, according to which the circumstances of the built-in principles need not be present at any other parts of the code,⁴⁰ it is made possible the norms to be applicable in any private legal case, which are maintained by the

³⁴ *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 360 (In Georgian).

³⁵ See *ibid*, 394.

³⁶ *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 270 (In Georgian).

³⁷ *Chanturia L.*, Commentary on Georgian Civil Code, Vol.3, Law of Obligations, General Part, Article 325, Tb., 2001, 80 (In Georgian).

³⁸ *Todua M., Willems H.*, Law of Obligations, Georgian Young Lawyers' Association, Tb., 2006, 109 (In Georgian).

³⁹ See *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, 318; *Todua M., Willems H.*, Law of Obligations, Tb., 2006, 109 (In Georgian).

⁴⁰ Regarding main body for the values, see *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 45-46 (In Georgian); at the same time of the same authorship: Freedom and Responsibility: Law and Jurisprudence of Post-Soviet Epoch, "Sani" Publishers, Tb., 2004, 32-33 (In Russian); *Zoidze B.*, From the History of Establishing Georgian Civil Law, Journal "Georgian Law Review", 6/2003-1, 110 (In Georgian).

expression of the will⁴¹ and which speaks about the fact that Georgian law in this regards better serves the rational approach.

In English law, there is an ongoing debate whether “the identity related mistake” represent one of the inherent element of the offer and acceptance.⁴² I think this viewpoint should not be shared while in this case we have the will already accepted by the parties, which is the representation of the will, which, on its own, linked the contractors. Therefore, it should be held unreasonable according to which in the contract designed by mistake, the fact whether the mistaken circumstance had been addressed to the designated party before or after the contract had been concluded.⁴³

As noted in introduction, the contract designed by mistake is not so thoroughly considered⁴⁴ in any of the Post-Soviet countries⁴⁵ like in this current law (code). During the project phase, the commission was studying the principles of general law, thus some norms experience slight influence of the Anglo-Saxon practice.⁴⁶ However, it is less of the case regarding the contract designed by mistake. Namely, in this case, the commission, along with German, used the norms of Swill and Italian law. The paragraphs 23 and 24 of the Swiss law regarding “Liabilities”, where precise definitions and classification of the mistake is given, were fully incorporated into the current code. The same can be said regarding paragraph 26 (point 2) of the same Swill law, which deals with the legal aspects of those mistakes committed by blunder. Some of the doctrines had been elaborated according to paragraph

⁴¹ *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 293 (In Georgian). Norms for designing a contract are determined by the private law regarding various fields, including corporate law as well: see *ibid.* 46. For example, with the principal partner or the third person the contract can be designed at the moment when the organization is being established, its preparation, implementation, maintenance, - instead of salary pay. This contract, in most cases, is connected with the personal qualities, for example, with one of the community member, her legal education or economy related experience, what is necessary for establishment of the organization as such. *Burduli I.*, Estate Related Issues Concerning Joint Stock Company (Especially During the Establishment Process) Based on Georgian and Austrian Experience, Tb., 2008, 100 (In Georgian). At the contract agreement as such, if the mistaken identity error takes place, this issue will be regulated by general norm.

⁴² *Spark G.*, Vitiating of Contracts: International Contractual Principles and English Law, Cambridge University Press, New York, 2013, 115; *Buckland W.W.*, A Textbook of Roman Law From Augustus to Justinian 3rd Ed., Cambridge University Press, Cambridge, 1963, 288.

⁴³ *Mariamidze G.*, Civil Law, General Part, Book One, 1st Ed., Tb., 2011, 91 (In Georgian).

⁴⁴ The general hallmark of the existing law and codification is to imply disputing character of the contract as part of the philosophy and is regulated within the while body: *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, 317 (In Georgian).

⁴⁵ Azerbaijan Civil Code of December 28 of 1999 is an exception, paragraph 347 displays close similarity with that of Georgia (norms of Georgian Code – both structurally and in contents).

