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## **Transactions Concluded Under Duress and Immoral Transactions: Comparative Analysis**

*The following article examines legal transactions concluded under the defect of declaration of intent, more precisely, the interrelation of transactions concluded under duress (Article 85 of the Civil Code) and immoral transactions (Article 85 of the Civil Code). Confusion between immoral agreements and duress in Georgian judicial practice is commonplace. Duress, as a socially unacceptable conduct, is often viewed as an immoral behaviour, regardless, immorality ground might not lead to the voidness of a transaction. The article explores German and English judicial practices and legal literature to provide an enhanced understanding of the interrelation between the said transactions. Considering that Georgian law stands closely with German law, drawing parallels with it is a logical approach. As for English law, it is one of the first countries in the world to adopt the concept of “undue influence” (immorality). In terms of immoral agreements, the article does not focus on the immoral transactions in their content (e.g. prostitution), but rather on the transactions, which, at a glance, are neutral, yet their motive or purpose is immoral.*

**Keywords:** *immoral, duress, transactions, undue influence, distinction criteria, defect of declaration of intent*

### **1. Introduction**

The Civil Code of Georgia (hereinafter – Civil Code) regulates the agreements concluded under the defect of declaration of intent and considers different forms of violation of consent with relevant legal consequences. The defect of declaration of intent entails the scenario, where the explicit consent does not correspond with the intrinsic intent, and the transaction was concluded upon explicit consent.<sup>1</sup> Immoral transactions and duress stand as exemplary illustrations of agreements concluded under the lack of consent. Georgian courts have different and, in most cases, contradictory approaches towards these two institutes. An apt portrayal was an infamous “Rustavi-2” case, where a party claimed annulment of a contract on the purchase of shares, on the grounds of duress. The courts of all three instances adjudicated in favour of the claimant, albeit, with different reasonings. The first and second instance courts deemed the purchase contract immoral and, hence, found it void on the grounds of disproportionality between the service provided and the price paid, whereas the Grand Chamber of the Supreme Court of Georgia, in contrast to both instances of the court, ruled that the contract was made under duress. The latter did not take account of the reasoning provided by the lower instances, that the

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<sup>1</sup> Chanturia L., General Part of Civil Law, “Samartali” Publishing, Tbilisi, 2011, 331 (in Georgian).

presence of the disproportion in the obligations undertaken by the parties to the contract suffices for it to be found immoral. As per the Supreme Court's interpretation, for a transaction to be deemed void on the grounds of immorality, one of the parties must have abused their market power or taken advantage of another party's vulnerability or naivety.<sup>2</sup>

This and other rulings illustrate that there is no clear demarcation line between articles 85 and 54 of the Civil Code, which undermines the principle of legal certainty and destroys the opportunity for the addressees to foresee the legal consequences.<sup>3</sup>

In light of the points raised above, through comparative, logical and analytical methodology, the paper aims to find out the features of transactions made under duress and immoral transactions, explore the interrelation between them and propose orientation criteria for differentiating these transactions.

## **2. Transactions Made Under Duress**

### **2.1. The Doctrine of Duress in Georgian Law**

The notion of agreements made under duress is well-defined in Georgian legal literature. Duress entails transactions made under the defect of declaration of intent, where the freedom of contractual intent is clearly undermined.<sup>4</sup> The party exerting duress does not mislead another party to declare intent but rather violates their free will.<sup>5</sup> Even though the consenting party, who can also be referred to as the victim of duress, understands the circumstances and does not wish to conclude a contract, their freedom is undermined in a manner which eventually leads them to formally make a decision.<sup>6</sup> As per predominant belief, duress entails psychological pressure, i.e. threatening, which is a message on the future peril, so as to influence the declaration of intent of the addressee of the threat and coerce them into sealing a contract. It is not required for the threatener to have the intent to bring the "promised" negative consequences. Should the addressee perceive the threat as genuine, it shall suffice.<sup>7</sup> Plenty of court rulings provide that the grounds for voidness of a contract may arise from influence exerted on

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<sup>2</sup> Compare., Ruling of the Constitutional Court of Germany BGHZ [2001] 146, V ZR 437/99.

