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Separation of the Agreement Concluded in Favor of Third Party from the Agreement Concluded Through a Representative**

The difference between an agreement concluded in favor of a third party and an agreement concluded through a representative is demonstrated in the article. The mentioned is shown through establishing interrelation between the separate elements of notion of an agreement concluded in favor of a third party, the purpose of declaration of will of the parties, powers of third party or the basics of legal relations of participants of contractual relationship. All of this illustrates the essence of an agreement concluded in favor of a third party and an agreement concluded through a representative, in addition, it makes clear that not all agreements involving three parties should be regarded as concluded in favor of third party.

Key words: *The agreement concluded in favor of the third party; transactional representation; separation, representative, represented person; third party.*

1. Introduction

Along with the agreement concluded in favor of a third party, there are some legal institutions, where the participation of third parties is a prerequisite for the formation or implementation of an obligatory legal relationship. Both in Georgian and foreign legal literature, there is a difference of opinion with regard to whether all agreements involving three parties should be considered as concluded in favor of a third party; this requires their separation.

The purpose of the study is separation of the agreement concluded in favor of third party from the agreement concluded through a representative, as from one of such institutions, by which the separate features of these agreements will be shown. Separation of the agreement concluded in favor of third party from the agreement concluded through a representative clearly demonstrates the essence of these two institutions and, based on the ascertaining the purpose of declaration of will of the parties, defines the scope of declaration of will of third party. This is important to ensure the proper qualification of legal relationship and, consequently, the correct outcome of the agreement.

The work shows interrelationship between the agreement concluded in favor of third party and a transactional representation. The agreement concluded in favor of third party is separated from direct representation. By establishing the interrelationship between the rights and responsibilities of the parties to the agreement and the scope of declaration of their will, the difference between these two institutions is displayed.

The general-scientific (historical) as well as special research methods - normative, dogmatic, systemic and comparative-legal methods – are used as a methodological basis of study of work. Historical development of interrelationship between the agreement concluded in favor of third party and the representa-

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tion has been studied using the historical method. For the purpose of differentiation of the agreement concluded in favor of third party and the agreement concluded through a representative, the approaches existing in doctrine and at legislative level have been distinguished using the dogmatic, normative and systemic methods. The approach existing in German doctrine towards the agreement concluded in favor of third party and transactional representation was predominantly displayed based on the comparative-legal method. Consequently, the compatibility of these approaches to the Georgian law has been shown.

2. Interrelation between the Agreement Concluded in Favor of Third Party and the Agreement Concluded Through a Representative

2.1. Historical Review of Agreement Concluded in Favor of Third party and Institute of Representation

According to one of the considerations existing in German legal literature,¹ the agreement concluded in favor of third party was closest to the agreement concluded through the representative.² Therefore, for scientific research purposes, the link between these two institutions needs to be properly evaluated, from the historical standpoint as well as according to applicable law.³

The Roman law was neither familiar with the agreement concluded in favor of a third party nor the institution of (direct) representation. However, it is clear that the Roman law was familiar with the cases, when it came directly to the representation; but the doctrine has considered it as an exception.⁴ The Roman law recognized only the institution of legal representation, but not the "transactional representation"⁵ institution.⁶

Neither Roman law commentator-lawyers⁷ nor the next generation knew the difference between the agreement concluded in favor of third party and the representation.⁸ The commentator-lawyers of Roman law considered the agreement concluded on behalf of a third party as having no legal force.⁹ They considered all the agreements, concluded for third party, as uniform legal institution. In their view, the representation and agreement concluded in favor of third party had common rudiments, and the principle – "no one can agree in favor of a stranger"¹⁰ - recognized in classical Roman law was applied towards both of them. But one of them¹¹ differentiated whether the fulfillment was implemented for a third party or on behalf of

¹ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 6; Comp. *Jürgen H.*, Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 16-17.

² *Ibid.*

³ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 9.

⁴ *Ibid.* 10.

⁵ *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 426; *Zoidze B.*, Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian).

⁶ *Chanturia L.*, Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 410 (in Georgian).

⁷ "Glossatoren".

⁸ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 15.

⁹ *Ibid.* 12.

¹⁰ "Alteri stipulari nemo potest", *Zweigert K., Kötz H.*, Introduction to the Comparative jurisprudence in the field of Private Law, *Sumbatashvili E. (transl.), Ninidze T. (ed.)*, Vol. II, Tbilisi, 2001, 146 (in Georgian); *Bayer W.*, Der Vertrag zugunsten Dritter, Tübingen, 1995, 5 ff; *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 10, 15; *Jürgen H.*, Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 16.

