"La Trahison des Images": Intentional discrepancy between individual will and its declaration

A. Y. Zezekalo

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The paper is intended to pursue the old issue of the underlying basis of contracts as well as legal transactions on the whole. The main idea is, consequently, to explore, using example of vices of will caused by intentional discrepancy between the internal will and its declaration, which theoretical pattern should be applied to the legislative regulation, which is in force nowadays first of all within the civil law legal space. In particular, with the aim of answering, in a way, the question whether it is really obvious that the dogma of the autonomy of the will here is no longer the basis of the rules of contract. Brief comparative overview demonstrates that despite the significantly different viewpoints of the doctrines as to the basis of legal transaction, and above all, a contract, many legal systems of continental Europe do take a serious account of the subjective element and proceed openly or implicitly from the necessity that the internal will should correspond to its external expression. At the same time, within the contract law, in some cases it is being spoken of consensus and its vices. However, if consensus in such cases means nothing but agreement on the parties' intentions, we are still dealing with the same subjective approach, based to a large extent upon the central idea of the old will theory and its modifications, attaching at least considerable degree of importance to the individual will.

Keywords: contracts, transactions, fictitious transactions, sham transactions, simulation, vices of will.

The "classical" contract theory proceeds from the assertion that contractual obligations are created by the parties' intentions. This conviction is based on the general premise of the preeminence of individual will, probably most vividly articulated by Savigny within the framework of the general theory of "juridical facts" as "events that bring about the beginning or end of a legal relationship"[1]. Among the latter he especially emphasized the acts aimed at certain legal consequences, including the so-called "legal transactions" or, speaking in terms of modern scholarly projects such as the Draft Common Frame of Reference (DCFR), "juridical acts" (in fact, there is no generally accepted English equivalent to the German notion of "Rechtsgeschäft"). Savigny argued, in particular, that the will in itself must be thought of as the only important and effective thing[2].

This standpoint, better known as the "will theory" (Willenslehre) became extremely influential, most of all in the German pandectistics, although not without modifications[3].

Its justification is very often becomes closely bound with the principles of priority of individual autonomy, aimed to provide self-determination (Selbstbestimmung) and self-

Alexander Y. Zezekalo — PhD in Law, Associate Professor, St. Petersburg State University, 7–9, Universitetskaya nab., St. Petersburg, 199034, Russian Federation; a857400@mail.ru

[1] *von Savigny F. C.* System des heutigen Römischen Rechts. B. III. Berlin: Veit & Comp., 1840. S. 3.

[2] Eigentlich muss der Wille an sich als das einzige Wichtige und Wirksame gedacht werden (Ibid. S. 258).

[3] *Coing H.* Europäisches Privatrecht. B. II. Munchen: C. H. Beck, 1989. P. 276.

regulation in the private law domain[4]. The same purpose is pursued by the principle of freedom of contract, which could be seen as a subspecies of the principle of private autonomy. Consequently, the idea of free will as the key element of legal transaction is echoed in the idea of freedom of contract in the legal systems where the general shape of legal transaction can be deduced from the provisions dedicated to contracts.

It's also true that, as the time passed, the will theory had to face significant restrictions, intended to reconcile autonomy of the individual will with social imperatives[5]. In Germany, in the second half of the 19th century, through the so-called "declaration theory" (Erklärungstheorie) which has developed in contrast to the prevailing doctrine and granted quite independent meaning and the key importance to the declaration. The theory obviously pursued the aim of reliance protection. It did not become the mainstream, but produced the counterbalancing effect[6].

In the situation where, as R. Zimmermann put it, neither of two fundamentally irreconcilable approaches can sensibly be taken to any extreme, without affecting the certainty of law most detrimentally on the one hand, or without leading to harsh and detrimental results, on the other, every developed legal system has to find some balance between the two positions[7].

As a certain compromise, it's become a common ground between many scholars within the continental legal tradition that for a valid contract, or putting it more generally, for a valid legal transaction, it is necessary that the internal will would correspond to the declaration of the latter. The initial Savigny's thesis that the full accordance of will and declaration is their natural relationship (naturgemäßes Verhältniß), without which there remains only "false ghost of the will" (falsche Schein des Willens)[8] faced serious objections and has been modified. The declaration, being seen already not only in a service role, acquired a stronger position and in some cases could be opposed to the internal will. In German legal doctrine this way of thinking found its embodiment in the "validity theory" (Geltungstheorie), according to which, unlike the "will theory", the declaration is not only a proof and a means of disclosure for the separate and independent will. The will is incarnated solely through the declaration and cannot be legally acknowledged otherwise[9].