<sup>3</sup> Ruling №3/7/679 of December 29, 2017, of the Constitutional Court of Georgia on the case "Broadcasting Company Rustavi-2 LTD" and "TV-company Sakartvelo LTD" v Parliament of Georgia (in Georgian).

<sup>4</sup> *Rusiashvili G.*, Civil Code Commentary, Book One, *Chanturia (Ed.)*, Tbilisi, 2017, Article 85, Field 1 (in Georgian).

<sup>5</sup> *Chanturia L.*, General Part of Civil Law, "Samartali" Publishing, Tbilisi, 2011, 380 (in Georgian). *Rusiashvili G.*, Civil Code Commentary, Book One, *Chanturia (Ed.)*, Tbilisi, 2017, Article 85, Field 1 (in Georgian).

<sup>6</sup> *Chanturia L.*, General Part of Civil Law, "Samartali" Publishing, Tbilisi, 2011, 381 (in Georgian). Ruling #სბ-132-124-2015 of April 29, 2015, of the Supreme Court of Georgia (in Georgian). Ruling #სბ-333-314-2014 of July 21, 2014, of the Supreme Court of Georgia (in Georgian). Ruling #სბ-170-163-2013 of May 27, 2013, of the Supreme Court of Georgia (in Georgian). Ruling #სბ-1796-1773-2011 of January 23, 2012, of the Supreme Court of Georgia (in Georgian).

<sup>7</sup> *Rusiashvili G.*, Civil Code Commentary, Book One, *Chanturia (Ed.)*, Tbilisi, 2017, Article 85, Field 15 (in Georgian).

the declaration of intent of the other party, such that, depending on its clear or actual nature, the court may deem that the consent could not have freely formed.<sup>8</sup>

## **2.2. The Doctrine of Duress in English Law**

The House of Lords has distinguished two elements: (1) Inducement of will; and (2) Illegitimate pressure<sup>9</sup>; In terms of the former, the law looks into whether the victim of coercion could express their free will while concluding a contract; For the latter, the nature of the pressure shall be explored – whether the coercer employed illegitimate pressure.<sup>10</sup>

English law places significant emphasis on the nature of pressure. It differentiates illegitimate pressure<sup>11</sup> from, so-called, general pressure, which is allowed and does not lead to the annulment of a transaction. General pressure is fully legitimate and exists in any society, which recognises competition.<sup>12</sup> General pressure is one of the features of a pre-contractual negotiation process, and it might be highly emotional and even aggressive. At a glance, a negotiation process might resemble a relationship between a coercer and their victim. Moreover, a contract might not bring desirable consequences for everyone and the law does not expect this either, however, when the contract brings negative consequences to parties, it cannot necessarily be considered as illegitimate pressure. In one of the judicial cases, a party threatened a counterparty that they would not purchase shares from the latter unless the counterparty agreed to additional conditions. A defendant, who wished to timely achieve an agreement, agreed on the proposed conditions, yet they raised a claim on the voidness of the contract, stating that their consent was given under pressure. The court found, that the contract should have remained in force, as the pressure at hand was commercial pressure and not coercion.<sup>13</sup>

For the contract to be found void, the court must determine whether the victim was under “illegitimate pressure”.<sup>14</sup>

For the definition of illegitimate pressure, special emphasis shall be put on the content of the threat – where the threat is illegitimate, it will fall within the scope of illegitimate pressure. E.g., a threat of violence against a person, in all cases, will be deemed as illegitimate pressure.<sup>15</sup>

Moreover, in some cases, lawful threats may be considered as illegitimate pressure. For instance, where a person is threatening to harm themselves and, in this manner, forces the other party to sign a contract, such pressure will be considered illegitimate and the contract will be made void.<sup>16</sup>

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<sup>8</sup> Ruling # 56-475-2020 of November 11, 2021, of the Supreme Court of Georgia (in Georgian). Ruling # 56-664-635-2016 of March 2, 2017, of the Supreme Court of Georgia, para. 211 (in Georgian).

<sup>9</sup> “Illegitimacy”.

<sup>10</sup> *Universe Tankships Inc of Monrovia v International Transport Worker’s Federation*, [1982] 2 All ER 67, *House of Lords*.