¹¹ "Accursius - gehörte zur Gruppe der Glossatoren".

third party; this indicates a separation of agreement concluded in favor of third party and representation from each other, but it was only of formal and not material nature.¹²

Later, the modern theories developed in the second half of 19th century differentiated the representation and the agreements concluded in favor of third party from each other.¹³ The German lawyer - *Friedrich Savigny*¹⁴ recognized the difference between these two institutions.¹⁵ In the deal made based on the representation, *Savigny* considered only the represented person as party, and the representative participating in conclusion of an agreement, considered as bearer of a will of represented person.¹⁶ Together with *Savigny*, *Heinrich Dernburg*¹⁷ made a principled difference between these two institutions; in the agreement concluded in favor of third party, *Dernburg* treated the creditor – the “promisee”¹⁸ as the counterparty; and in representation – the represented person and not the representative.¹⁹ According to *Windscheid*,²⁰ the person concluding the agreement in favor of third party acted on his/her own behalf, and the one who concluded the agreement as the representative acted on behalf of others.²¹

At present, the agreement concluded in favor of a third party and an agreement concluded through a representative are regarded as non-interdependent institutions, but certain similarities between them are the subject of doctrinal research.²²

2.2. Separation of the Agreement Concluded in Favor of Third Party from the Direct Representation

The agreement concluded in favor of third party should be separated not from the institution of representation in general, but from the deal made by the representative. Since the legal representation proceeds from the law²³ and in the present case the rights of a third party arise not based upon a law but an agreement, the subject of comparison is only the “transactional representation”.

¹² *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 12-13.

¹³ *Ibid.* 46-50.

¹⁴ *Friedrich Carl von Savigny* (1779-1861.).

¹⁵ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 46.

¹⁶ *Chanturia L.*, Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 411 (in Georgian);

Comp. *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 47.

¹⁷ *Heinrich Dernburg* (1829-1907).

¹⁸ “Versprechensempfänger=Promissar, Stipulant”.

¹⁹ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 47.

²⁰ *Bernhard Windscheid* (1817-1892).

²¹ *Dniestrzanski S.*, Die Aufträge zugunsten Dritter, Leipzig, 1904, 48.

²² See *Graffenried C.*, Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 219 ff., 98 ff.; *Raab Th.*, Austauschverträge mit Drittbeteiligung, Tübingen, 1999, 37, 38; *Erman W.*, *Westermann H.*, Handkommentar, 14., Aufl., §328, Köln, 2014, Rn. 2, 1485; *Jürgen H.*, Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung, Münster, 1983, 15-17; *Gottwald P.*, Münchener Kommentar, Schuldrecht AT, München, 8. Aufl., 2019, §328, Rn. 12 ff., 676-677; *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408; *Christandl G.*, Der Vertrag zugunsten Dritter im Entwurf für ein neues spanisches Schuldrecht im Spiegel des europäischen Vertragsrechts, ZEuP 2012, 247; *Hirtsiefer W.*, Unterschied zwischen echtem und unechtem Vertrag zugunsten Dritter, Diss., Köln, 1935, 2; *Baigusheva Yu. V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian); *Chanturia L.*, Comments to the Civil Code of Georgia, Book III, Tbilisi, 2001, 218-219 (in Georgian).

²³ *Zoidze B.*, Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian); on legal representation see also, *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 401 and

By carrying out a specific action in "transactional representation",²⁴ the legal effect arises for others.²⁵ The same takes place in the agreement concluded in favor of third party. An "outward resemblance"²⁶ of the agreement concluded in favor of third party and transactional representation is conditioned by that in both cases the legal effect under the agreement arises for the person, who did not participate directly in the conclusion of the agreement.²⁷ Therefore, in order to separate these two institutions, first of all, it is necessary to identify in each case, who is the person, that is, the "other person"²⁸ (third party), who derives the benefit and/or to whom the rights and obligations arise from the agreement. Such a person, when transactional representation, is a represented person, and in the agreement concluded in favor of third party, usually, a third party not involved in the conclusion of an agreement.

2.2.1. Participants to the Agreement Concluded in Favor of Third Party and Transactional Representation

At least three persons participate in a "transactional representation" as well as in the agreement concluded in favor of third party.²⁹ The presented person(s) and his/her (their) representative participate on one side of the agreement concluded through the representative, and on the other side - the person(s) with whom the agreement is concluded.

Three entities of jural relationship participate in the agreement concluded in favor of a third party: the debtor as a "promisor",³⁰ the creditor as a "promisee"³¹, in addition, the participant is a "beneficiary"³² which is a third party.³³ "A promisee is a person, who receives a promise from a promisor regarding

following (in Georgian); *Jorbenadze S., Chanturia L., (ed.)*, Comments to the Civil Code of Georgia Book I, Tbilisi, 2017, Article 103, field, 7, 593 (in Georgian).

²⁴ *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 400-403 (in Georgian).

²⁵ *Erkvania T.*, Protection of Interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal "Justice and Law", №3(34)'12, 29 (in Georgian); see also, *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 422 (in Georgian); *Jorbenadze S., Chanturia L., (ed.)*, Comments to the Civil Code of Georgia Book I, Tbilisi, 2017, Article 104, field, 2, 600 (in Georgian).

²⁶ *Chanturia L.*, Comments to the Civil Code of Georgia, Book III, Tbilisi, 2001, 219 (in Georgian).

²⁷ *Baigusheva Yu. V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian).

²⁸ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276 (in Georgian); *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 421 (in Georgian).

²⁹ *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 429 (in Georgian).

³⁰ "Versprechender=Promittent", see *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 12, 11; *Krauskopf P.*, Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 14, 6; *Graffenried C.*, Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 199, 91.

³¹ "Versprechensempfänger=Promissar/Stipulant", see *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 13, 11; *Krauskopf P.*, Der Vertrag zugunsten Dritter, Diss., Freiburg, Schweiz, 2000, Rn. 15, 6.