But even in this form, regard being had to the above transformations, one can hardly deny that the legal doctrine became driven by the idea that the fundamental purpose of contract, as well as any other legal transaction, is to give effect, even though within the certain necessary limits, to the intentions of the parties, to provide them with the instrument to create legally recognized consequences if they so wish.

Within the English-speaking world the classical theory of contract also saw all the effects of a contract as depending entirely on the intention of the parties[10]. As P. Atiyah suggested, today many lawyers would want to qualify it, or modify it in a variety of respects[11]. Thus, in the "common law" legal space the general theory of contract is still the subject of the ongoing discussion, whereby different theories of contract emerge and gain ground. But even here one can distinguish the subjective approach, closely linked to the freedom

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[4] *Larenz K., Wolf M.* Allgemeiner Teil des Bürgerlichen Rechts. 8. Aufl. München: C. H. Beck, 1997. S. 654.

[5] See, e. g.: *Rolland L.* "Qui dit contractuel, dit juste" (Fouillée)... en trois petits bonds, à reculons // McGill L.J. 2006. No. 51. P. 768.

[6] *Coing H.* Europäisches Privatrecht. P. 278.

[7] *Zimmermann R.* The Law of Obligations: Roman Foundations of the Civilian Tradition. Cape Town: Juta & Co, 1990. P. 585.

[8] *von Savigny F. C.* System des heutigen Römischen Rechts. S. 258.

[9] *Larenz K., Wolf M.* Allgemeiner Teil des Bürgerlichen Rechts. S. 479.

[10] *Elegido J. M.* A basic rationale for contract law // Persona y Derecho. 1993. No. 28. P. 31.

[11] *Atiyah P. S.* Essays on Contract. Oxford University Press, 1996. P. 12.

of contract which, in its turn, stems from the principle of individual autonomy: the contract is binding because of the fact that both parties voluntarily agreed.

In civil law countries the analysis of this topic at the moment does not attract much attention. Within "the continental legal space" many scholars traditionally consider the internal will to be the "heart", or rather the "engine" of a contract[12]. Moreover, there exist certain signs capable to reveal the legislator's standpoint and the commitment to the subjective theory, based on the internal will.

Such signs may be enshrined, *inter alia*, in the provisions, pertaining to the invalidity of contracts. In some systems, first of all, in Germany, but also in Russia and some others, which stick to the pandectistic model (Greece, Poland, Lithuania, etc.), these signs may be found on a higher level of abstraction — not in the contract law but among the provisions on the invalidity of legal transactions.

Accordingly, whether the legal order readily accepts vices of will as a ground call into question validity of legal transaction reveals the importance of subjective component. However, there are not really so many reasons for in-depth study of the internal will since it is very hard to be verified. The law normally takes into account only extreme cases where vices of will should be reasonably presumed, e. g. duress and fraud.

But if we admit the importance of the individual internal will, it should be accurately disclosed for the others to produce intended legal effect. This is true both for the unilateral transactions, and for the contracts, where the disclosure of the parties' intentions is effectuated through their consensus. Consequently, any discrepancy between "intended" and "declared" should cast doubt on the validity of a contract. Thus, we come across another type of vices of will.

Towards the persons, making declaration, dogmatically we discern between intentional and unintended discrepancy.

Whereas the latter type, comprising above all, error, traditionally attracts attention of scholars and researchers and it has already given rise to extensive literature, especially in Germany, but also in France, Italy and elsewhere in Europe, the former type (i. e. intentional discrepancy), on which I would suggest focusing in this paper, in a way, remains in the shadows.

Besides, such vices as error, fraud and duress are acknowledged not only in the continental law, as at this point the principle of freedom of contract surprisingly matches the law and economics views. Well-known is the quotation of R. Posner, who noted that "economic analysis, at least, reveals no grounds other than fraud, incapacity and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract"[13].

