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Ye.L. Babadzhanyan*

Maqsut Narikbayev University, Astana, Kazakhstan

(E-mail: e_babadzhanyan@kazguu.kz)
ORCID ID 0009-0006-8437-8562, Scopus Author ID 56019099200

The concept and correspondence between internal and external will (expressed will) within structure of a civil transaction

This article is focused on such elements in the structure of a civil transaction as the will and expressed will, as well as on specifics of judicial proceedings in cases on challenging transactions with defects of the will and expressed will. The study of the indicated categories is important for determining the composing elements of a transaction, its existence and validity, as well as for the correct derivation of a civil transaction's concept. The practical significance is the opportunity to determine the ways for assessing the possibility of applying provisions on transactions to various forms (types) of expressed wills, including the provisions on the invalidity of transactions with defects of the will and expressed will. The author while conducting the research set herself of solving the following main tasks: what the will is and what the process of its formation is, how the will and expressed will correspond to each other, the possibility of executing an expressed will in a way other than performing actions, which category is predominant and why, as well as how it affects the resolution of disputes on the invalidity of transactions with defects of the will and expressed will. Thus, the purpose of the research is to establish the process of formation of a will, methods of performing an expressed will and their correspondence. The author has used a wide combination of existing general scientific and special legal methods of scientific cognition in the course of the research, which led to the following results. The research of the categories of the will and expressed will within the structure of a civil transaction conducted by the author has been carried out in relation to the primary subjects of private law and to the ultimate beneficiaries of goods — individuals. Based on theoretical analysis, the author distinguishes these categories in order to establish the priorities while assessing the defects of the will and expressed will, as well as determines their sequence by proving the primacy of the will.

Keywords: will, external will, expressed will, civil transaction, contract, legal effect, theory of trust, theory of expression, theory of the will.

Introduction

The will and expressed will are psychological and legal categories that are inextricably related to civil legal relations, most often preceding their emergence, change or termination.

These categories have a special place in the theory and structure of a civil transaction. The will and expressed will are the key composing elements of a transaction [1; 53]. A transaction is often identified with the expressed will [2], by defining the will and expressed will as one of the conditions for a transaction's validity [3; 392].

The legal category of the "expressed will" is inextricably related to the concept of the "will". The expressed will is expression of will, most often accomplished through actions, less often — through the act of omission, in such a way that the will becomes obvious to everyone. That is the reason why the expressed will is often called as external will, while the will is called internal [4; 217].

However, not every expressed will can generate legal consequences and have an effect in legal relations. The expressed will that cannot generate private and legal consequences is not relevant to private law.

The study of the categories of internal and external will is becoming especially relevant in the context of the development of digital technologies that allow transactions to be concluded online. In such a situation, a change in the approach to determining the priority of internal will over its external expression will allow the interests of the subjects of turnover to be protected most objectively and fairly.

The observance over the process of generating a private legal effect from the expression of will seems to be important. We believe that the determinant of this process is the subject's interest (most likely, the

* Corresponding author's e-mail: *e_babadzhanyan@kazguu.kz*

property one). In our opinion, the process of expressing the will (expressed will) may look like in the following form: a person's interest predetermines the formation of his will for a specific legal effect (desired to be achieved). For example, it may be the will to begin, change or terminate legal relationships. Then such a will is notified to third parties in such a way that the orientation of the will towards a specific interest becomes obvious and is expressed through the execution of an active action or through an act of omission. Such an action (act of omission) aimed at expressing the will, predetermining a certain legal consequence, is an expressed will in the form of a transaction. The will, being "an impulse to action" [5; 9], launches the process from a desire to a legal effect through actions. That is the reason when the correspondence between such categories as "will" and "expressed will" is important for the purposes of this research.

In connection with the above-defined relevance, the author intends to solve the following research tasks:

1) to carry out a theoretical review of the concepts of internal and external will;

2) to determine the role of the categories of internal and external will in transactions and in establishing the conditions of the validity of a transaction;

3) to conduct an analysis of the relationship of the categories under study with law enforcement practice.

Methods and materials

The methodological basis of the research was a combination of general scientific, special legal and other methods of scientific cognition.

By applying methods of analysis and synthesis, the author divided the studied categories into structural components for a more detailed examination, resulting in the combination of data and the identification of the concept of "expressed will" along with other related categories.

While using the methods of induction and deduction, the author analysed existing theories of the correspondence between the will and expressed will and after obtaining conclusions on them formed general conclusions based on the results of the research.