³² "Begünstigter, Destinatar", see *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; *Soergel Th., Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 14, 12; *Krauskopf P.*, Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 16, 6.

the fulfillment”.³⁴ The “promisor” is a person, who gives a promise to a party to the agreement on fulfillment in favor of third party.³⁵ Of the above, the parties to the agreement concluded in favor of a third party are the promisor and the promisee. The third person is not a party to the agreement.

In the Georgian legal literature the third party to the transactional representation is a person to whom the representative concludes an agreement on behalf of the person represented.³⁶ Therefore, for the purpose of the present work, it is expedient to explain that the comparison will be made not between so-called “third person” and the rights and obligations of a third party participating in an agreement concluded in favor of a third party, but between the latter and represented person, referred to in the same literature as the “other person”³⁷, - because an outward resemblance of the agreement concluded in favor of a third party and transactional representation, apart from the similarities in the number of parties involved in both of them, is precisely conditioned by the issue of non-participation of these two persons in conclusion of an agreement.

2.2.2. Interrelation between the Person Presented and Rights and Obligations of a Third Party

2.2.2.1. Impact of Declaration of Will of Person Presented and Third Person over the Agreement

An agreement, where the debtor is obliged to fulfill the obligation to a third party is defined as an agreement concluded in favor of a third party.³⁸ However, the elements of the notion of an agreement in favor of a third party are not exhaustive, because the aforementioned is a very general definition of an

³³ *Joussen J.*, Schuldrecht I, AT, 3., überarb. Aufl., Stuttgart, 2015, 358; *Brox H., Walker W. -D.*, Allgemeines Schuldrecht, 39., Aufl., München, 2015, §32, Rn. 1, 377; *Soergel Th., Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 11, 11; *Chechelashvili Z.*, Contract Law, Tbilisi, 2010, 85 (in Georgian).

³⁴ (“Versprechensempfänger ist die Person, der gegenüber dieses Versprechen abgegeben wird.”), for this, see *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, Rn. 1, 4; Also, (“Die Person, die sich beim Vertrag zugunsten Dritter die Dritt-Leistung vom Promittenten versprechen lässt, heisst Stipulant, Versprechensempfänger oder Promissar”), *Krauskopf P.*, Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 15, 6; *Soergel Th., Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 12, 11.

³⁵ “Versprechender=Promittent”, see *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, 4; *Petersen J.*, Die Drittwirkung von Leistungspflichten, Jura, 2013 (12), 1230; *Kropholler J.*, German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.)*, *Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §328, field 4, 233 (in Georgian).

³⁶ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 288 (in Georgian); *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 429 (in Georgian); see, *Erkvania T.*, Protection of Interests of Third Parties in the Representation, Journal “Justice and Law” №3(34) 12, 28-43 (in Georgian); Opposing opinion (regarding expediency of noting the third party as the second party), see *Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 103, field 5, 592 (in Georgian).

³⁷ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276 (in Georgian); *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 421 (in Georgian).

³⁸ *Bayer W.*, Der Vertrag zugunsten Dritter, Tübingen, 1995, 129.

agreement concluded in favor of third party. But since the subject of the present article is not a notion of an agreement concluded in favor of third party³⁹ that is also the subject of independent research, only the section that is necessary for separation from transactional representation will be focused.

The person so-called the "other person" represented is not directly involved in arranging a deal. When arranging a deal the representative declares his/her own but not the represented person's will.⁴⁰ But the scope of action of the representative is precisely based upon the will of the person represented that is expressed in granting the representative authority by the latter.⁴¹ The person represented shall determine the scope of this authority for himself/herself.⁴² Therefore, the will of the represented person have influence upon the formation⁴³ of the representative's will and the deal is arranged exactly at the will of represented person, i.e. "the deal is made in representative's identity".⁴⁴ The third party, when concluding an agreement in its favor, cannot influence the formation of a will of "promisee". The promisee, independently of the third party, concludes the agreement in favor of the third party at his/her own will. However, apparently, this does not imply that the will of third party is neglected in the agreement concluded in its favor. In certain cases, for conclusion of agreement in favor of a third party, the availability of written consent of third party may be prescribed by the law. For example, a life insurance agreement concluded in favor of a third party.

For differentiation of transactional representation and the agreement concluded in favor of a third party, the influence of declaration of will of third party over the agreement concluded in its favor have to be separated from each other before and after conclusion of agreement. Although a third party has not the legal capacity to have an influence upon how its authority will be formulated in the agreement, but he/she is free to decide whether he/she receives the fulfillment promised in his/her favor at all.⁴⁵ For example, if a third party does not participate in the contracting process and mostly does not show the will to do so,⁴⁶ it affects an agreement already concluded in its favor in such a way that a third party may waive the right acquired under the Article 351 of the Civil Code of Georgia (hereinafter referred to as CCG).⁴⁷ This, in turn, becomes the basis for the change in the addressee of fulfillment of obligation or completely the termination of the contractual relationship between the promisee and the promisor. The will of the person represented may always influence the transaction both before as well as after its conclusion.

³⁹ On the notion and essential conditions of the agreement concluded in favor of the third person see *Legashvili D.*, Peculiarities of Definition of Essential Conditions for the Agreement Concluded in Favor of the Third Party, based on Independent Request, "Law Journal", №2, 2016, 104-120 (in Georgian).