It may seem rather odd that parties to a contract declare something which they in reality do not wish at all. The situation seems as perplexing as the well-known painting of R. Magritte, when a spectator sees an image of a pipe, but the text under it convinces him or her that it is not a pipe (ceci n'est pas une pipe). This seems unnatural and ambiguous. But even more unnatural such ambiguity is in the legal realm, where, ideally, confidence, transparency and certainty should prevail. However, it's a fact that there exist a good number of reasons sometimes prompting people to do things of that kind. The most typical reasons, unfortunately, are dishonest, or even illegal in their nature: sheltering property from seizure, confiscation or recovering, creating advantages for selected creditors in bankruptcy, changing the regime of joint property, tax evasion, and so on.

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[12] Puisque c'est la volonté de s'engager qui justifie la «force de loi» du contrat pour les parties, c'est elle qui constitue l'élément moteur de la formation du contrat: elle en est alors la condition essentielle (*Bénabent A.* Droit des obligations. 19nd éd. LGDJ, 2021. P. 71).

[13] *Posner R.* Economic Analysis of Law. 2nd ed. Boston, 1977. P. 87.

Russian Civil Code contains rather concise regulations in respect to such kind of contracts. Besides, Russian civil law tackles the problem on more general level — it deals with the legal acts, "legal transactions" on the whole.

The basis for the abovementioned regulation forms the distinction between fictitious transactions and sham transactions. This distinction transpires directly from the provisions of Article 170 of the Russian Civil Code. The mentioned article provides in its first paragraph that fictitious transaction is the one which is effected just for show, for form's sake, without an intention to create either respective legal consequences or any legal consequences whatsoever. Sham transaction as defined in paragraph 2 of the same article, is the one which is effected with a view to conceal (or to screen) another legal transaction[14].

Similar distinction, between fictitious and sham contracts, can be spotted in many other European legal systems, although it may not be drawn in the fully identical manner.

First of all, differences appear from the point of view of terminology, which may seem quite natural, given that we deal with different languages. But even translation of the respective terms into one language will not give the same result. In German Civil Code (§ 117) the word "Scheingeschäft" can be translated as "false deal". Italian Civil Code (Art. 1414), French Civil Code (Art. 1201) employ the term "simulation" ("simulazione"), which in both languages possesses more general meaning, maximally close to, if not completely the same with the English "simulation". The latter English term ("simulation") is also used in DCFR (II. — 9:201: Effect of simulation).

Secondly, there are also certain differences in substance. German "Scheingeschäft" and Italian "simulazione" as such, in essence, correspond to fictitious transactions in terms of the Russian Civil Code. But whereas in Russian law fictitious and sham transactions are treated as two separate categories, in Germany and in Italy sham transactions (sham contracts) are viewed, as a matter of fact, as a subcategory of fictitious ones[15].

Conversely, French Civil Code (Art. 1201), defines "simulation" as the fact that the parties hide their real agreement under the false mask of a different "official" agreement[16]. The simulated (exposed) act is said to be an "ostensible" (disguising) contract. The real (underlying) act is said to be a "counter-letter" intended to secretly deny the ostensible act. Such perception is evidently closer to sham transactions as they are defined in Russian law.

In French doctrine, however, simulation is described as having different forms. Among them first of all is fictitious contract, whereby the mere existence of contract is false[17]. This conclusion can be interpreted as based on the rule "*in maiore minus inest*". So, in France the pattern is reversed: fictitious contracts are seen as a subcategory of sham contracts.

Thirdly, there turn out to be some differences as to the scope of the relevant rules. Thus, in Russian civil law, as it unequivocally ensues from the up-to-date version of Article 170 (paragraph 2) of the Civil Code, the notion of a sham transaction can cover up a transaction of a different nature (e. g. contract of sale disguised as donation), as well as a transaction even though of the same nature, but on different terms and conditions (e. g.

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[14] One should be cautious to pay attention to the choice of the terms. The English translation of the respective legal concepts is not yet established. Hence there exists a certain variety of translations which differ from that, employed in the present paper. Sometimes it is offered to translate even vice versa — the concept defined in the first paragraph of Art. 170 — as sham transactions, in the second — fictitious (see, e. g. English translation of the Russian Civil Code on the WTO web-site (Available at: https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_360.pdf (accessed: 01.04.2023)).

[15] See also *infra*.

[16] Code civil. Art. 1201. — Lorsque les parties ont conclu un contrat apparent qui dissimule un contrat occulte, ce dernier, appelé aussi contre-lettre, produit effet entre les parties. Il n'est pas opposable aux tiers, qui peuvent néanmoins s'en prévaloir.