Systematic approach was applied to establish the primacy of the category of "will" in relation to the category of "expressed will" for assessing the defects of the will and expressed will while establishing the validity of a civil transaction.

While analysing and interpreting legal norms on a civil transaction, the author used the formal and legal method of scientific cognition. The usage of the comparative and legal method allowed the author to identify the experience of a number of foreign jurisdictions and, in particular, German one, for determining the ways of improving the national legislation in the researched area.

Besides, the author used the casuistic method and the method of legal modelling, which assisted to carry out an empirical analysis.

The author used a combination of other general scientific and special legal methods to achieve the most objective and comprehensive results.

To write this article, more than 30 sources were analyzed, starting from F.C. Savigny's "System of Roman Law" and general teachings on the transaction in the works of German pandects and ending with modern scientific works that examine the issues of the relationship between will and expression of will as structural elements of a civil-law transaction. The comparative approach helped to determine existing models of the relationship and establish the conditional priority of internal will over external will.

Results

An analysis of the evolution of the concept of expression of will and approaches to the relationship between the categories of will and expression of will allowed us to identify three dominant models of the relationship between the categories under study:

1) Willenstheorie — a theory of will that assumes the priority of internal will over its external fixation;

2) Erklärungstheorie — a theory of expression, according to which the external expression of will has priority over the internal (subjective) component;

3) Vertauenstheorie — a theory of trust, according to which both components, internal and external will, have the same meaning.

A general assessment of the civil legislation of the Republic of Kazakhstan allows us to establish that the Vertauenstheorie model has been adopted in Kazakhstan, however, an assessment of individual elements contained in the provisions on the grounds for invalidity of a transaction due to defects in will and expression

of will has revealed the fact of an insignificant priority of will over expression of will. On the one hand, such an approach is optimal given the definition of the legal interest of a person as a determinant of will. But the subjective component often cannot be assessed, especially at the time of the dispute. It seems fair to presume the transformation of will due to inaction of a person whose will did not correspond to the expression of will, in matters of challenging a transaction made by him.

The following formula is presented in this regard: if a person has not challenged a transaction made in opposition to his internal will within a reasonable period, this means that his will has been transformed and has come to correspond to the legal effect that has occurred, which should henceforth be considered desirable for such a person.

Such an approach will protect bona fide participants in the turnover and the turnover itself, preserving the participants' right to trust and formal certainty in relations with other persons.

The specified approach will allow law enforcement practice to move from the model of "protecting the appearance of a transaction" to the model of "protecting the interests" of the parties to the transaction when concluding online transactions. After all, participants in online transactions often accidentally accept an offer that creates the appearance of a perfect acceptance without this appearance corresponding to the internal will of the subject.

Discussion

The category of "will" is the object of various scientific studies: philosophical, psychological and even linguistic. The will is the focus of interest for legal science in dynamics: namely, its formation and external expression [6].

V.A. Ojgenziht noted that "will is the process of mental regulation of subjects' behaviour" [5; 9]. That is the reason that the will is most often revealed in legal science through intention or through desire, often identifying these two concepts and noting the lack of a fundamental difference between intention and desire [1; 53]. However, we believe that the will as an intention to achieve a certain legal effect can be significant as a composing element of a transaction, and the desire in this respect may not always generate such an intention. If we follow the theory that "the process of the will's formation and its expression, as a result of which the will of a person becomes recognizable to third parties is a volitional process" [7; 11], then the desire in such a process precedes the intention.

The importance of intention in the volitional process was also noted by Roman lawyers. The need for the correspondence between the party's intention to the expression of this intention was noted in the Digest of Justinian, where it was stated that "the one who says something and wants another, does not say anything that he means, because he does not want it..." [8; 264].

Thus, one should agree with the statement made by V.A. Ojgenziht that the process of forming the will begins with motivation as awareness of needs, which leads to the formation of desires [5; 16]. Then there is goal-setting and determination of "the ways to achieve the goals" [9; 208-209], which is expressed in the formation of the intention to achieve a specific legal effect and is reflected in the final decision, after which such a decision is notified to third parties (the will is expressed).

Intention is the final point for the formation of the will and reflects a precisely formed focus on a specific result.