<sup>11</sup> “Illegitimate pressure”.

<sup>12</sup> *Atiyah, PS*, *An Introduction to the Law of Contract*, 5<sup>th</sup> ed Clarendon Oxford, 1995, 266.

<sup>13</sup> *Pao On v Lau Yiu Long*, [1980] UKPC 17, Court of Appeal of Hong Kong.

<sup>14</sup> *Tetzlaff N.*, *What is Duress in Contract Law*, Smith and Partners, 2021, <<https://smithpartners.co.nz/business-law/contract-law/contract-law-duress/>> [20.01.2024].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

### 2.2.1. The Forms of Duress

In English law, three forms of duress are distinguished: duress of persons, duress of goods and economic duress.

Duress of a person is the most explicit form of duress as it entails inflicting a threat on the other party's life, health, freedom or physical comfort, to coerce them into concluding a transaction.<sup>17</sup>

Where there is physical violence, for instance, when somebody is physically forced to sign an agreement, it shall not be considered a contractual relationship. German contract law directly indicates that the main element of contracts concluded under duress is psychological pressure i.e. threatening.<sup>18</sup>

In English law, they often refer to the Australian case *Barton v Armstrong* as a prime example of duress. In this case, Barton sought voidness of the contract, where they agreed to purchase Armstrong's shares in the company. The court found that Armstrong was threatening Barton with death. Barton genuinely feared for his life and thought that Armstrong was planning to kill him unless he signed the contract. During the litigation, upon presenting the facts of threatening and relevant evidence, the burden of proof shifted to Armstrong, who was to prove that the conclusion of the contract had not resulted from the threats he had made. The latter was not able to rebut the presumption of duress.<sup>19</sup>

The doctrine of duress of goods has widely found a place in English law.<sup>20</sup> In *Maskell v Horner*, the plaintiff was deprived of a large sum without any legitimate grounds, along with being threatened that his market stall would be shut down and all the goods would be taken away. The court ruled in favour of the plaintiff on returning the sums paid. The court stated that when a person pays a certain amount they are not obliged to pay and the act of seizure of goods does not have any legitimate ground, they will have a right to reclaim the goods seized.<sup>21</sup> *Skeate v Beale* led to different consequences. The landlord threatened the tenant to terminate the tenancy contract, evict them from the apartment and sell the movables (which were purchased by the tenant) if the tenant did not pay the rent as per the agreement. The tenant raised a claim against the landlord, that the latter's demand was duress and that the rental agreement for the said amount was concluded under duress. The court did not consider the contract to be concluded under duress and upheld it.<sup>22</sup> It is noteworthy, that the landlord threatened the tenant with selling the items and not, for instance, with burning or destroying them. In this case as well, along with the legitimacy of the demand to pay sums, a crucial importance was attributed to the nature of the threat.

The difference between these two cases lies in the legitimacy of the grounds for fulfilling obligations, and the similarity – assessing the nature of the threats. In the first case, the contract on the payment was concluded under duress, upon threatening and the defendant lacked a legitimate basis to

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<sup>17</sup> *Cartwright J.*, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts*, Clarendon paperbacks, 1991, 153.

<sup>18</sup> German Civil Code < <https://www.gesetze-im-internet.de/bgb/> > [20.01.2024], §123, 1990.

<sup>19</sup> *Barton v Armstrong*, [1973] UKPC 27, The court of appeal of the supreme court of new south wales, judgment of the lords of the judicial committee of the privy council.

<sup>20</sup> *Skeate v Beale*, [1841] 11 Ad&El 983, Court of the Queen's Bench, England and Wales.

<sup>21</sup> *Maskell v Horner*, [1915] 3 KB 106, Senior Courts of England and Wales.

<sup>22</sup> *Skeate v Beale*, [1841] 11 Ad&El 983, Court of the Queen's Bench, England and Wales.

demand payments, whereas in the second case, the tenancy contract had been concluded upon free declaration of intent and demanding money through making threats served the purpose of executing the legitimate contract.

