

## Acknowledgement of the Existence of Debt in the Light of Doctrine and Judicial Practice

*Acknowledgement of debt is one of the major law-of-obligations relationship. Correct regulation of this relationship greatly depends on the form of manifestation of this relationship, its content, legal good faith, etc. The paper investigates the legal nature of the acknowledgement of debt, offers the general overview of key aspects like the concept of acknowledgement of the existence of debt, its content and form of expression, also delimitation from and links with other legal institutions, what is of major theoretical and practical importance.*

**Key words:** *acknowledgement of the existence of debt, abstract contract, causal acknowledgement, novation, other performance, other obligation.*

### 1. Introduction

Legal viability of an obligation is conditioned by its form and content, which meets the requirement of imperative and discretionary rules. Fulfilment of this very type of obligation in practice is simplified. However, owing to subjective and objective circumstances the quality of fulfilment of an obligation often becomes grounds of a dispute. The situation is even more complicated when the content, type, form, etc. of an obligation is obscure.

The well-elaborate and explicitly clear is the content of legal rules, less problems arise in the course of fulfilment of different obligations. In this light, worth mentioning is the law-of-obligation relationship arising as a result of acknowledgement of debt and the procedure of its regulation, where the compulsion under morals and law and its regulation are equally combined.

Somewhat specific is the case when a claim for fulfilment an obligation is aged, when a debtor does not deny the existence of the obligation, but refuses its fulfilment. From practical point of view, legal analysis of such cases is very difficult as it becomes difficult to determine, whether or not this is the acknowledgement of debt, does the flow of the period of limitation start, is this the claim of the creditor, whose claim was already expired, etc.

Analysis of judicial practice evidences that these issues often prove to be painful and become the subject matter of disputes.

There are cases in judicial practice, when mutually contradictory assessments are made and it becomes unclear whether the acknowledgement of the existence of debt is a unilateral transaction or a

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\* Doctor of Law, Professor at Tbilisi Humanitarian Teaching University, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law, University of Georgia and Guram Tavartkiladze Teaching University.

unilateral contract. However it should be established on a case-by-case basis what we are dealing with: acknowledgement of the existence of debt as a unilateral declaration of intent, which is of full force and effect and may have consequence or the acknowledgement of the existence of debt as a unilateral contract.

Based on the foregoing it becomes necessary to evaluate a specific case on the basis of both correct interpretation of legislative rules and deep analysis of judicial practice. The comparative legal analysis of the acknowledgement of the existence of debt and other legal institutions is also necessary, what will also promote accurate regulation of litigations and protection of the interests of the parties.

Hence the issues discussed in this paper are topical both from theoretical and practical points of view. Correct regulation of law-of-obligations relationship, that originated on the basis of acknowledgement of the existence of debt, guarantees the protection of interests of not only the person, for whose benefit the debt was acknowledged, but also of the person, who acknowledges the existence of debt.

Worth mentioning is the problem, that the person for whose benefit the debt was acknowledged may or may not accept the intent of the person, who acknowledges the existence of debt. Such freedom of declaration of intent should not become grounds for voidance of the acknowledgement of the existence of will. Hence, the freedom of declaration of intent of one person should not restrict the declaration of intent of the other person without any legal grounds. This means, that the person, who acknowledged the existence of debt, should be given the legal opportunity to attain consequences.

## **2. Acknowledgement of the Existence of Debt (General Characteristics)**

Every obligation and its fulfilment has its basis. This basis can be either contractual or statutory. Its fulfilment is the result of an act, actually performed by a citizen, which can be manifested either in an act or omission, what should be accompanied by the principle of good faith of fulfilment.

In practice dominating are the obligations that originate on a contractual bases. These obligations can be of different type.

Conclusion of a contract constitutes a free declaration of intent. "Freedom of contracting means that nobody is obliged to enter into a contract."<sup>1</sup> Hence, a contract is not concluded and the content thereof is not determined under compulsion. "The content is limited to the union of rights and obligations,"<sup>2</sup> and a contract is performed through legal compulsion. "Compulsion, which can be embodied in the essence of an obligation does not explicitly constitute a compulsion of some specific type (ethical, legal or other), it is a set of compulsions that form an obligation."<sup>3</sup>

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<sup>1</sup> Zoidze B., Reception of the EU Private Law in Georgia, Tbilisi, 2005, 270 (in Georgian).