Thus, someone may have several desires: to have a bicycle, to spend vacations in Europe, to save up funds to mortgage. These desires may be in conflict with each other, when the achievement of one of them may threaten the impossibility of achieving another — competition of desires. Overcoming the competition forms an intention, where someone makes a decision to purchase a bicycle (the will is formed) and through the performance of specific actions informs others about the formed will — carries out an expressed will (for example, through the acceptance by implicative actions of a public offer,) leading to a specific legal result (conclusion of an agreement).

Therefore, the formation of the will precedes the expressed will, which has a constitutive (divestive, dispositive) effect, and reflects the intention of a person to generate these consequences. Some authors calls such an intention as "internal will" the presence of which "is not enough to conclude a transaction" and believes that "informing others" about this will can clearly lead to a certain legal effect [4; 217], which is called as external will.

Intention as a factor that generates the will is also the subject matter of studying the philosophy of mind and the philosophy of law, "where this term, despite the general agreement regarding the relevance of the intention to the theory of responsibility…, is used differently" [10; 205]. In the philosophy of mind "the term

of “intentionally” is associated with the denial of coincidence or error. It turns out that analysis of an intentional act is possible only through the description of the corresponding context of using the word of “intentionally”, which denies coincidence or error, as well as through the explanation of coincidence or error” [10; 216].

The commission of an action or act of omission that may lead to the legal result, where the intention was formed on is the expressed will, and only their conjunction reflects the purity of the will and expressed will. It reflects their unity for private law purposes.

In this regard, the formula derived by H. Hart and S. Hampshire seems to be interesting and is as follows: “I think that I will do this, but I am not sure” and “Now I know what I will do” [11; 215–229]. It testifies and confirms the thesis that an intention does not always reflect a desire and they cannot be identified, since “despite the fact that a desire and intention have similar usage” [10; 218], their difference is revealed in the fact that “intentions are differently related to actions than desires. One can intend to do only those things that one thinks is able to do; when you intend to do something, if your intention has been formed, then it will be accomplished as it should be, for example, in the way the agent expected it to be done. These two aspects distinguish intentions from such phenomena as desires” [12; 169].

Thus, if we want a certain legal effect to occur, then we need an external notification from the formed will. That is, an expression of will made in the proper legal form is an expressed will. In this case it is important to determine the facts, where such an expression of will can be derived from.

E. Godeme points out the need for external, sensory facts. There is not enough just a simple intention [13; 42]. The expression of will must be made in such a way that the intention of the one who expresses the will for the legal effect, which is the goal and the intention of the one expressing the will is aimed at, is obvious to any third party. Otherwise, the expression of will is invalid when it does not reflect the true intention of a person, which often leads to the recognition of the legal effect as null and void. (invalidity of a transaction).

In this regard, we should agree with the thesis on the unity of the will and expressed will. The will and the expressed will are two aspects of the same process, reflecting a person’s mental attitude towards the action being performed. It is originally that the will and expressed will must correspond to each other. A transaction may cause disputes between the participants in case if the will is oriented towards one action, but expressed will expresses the intention to perform another action, which prevents the transaction to be performed. Thus, the unity of the will and expressed will is important for a transaction” [4; 218].

Such a position is not always recognized in the absolute sense. Thus, Ya.A. Kantorovich writes that “Roman jurisprudence did not allow studying the will, once it was expressed in the required form. The Romans expressed this formalistic point of view on a contractual obligation in the well-known concise formula: although, being unstrained, I would not have wished for this legal result, however, being enforced, I nevertheless wished it” [14; 153]. We believe that it is not about indifference to the will under a proper expressed will in any case, but rather about a deviation from the concept of the unity of the will and expressed will in particular cases. Thus, F.C. Savigny, in relation to such a formula, pointed out the prevalence of the opinion in Roman law that an error in the guiding motives, as a rule, does not affect the validity of legal transactions. Even if the motive has been expressed and it turns out to be inconsistent (falsa causa), the transaction does not become less valid because of it [15; 381]. Motive and intentions, motive and the will are not identical phenomena. The motive may be important for the formation of the will, but not always, therefore, inconsistency between the legal effect from the expressed will and the motives does not affect the validity of a transaction.

V.N. Urukov also provides several examples from the classical Roman law indicating the possibility of expressing the will in various ways, including stiplatio, which created an abstract obligation in its original form [7; 14]. The Romans classified obligations into abstract and causal, where consideration (reason) was of no importance for the first category and only the method of expressing the will was externally important. Thus, “consideration should be understood... a certain justification for the existence of the phenomenon under consideration. In other words, by finding consideration of a transaction or obligation, we answer the following question: why is a transaction made, why does an obligation exist?” [16; 81].