[17] Les parties «font semblant» de conclure un contrat, mais il est convenu qu'il restera lettre morte (*Bénabent A.* Droit des obligations. P. 261)

indicating a lower price in an exposed contract). At the same time, transactions with "hidden", disguised participants normally are not attributed to the category of sham transactions. Similarly in Germany, the prevailing view has come to distinguish sham transactions and the transactions of nominal participants (Strohmanngeschäfte), when, for example, relatives run business for other, hidden persons[18]. Conversely, in French doctrine one can come across the statements to the effect that simulation may relate not only to the very nature of a contract or to its object, but also to the parties, when, e. g., a person A appears as a party to a contract with B being in reality only a nominee of C[19].

Still, despite any discrepancies, at least on example of the abovementioned legal systems one can observe that in substance, both, fictitious and sham contracts (or, to generalize, legal transactions), are fairly common phenomenon for the continental legal reality.

As long as in these cases we are dealing with the intentional discrepancy between will and declaration, and given the basic premise that any contract presupposes consensus of the parties thereto, no doubt that all the parties to a contract must be fully aware of its false character, in other words, be *ad idem* both in their intentions as well as in their (untrue) declarations.

Consequently, this visible effect of a false contract is always directed outwards, at the third persons, not participating in a contract. The same is true in the case with the unilateral transactions, which require reception (Empfangsbedürftige Rechtsgeschäfte).

This feature is emphasized in the definition enshrined in § 117 of the German Civil Code, where it's stated that a fictitious deal *vis-à-vis* another party is void when it is made upon the consent of the latter. In Russia the similar approach is elaborated in the Supreme Court's case-law[20], even though it does not stem literally from the text of the Civil Code (Art. 170 of the Russian Civil Code)[21].

French Civil Code places the provisions governing simulation within the Chapter 4 pertaining to the effects of a contract, and namely, in its 2nd Section, entitled: "Effects of a contract in respect of the third parties" (Les effets du contrat à l'égard des tiers). This also highlights that, indeed, as a rule, the purpose of such acts is to create a false impression in the eyes of the third parties.

Given the mentioned risk of adverse consequences for the third parties, emphasis should be made on the means capable of providing necessary protection of their respective interests. Most likely, the interests of both third parties and the exchange as a whole will be secured first of all by the elimination of a false appearance of a contract or other legal transaction. Thus, in one of the cases, the commercial court dismissed the claim having noted that the plaintiff's arguments were based on a fictitious transaction that did

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[18] See, e. g.: *Medicus D.* Bürgerliches Recht. 20. neub. Aufl. Köln; Berlin; München: Carl Heymanns Verlag, 2004. S. 81; *Brox H., Walker W.-D.* Allgemeiner Teil des BGB. 31., neu bearb. Aufl. Köln; München: Carl Heymanns Verlag, 2007. S. 207. — In such cases we rather deal with a particular kind of a fiduciary transaction — a person is nominated by another one (the so-called "protector" (Hintermann)) as, e. g., a party to the contract, whereas another party to the contract may not suspect anything about this (and, most often, this is the case).

[19] See, e. g.: *Cabrillac R.* Droit des obligations. 12e éd. Dalloz, 2016. P. 118: "Cette simulation peut porter sur la nature même du contrat [...], sur l'objet du contrat [...], ou sur les parties (exemple: une personne A apparaît comme partie à un contrat avec B alors qu'elle n'est qu'un prête-nom de C)".

[20] At least in respect of sham transactions (Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 23 June 2015 No. 25, p. 87 (abs. 1): "...the intention of only one party to make a sham transaction is insufficient to apply this rule [Art. 170 (2) of the Russian Civil Code]").

[21] In particular, for the purpose of practical application of Art. 170 (2) of the Russian Civil Code, it will not suffice if only one party of a contract has borne in mind different legal effect rather than that, declared. In such cases, rules of sham transactions enter into a conflict with the provisions on error (e. g., as to the nature of legal transaction, see Art. 178 of the Russian Civil Code) and on fraud (see: Art. 179 of the Russian Civil Code), which in both cases provide that the legal transaction is not null and void, but can only be rescinded.

not have a legitimate purpose, whereas the real purpose of the claim has been to legitimate, through the court's judgment, the transfer of a significant amount of money on the eve of the plaintiff's liquidation with a view to distribution of his property[22]. In such cases, the elimination of or ignoring the false transaction's legal consequences is favorable to the third parties

Consequently, as long as the discrepancy between will and declaration (either in fictitious or sham contracts) is apparent, mutual and intentional in regulating the consequences of such contracts, many legal orders employ one and the same basic approach — declare them null and void.