It is a different discussion whether fulfilling a legitimate claim through threatening can be permitted, where the threatening itself is unlawful. In *Sibeon v The Sibotre*, the judge provided that threats made by one party to fulfil the contract concluded under mutual consent of both parties, such as threats of burning their house or expensive artworks (threats about the property) can be considered duress.<sup>23</sup>

Accordingly, when examining coercion against property in English law, it is not only the legal basis of the contract that must be considered but the content and form of the threat itself.

As for economic duress, it was determined in *Crocker v. Schneider* and it refers to gaining undue benefits by abusing someone's weak position, financial stress or hopeless situation, which would not be possible had the person in question been in different circumstances.<sup>24</sup> For instance, in *B&S Contractors v Victor Green Publications* an organiser undertook an obligation to place stands in the exhibition hall "Olimpia", however, a week before, they informed their client that they would not perform this obligation unless the client paid more. The consequences of not placing the stands would put the client in a devastating position as this could harm their reputation and might have caused claims for damages against them. The court found that the organiser had led the client to a dead-end and benefited from their hopeless position. Hence, the payment was made under duress and the court granted the client's claim for reimbursement of the sum.<sup>25</sup> In the case at hand, a party benefitted from the weak position of the client and anticipated financial stress. They received such benefits, which would not have been possible in healthy, competitive and equal trade relations.

### **2.3. German Doctrine of Duress**

In the Civil Code of Germany (hereinafter, BGB) duress is regulated in §123 which entails the right to rescind on the grounds of deceit or threatening: (1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid the declaration.<sup>26</sup> As per the German Civil Code Commentary, according to the 2nd alternative of the first part of the norm, a threat is an intimidation to commit future evil (harm) when the threatener claims that they can execute the said action and is even willing to do so if the victim of coercion does not show the consent desired to the threatener.<sup>27</sup> Unlawfulness of threat, similar to English law, is in focus in German law as well. BGB Commentary provides that unlawful is the threat when the aim and the means to achieve this aim are not in line. For instance, a person owed a debt to another person for a long time. The latter happened

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<sup>23</sup> *Sibeon v The Sibotre*, [1976] 1 Lloyd's Rep 293, England and Wales High Court.

<sup>24</sup> *Crocker v. Schneider*, [1984] 683 S.W.2d 335, Court of Appeals of Tennessee, Western Section, at Jackson USA.

<sup>25</sup> *B&S Contractors v Victor Green Publications*, [1984] ICR 419, Court of Appeal England and Wales.

<sup>26</sup> *Kropholler J.*, German Civil Code, Study Comment, 13<sup>th</sup> rev. ed., translated by Zurab Chechelashvili and Tornike Darjania, Tbilisi, 2014, §123, 49 (in Georgian).

<sup>27</sup> *Ibid.*

to learn that the debtor had committed theft. The creditor threatened the debtor with informing the authorities if the debtor did not fulfil their obligation. The mentioned threat is unlawful and the deal concluded under it will be subject to voidness. In contrast, a threat is an appropriate means of achieving a legitimate interest in the following case: the creditor threatens the debtor with a lawsuit should they not pay the debt.<sup>28</sup>

In both cases, a creditor demands the contractual performance of a debtor, which, supposedly, has arisen on legitimate grounds. However, in the former case, the creditor is putting pressure by threatening to report to authorities, whereas in the latter – by raising a claim. It is a person's lawful and social-ethical obligation to provide the authorities with information on a potential crime. A failure to report a crime is a punishable conduct in both, Georgian and German legislation. Manipulating a person by criminal liabilities (by reporting a crime) cannot be a legitimate ground for threats and a contract concluded on this basis, even though it serves the purpose of fulfilling a legitimate demand, cannot be considered valid. In the second case, a completely legitimate warning on raising a claim, cannot be considered illegitimate threatening, and hence, cannot be made void.