⁴⁰ *Erkvania T.*, Protection of Interests of Third Parties in the Representation, Journal "Justice and Law" №3(34)'12, 32 (in Georgian); *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian); *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 430, 431 (in Georgian); *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 405 (in Georgian).

⁴¹ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian).

⁴² *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 402 (in Georgian).

⁴³ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 283 (in Georgian).

⁴⁴ *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 422 (in Georgian).

⁴⁵ *Staudinger J., Löwisch M. (Red.), Jagmann R.*, BGB, Buch 2, Berlin, 2015, §333, Rn. 2, 210.

⁴⁶ *Chanturia L.*, Comment to the Civil Code of Georgia, Book III, Tbilisi, 2001, 216 (in Georgian).

⁴⁷ See *Rusiashvili G., Aladashvili A., Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book III, Tbilisi, 2019, Article 351, field 1, 292 (in Georgian); *Baigusheva Yu. V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian).

Therefore, although the person represented is not directly involved in conclusion of an agreement, but his/her will is implemented by a representative. In the agreement concluded in favor of a third party, the promisee does not exercise the will of a third party, but willfully grants the right of claim or only an entitlement for fulfillment to the third party, and declaration of will by the third party is deemed as precondition for raising of right in its favor only in certain cases. Such is, for example, a life insurance agreement concluded in favor of a third party, for the validity of which, pursuant to the Article 844, section two of the CCG, the written consent of that person or his/her legal representative is required.

The attention should also be paid to the consequences of the death of the person represented and the third person. According to Article 109 “d” of the CCG, the death of the grantor (the representative) of the authority is the basis for termination of the representative power. Therefore, in the event of the death of the represented person, if “an assignment agreement is not concluded under the proper condition”, the representative power shall be deemed as terminated.⁴⁸ The death of a third person in the agreement concluded in favor of a third party will not always result in the termination of this contractual relationship. Unless otherwise stated in the essence of the obligation, the parties may agree under the agreement that in the event of death of a third person, the third person shall be replaced by another.

The consequence of death of the promisee and the representative must also be noted here. Proceeding from “the essence of representation”,⁴⁹ if the death of a representative is the basis for cancellation of representative power,⁵⁰ in the agreement concluded in favor of a third party, exactly the death of the promisee may become the basis for origination of the right to a third party, when fulfillment in favor of a third party shall be provided after the death of a promisee.⁵¹ But the death of an insurer in the insurance agreement concluded in favor of a third party may become the basis for termination of this contractual relationship due to non-payment of the insurance premium. Therefore, whether the death of the promisee is the basis for termination of the contractual relationship in favor of a third party should, in each particular case, be determined proceeding from the essence of obligatory relationship.

2.2.2.2. Addressee of Agreement Outcome

In the direct representation, the outcome of the deal is observed directly towards the person represented,⁵² also, in the agreement concluded in favor of a third the outcome also occurred for a third party. But unlike the person presented, the third party does not become a party to the agreement.⁵³ The person

⁴⁸ *Jorbenadze S., Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 109, field 8, 622- 623 (in Georgian).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ “Vertrag zugunsten Dritter auf den Todesfall”, *Wall F.*, Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall - ein Forderungsvermächtnis, Tübingen, 2010, 536 ff.

⁵² *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277; *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 427; *Jorbenadze S., Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 104, field 2 and next field, 600 (in Georgian); *Gernhuber*, Das Schuldverhältnis, Tübingen, 1989, §20 I 3-4, 470.

⁵³ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408; *Gernhuber J.*, Das Schuldverhältnis, Tübingen, 1989, §20 I 3-4, 470; *Baigusheva Yu. V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 117 (in Russian).

presented is a party to the agreement and, consequently, all contractual rights and obligations arise thereon. Accession of third party to an agreement or other type of co-participation is not required for arising of its right under the agreement⁵⁴ and its non-participation may not be the basis for the voidance of this Agreement.⁵⁵ If a third party accesses to an agreement this may not be an agreement concluded in favor of a third party; in such case, the third party itself shall become a party to the agreement⁵⁶ that contradicts the essence of such an agreement.

During representation, the addressee of the outcome of transaction is only the person represented,⁵⁷ in particular, in accordance with first section of Article 104 (e) of Civil Code of Georgia, by the deal that the representative makes within his/her authority and on behalf of the person he/she represents, the rights and obligations arise only for person represented; i.e. reasoning from the deal, the rights and obligations are also arisen for person represented.⁵⁸ In this regard the content of third section of Article 104 of the same Code should also be taken into account, according to which if the representative does not indicate on his/her representative power when concluding the deal, then the deal generates the outcomes directly for the person represented only if the other party had to make assumption of representation. The same rule applies even when it doesn't matter for other party with whom the deal is arranged.

In the agreement concluded in favor of a third party, the third party has only a separate right and obligation, the rest of the rights and obligations remain with the promisee.⁵⁹ For example, proceeding from the content of Article 349 of the CCG, the creditor and the debtor grant the right to request the fulfillment of the contract to the third party. But it is interesting who enjoys the rest of the rights arising from the agreement, since in the case of non-fulfillment of the liability stipulated under the agreement – non-fulfillment of primary requirement – the issue of a secondary claim is considered.⁶⁰

“In the case of a breach of an obligation by a promisor, the question often arises in legal scientific literature as who is entitled to exercise the secondary rights, the promisee or the third party, or only both

⁵⁴ *Jürgen H.*, *Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung*, Münster, 1983, 14; *Jauernig O., Stadler A.*, *BGB, Kommentar*, 15. Aufl, München, 2014, §328, Rn., 8, 475.