Obviously, the legal effect for contracts with consideration (obligations arising from them), where the will of a person is directed to, is predetermining and therefore, a defect of the will can lead to the invalidity of the expressed will and subsequently consideration in such cases is “an obligatory element both of the expressed will and the obligation arising from it” [17].

For abstract transactions (obligations), "the lack of an indication on the basis presumes the validity of a transaction" [18; 15]. Since the stipulation was essentially an abstract transaction, the reason for its execution and its connection to the internal will's orientation had no impact on the validity of the transaction.

Modern legislation often reflects the concept of the unity of the will and expressed will. Thus, paragraph 5 of the Article 159 of the Civil Code of the Republic of Kazakhstan determines the nullity of a transaction committed by a person recognized incompetent due to mental illness or dementia, since the legislator proceeds from the fiction of the prevalence of the will of such persons established by a prejudicial act. Even if there is a proper expressed will, the legal effect will not arise, since the behavioural act aimed at the expressed will cannot express the true will of such a subject due to the defect of such a will. And such an example is not singular. Thus, "A transaction, which is entered by a citizen, although capable, but at the moment of its commitment was in a state that he could not realize the meaning of his actions or guide them, may be recognized by the court as invalid..." (paragraph 7 of the Article 159 of the Civil Code of the Republic of Kazakhstan). The same is applied to transactions concluded as a result of a wrong belief having significant importance, under the influence of fraudulent behaviour, one-sided transactions. All these examples reflect the legislator's recognition of the key role of the will in a transaction, where a defect, even with a properly expressed will in the correct form, can lead to the legal effect being "canceled".

In this regard, the standpoint of the German legislator with respect to unilateral expressed wills is interesting. Thus, according to the Section 116 of the German Civil Code, "A declaration of intent is not void by virtue of the fact that the declaring person has made a mental reservation that they do not want for what they are declaring to be realised. The declaration is void if it is to be made to another person and that person knows of the reservation" [19; 34].

Thus, both the fact of expressing the will must be obvious to other persons and sufficiently clearly indicate the orientation of the inner will to a legal effect for the occurrence of such a legal effect, and the fact of inconsistency between the inner will and its external expression must be known to a person, who is the subject of such an expression of will in order to establish the defect of the will. We believe it involves persons who acquire some rights or benefits as a result of such an expressed will, persons in whose interests the will is expressed. In this regard, we should note the special place of legal interest in the process of the expressed will, called by V.A. Ojgenziht as "from desires to action" [5; 9]. Nevertheless, "expedient actions aimed at satisfying one's desires purposely" [5; 9] are carried out in the process of the expressed will in order to "realize into reality something you consider expedient" [5; 9], that is, corresponding to your interest. It is precisely "interest that is the material basis of law" [20; 9].

Thus, the interest acts as the determinant of the entire volitional process.

Civil science knows various doctrines of the will and expressed will.

The expressed will has only evidentiary value according to the theory of will, while the will has determining value [21; 10]. This theory is aimed at the interests of the expressor of will and against the interests of a person who is the subject of the expressed will regardless of his good faith [22; 441-442].

The legal effect depends on the content of the external will — the expressed will in accordance with the doctrine of reliability (theory of validity) of K. Larenz [22; 113]. Essentially, the internal will of a "declarant" and the will externally expressed in the "declaration" is the starting point for the occurrence of legal consequences [23; 431]. Merely desiring legal consequences is not sufficient for the "declaration of intent" (expressed will) to be valid. Legal consequences are achievable when performing permitted actions (legal acts) that declare the inner will through its external manifestation [23; 434]. This theory became the basis of the Section 116 of the German Civil Code.

Despite the well-known criticism of the theory of credibility [21; 12], we believe that it is closer to the principle of justice and reasonableness than the theory of will.

Faultlessness of the expressed will is also important for the validity of a transaction.

Legal consequences stem from the will. However, the internal will cannot be recognized, and due to its hidden and unformalized nature, it cannot create consequences without being externally expressed. For legal relationships (or legal consequences) to arise, formalization is required to ensure the alignment of the parties' expectations regarding lawful behaviour. Without this, legal relationships cannot be established. Therefore, the will becomes a legal fact only when it is expressed externally and formalized. The form acts as a means of regulation — the point where the parties' wills and legal norms intersect. Without formalization, the subject of the agreement cannot be determined [15; 38].