<sup>2</sup> Zoidze B., An Attempt to Understand Practical Existence of Law Mainly in the Context of Human Rights, Tbilisi, 2013, 95 (in Georgian).

<sup>3</sup> Ibid.

The principle of freedom to contract and determine its content also applies to the conclusion of a contract on the acknowledgement of the existence of debt. This contract is a special case, having certain specific features. It is necessary to delimit between the acknowledgement of debt and a contract on the acknowledgement of the existence of debt.

We deal with the acknowledgement of the existence of debt when the fact of existence of an obligation is evidenced by an act performed by a person (drawn up document, or oral explanations), which obligation was not fulfilled by the person concerned in due time and the obligation is no more subject to fulfilment owing to period of limitation. If the person agrees to fulfil this obligation through declaration of his/her intent at his/her own free will in accordance with prescribed form, this will be the acknowledgement of debt, what may be followed by respective consequences, specifically: the right to claim and starting of the flow of the period limitation anew.

A debt should be acknowledged not during the flow of the period of limitation, but rather after the lapse thereof.

The situation, when debtor confirms the existence of an obligation but denies its fulfilment owing to the expiry of the period of limitation, is not the case of debt acknowledgement. This situation is also dealt with by judicial practice of the Supreme Court of Georgia, specifically "Amongst documents requested from "ZRCP" LLC on the basis of applicants' solicitation there is a table specifying the amount of wages, not received only by the applicants. The Chamber considered that the company recorded the claim, what in itself, does not mean the acknowledgement of the obligation to pay. The essence of the period of limitation is that the debtor does not deny the existence of the obligation, but rather confirms it, but denies its fulfilment due to the lapse of the period."<sup>4</sup>

Hence, the confirmation of the obligation by the debtor should be followed by the declaration of intent on the part of the debtor regarding its fulfilment. Otherwise it will not be the acknowledgement of the existence of debt. Respectively the periods of limitations will not matter and the imperative nature of protection of right during the period of limitation will become meaningless, what is of major importance under the Civil Code of Georgia.

Acknowledgement of plaintiff's claim by the defendant during judicial proceedings and the declaration, that he supports the existence of obligation, does not constitute the acknowledgement of the existence of debt. Hence, the consent to fulfil an obligation declared by person on the basis of a claim does not mean the acknowledgement of the existence of debt envisaged by Article 341. This is the declaration of intent within the framework of existing contract and its fulfilment, what may be related to the procedure of fulfilment of the obligation, prescribed by the contract and amendments thereof, in which case the debtor does not deny the fulfilment of the existing obligation. In this respect, in my opinion, some incorrect assessments have been made in judicial practice. In this context worth mentioning the are the opinions of Cassation Court regarding the decisions of the Appeals Court, specifically: "The receipt, drawn up by the parties cannot be regarded as an agreement on acknowle-

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<sup>4</sup> Ruling on the Acknowledgement of Debt, №AS-392-371-2013, November 8, 2013, Tbilisi, Collection of Court Decisions, №10, 2014, 24 (in Georgian).

dgement of the existence of debt prescribed by Article 341 of the Civil Code, as, according to the explanations of the parties, and also by the testimonies of witnesses, present upon drawing up the receipt, it is established for fair that the receipt determined the scope of the obligation originating from law-of-obligations relationships and subject to future fulfilment."<sup>5</sup>

There are cases, when a person acknowledges the existence of debt and tries to conceal some other, more complex obligation or the other obligation and avoid its fulfilment. In my opinion this is not the acknowledgement of debt under Article 341. For example, a person acknowledges the existence of debt through fulfilment and thus tries to avoid liability before law enforcement authorities. The acknowledgement of the existence of debt is allowed in private law relationships as well, when public interests are not violated. However, when a debt is acknowledged through mutual agreement of private persons, the settlement within the framework of mutual responsibilities, i.e. compensation of damages, the deal maintains its legal force, but the liability before the law enforcement authorities cannot be excluded on the basis of settlement. Also, the acknowledgement of debt may aim at misleading a third person (e.g. a victim) and avoidance of full liability in this way. For example: a person is well aware of the gravity of his guilt and fully declined his liability to the victim through acknowledgement of immediate fulfilment. In this case the principle of good faith fulfilment of obligation is violated, when the result may be become subject to voidance.