So does the Russian Civil Code (Art. 170 (1), (2)), the German Civil Code (§ 117 (1), (2))[23], the Italian Civil Code (Art. 1414)[24], and some other codifications[25].

The only difference between fictitious and sham contracts is that in the latter case the legal effect between the parties gains the hidden contract which reflects their real intention, provided that it is not unlawful in itself [26]. The French Civil Code, does the same stipulating that in cases where an "ostensible" contract screens a secret agreement ("counter-letter"), the latter (not former) has effect between the parties, nullity of an "ostensible" contract being here clear and self-evident.

So, in all the mentioned examples the basic solution is purely in the spirit of the subjective approach, developed on the basis of the "will theory" — to give effect to the parties' real intention and to disregard their false declaration. It is still use at least in the mentioned legal systems of the continental Europe. The same is also reflected in the scholarly projects, such as DCFR, where "simulation" is treated as a general rule, in line with the "will theory", namely, in stipulating prevalence of the parties' "true" intention[27]:

In regulating the consequences of false contracts for the parties the mentioned nullity raises objections neither dogmatically, nor from the viewpoint of legal certainty and reliance protection. However the possibility of special or exceptional rules and even reverse decisions where the interests of the third persons are at stake, still, cannot be ruled out. Thus, the French Civil Code makes one step further weakening the effect of secret agreement, in particular, it stipulates that the "counter-letter" is not opposable to third parties.

The French Civil Code has been familiar with the non-opposability of the counter-letter long before the recent reforming of the law of obligations of 2016. The relevant provisions have been contained in Art. 1321 of the ancient version[28]. However, interpreting this article *a contrario*, in favor of the third parties, the French jurisprudence came to consider that while the parties could not avail themselves of the "counter-letter" *vis-à-vis* the third

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[22] See, e. g.: "Case-law review on certain issues as to the judicial measures to counter illegal financial transactions" (approved by the Presidium of the Supreme Court of the Russian Federation on 8 July 2020), para. 7.1.

[23] BGB,§ 117 (Scheingeschäft): "(1) Wird eine Willenserklärung, die einem anderen gegenüber abzugeben ist, mit dessen Einverständnis nur zum Schein abgegeben, so ist sie nichtig".

[24] Codice civile, Art. 1414 (Effetti della simulazione tra le parti): "(1) Il contratto simulato non produce effetto tra le parti".

[25] See also, e. g.: the Hungarian Civil Code Section 6:92 (Disguised stipulations, fictitious contracts) (translated into English): "(2) A fictitious contract shall be null and void…"

[26] BGB, § 117 (Scheingeschäft): "(2) Wird durch ein Scheingeschäft ein anderes Rechtsgeschäft verdeckt, so finden die für das verdeckte Rechtsgeschäft geltenden Vorschriften Anwendung".

Codice civile, Art. 1414 (Effetti della simulazione tra le parti): "(2) Se le parti hanno voluto concludere un contratto diverso da quello apparente, ha effetto tra esse il contratto dissimulato, purché ne sussistano i requisiti di sostanza e di forma".

[27] DCFR. II. — 9:201 (Effect of simulation): (1) "When the parties have concluded a contract or an apparent contract and have deliberately done so in such a way that it has an apparent effect different from the effect which the parties intend it to have, the parties' true intention prevails".

[28] Code civil, Art. 1321 anc.: "Les contre-lettres ne peuvent avoir leur effet qu'entre les parties contractantes; elles n'ont point d'effet contre les tiers".

persons, the latter could avail themselves of it *vis-à-vis* the parties if they interested in doing so. After the reforming of 2016 this became a rule secured in Art. 1201. As R. Cabrillac notes, a certain complexity, which still may arise in case of a conflict between different categories of third parties, namely, of those, for whom it might be favorable to refer to an apparent contract and those, who'd prefer to benefit from a secret one, is resolved in the jurisprudence in favor of those who relied on an apparent act[29].