If the will directly contradicts the expressed will — for example, when expressed under the impact of violence, threat, fraudulent behaviour — the defect of the will is obvious and gives rise to the invalidity of a

transaction. If the inconsistency between the will and expressed will was known to the counterparty, then he is not in good faith, therefore he has no protected interest and a transaction is invalid. If he was not aware of such an inconsistency between the will and the form, then his interest must be protected.

But a completely different algorithm is applicable in case of a good faith error of the subject who expressed it. The approach of the German legislator concerning the consequences of such an inconsistency between the will and expressed will seems to be fair in this regard. It is not fair to deprive a person, who is the subject of the expressed will, given his good faith, of his expectations from the expressed will (transaction) only because of the error of a person expressing the will. Even if it is a good faith error.

Despite the fact that such a provision is obvious and can be applied by law enforcement agencies in disputes on recognizing a transaction as invalid due to defects of the will even without the direct legislative guidance, case-law of the republic of Kazakhstan does not apply this approach. On the one hand, there is no direct legislative consolidation, on the other hand, there is a regulatory approach while forming the opinion of the courts.

The civil legislation of the Republic of Kazakhstan only indirectly indicates the reception of such a doctrine. For example, only a significant error may be the basis for invalidity of a transaction according to paragraph 8 of the Article 159 of the Civil Code of the Republic of Kazakhstan. But even in this case, the burden of proving a significant error is upon an action by the party which acted under the influence of misguidance; and the interests of the person who is the subject of the expressed will are protected by the presumption of his good faith, as well as by the presumption of reasonableness of the person expressing the will [30].

The expressed will (Willenserklärung) as a civil category was most broadly defined for the first time by German civilises who were supporters of law that were based on the pandect of Justinian and its first usage was related to promises (Versprechung) [24; 70]. However, there was no consensus among scholars until the XIX century in regard to the terminology and significance of the used terms denoting the expressed will. The expressed will was mentioned for the first time in 1807 in the work of G.A. Heise, in the Section focused on transactions [25; 29–32], and the most complete content of the expressed will was revealed in the work of F.C. Savigny, where he identified several components of the expressed will: 1) the will; 2) expression of will; 3) correspondence of the will to the expression [26; 99].

The first element of the expressed will, defined by F.C. Savigny, points out the relationship between the expressed will and the inner will, only in case when I inform other persons about the content of the inner will for a specific effect, I carry out the expressed will. Without a formed inner will, there is no its divulgation, objectification.

The second element indicates the possibility of objectifying the will by the expressed will — to make it public, to make it known to third parties, resulting that the consequences may occur (both legal and others related to satisfying the interests of the volitional party).

The third element is similar to the first one but narrows the relationship between the will and expressed will also by their content, which must correspond to each other [1; 61].

In this regard, A.A. Panov's reasoning that the expressed will performs three main functions seems to be correct: "firstly, … the function of objectification of the inner will, that is, a manifestation of the will. Secondly, … the generation of legal consequences of the corresponding volitional act, and … the fixation of the content of the inner will" [1; 61-62].

Most certainly, the function of objectifying the inner will is the main function of the expressed will. But it is important to determine, in the context of a transaction, how this function is carried out.

The expressed will is most often implemented through a certain behavioural act expressed in a positive action of a subject. Such actions can be expressed both through words (both in writing and orally) and through implicative actions. But the main feature of such actions is the possibility of generating precisely civil consequences. Otherwise, such a behavioural act will not have the characteristics of the expressed will as a civil transaction.

Moreover, not all actions that objectively indicate their certain orientation should be considered the very behavioural act that expresses the will.

In this regard, the position of D.D. Grimm seems to be interesting; he pointed out that "An action is not the sole, and certainly not the primary, basis for evaluating someone's volitional acts. When analysing an action, at the first step it is necessary to determine whether it represents an act of will at all, and if it does, the next step is to understand what kind of volitional act is behind it. In other words, the goal is to interpret the meaning of the action. The first step in solving this task requires consideration of the surrounding circumstances under which the coordinated series of movements took place. As for the second part, it's important to

recognize that similar signs or movements can represent different volitional acts and be directed toward various purposes. Furthermore, individual actions alone cannot serve as a basis for concluding whether they carry independent significance or are merely components of a larger, more complex action" [27; 234].