Acknowledgement of the existence of debt, according to initial grounds of its origin, may be either contractual or statutory.

The following cases can be regarded as the acknowledgement of contractual obligations:

a) A contractual (causal) obligation, which was not fulfilled within prescribed terms and conditions and it is impossible to satisfy the claim of the creditor for its fulfilment owing to the expiry of the period of limitation. The acknowledgement of such debt constitutes grounds for the origin of a new, independent claim.

b) Acknowledgement of contractual law-of-obligations relationship is also the case, when obligation might have initially originated on the basis of an oral arrangement and the person failed to prove the negotiation thereof due to the absence of evidences. Respectively, the debtor failed to perform it within prescribed timelines, however the latter personally admitted the existence thereof, etc.

The cases of acknowledgement of the obligations, that originated on the basis of statutory grounds are as follows:

a) A person acknowledges the inflicting of damage upon some person and the existence of debt, that originated on the basis of foregoing. This may be related to cases, when a person is not aware of the fact of inflicting damage upon his proprietary or non-proprietary interest or the identity of the inflictor of damage, i.e. when he is not aware who inflicted damage upon him. In this case the person who inflicted damage, himself acknowledges the fact of inflicting damage and the existence of debt.

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<sup>5</sup> Decision of the Supreme Court of Georgia №AS-839-890-2011, November 8, 2011, Acknowledgement of the Existence of Debt, 2012 Collection №2 (in Georgian).

b) When a statutory debt is not satisfied due to the lapse of the period of limitation. For example: due to the lapse of the period of limitation a heir is not able to receive due share from the estate, which is already distributed between the other heirs. However, the heirs may assign due share to such heir on the basis of acknowledgement, which share he/she would have legally received had he/she not missed the period of claiming the estate.

Hence, as already mentioned, the acknowledgement of the existence of debt is the grounds for origin of a new, independent claim. The claim is related to fulfilment of initial (statutory, contractual) obligation. When the obligation ceases to exist owing to the period of limitation or some other reason and the claim of the creditor is no more subject to fulfilment, it is impossible to apply the aggregate of compulsions. This is the case of ethical compulsion, which is based on the freedom of declaration of intent, when the motivation thereof does not matter.

### **3. Acknowledgement of Debt as a Unilateral Transaction**

Acknowledgement of the existence of debt is a unilateral transaction, when a person acknowledges the existence of obligation during the certain period.

Execution of a contract on acknowledgement of the existence of debt does not the obligation of the person, for whose benefit the debt was acknowledged. The latter is entitled to deny the acceptance of what was acknowledged. However, this does not always mean the voidance of the intent declared with regard to acknowledgement of the existence of debt.

Declaration of intent by a person regarding the acknowledgement of debt may be invalid in the light of general rules. For example: forced nature of declaration of intent regarding acknowledgement, or if the declaration of intent concerns the law-of-obligations relationship, the initial grounds of origin of which was found invalid, or acknowledgement was done without observance of form, etc.

In my opinion, acknowledgement of the existence of debt cannot be explicitly accepted as a unilateral contract.

Acknowledgement of debt by a person can also be regarded as a unilateral transaction, which may be followed by a legal consequence. For example in February 2016, "A" credited 3000 GEL to bank account, which money he borrowed from "B" and was to repay in January, 2012. The claim of "B" is no more enforceable with regard to "A" owing to the period of limitation. Based on the foregoing, crediting of the amount to bank account means the acknowledgement of debt.

We witness the acknowledgement of debt through fulfilment when a person makes fulfilment at notary's office (through deposition).