⁴⁶ *Zoidze B.*, The Influence of Anglo-American Common Law on the Georgian Civil Code, Journal “Georgian Law Review”, First and Second Quarters, 1999, 18 (In Georgian).

1110 of the French civil code. Thus, the commission did not rely on any particular legislature of one particular country.⁴⁷

6. MISTAKE AS TO THE IDENTITY OF A CONTRACTING PARTY AS ONE OF THE TYPES OF SUBSTANTIAL MISTAKES

Mistake means misconception regarding a specific case of phenomenon.⁴⁸ According to paragraph 72 of the civil code, the contract can be held disputed if the expression⁴⁹ of the will was caused by the mistakes in view⁵⁰. While making the mistake, the concept regarding the case does not correspond to its real state of affairs; therefore, the mistake leave negative impact on the formation process of the will and presents distorted reality towards what one of the parties strives.⁵¹ Thus, the mistake (the same lack of the will) can cause the cancelation of the contract. However, if any mistake is to be considered as the foundation for contract suspension, social relationships can be drawn under threat. This is the sole reason why the legislature accentuates on the grave reasons existence of which the contract related circumstances might be questioned.⁵²

The advantage of the current code resides in the fact according to which the details, which determine the discrepancy, are given with more legal accuracy compared with those of other country legislatures. These norms are based on huge court practice of various countries.⁵³

⁴⁷ *Zoidze B.*, Reception of European Private Law in Georgia, Tb., 2005, 237 (In Georgian). Regarding this issue, see also *Kereselidze D.*, General Systemic Doctrines of Private Law, Institute of European and Comparative Law Press, Tb., 2009, 319 (In Georgian).

⁴⁸ *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 365 (In Georgian).

⁴⁹ According to the concepts expressed in the correspondent literature, the statement – the contract can be made disputable – is not accurate enough. According to the author's guess, the legislature means that the contract "might be considered as disputable", what he wanted to express by the phrase "the contract can be represented as the subject of a dispute": *Kereselidze D.*, General Systemic Doctrines of Private Law, Tb., 2009, Ref. 1589, 318 (In Georgian). The author's position is mostly theorized, as the practical outcome seen through the issue he formulates does not seem to be viable. The logic of this legislature is quite clear. Namely, as the norms regulating the disputable case give a party the possibility to come up with the rightful claim, what is his right and not a liability, the formulation such as "a contract might be represented as a subject of a dispute" means it might not be such if the authorized person does not express the will in the legal deadlines given.

⁵⁰ Regarding the interdependence of paragraphs 72 and 52, see *Zippelius R.*, Introduction to German Legal Methods, Tb., 2009, 65-66 (In Georgian).

⁵¹ *Zoidze B.*, Commentary on Georgian Civil Code, Vol. 1, General Provisions of Georgian Civil Code, Article 72, Tb., 1999, 223 (In Georgian). Regarding this issue, see also *Tumanishvili G.G.*, Contracts (Legal Nature and Normative Regulations), Iliia State University Press, Tb., 2012, 54 (In Georgian).

⁵² *Chanturia L.*, General Part of the Civil Law, Tb., 2011, 365 (In Georgian). Also see *Chechelashvili Z.*, Contract Law (Research Regarding Comparative Law Based on Georgian law), (2nd Rev. Ed.), Tb., 2010, 49 (In Georgian).

⁵³ *Chanturia L.*, Introduction to the General Part of the Civil Law, Tb., 1997, 370 (In Georgian).