Thus, two methods of accepting an inheritance are defined by the civil legislation of the Republic of Kazakhstan: legal and actual. If the first is subject to strict rules on the form and involves the performance of formalized actions taken in a jurisdictional manner, then the second involves the performance of certain actual, not always formalized actions that may reflect the intentions of a person to acquire an inheritance. However, if an heir does not have such intentions and the actual actions are committed for a different, non-legal succession purpose, then such actions cannot give rise to legal consequences, which is reflected in paragraph 2 of the Article 1072-1 of the Civil Code of the Republic of Kazakhstan establishing the possibility of an heir to bypass the presumption of acceptance of an inheritance while performing actual actions upon proving the fact of the absence of a volitional component.

Thus, not every action is a manifestation of the act of will.

The expressed will is not always expressed in positive actions of a subject. There are frequent cases of expressing the will through passive (negative) behaviour — act of omission, which can bring to the attention of others the will of a subject for a specific legal effect.

Both the "In law, both the intent and internal content of the will, as well as its external expression — which makes it accessible to understanding by third parties and judicial authorities — are important. The methods of externally expressing the will are quite varied. While the primary method of communication is through words, they are not the will itself, but merely a means of expressing it (a distinction seemingly not made in Ancient Roman Law). Moreover, words are not the only way to express the will" [28; 142].

Positive sources of law establishing preclusive periods for the implementation of a subjective right formalize the expression of the will through an action of omission, which is capable of generating a legal effect after the expiration of such preclusive periods. Thus, the Civil Code of the Republic of Kazakhstan, in effect until January 12, 2007, established that an heir could acquire an inheritance if they did not renounce it within six months from the date they learned, or should have learned, of their right to inherit (the Article 1072, paragraph 1 of the Article 1074 of the Civil Code of the Republic of Kazakhstan). That is, the heir had the opportunity to express their intention to accept the inheritance through an act of omission — by not refusing within a specified period, after which the intended legal effect took place (in the form of the emergence of the ownership right to the property of a testator, the transfer of his / her property rights, obligations, etc.) [29].

Another example of expressing the will through a passive (negative) behavioural act — an act of omission (or, in other words, silence) — is the form of accepting the guarantor's (surety's) offer by the creditor to conclude an indemnity contract (contract of guarantee). According to paragraph 3 of the Article 331 of the Civil Code of the Republic of Kazakhstan "The written form of guarantee or surety agreements shall be deemed to the complied with, provided the guarantor or surety notified in writing the creditor of his liability for the execution of the obligation by the debtor, and the creditor did not refuse the proposal of the guarantor or surety during the period of time which is reasonably required for such a refusal" [31]. The behaviour of the creditor within a certain reasonable period demonstrating the absence of a refusal of the guarantor's (surety's) proposal to conclude an indemnity contract is an example of acceptance by silence (act of omission), stipulated by paragraph 2 of the Article 396 of the Civil Code of the Republic of Kazakhstan [30].

In addition, the expressed will fixates the will, making it known at a certain stage. And if the internal processes influencing the formation of the internal will, as well as the internal will of a subject change due to the dynamism of their nature, then the fixation makes the will that was expressed from outside, unchanged in the context of legal consequences that is aimed at protecting the interests of those persons who are subjects of such a will as a result of the expressed will [31; 195].

This position is supported by I.B. Novickij, who determines that "Subsequent changes in the decision, desire, motives, as a general rule, cannot be grounds for changing the already expressed legally significant will" [31; 195].

Thus, the legal effect arises due to the fixation of the will through its expression and objectification in such a way that it becomes accessible to third parties and expresses the intentions of a person for a certain effect from such an expression of will.

The correspondence between the will and expressed will is also of great importance in the theory of the transaction.

There are many theories of the correspondence between the will and expressed will, however, the most famous are three theories developed in German civil law:

1) Theory of the will — Willenstheorie;

2) Theory of expression — Erklärungstheorie;

3) Theory of trust (credibility) — Vertauenstheorie.

According to the first theory — Willenstheorie, if the will does not correspond to the expressed will, the inner will is the decisive one. In this regard, I.A. Pokrovsky wrote: "... There can be no talk of a legal effect of the contract if there is no such a will: there is only the appearance of the contract, but not its essence" [32; 246–248]. On one hand, this theory rightly points to the relationship between the expressed will and the inner will for the purposes of legal consequences; however, on the other hand, the supporters of this theory did not consider the interests of good faith of third parties, who may be subjects of the legal effect from the expressed will.