So, the nullity of sham contract under the French Civil Code turns out to be not absolute, but relative. This does not necessarily mean abandoning the subjective approach, but the will theory, as considered in its most rigorous sense, yields here in favor of legal certainty and reliance protection.

The partially similar approach, securing certainty in the exchange, have employed the drafters of DCFR which stipulates that the apparent effect prevails in relation to a person, not being a party to the contract or apparent contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the apparent effect[30].

It is almost impossible overlook in these regulations the influence of the approaches developed by the jurisprudence in response to the extremes of the will theory.

Fictitious and sham contracts and transactions do not exhaustively represent all the possibilities of intentional discrepancy between will and declaration.

At this point German legal system deserves a particular attention. In the absence of the respective provisions in the Civil Code of the Russian Federation, the Russian doctrine practically does not pay attention to such possible vices of will as a "joky" or a facetious declaration (Scherzerklärung) or an internal mental reservation (Geheimer Vorbehalt). In both cases a person expresses what he or she does not really mean and wish, but whereas in the former case it is done in a form that is apparent to everyone (jokes), in the latter case it is done in secret towards the person concerned.

In the standard case, the internal mental reservation does not affect the validity of the declaration[31]. Being one of the proponents of the so-called the "validity theory" (Geltungstheorie) K. Larenz, unsurprisingly, commented on the first part of the relevant paragraph (BGB, § 116) to the effect that it is quite self-evident as soon as no one can, when declaring one thing, refer to the invalidity of this declaration only because he himself, secretly assumed something else[32]. This is the case where a basic understanding of reliance protection comes into play.

The second sentence of § 116 BGB, on the contrary, lifts the reliance protection as it rules that pronounces the declaration null and void if a person in front of which the declaration is to be given, is aware of the reservation. A parallel inevitably arises at this point with the fictitious transactions (whereby all the interested parties are aware of the discrepancy between the internal will and its declaration). From this standpoint nullity of transaction with mental reservation in such cases is in line with the subjective approach[33].

Fully corresponds to this approach also the nullity of facetious declarations, which are defined in § 118 BGB as "made in the expectation that the lack of seriousness will

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[29] *Cabrillac R.* Droit des obligations. P. 118.

[30] DCFR. II. — 9:201 (Effect of simulation): (2).

[31] BGB. § 116 (Geheimer Vorbehalt): "Eine Willenserklärung ist nicht deshalb nichtig, weil sich der Erklärende insgeheim vorbehält, das Erklärte nicht zu wollen. Die Erklärung ist nichtig, wenn sie einem anderen gegenüber abzugeben ist und dieser den Vorbehalt kennt".

[32] *Larenz K., Wolf M.* Allgemeiner Teil des Bürgerlichen Rechts. S. 656.

[33] However, some authors disagree with such decision. In particular, it is criticized by K. Larenz, who considers it unfair. In his opinion, another person deserves protection even if he or she knew about the mental reservation, and since the declaring person sought to deceive, there should be a possibility to catch him at his word (see: Ibid. S. 656).

not be misjudged"[34]. Since the author of a declaration has neither intention to produce declared legal effect, nor any reproachable motive (as he truly thought that his joke was self-evident), the law does not allow to catch him at his word in such cases and thus to make everyone take a joke seriously.

But does not the other party (addressee), who really takes everything on faith, deserve any protection? Jokes and circumstances may differ. The protection depends here on the circumstances, in particular, on knowledge and diligence. But in any event it does not stretch so far as to grant facetious declaration legal effect. However, the author of the declaration can be obliged to compensate the addressee or a third party for damages if they did not know about the joke and could not recognize it (§ 122 (1) BGB). The latter possibility falls away if their ignorance was the result of negligence (§ 122 (2) BGB).

On balance, the autonomy of the individual will proceeding from the recognition of self-determination and self-regulation in the private law, enables everyone to act independently and initiatively. Against this background, and despite the significantly different views of the doctrines as to the basis of legal transaction, and above all, a contract, many legal systems of continental Europe do take a serious account of the individual will and proceed openly or implicitly from the necessity that the internal will should correspond to its external expression. At the same time, within the contract law, in some cases it is being spoken of consensus and its vices. However, if consensus in such cases means nothing more than agreement on the parties' intentions, we are still dealing with the same subjective approach, based to a large extent upon the central idea of the old will theory and its modifications, attaching at least considerable degree of importance to the individual will. In cases of intentional discrepancy between will and declaration such an approach allows at least a consistent explanation of why a contract in such cases should not have a legal effect.