Paragraph 72 of the current code authorizes of the contract parties to dispute the contract if the will is displayed based on misconception. The title of the paragraphs leaves expectations so as all kinds of mistakes will be listed in it, which the law initially recognizes as substantial. Though, the contents of paragraphs 74, 75 and 76 (“mistake is considered to be substantial if..., the mistake is of the crucial importance if..., mistake cannot be considered as substantial except for the cases when...”) indicates that the legislature through paragraphs 73-76 offers the detailed categorization of the concept. Specifically, the law determines, what preconditions should exist so as the contract is to be considered as disputable; thus, we have here the case of the representation of the negative will as a necessary precondition for the validity of the issue.⁵⁴

Thus, Georgian legislature, through paragraphs 73-76 solidifies seven substantial kinds of mistake:⁵⁵ first, mistake at choosing the type of agreement; second, mistake related to the contents of agreements; third, mistake at the basis of the agreement; fourth, mistake at the contractor personality; fifth, mistake related to the object properties; sixth, mistake at the right; seventh, mistake at the motive for the agreement.

The mistake regarding the contractor’s personality is regulated by paragraph 74 of the existing law (part one). The substantial part of this case is regulated, for example, by the Swiss law about “liabilities” (paragraph 24; part one, point 2); paragraph 1429, part 3 of the Italian Civil Code; paragraph 119, part 2 of German civil code; General Civil Code of Austria, paragraph 873; paragraph 1110 of French Civil Code; paragraph 1266 of Spanish Civil Code, paragraph 1950 of Louisiana Civil Code and paragraph 1400 of Quebec Civil Code.

Azeri civil code represent exception from the Soviet Codification System, which foresees kinds of substantial mistakes. According to paragraph 178 (part one) of Russian Federation’s Civil Code, the mistake is of substantial character only related to the type or the object of the contract.⁵⁶ It must be noted that recently many theses have been dedicated to the issue in Russian Federation,⁵⁷ the authors of which recommend that the resolution according

⁵⁴ Comp. *Zippelius R.*, Introduction to German Legal Methods, Tb., 2009, 5-6 (In Georgian).

⁵⁵ Comp. *Jorbenadze S.*, Contract Related Mistakes According to Georgian Civil Code, in: *Roman Shengelia – 70, Jubilee Collection, Problems of the Law, Tb.*, 2012, 401 (In Georgian).

⁵⁶ See *Sadikov O.N.*, Commentary on Civil Code of Russian Federation, Part One, “Contract”, “Infra-M” Publishers, 1997, 224 (In Russian); *Tolstoy Y.K., Sergeev A.P.* (Eds.), Civil Code, Vol.1, “Prospect” Publishers, St. Petersburg, 1996, 213 (In Russian).

⁵⁷ The thesis defended on this issue dates back by 2008: <<http://www.dissercat.com/content/zabluzhdenie-pri-sovershenii-sdelki-evropeiskaya-pravovaya-traditsiya-i-sovremennoe-rossiisk>>, [28.03.13].

to which the mistake regarding the contractor's personality and considered as substantial needs to be added to the norm.⁵⁸

7. CONCLUSION

The discussion developed in the article gives us possibility to come up with certain inferences. As during the disputable contracts we deal with already designed agreements, it can be noted that the mistake regarding the party's personality cannot be considered as one of the elements of offer or acceptance.

According to the existing code, paragraph 72, the statement – “the contract can be hailed disputable” – indicated to the fact that the dispute is the right of the person and not her liability, which means that the agreement may not be made disputable at all unless the authorized party does not challenge it with the deadlines given.

By paragraphs 73-76, Georgian legislature offers the detailed categorization of the mistake, which is determines those conditions the existence of which determines the disputable character of the issue. Therefore, we can consider them as negative precondition for the expression of the validity of the legal will.

In the end, we can add that paragraphs 73-76 of the current law gives us the possibility to infer that the law regulates the seven kinds of the existing discrepancy (mistake), which are the mistake in choosing the type of agreements, the contents, the foundation, contractor's personality, main properties of the subject and the mistake regarding the motive of the agreement.

⁵⁸ Comp. *Savolainen A.N.*, Actual Problems Dealt with Contracts Designed by Influences of Error; Electronic Journal “Contemporary Legal Researches and Innovations”, October, 2011, (In Russian), <<http://web.snauka.ru/issues/2011/10/3016>>, [28.03.13].