The nature of threatening itself is emphasised in German law, albeit, as opposed to English law, the legal basis of a contract made under duress. In one of the cases, a creditor forced a representative of a debtor (a legal person) to sign a settlement agreement, otherwise, they would initiate insolvency procedures against them (a debtor). German courts did not deem this act as duress, as the creditor and the debtor were in legal relations already, which was not legally questionable, a creditor had a legitimate interest in their demands to be fulfilled, whereas the debtor had an alternative not to sign a contract and avoid an agreement.<sup>29</sup>

#### **2.4. Comparison of Georgian, German and English Doctrines of Duress**

The definitions for articles regulating duress in Georgian and German law are relatively similar – in both cases, the focus is directed towards the promise of the future “evil”, which must be perceived by the victim as real. Georgian and German doctrines of duress are wider than the English, as they do not require the unlawfulness of coercion for the contract to be considered concluded under duress. English law differentiates duress of persons, duress of goods and economic duress, whereas in Georgian and German laws duress is not limited in addressees or forms and it entails any action, which is intended to instil future evil and fear if it is perceived seriously by the victim.

In German judicial practice, emphasis is also placed on the grounds for obligations that have arisen between the parties. A contract may be considered to have been concluded under duress where the coercion is legitimate, albeit the coercer demands the performance from the victim without any grounds.

The main difference between Georgian, German, and English approaches lies in the fact that Georgian and German systems provide a wider interpretation of duress, whereas English law requires a higher extent of pressure and coercion in order to find a contract concluded under duress.

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<sup>28</sup> *Kropholler J.*, German Civil Code, Study Comment, 13<sup>th</sup> rev. ed., translated by Zurab Chechelashvili and Tornike Darjanina, Tbilisi, 2014, §123, 49 (in Georgian).

<sup>29</sup> BGH, [2013] IX ZR 204/12.

In addition, Georgian and German legislation focuses more on the validity of the expressed will of the person under threat and not on the liability of the coercer. Hence, German and Georgian laws, first hand, check, whether the contract has been concluded under the expression of free will/consent and put less emphasis on assessing the form of pressure, unlike English law. English courts, unlike German legislation, do not rely on the principle of freedom of contract, as an inherent part of the concept of duress and the court rulings are based on the shortcomings in the consent of a victim.<sup>30</sup>

### **3. Immoral Agreements/Agreements Concluded under Undue Influence**

#### **3.1. Immoral Agreements in Georgian Law**

In Georgian law, an utterly general substance of the article on immoral agreements does not allow for a deep understanding of this institute. Moreover, judicial practice is scarce. For instance, we encounter the definition of immorality provided by the Supreme Court of Georgia in terms of a contract of suretyship.<sup>31</sup> As per the reasoning of the Cassation Court (Supreme Court), putting obligations on a surety, who reached the age of majority several months before the conclusion of the contract, under a suretyship agreement goes against the norms of decency and is void under Article 54. Based on the analysis of this ruling, it is difficult to formulate the set of criteria for immoral agreements, as the court focused on underaged sureties, yet there is alternative reasoning in the legal literature<sup>32</sup> that a mutually binding agreement concluded between two adults does not in itself constitute an argument for the invalidity of this manifestation of consent. The agreement shall be made void on the grounds of its immoral nature, more precisely, through the reasoning that the agreement had been concluded by psychological pressure on a surety, violated their rights and contradicted moral principles.<sup>33</sup> The prerequisites for the invalidity of this type of suretyship have been identified: a financial burden that is significantly greater than the surety's capabilities; close private connections between the surety and the main obligee (e.g. spouse, child, parent); Undertaking an obligation in suretyship based on an emotional connection can deprive the surety of the full protection of their own interests from the beginning (including the ability to reject the suretyship obligations); subordination and the abuse of such subordination by the creditor.<sup>34</sup>

Besides suretyship, in Georgian judicial practice, due to strict reality, there are a number of decisions, where agreements between a state and a person have been found void on the grounds of immorality. For instance, a contract for a gift of a car between the parents of a convicted person and

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<sup>30</sup> *Lawson F.H.*, *The Rational Strength of English law*, Stevens & Sons Ltd, London 1951, 58.

<sup>31</sup> The ruling №სს-726-2019 of July 5, 2019, of the Supreme Court of Georgia (in Georgian).

<sup>32</sup> *Kavshbaia N.*, *Voidness of a Transaction on the Grounds of Immorality*, analysis of the ruling on the case სსქთგ №სს-726-2019 of February 9, 2019, of the Supreme court of Georgia, “Georgian-German Journal of Comparative Law”, 1/2020, Tbilisi, 2020, 62 (in Georgian).