The theory of expression — Erklärungstheorie reflects the completely opposite effect because of the inconsistency between the will and expressed will, determining that the legal consequences should not be changed, if the will and expressed will do not coincide [7; 37].

According to the theory of trust — Vertauenstheorie, the will and expressed will have the same significance for establishing the legal effect; and the preference of one of the components depends on the "interests of the turnover, but the good faith of persons performing a transaction should be of great importance" [7; 37].

However, in most cases the theory of the will and the theory of expression are opposed, such an opposition according to J. Schapp is of paramount importance in the doctrines on a transaction [24; 74].

The current Civil Code of the Republic of Kazakhstan reflects both concepts. Thus, the affected will can lead to the invalidity of a transaction, which makes the will as a predetermining factor of the legal effect, however, a defect of the will stated in paragraphs 8 and 9 of the Article 159 of the Civil Code of the Republic of Kazakhstan does not invalidate a transaction, but makes it contentious, which means the validity of such a transaction until the court establishes its invalidity, as well as in case of a missed limitation period, which is «truncated» for the purposes of challenging transactions due to a defect of the will — one year from the moment when the party became aware of the challenge ability grounds. On one hand, such a provision may indicate the prevalence of the theory of expression, given that the law does not establish the nullity of such transactions without judicial recognition. On the other hand, the law, in our opinion, allows changing the will after its expression, aimed at the desire for a legal effect from a transaction. That is, if a subject of the expressed will does not report about a defect of the will with the intent of cancelling the legal effect from the expressed will, then it means that his will has changed and corresponds to the occurred legal effect.

We believe that such an interpretation gives reason to believe that the theory of the will prevails over the theory of expression.

Thus, when the courts asses the circumstances indicating the presence or absence of defects of the will and expressed will, they should establish not only the compliance of the external will including the process of its formalization, but also determine the priority of this external will. However, if the will-expressing subject does not initiate a dispute within the existing limitation periods (the author believes it is reasonable to establish a truncated one-year limitation period for this category of disputes), then such an act of omission should be assessed as evidence of the transformation of the will (the will "catches up" with the expressed will).

Conclusions

Thus, the expressed will is an external expression of the internal will aimed at a certain legal effect in the form of the emergence, change or termination of rights and obligations, which is capable to satisfy the interest of the expressed will's subject. It is the interest that predetermines the formation of the will and is an indicator of the determination of the will's compliance with the legal effect from the expression of the will. The expressed will itself is realized through a behavioural act in an active or passive form, which records the will at the moment of such an act's commission and makes such a will unchanged for the purposes of the raised legal relationship. The expressed will is the very legal fact-action that serves as the basis for the emergence of a civil legal relationship from transactions. That is the reason that the concept of a transaction contained in the Article 147 of the Civil Code of the Republic of Kazakhstan is informatively incorrect. It is more properly to reveal the concept of a transaction not through actions, because one can express the will and make it obvious to everyone, in particular, through silence and through the act of omission, but through

the expressed will. Thus, a civil transaction is the expressed will of subjects aimed at such possible variants of legal effect as the emergence, change or termination of civil rights and obligations.

It is indisputable that the subjects of the expressed will with a private and legal effect can only be subjects of civil law in their classical ternary version — individuals, legal entities, the state.

However, the process of expressing the will will not always be identical for all of these subjects. It is clear that this process differs for collective subjects (legal entities, the state) from the process of the expressed will by individual subjects (individuals). But different forms and methods of the expressed will depending on certain factors may exist even within these groups of subjects.

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Е.Л. Бабаджанян

Азаматтық мәміле құрылымындағы ішкі және сыртқы ерік (ерік білдіру) арасындағы қатынас