⁵⁵ The Judgment №3k-1492-02 of 19th March, 2003 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

⁵⁶ *Jürgen H.*, *Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung*, Münster, 1983, 14; *Jauernig O., Stadler A.*, *BGB, Kommentar*, 15. Aufl, München, 2014, §328, Rn., 8, 475.

⁵⁷ The Judgment №3as-329-313-2013 of 30th April, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-479-806-05 of 27th January, 2006 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

⁵⁸ *Chanturia L. (ed.)*, *Comment to the Civil Code of Georgia*, Book I, Tbilisi, 2002, 219 (in Georgian); see also, *Kereselidze D.*, *The Most General Systemic Concepts of Private Law*, Tbilisi, 2009, 406 (in Georgian); *Erkvania T.*, *Protection of Interests of Third Parties in the Representation*, Journal “Justice and Law”, №3(34) 12, 29 (in Georgian).

⁵⁹ *Jürgen H.*, *Der echte Vertrag zugunsten Dritter als Rechtsgeschäft zur Übertragung einer Forderung*, Münster, 1983, 16-17.

⁶⁰ *Boiling H., Lutrinhouse P.*, *Systemic Analysis of Basics for Requirements of Civil Code of Georgia*, Bremen, Tbilisi, 2009, 30 (in Georgian); *Macharadze M.*, *Withdrawal from and termination of Agreement – differences and the legal consequences (in accordance with the Georgian and German Laws) Review of Georgian Law - Special Edition*, 2008, 126 (in Georgian).

of them together”.⁶¹ Specifically, in German doctrine, before as well as after the reform of law of obligation, it is debatable, in the event of breach of an obligation by the promisor, whether the third party should enjoy the right of claim to withdraw from the agreement, payment of damages, additional fulfillment or reduce the price,⁶² (for example: Articles 352, 394, 491, 492, 494, 642, 643, 644; 645 of the CCG; §§ 281, 323, 437, 634 of the GCC), whether a third party should have the "freedom of choice among the requirements”,⁶³ such as: the right to claim damages instead of fulfilling of obligation,⁶⁴ the choice between withdrawal from the agreement and reduction of price.⁶⁵ German legal literature suggests that the promisee is entitled to claim damages instead of fulfilling the obligation.⁶⁶ The promisee also has the right to claim to withdraw from the agreement, terminate the agreement, cancel the agreement,⁶⁷ and reduce the purchase price.⁶⁸ But by interpretation of an agreement it can be determined that a third party may enjoy full rights under the Agreement.⁶⁹ The latter position cannot be shared unconditionally. In case of breach of the obligation, the peculiarity of the agreement concluded in favor of a third party calls forth the need for a different arrangement of implementation of claims and rights arising from it. Since a third party does not become a party to an agreement, it cannot enjoy all the rights deriving from the agreement. For example: the legal nature of the institution of withdrawal from an agreement calls forth that the third party's right to withdraw from the agreement should be rejected. Withdrawal from the agreement can be implemented only by one of the parties; accordingly, a third party cannot withdraw from an agreement to which it is not a party. But if a third party acquires an independent, irrevocable right, the promisee, in consequence of the exercising of secondary rights, may deprive the third party of this right only when the third party agrees to infringe upon its legal position.⁷⁰ Whether a third party

⁶¹ *Bayer W.*, *Der Vertrag zugunsten Dritter*, Tübingen, 1995, 339; *Larenz K.*, *Lehrbuch des Schuldrechts, Band I*, AT, 14. Aufl., München 1987, 223; *Joussen J.*, *Schuldrecht I*, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1195 ff., 367.

⁶² *Staudinger J., Löwisch M. (Red.), Jagmann R.*, BGB, Buch 2, Berlin, 2015, §335, Rn. 10, 233-234; see also, *Soergel Th., Pfeiffer Th. (Red.), Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 41, 22; *Joussen J.*, *Schuldrecht I*, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1195 ff., 367.

⁶³ *Chachava S.*, Online comment to the Civil Code of Georgia, Article, 492, field 7, <www.gccc.ge> [30.03.2016] (in Georgian); on “Alternative Competition of Requirements”, see *Chachava S.*, *Competition of Requirements and Basics for Requirements in Private Law*, Tbilisi, 2010, 32-35 (in Georgian).

⁶⁴ *Larenz K.*, *Lehrbuch des Schuldrechts, Band I*, AT, 14. Aufl., München, 1987, 223.

⁶⁵ *Staudinger J., Löwisch M. (Red.), Jagmann R.*, BGB, Buch 2, Berlin, 2015, §335, Rn. 10, 234; see *Chachava*, Online comment to the Civil Code of Georgia, Article 492, field 3 and following field, <www.gccc.ge>, [30.03.2016] (in Georgian).

⁶⁶ *Comp. Kropholler J.*, German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §328, field 15, 235 (in Georgian); The Decision №3g-ad-537-k-02 of 16th April, 2003 of Chamber of administrative and other category cases of the Supreme Court of Georgia.