<sup>33</sup> *Compare* BGH, [1994] NJW, IX ZR 227/93.

<sup>34</sup> *Kavshbaia N.*, *Voidness of a Transaction on the Grounds of Immorality*, analysis of the ruling on the case სსქთგ №სს-726-2019 of February 9, 2019, of the Supreme court of Georgia, “Georgian-German Journal of Comparative Law”, 1/2020, Tbilisi, 2020, 62 (in Georgian).

the Ministry of Internal Affairs of Georgia which led to the approval of a plea bargain in favour of the accused.<sup>35</sup>

### 3.2. Transactions Made under Undue Influence in English Law

In English law, unlike Georgian, unlawful and immoral transactions, as well as, transactions going against public order are placed under the same umbrella term – illegal transactions. This term entails agreements subject of which are criminal actions, as well as public misdemeanours. In English judicial decisions, we find the term “undue influence” to characterise immoral deals, which are a mechanism of exercising control over the person whose actions become questionable. The purpose of undue influence is to undermine another person’s free will and limit it to the extent that it affects their free choice.<sup>36</sup>

In *Scurry v. The Cook* Court explained that for an influence to be “undue,” it must neglect the will of a person and substitute with the will of the person exercising influence.<sup>37</sup> By undue influence one party gains unfair privilege over the other, albeit, it cannot be concluded, that any influence is undue “for, it is not forbidden for a person to put proper influence on the other party for their own benefit.” Undue influence was introduced to apply to cases where the contract is concluded under pressure, however, this pressure is not duress.

In English law, four equally important elements of undue influence are distinguished, which, in combination, can provide for a presumption that one party is signing an agreement under the absence of free consent. These elements are as follows:<sup>38</sup>

1. Vulnerability of the victim<sup>39</sup> – the victim must be sensitive to the manipulations of the other party. This can be established by the nature of the relationship between the parties, the victim's limited abilities or their current mental or psychological state.

2. The authority of the person exercising influence – there must be a type of relationship between the parties that is a prerequisite for the emergence of trust.

3. Tactics – the person exercising influence must use certain tactics to influence the victim. These tactics may include controlling the necessities of life, such as food, medicine, etc. Also, non-physical influences, including affection, ignorance, humiliation, etc.

4. Unfair consequences – there must be unfair consequences for the victim, which caused them to suffer economically.

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<sup>35</sup> Decision №28/4686-13 of April 15, 2014, of the Chamber on Civil Cases of the Tbilisi Court of Appeals (Compare Judgement of the European Court of Human Rights of May 19, 2004, on *Gusinskiy v. Russia*; Decision #6-15-15-2016 of March 1, 2016, of the Chamber on Civil Cases of the Supreme Court of Georgia) (in Georgian).

<sup>36</sup> *Tidwell v. Critz*, (1981) 248 Ga.US 201.

<sup>37</sup> *Scurry v. Cook*, [1950] 59 S.E.2d 371, Supreme Court of Georgia.

<sup>38</sup> *Andrews N.*, Contract Law, 11- Duress, Undue Influence and Unconscionability, Cambridge University Press, Cambridge, 2011, 306.

<sup>39</sup> “Vulnerability”.

### 3.2.1. Classes of Undue Influence

In *Bank of Credit & Commerce International v Aboody* the Court of Appeal of England developed three different classes of undue influence<sup>40</sup>: Class 1 includes actual undue influence and the burden of proof of actual damages (manifest disadvantage) is the prerogative of the plaintiff or alleged victim.<sup>41</sup> The influence must be obvious and conspicuous and must be demonstrated in a specific material damage (loss).<sup>42</sup> The most recent example of factual undue influence is *Whittle v Whittle*, one of the rare cases where a court found undue influence and made a will void on that basis. Mr Whittle passed away on December 7, 2016, at the age of 92. He drafted his first and only will in November 2016, a month before he passed. He left a car collection and a garage to his son David, provided that he would free the territory, whereas the rest of the remaining vast property was left to daughter Sonya and her partner in equal parts. David raised a claim seeking the voidness of the will on the grounds of undue influence. The actual damages consisted of the property worth billions as David was supposed to inherit. The claimant argued that the will was drafted under the undue influence of his sister, who persuaded the father, that David was a thief and lived an immoral way of life. She shared these accusations with their father when he had already fallen unwell. During the trial, Sonya could not substantiate the accusations against her brother and therefore could not refute that the will had been drafted under her negative influence.<sup>43</sup>