Those legislations that focus on the external element, considering, for example, a contract solely from the point of view of the existence of an external consensus, experience difficulties in regulating situations when such an external consensus turns out to be a screen for completely different goals, really intended by the parties. In particular, the Spanish Civil Code resolves such situations through the prism of the so-called "false causation" (Art. 1276) (*causation*, along with the *consensus* of the parties and a *definite subject*, being among the necessary conditions for the validity of the contract (Art. 1261)).

References

Atiyah, Patrick S. 1996. *Essays on Contract.* Oxford, Clarendon Press.

Bénabent, Alain. 2021. *Droit des obligations*. 19 éd. Paris, LGDJ.

Brox, Hans, Walker, Wolf-Dietrich. 2007. *Allgemeiner Teil des BGB.* 31, neu bearb. Aufl. Köln, München, Carl Heymanns Verlag.

Cabrillac, Rémy. 2016. *Droit des obligations*. 12 éd. Paris, Dalloz.

Coing, Helmut. 1989. *Europäisches Privatrecht*. B. II. München, C. H. Beck.

Elegido, Juan M. 1993. A basic rationale for contract law. *Persona y Derecho* 28: 27–69.

James Gordley. 1993. *The Philosophical Origins of Modern Contract Doctrine*. Clarendon Law Series. Clarendon Press.

Larenz, Karl, Wolf, Manfred. 1997. *Allgemeiner Teil des Bürgerlichen Rechts*. 8 Aufl. München, C. H. Beck.

Medicus, Dieter. 2004. *Bürgerliches Recht*. 20 neub. Aufl. Köln, Berlin, München, Carl Heymanns Verlag.

Posner, Richard A. 1977. *Economic Analysis of Law*. 2nd ed. Little Brown and Company.

[34] BGB. § 118 (Mangel der Ernstlichkeit): "Eine nicht ernstlich gemeinte Willenserklärung, die in der Erwartung abgegeben wird, der Mangel der Ernstlichkeit werde nicht verkannt werden, ist nichtig".

Rolland, Louise. 2006. “Qui dit contractuel, dit juste” (Fouillée)… en trois petits bonds, à reculons. *McGill L. J.* 51: 765–780.
von Savigny, Friedrich C. 1840. *System des heutigen Römischen Rechts*. B. III. Berlin, Veit & Comp.
Zimmermann, Reinhard. 1990. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town, Juta & Co.

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А. Ю. Зезекало

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Статья написана по материалам доклада на научной конференции и является продолжением обсуждения старого вопроса об основании действительности договоров и в целом юридических сделок. Основная задумка состоит в том, чтобы на примере пороков воли, связанных с намеренным несоответствием внутренней воли и ее изъявления, исследовать, какая теоретическая модель или модели применимы сегодня к законодательному регулированию, действующему прежде всего в правовом пространстве континентальной Европы, получить возможность дать ответ на вопрос, действительно ли догмат об автономии воли больше не является здесь основой договорных норм. Краткий сравнительный обзор показывает, что, несмотря на существенно различающиеся взгляды доктрин на основу юридической сделки, и прежде всего договора, многие правовые системы континентальной Европы действительно уделяют значительное внимание субъективной, внутренней стороне сделки и прямо или косвенно исходят из необходимости того, чтобы внутренняя воля соответствовала своему внешнему выражению. В то же время в договорном праве в ряде случаев говорится о консенсусе и его пороках. Если же, однако, под консенсусом в таких случаях понимать не что иное, как согласие относительно намерений сторон, то мы по-прежнему имеем дело с тем же субъективным подходом, в значительной степени основанным на центральной идее старой теории воли и ее модификациях, придающих значительную степень важности индивидуальной воле.

Ключевые слова: договоры, сделки, мнимые сделки, притворные сделки, волеизъявления, пороки воли.

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Зезекало Александр Юрьевич — канд. юрид. наук, доц., Санкт-Петербургский государственный университет, Российская Федерация, 199034, Санкт-Петербург, Университетская наб., 7–9; a857400@mail.ru