⁶⁷ “Der Widerruf”.

⁶⁸ *Palandt O., Grüneberg Ch.*, BGB, 78. Aufl, München, 2019, §328, Rn., 6, 565.

⁶⁹ *Comp. Rusiashvili G., Aladashvili A., Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book III, Tbilisi, 2019, Article 349, field 28, 277 (in Georgian).

⁷⁰ *Staudinger J., Löwisch M. (Red.), Jagmann R.*, BGB, Buch 2, Berlin, 2015, §335, Rn. 14, 235-236; *Joussen J.*, *Schuldrecht I*, AT, 4., überarb. Aufl., Stuttgart, 2017, Rn. 1197, 367.

should enjoy the right to fulfill particular claim, depends on the legal position of a third party in the agreement as well as the content of the right.

Thus, the results of showing the will of promisee in the agreement concluded in favor of a third party refers not only to the third party but, in most cases, the promisee itself is an authorized and obliged person.⁷¹ For example, if a third party under the Article 351 of the CCG renounces the right acquired under the agreement, then the promisee may demand fulfillment of the obligation in his/her favor (if this is possible proceeding from the essence of the obligation).

2.2.2.3. A Person with Right to Rescind

It is controversial whether only the creditor has the right to rescind or a third party too.⁷²

In accordance with section three of Article 59 of CCG, an interested person shall enjoy right to rescind. Although, in line with the view existing in Georgian legal literature, such person is considered as “party to the transaction” and the third person, whose interests may be infringed by transaction,⁷³ but the position that the “declarer of a will or the one, who has shown the voidable will, enjoys right to rescind” shall be shared.⁷⁴ Since a third party does not show the will to conclude the agreement, it cannot exercise the right to rescind. By the same logic, when a transaction is voidable by reason of a defect in the declaration of will, the will of representative but not the represented person shall prevail.⁷⁵ However, if the circumstances, which may cause invalidity of transaction, are known to the person represented before the conclusion of an agreement, the will of the person represented and not representative shall be taken into account in the event of voidance of transaction.⁷⁶

Thus, in the event of voidance of transaction, the person represented, as well as the third party, cannot enjoy the right to rescind. In the transaction concluded by the representative, the person having the right of rescission is a representative, and in the agreement concluded in favor of a third party – a

⁷¹ *Looschelders D.*, Schuldrecht, AT, 16., neu bearbeit. Aufl., München, 2018, §51, Rn. 26, 423.

⁷² See *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 360 (in Georgian); *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196 (in Georgian); *Chanturia L.*, Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2000, 390 (in Georgian).

⁷³ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 196 (in Georgian); *Chanturia L.*, Introduction to the General Section of Civil Law of Georgia, Tbilisi, 2011, 395 (in Georgian); *Darjanian T.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 412, field 8, 412 (in Georgian).

⁷⁴ *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 360 (in Georgian); see also, *Rusiashvili G.*, *Chanturia L. (ed.)*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 85, field 2, 492 („Only the person taking part in arrangement of a deal, has the right of rescission“) (in Georgian).

⁷⁵ *Erkvania T.*, Protection of Interests of Third Parties in the Representation, Journal “Justice and Law”, №3(34)’12, 33 (in Georgian); *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 284 (in Georgian); Comp. *Kereselidze D.*, The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 408 (in Georgian).

⁷⁶ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 284 (in Georgian); see the Judgment №as-479-806-05 of 27th January, 2006 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

promisee (or promisor). However, unlike a third party, the person represented has the right to rescind, if he/she was aware of the circumstances causing the avoidance of transaction.

2.2.3. Interrelationship of Powers of the Promisee and the Representative

The action of the promisee in the agreement concluded in favor of a third party, and the action of the representative in the transactional representation, causes the effect provided for the agreement for another person; i.e. the other person acquires the right to claim execution of the agreement.⁷⁷ In the first case - in an agreement concluded in favor of a third party by independent request, such is a third party⁷⁸ and in the second case – the represented person. But the difference between them is conditioned by that the relationship arisen between the representative and the person represented is based upon the transaction - the granting of power of attorney⁷⁹ as a form of outward expression of representative power.⁸⁰ However, the relationship between the promisee and the third party is not based upon the granting of authority to the promisee. Although, there is a legal relationship between the promisee and the third party, which is noted⁸¹ as a "currency relationship",⁸² but, in general, authenticity of currency relationship plays no role⁸³ in conclusion of agreement in favor of third party and its authenticity, also, for acquiring of legal claim by the third party, because the agreement concluded in favor of a third party (proportional relationship) and the currency relationship are independent of each other.⁸⁴

The promisee - on his own behalf and not on behalf of a third party⁸⁵ and for the interests of others, and the representative - on behalf of others⁸⁶ and for the interests of others makes a deal,⁸⁷ i.e. the

⁷⁷ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 408.

⁷⁸ *Medicus D., Lorenz S.*, Schuldrecht I, BT, 20., neubearb. Aufl., München, 2012, Rn., 805, 410.

⁷⁹ *Chanturia L.*, General Section of Civil Law of Georgia, Tbilisi, 2011, 426 (in Georgian); The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia; see, *Baigusheva Yu. V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian); *Graffenried C.*, Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 220, 99.