The second and third classes are Classes 2a and 2b, which entail an alleged undue influence. These classes do not require to prove that undue influence has taken place, albeit, in the first case, it is required that a relationship based on special trust between the parties, arising out of a particularly close relationship between the parties, is proved to exist, e.g.: spouses, parents and children; whereas in the second case (Class 2b), a relationship between the parties arises from the law, a contract or another type of an agreement (often confidential), e.g., doctor/patient, attorney/client, spiritual father/priest, employee/employer, roommates, and other similar relationships. In both instances, where the transaction carried out is unusual and cannot be explained by the nature of the relationship between the parties and one party has suffered actual damages (Manifest Disadvantage), the presumption of undue influence arises and the burden of proof is shifted to the person who exercises influence, i.e. the defendant. For example, when a client gifts their own home to the attorney and through this, suffers damages, the presumption of undue influence from the attorney arises and hence, the attorney shall prove that the client's will was free of any influence.<sup>44</sup>

### 3.3. Immoral Transactions in German Law

The German doctrine of duress (BGB 123) is narrow for protecting every kind of freedom of choice. In situations, where certain actions or circumstances may be “indecent”, they fall within the

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<sup>40</sup> <<https://www.claims.co.uk/knowledge-base/contract-law/duress-undue-influence-in-contracts>> [20.01.2024].

<sup>41</sup> *Edwards v Edwards*, (2007) 481 P.2d US 432.

<sup>42</sup> *CIBC Mortgages v Pitt*, [1994] UKHL 7, House of Lords.

<sup>43</sup> *Whittle v Whittle*, [2022] EWHC 925 (Ch), England and Wales High Court (Chancery Division) Decisions.

<sup>44</sup> <<https://www.claims.co.uk/knowledge-base/contract-law/duress-undue-influence-in-contracts>> [20.01.2024].

scope of the general rule of BGB Paragraph 138. This normative provision is a primary legal source for regulating duress in German doctrine and results in the voidness of transactions “which do not comply with the norms of decency.” In German law immoral transactions and unlawful transactions are given in separate paragraphs (BGB 134; 138), whereas transactions which go against public order are not mentioned.

As per BGB Paragraph 138, a transaction offends common decency where (a) its conclusion is induced; (b) through the abuse of dominant position and (c) one party deliberately uses such dominant position. The analysis of the combination of these elements determines whether a transaction contradicts the sense of fairness of each person.<sup>45</sup> As per German law, the voidness of a transaction on the grounds of indecency is possible where the violation stems from the content of the transaction (e.g., a contract on committing a crime), however, frequently, incompliance with moral norms derives only from the features characteristic of the transaction as a whole. In this case, the motive and purpose of the transaction shall be taken into consideration.<sup>46</sup> The transaction might not be objectively indecent as of a particular time (e.g., gifting the only apartment), yet, the motive and the purpose (gifting it to a mistress/lover) might lead to voidness as per Paragraph 138. The subjective element must be present for both parties, where the violation of the norms of decency is directed against society or third parties; Where it is directed against the other party, unilateral violation of the norms of decency suffices. Awareness about the violation of moral norms should be differentiated from knowledge of immoral circumstances, which is not required in any case.<sup>47</sup> According to the judicial practice, the moment of concluding the transaction is crucial to assess the violation of moral norms.<sup>48</sup>

It must be noted, that German courts have set circumstances when undue influence takes place outside of the relationships based on special trust. There are many different types of dominant positions, which can lead to undue influence. For instance, an entity in a dominant market position, public authority, a landlord, an employer and a banker have been identified as holding dominant positions. They can impede the freedom of choice of a party.<sup>49</sup>

### **3.4. Comparison of Georgian, English and German Transactions under Undue Influence**

English, as well as, German law, compared to Georgian, provide much detailed definitions of undue influence/immorality. In Georgian law, the article, which more clearly defined immoral transactions has been annulled, whereas Article 54 of the Civil Code is general and it is impossible to find specific criteria in it. Hence, the load is shifted to the courts, which must develop uniform criteria for finding a transaction immoral.