Hence, acknowledgement of debt through fulfilment (crediting of amount to bank account, deposition, etc.), as a unilateral declaration of intent, is valid until the opposite is proved with due justification. For example: this can be done when it is established that the obligation, which was acknowledged, has never existed at all.

In my opinion a notice on acknowledgement of debt, sent by one person and received by the other party, is valid. On the basis of the foregoing one party (the one, who acknowledged the obligation) undertakes its fulfilment, whilst the other party (for whose benefit the acknowledgement was done) acquires the right to claim.

Based on the foregoing I believe, that unilaterally declared intent regarding the acknowledgement of debt in accordance with the established form, is of that category of transactions, "which, although, become legally valid as a result of declaration of intent by only one person, still give proprietary or other preference to third persons."<sup>6</sup>

For example: "A" sent a written notice to "B", that he is ready to return 1000 GEL to him, which amount he was to return on the basis of a loan agreement 5 years ago, but has not returned. This notice constitutes the acknowledgement of debt on the part of "A". From the date of receipt of such notice "B" acquired the right to claim and the flow of the period of limitation started anew for the latter. Hence, the intent to acknowledge debt, declared in this manner is valid as the other party acquires the right to claim on the basis of the foregoing.

Based on the foregoing, the definition stemming from judicial practice, that "Acknowledgement of the existence of debt is a unilateral and abstract contract, one party to which independently undertakes the fulfilment of certain actions for the benefit of the other party and thus, *the declaration of intent of one person is quite sufficient*" - is absolutely unacceptable. The abstract nature of the acknowledgement can be accepted, however the declaration of intent of only one person is not sufficient for a unilateral contract.

According to definition, given in the Doctrine, "In civil law transactions, for the validity of which the declaration of intent by one person is sufficient, are called unilateral transactions, because the origin, amendment or termination of legal relationships in the case of such transactions *depend on the intent of a single person.*"<sup>7</sup>

Acknowledgement of the existence of debt according to relevant form is a free declaration of intent by a person, which becomes independent and the basis of which a person agrees to make fulfilment for the benefit of another person. At the same time, the fulfilment concerns the obligation which was not performed in due course.

Hence, when a person acknowledges in accordance with the established form, that the obligation existed and, at the same time, agrees to fulfil this obligation, this will be unilateral declaration of intent, which equips the other person with the right to claim fulfilment from the person, who acknowledged debt. The flow of the period of limitation starts from the moment of acknowledgement of debt.

Private law relationship is regulated on the basis of imperative and discretionary rules, which establish harmonious relationship between the parties, meaning that the interests of all the parties of the relationship are equally protected. A right cannot be restricted by an obligation. Hence, a person, for

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<sup>6</sup> Chanturia L., General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 2011, 298 (in Georgian).

<sup>7</sup> Chanturia L., Introduction into General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 1997, 315 (in Georgian).

whose benefit the debt was acknowledged, is entitled to accept or not to accept the consequence of acknowledgement. Insofar as the acknowledgement of the existence of debt and its motivation do not matter, it also does not matter from the legal point of view, why person, for whose benefit the debt was acknowledged, may deny the acceptance of the fulfilment. However the intent declared by the person regarding acknowledgement will be valid.

#### **4. Acknowledgement of Debt as a Unilateral Contract**

Declaration of intent by a person regarding the acknowledgement of the existence of debt and its fulfilment becomes a unilateral contract only when, on the basis of acceptance of declared will, the person, for whose benefit the debt was acknowledged, agrees to enter into contract on the acknowledgement of will, i.e. the acknowledgement is followed by an agreement, that is, the parties agree on the procedure and terms and conditions (time, place, etc.) of fulfilment. Respectively, the flow of the period of limitation starts anew.

However, the latter may refuse the execution of contract, or acceptance of already performed obligation, what, in its turn, will also be a unilateral transaction. To a certain extent the foregoing acquires the signs of pardoning. If this is unacceptable for the debtor, who acknowledged the existence of debt, and declared his intent to fulfil it, he is also entitled to deny what he takes as pardoning and fulfil it according to general rules, regulating the termination of obligation. Hence, the validity of the acknowledgement of the existence of debt by a person should not always depend on acceptance or non-acceptance thereof by the other party.