⁸⁰ *Chanturia L.*, General Section of Civil Law of Georgia, Tbilisi, 2011, 434 (in Georgian); The Judgment №as-329-313-2013 of 30th April, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; The Judgment №as-127-124-2011 of 5th September, 2011 of the Chamber of Civil Cases of the Supreme Court of Georgia.

⁸¹ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, Rn. 1137, 404; *Bamberger G., Roth H. Janoschek Ch.*, BGB, 4. Aufl., München, 2019, §328, Rn. 8, 2286; *Medicus D., Lorenz S.*, Schuldrecht I, AT, 21., neubearb. Aufl., München, 2015, Rn. 853, 387.

⁸² "Valutaverhältnis".

⁸³ *Bayer W.*, Der Vertrag zugunsten Dritter, Tübingen, 1995, 209; *Joussen J.*, Schuldrecht I, AT, 3., überarb. Aufl., Stuttgart, 2015, Rn. 1173, 360.

⁸⁴ *Gottwald P.*, Münchener Kommentar, 8. Aufl., München, 2019, §328, Rn. 29, 680-681; *Looschelders D.*, Schuldrecht, AT, 14. Aufl., München, 2016, Rn. 1138, 411; *Bamberger G., Roth H. Janoschek Ch.*, BGB, 4. Aufl., München, 2019, §328, Rn. 8, 2286; *Staudinger J., Löwisch M. (Red.), Klumpp S.*, BGB, Buch 2, Berlin, 2015, §328, Rn. 18, 63; *Comp., Krauskopf P.*, Der Vertrag zugunsten Dritter, Diss., Freiburg Schweiz, 2000, Rn. 1632 ff., 402.

⁸⁵ *Raab Th.*, Austauschverträge mit Drittbeteiligung, Tübingen, 1999, 38; *Graffenried C.*, Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen, Diss., Bern, 2019, Rn. 220, 99.

promisee shows his will on his/her own behalf,⁸⁸ and the representative acts on behalf of another person.⁸⁹ Therefore, it can be said that at first glance the agreement concluded in favor of a third party is in pace, when a person concludes the agreement in his/her own behalf and in favor of another person.⁹⁰ The agreement concluded in favor of a third party is in pace, when the deal made by a representative depends on whether the will to act on behalf of another person is clearly expressed or not.⁹¹ It is clear that in case of positive answer, the representative transaction is in place, but when in doubt, it is taken into account that the person acts on his/her own behalf and in favor of a third party.⁹²

Since the interpretation of an agreement shall determine whether a third party should acquire the right or not,⁹³ in the event when a separation between the agreement concluded in favor of a third party and the transactional representation cannot be separated, the preference shall be given to the issue of interpretation of the agreement.

3. Separation of an Agreement Concluded in Favor of a Third Party from Indirect Representation

Indirect representation is characterized with peculiarity that in that case the representative acts on his/her own behalf,⁹⁴ but for the benefit of another person.⁹⁵ In this way it resembles an agreement concluded in favor of a third party, in which, as noted above, the promisee also acts on his/her own behalf. But in case of indirect representation the outcome of a legal relationship first occurs with the representative and then - with the person represented.⁹⁶ The right of claim to the party of an agreement arises for

⁸⁶ *Schmidt R.*, GBG AT, Grumndlagen des Zivilrechts Methodik der Fallbearbeitung, 13 Aufl., Hamburg, 2015, 182.

⁸⁷ *Zoidze B.*, Comments to the Civil Code of Georgia, Book I, Tbilisi, 2002, 276, 278, 279 (in Georgian); The Decision №3k-313-03 of 18th June, 2003 of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia.

⁸⁸ *Erman W., Westermann H.*, Handkommentar, 14., Aufl., §328, Köln, 2014, Rn. 2, 1485; *Baigusheva Yu.V.*, Representation in Russian Civil Law, Thesis work, Saint-Petersburg, 2015, 118 (in Russian); *Christandl G.*, Der Vertrag zugunsten Dritter im Entwurf für ein neues spanisches Schuldrecht im Spiegel des europäischen Vertragsrechts, ZEuP 2012, 247.

⁸⁹ *Kötz H.*, Vertragsrecht, 2., Aufl., Tübingen, 2012, Rn. 400, 170, (“Handeln unter fremdem Namen“); *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; see *Lübe G.*, Vertragsschutz Dritter und allgemeine Haftungsrecht, Dissertation, Düsseldorf, 1964, 154 ff.

⁹⁰ *Medicus D., Lorenz S.*, Schuldrecht I, BT, 20., neubearb., Aufl., München, 2012, Rn. 805, 410; *Bettermann K.*, Verpflichtungsermächtigung und Vertrag zu Lasten Dritter, JZ, 1951, 321.

⁹¹ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; *Medicus D., Lorenz S.*, Schuldrecht I, BT, 20., neubearb. Aufl., München, 2012, Rn., 805, 410; *Kropholler J.*, German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §164, field 9, 80 (in Georgian).

⁹² *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1151, 409; *Medicus D., Lorenz S.*, Schuldrecht I, BT, 20., neubearb. Auf., München, 2012, Rn., 805, 410.

⁹³ *Medicus D., Lorenz S.*, Schuldrecht I, BT., 20., neubearb. Aufl., München, 2012, Rn., 810, 411.