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<sup>45</sup> *Hadjiani A.*, *Duress and Undue Influence in English and German Contract Law: a comparative study on vitiating factors in common and civil law*, Oxford U Comparative L Forum, 2002.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Kereselidze D.*, *The Most General Systemic Notions of Private Law*, European and Comparative Law Institute, Tbilisi, 2009, 357 (in Georgian).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Hadjiani A.*, *Duress and Undue Influence in English and German Contract Law: a comparative study on vitiating factors in common and civil law*, Oxford U Comparative L Forum, 2002.

The parts on the burden of proof also differ. In English law, the presumption of undue influence arises where one person trusts the other (special relationship) (1), a person exercising an influence causes actual damages to the other person and benefits from it (2) and the victim of the influence is put in an unfavourable position, a person exercising an influence acknowledges said facts (factual and constructive knowledge) (3).

In English law, upon the presence of these three elements, it is presumed that the other two elements are also at hand: causal relation (4) and the violation of the freedom of choice (5).<sup>50</sup> As per English law, for the presumption to arise, it is sufficient for a party to prove the presence of elements 1, 2 and 3 (Classes 2a and 2b) or elements 1, 2, 3, 4, 5 (Class 1), to create a presumption of undue influence and shift the burden of proof to the potential influencer. German and Georgian laws provide for different rules. In both approaches, the claimant shall prove the cumulative presence of all elements (1, 2, 3, 4, 5) to create the presumption of immorality of the transaction and the burden of proof to shift. Therefore, in English law, the burden of proof of undue influence is lighter for a victim than it is in German and Georgian systems.

#### **4. Conclusion**

Upon comparing transactions concluded under duress and immoral transactions it has been concluded that duress is the strongest form of pressure, which entails obvious and gross violation of free will. The English doctrine of duress, compared to Georgian and German ones, is narrower and is mainly focused on the legal nature of the threat, whereas Georgian and German approaches put emphasis on the fault in the consent. In all three jurisdictions, in case of duress, coercion of consent does not take place silently, but rather the victim understands the real circumstances and does not wish to establish legal relations, yet, they are deprived of freedom of choice, as in their subjective perception their life/health, property or economic state is under threat.

The limited notion of duress is made complete with the concept of undue influence. In this case, the influence on the consent, compared to duress, is rather subtle. Within the scope of the undue influence doctrine, all three legal systems require the assessment of material unfairness. For the transaction to be deemed immoral, besides the encroachment on the free will characteristic for duress, the element of immorality shall be at hand. The probability of the presence of an element of immorality is high where there is subordination, close relationships or relationships based on trust, one party has suffered damages and the other party has benefitted in a manner which would have been impossible in different circumstances. Moreover, the influence has been exercised through pre-determined tactics.

Unlike the English approach, Georgian and German laws do not put emphasis on close relationships, albeit, inequality of the parties is still a crucial component. Georgian and German approaches are based on more of a general definition – where a transaction is concluded only due to one party abusing its market power, or benefiting from a counter-party's dire state or innocence, then it can be concluded that an immoral transaction is at hand.

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<sup>50</sup> *Lloyds Bank v Bundy*, [1974] EWCA Civ 8, Court Of Appeal, Salisbury County Court UK.

In addition, unlike the duress doctrine, in the case of immoral transactions, the weight of the subjective element (awareness) is lighter and the main focus is directed towards the objective circumstances – the German approach presumes that subjective features are at hand even when the party turns a blind eye to the unfavourable state of the other party.

In all three legislations, the burden of proof in undue influence is lighter than in duress. Where in case of duress it is required to prove the presence of specific circumstances of undermining the consent, in undue influence, the presence of certain preconditions automatically creates the presumption which shifts the burden of proof in favour of the alleged victim. The burden of proof is even lighter to carry for a victim in English law, where showcasing the existence of a special relationship, actual damages and benefits enjoyed by the person who exercises the influence suffice to create the presumption of undue influence. It is not required to prove the existence of the causal connection and violation of freedom of choice.

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