Based on the foregoing it can be said, that intent declared about the acknowledgement of the existence of debt, which should reach the persons, for whose benefit the debt was acknowledged, has certain features of an offer, that is, the latter may accept this proposal or not. However, the difference is that, that in the case of negative acceptance, or when the offer is not accepted, no contract will be executed and the offer will have no consequences. As regards the acknowledgement of the existence of debt, the person, for whose benefit the debt was acknowledged, refuses the consequences of fulfilment, the consequence may still occur through the fulfilment of acknowledgement, that is, an obligation may either be fulfilled or terminated on the basis of unilaterally declared intent, for example: through a document, drafted under the participation of a notary. Furthermore, the same document, which declared the intent of the person regarding the acknowledgement of debt, entitles the person (for whose benefit the debt was acknowledged) to claim fulfilment, until the claim expires.

Hence the debt may be acknowledged through mutual agreement of the parties, i.e. when the intent declared by person reaches the addressee and the latter accepts it. This acknowledgement may concern the confirmation and fulfilment of the law-of-obligations relationship, which is not subject to fulfilment any more due to the period of limitation or for some other reason, or the creditor may even be unaware of the claim. In this case we deal with a unilateral contract, which should fully meet the content-related requirements (quality, scope, time, timelines, etc. of fulfilment), about what the parties will agree. In this

respect, worth mentioning are the assessments of judicial practice of the Supreme Court of Georgia: "Insofar as the contract of acknowledgement of debt is an independent transaction, it should meet the terms and conditions, set for the validity of a transaction, as prescribed by statutory requirements. What is more, required is the agreement of the parties on essential terms of the contract. In this respect quite reasonable is the reference of the cassator to Article 327 of the Civil Code, under Parts 1 and 2 of which Article a contract is regarded concluded, if the parties agreed upon essential terms thereof in accordance with the form, prescribed to this end. Essential are those terms of the contract, with regard to which an agreement should be reached on request of one of the parties, or which are regarded as such by law. According to this opinion of the Chamber, the terms, like agreement of the parties on the subject matter of the contract, determination of basic rights and obligations, price, fulfilment timelines, etc., should be regarded essential. Hence, not every document, where the existence of debt is recorded, can be regarded as a contract on acknowledgement of the existence of debt, unless it is established that the parties have agreed upon essential terms of the contract."<sup>8</sup>

Hence the opinion, declared both in the doctrine and judicial practice, that a contract on acknowledgement of the existence of debt should include the agreement on all the essential terms,<sup>9</sup> is explicitly acceptable. However, the content should derive from the terms and conditions of the obligation, that existed (or exists) between the parties, but was not performed owing to the period of limitation or other grounds. In my opinion, the changes in the content of the contract on the acknowledgement of the existence of debt should not result in material difference from the content of the initial obligation, except for the case when it comes to other fulfilment, which guarantees the fulfilment of the outstanding obligation. Otherwise this will not be a contract on the acknowledgement of the existence of debt, but rather the other obligation.

As regards the recognition of debt, which originated on statutory basis (for example, compensation of damages), the parties thereof enjoy more freedom with the determination of the content of such contract.

## 5. The Form of Acknowledgement of the Existence of Debt

The law should be expressed in some way for us to acknowledge its existence and its impact upon us.<sup>10</sup> Legitimacy of the agreement reached by the parties depends on the form of its expression. It is common ground, that form is established through the agreement of the parties, on the basis of free choice, or is imperatively provided by law. Part 1 of Article 341 of the Civil Code directly states, that "For the validity of a contract, by virtue of which the existence of law-of-obligations relations will be acknowledged (acknowledgement of the existence of debt), its written acknowledgement is mandatory.

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<sup>8</sup> Ruling № AS-1485-1401-2012, Supreme Court Decisions, Collection of 2013, №12, Tbilisi, November 11, 2013, 9 (in Georgian).

<sup>9</sup> *Tsertsvadze L.*, Specific Grounds for Origin of an Obligation - Contract Law (Group of Authors), *Jugheli G. (ed.)*, Meridiani Publishing House, Tbilisi, 2014, 201 (in Georgian).