⁹⁴ *Chanturia L.*, General Section of Civil Law of Georgia, Tbilisi, 2011, 428 (in Georgian).

⁹⁵ *Kropholler J.*, German Civil Code, Study Comment, *Darjania T., Chechelashvili Z. (transl.), Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, §164, field 4, 80 (in Georgian).

⁹⁶ *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 278 (in Georgian); see *Kobakhidze A.*, Civil Law, I, General Section, Tbilisi, 2001, 310 (in Georgian).

the person represented through the transfer of rights by a representative.⁹⁷ By the independent request in the agreement concluded in favor of a third party, the right of claim of execution of an agreement arises immediately⁹⁸ for “the third person”⁹⁹ based on this agreement.

Indirect representation differs from the agreement concluded in favor of a third party as well as from the representation provided for in section 1, Article 103 of the CCG.¹⁰⁰ Therefore, the separation between an agreement concluded in favor of a third party and indirect representation is less significant.¹⁰¹

The full legal effect of the agreement concluded through a direct representative applies to “other persons”. In this case the “other party” itself is a party to the agreement. In case of indirect representation the person represented is not a party to the agreement;¹⁰² the contractual rights are being subsequently transferred. By the independent request in the agreement concluded in favor of a third party, a third party enjoys only separate legal claims. The promisee remains as party authorized for other claims as well as the person responsible for responsive fulfillment.¹⁰³

4. Conclusion

The agreement concluded in favor of a third party differs from an agreement concluded through a representative. In each case, there is an intersection between the powers of the third party to the agreement concluded in favor of the third party and the third party, due to participation of which, the contractual relationship becomes similar to an agreement concluded in favor of the third party. But the main difference between the separate element of the notion of agreement concluded in favor of a third party, the purpose of declaration of will of parties, the powers of the third party, or the basics of relationship between the parties involved is conditioned by the difference between the above elements.

The agreement concluded in favor of a third party must be separated not from the institution of representation in general, but from the transaction concluded by the representative. Although the person represented does not directly participate in the conclusion of agreement, but his/her will is implemented by the representative. In the agreement concluded in favor of a third party, the promisee does not exercise the will

⁹⁷ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1152, 409; *Erkvania T.*, Protection of interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal “Justice and Law” №3(34) 12, 37-38 (in Georgian).

⁹⁸ *Bayer W.*, Der Vertrag zugunsten Dritter, Tübingen, 1995, 219.

⁹⁹ “in der Person des Dritten“, see *Soergel Th.*, *Pfeiffer Th. (Red.)*, *Hadding W.*, BGB, Band 5/3, 13. Aufl., Stuttgart, 2010, §328, Rn. 17, 13.

¹⁰⁰ *Kropholler J.*, German Civil Code, Study Comment, *Darjania T.*, *Chechelashvili Z. (transl.)*, *Chachanidze E.*, *Darjania T.*, *Totladze L.* (ed.), Tbilisi, 2014, §164, field 4, 80; *Zoidze B.*, Comment to the Civil Code of Georgia, Book I, Tbilisi, 2002, 277 (in Georgian); see *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 427-428 (in Georgian); *Erkvania T.*, Protection of Interests of Third Parties in the Representation (in accordance with the Civil Codes of Georgia and Germany), Journal “Justice and Law” №3(34) 12, 37 (in Georgian).

¹⁰¹ *Looschelders D.*, Schuldrecht, AT, 12. Aufl., München, 2014, §51, Rn. 1152, 409.

¹⁰² *Ibid.*

¹⁰³ *Gottwald P.*, Münchener Kommentar, Schuldrecht AT, 8., Aufl. München, 2019, §328, Rn. 12, 676-677; OLG Köln, NJW 1978, 896- 897.

of the third party, but willfully grants the legal claim to a third party, and declaration of will by third party shall sometimes only be considered as a precondition for the arising of right in his/her favor.

Based on the agreement concluded through a representative and the agreement concluded in favor of third party, the rights may arise for the person not participating directly in conclusion of an agreement. But the difference between them is that the representative acts on behalf of another person, and the promisee - on his/her own behalf. Unlike an agreement concluded in favor of a third party, the party to the agreement is represented and, therefore, all contractual rights and obligations arise thereon. A third party never becomes a party to the agreement. In case of transactional representation and proceeding from the transaction, the rights and obligations arise for the person represented. In the agreement concluded in favor of a third party, the third party has only the separate rights, the rest of the rights and obligations remain with the promisee or the promisor (debtor).

When a transaction is voidable, the represented person as well as the third party cannot enjoy the right of rescission. The person with the right of rescission is a representative in the transaction made by a representative, and in the agreement concluded in favor of a third person – the promisee; however, unlike a third party, the person represented has the right to rescind if he/she is aware of the circumstances causing the voidance of transaction.

The relationship arose between the representative and the person represented is based upon the issuance of a power of attorney, but the relationship between the promisee and the third party is not based upon the granting of authority to the promisee by a third party.

The death of a representative is the basis for the abolition of representative authority; in the agreement concluded in favor of a third party, the death of the promisee may become the basis for arising the right for a third party.

Indirect representation differs not only from the agreement concluded in favor of a third party but also from the representation provided for in section 1, Article 103 of the CCG. Therefore, the separation between the agreement concluded in favor of a third party and indirect representation is less significant.

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