Мақала азаматтық-құқықтық мәміле құрылымындағы ерік пен ерік білдіру секілді элементтер, сондай-ақ ерік пен ерік білдіруден тыс жасалған мәмілелердегі дауласу туралы істер бойынша сот ісін жүргізу ерекшеліктеріне арналған. Аталған санаттарды зерттеу мәміленің құрамын, оның жасалуын және жарамдылығын анықтау үшін, сонымен қатар азаматтық-құқықтық мәміле ұғымын дұрыс қорытындылау үшін өте маңызды. Жұмыстың практикалық маңыздылығы мынада: ерік білдірудің әртүрлі нысандарына (түрлеріне) мәмілелер туралы ережелерді, оның ішінде ерік пен ерік білдіруден тыс мәмілелердің жарамсыздығы туралы ережелерді қолдану мүмкіндігін анықтаудан көрінеді. Зерттеу жүргізу кезінде автор өзінің алдына негізгі міндеттер ретінде келесі мәселелерді шешуді қойды: ерік дегеніміз не және оны қалыптастыру процесі қандай, ерік пен ерік білдіру бір-бірімен қалай байланысты, ерік білдіруді басқа жолмен жасауға бола ма, категориялардың қайсысы басым және ерік пен ерік білдіруден тыс жасалған мәмілелердің жарамсыздығы туралы дауларды шешуде қалай әсер ететіндігі. Осылайша, зерттеудің мақсаты — ерікті қалыптастыру үрдісін, ерік білдірудің әдістерін және олардың арақатынасын анықтау. Зерттеуді жүргізу кезінде автор қолданыстағы жалпы ғылыми және арнайы құқықтық әдістердің кең жиынтығын қолданды, бұл келесі нәтижелерге әкелді. Автордың азаматтық-құқықтық мәміле құрылымындағы ерік пен ерік білдірудің категорияларын зерттеуі жеке құқықтың бастапқы субъектілеріне және игіліктердің түпкі бенефициары — жеке тұлғаларға қатысты жүзеге асырылды. Теориялық талдау негізінде ерік пен ерік білдірудің ерекшеліктерін бағалауда басымдықтарды белгілеу мақсатында осы категориялардың аражігін ажыратады, сондай-ақ олардың реттілігін анықтайды, еріктің негізділігін дәлелдейді. Зерттелетін категорияларды жан-жақты талдау мақсатында автор уақыт шеңберімен және бағытымен шектелмей, бұрын жүргізілген зерттеулерге жүгінеді. Сонымен, зерттелетін құбылыстардың қалыптасқан пәнаралық байланысына сүйене отырып, алынған нәтижелерді психология және философия сияқты ғылым салаларындағы ерік пен ерік білдіру категорияларын зерттеумен байланыстыра, неміс азаматтық ойының классиктерінің еңбектері пайдаланылған.

Кілт сөздер: ерік, ішкі ерік, ерік білдіру, мәміле, шарт, құқықтық әсер, сенім теориясы, ерік білдіру теориясы, ерік теориясы.

Е.Л. Бабаджанян

Соотношение внутренней и внешней воли (волеизъявления) в структуре гражданско-правовой сделки

Данная статья посвящена анализу воли и волеизъявления в структуре гражданско-правовой сделки, а также особенностям судопроизводства по делам об оспаривании сделок с пороками воли и волеизъявления. Исследование этих категорий имеет большое значение для определения состава сделки, её заключенности и действительности, а также для целей корректной формулировки понятия гражданско-правовой сделки. Практическая значимость исследования заключается в оценке возможностей применения положений о сделках с различными формами волеизъявлений, в том числе положений о недействительности сделок с пороками воли. Основной задачей автора стало раскрытие процесса формирования и взаимосвязи воли и волеизъявления, а также анализ возможности совершения волеизъявления иначе, чем через выражение действительной воли. Тем самым, цель исследования — это установление процесса формирования воли, способов совершения волеизъявления и их соотношение. При проведении исследования автор использовал широкую комбинацию общенаучных и специально-правовых методов научного познания, что привело к определенным результатам. Проведенное исследование категорий воли и волеизъявления в структуре гражданско-правовой сделки осуществлялось применительно к первичным субъектам частного права и конечным бенефициарам — физическим лицам. На основе теоретического анализа автор проводит разграничение данных категорий для целей установления приоритетов при оценке пороков воли и волеизъявления, а также определяет их последовательность, доказывая первичность воли. Для целей всестороннего анализа исследуемых категорий автор обращается к проведенным ранее исследованиям, не ограничиваясь временными рамками и направленностью, использует работы классиков немецкой цивилистической мысли и соотносит полученные результаты с исследованиями категорий воли и волеизъявления в психологии и философии, исходя из установленного междисциплинарного характера.

Ключевые слова: воля, внутренняя воля, волеизъявление, сделка, договор, правовой эффект, теория доверия, теория изъявления, теория воли.

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Information about the author

Babadzhanyan Yester Levonovna — Master of Juridical Sciences, PhD Student, Adjunct Assistant Professor, Maqsut Narikbayev University, Astana, Kazakhstan, e-mail: e_babadzhanyan@kazguu.kz.