<sup>10</sup> *Zoidze B.*, An Attempt to Understand Practical Existence of Law Mainly in the Context of Human Rights, Essays, Tbilisi University Publication, Tbilisi, 2013, 51 (in Georgian).

If some other form is prescribed for the origin of law-of-obligations relations, the existence of which was acknowledged, acknowledgement also requires the same form." This part of the rule refers to written form of a transaction in its narrow meaning, meaning that the existence of debt should be acknowledged in writing, however it is not specified whether this should be a simple or complex written form. The foregoing should be decided on a case-by-case basis, i.e. important is the form of origin of law-of-obligations relations, which is being acknowledged.

Hence, a contract on the acknowledgement of the existence of debt should be executed in writing between the parties, otherwise it will not be legally valid. Written form serves the purposes of legal security and protects the interests of the parties. Owing to written agreement of the parties the essential terms, that parties agree upon in the course of execution of the contract on the acknowledgement of the existence of debt, are beyond doubt.

Worth mentioning is Part 2 of the above provision, according to which: "If the existence of debt is recognised on the basis of payment, or through settlement, observance of form is not necessary."

The study of judicial practice demonstrates and of no less importance is the written form, when the existence of debt is acknowledged on the basis of payment, when the indication of the purpose and grounds of payment is mandatory. In this case it does not matter whether the payment is made in cash or through money transfer. Mandatory nature of observance of form is particularly important in the case of payment in cash, when the parties are less protected without a written form. In this case the purpose, payment thresholds, exchange rate, type and scope of the acknowledged obligation are specified, as well as changed circumstances, etc. Hence, the parties distribute risks and determined contract terms by a contractual agreement or without it.<sup>11</sup>

As regard settlement, it is the manifestation of a compromise between the parties. when both parties make concessions to each other. A settlement agreement can be executed only between disputing subjects of material law (between a claimant, defendant and a third person, having an independent claim with regard to the subject of the dispute). A settlement agreement is approved by court, meaning that it verifies the validity of the terms and conditions of the contract, whether or not they contradict the law or rules of ethics, whether or not they violate the statutory rights of third persons.<sup>12</sup>

A settlement with regard to disputes, arising between private persons out of law-of-obligations relationships, can be reached either judicially or under the participation of a notary. In both cases the outcome of settlement is recorded in writing, specifically in a court decision, or a notarized act on settlement.<sup>13</sup> Insofar as the stipulation of Part 2 of Article 241 is not general, it can be presumed, that

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<sup>11</sup> Chitashvili N., Impact of Changed Circumstances on the Fulfilment of Obligation and Potential Secondary Claims of the Parties (Comparative Analysis), Bona Causa Publishing House, Tbilisi, 2015, 256-257 (in Georgian).

<sup>12</sup> Kurdadze Sh., Trial of Civil Cases at First Instance Courts, Meridiani Publishing House, Tbilisi, 2005, 124 (in Georgian).

<sup>13</sup> The Law of Georgia on Notary, December 4, 2009 № 2283-IIS, Art. 38<sup>1</sup> and Order of the Minister of Justice of Georgia №71 On Approval of the Guidelines Regarding Procedure of Performance of Notary Actions, March 31, 2010, Tbilisi.

parties may settle about the acknowledgement of the existence of debt without a court or notary. In this case, observance of written form is mandatory in my opinion.

Based on the foregoing, the necessity of observance of written form will be acceptable, when the existence of debt is recognised on the basis of payment or settlement.

## **6. Delimitation Between the Acknowledgement of the Existence of Abstract Debt and Causal Debt**

Acknowledgement of abstract debt is an independent promise of the debtor to the creditor.<sup>14</sup> Acknowledgement serves the fulfilment of the obligation, which is not subject to fulfilment due to some reason.

Causal debt is acknowledged within the framework of its fulfilment, when the parties agree upon changing or adding some term, which serves the purposes of fulfilment of the obligation. Acknowledgement of causal debt may fully, or at least, to some extent ensure the prevention of a dispute or disagreement and the latter may be finally settled.<sup>15</sup> Based on the foregoing there are several modes of acknowledgement of causal debt: firstly, when a party confirms or specifies some term upon fulfilment of obligation and this may concern the quality of fulfilment, amount of money, place of fulfilment, etc. On the other hand, acknowledgement may serve the prevention of complications, what may be associated with the fulfilment of obligation. This is the case of other performance, when the parties agree only with regard to fulfilment of obligation, in order to attain the termination of obligation.<sup>16</sup> In the case concerned the debtor offers some other performance to creditor. i.e. even before the fulfilment of obligations it is possible for the parties to determine, that the debtor is entitled to make some other performance instead of fulfilment of assumed obligation. In this case the debtor is granted with the right to substitute the performance.<sup>17</sup> For example: according to contract, the company, producing soft drinks, is to supply 1000 bottles of the lemonade "Mziuri" to the restaurant. The company offered the restaurant the same amount of lemonade "Gvirila" because he failed to manufacture the aforementioned soft drink and the restaurant accepted the offer. This will be the other performance within the framework of the existing obligation, that is, the acknowledgement of causal and not abstract debt.

Agreement of the parties about other obligations also constitutes the acknowledgement causal debt, which, in its turn differs from other performance. For example: a borrower is not in the position to perform the obligation under the loan agreement and repay 1000 GEL to the lender. The parties agreed that the borrower with instead conduct refurbishment works in lender's apartment. The other performance (novation) originates on the basis of this agreement, which does not entail the termination

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<sup>14</sup> *Kropholler J.*, German Civil Code, Educational Comments, 13<sup>th</sup> rev.ed., Translated by: *T.Darjania, Z. Chechelashvili*, Tbilisi, 2014, 580 (in Georgian).

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

<sup>16</sup> *Chanturia L.*, Comments on Article 428 of the Civil Code of Georgia, Commentary on the Civil Code of Georgia, III Book, Samartali Publishing House, Tbilisi, 2001, 518 (in Georgian).

<sup>17</sup> *Kropholler J.*, German Civil Code, Educational Comments, 13<sup>th</sup> rev. ed., Translated by: *T.Darjania, Z. Chechelashvili*, Tbilisi, 2014, 264 (in Georgian).

of initial obligation unlike the other performance. According to the foregoing, if the new obligation is not performed, the creditor is entitled to claim the fulfilment of initial obligation.

It should be said, that one of essential differences of acknowledgement of abstract debt is the option, enjoyed by the debtor upon acknowledgement of debt, who is entitled to have his declaration of intent on the acknowledgement of the existence of debt and in general, about its fulfilment, recorded in writing (e.g. with a notary) irrespective of the consent of the creditor. From this very moment the flow of the period of limitation will start with regard to exercise of the right to claim by proper creditor. In the case of acknowledgement of causal debt the respective consequences occur only under the consent of the creditor, through other performance and novation.

Hence in the case of acknowledgement of causal debt it should be established whether we are dealing with the fulfilment of existing obligation, the other performance or other obligation. Respectively, it should be determined, whether what is the main goal of acknowledgement of debt: fulfilment of the existing obligation or origin of an independent one, that is - fulfilment of defaulted obligation within established timelines and under established terms and conditions.

Acknowledgement of causal debt and its consequences may be found void if it turns out that the existing law-of-obligations relationship, the fulfilment of which it served, is void.

Acknowledgement of debt also differs from a promise. Promise and obligation to fulfil it is an ordinary contractual obligation, which is subject to mandatory fulfilment. Failure to fulfil a promise results in the liability of the debtor (promissor) in accordance with the requirements of both general and special rules. For example: promise to donate, promise to give loan, etc.

## **7. Acknowledgement of Debt as Grounds for Unjust Enrichment**

Fulfilment through acknowledgement of existence of abstract debt may become grounds for unjust enrichment. This is the case when a person wrongfully presumed that he was liable to make fulfilment and acknowledges this according to relevant form (in writing, through fulfilment, e.g. through transfer of money, etc.) This means that the debt was acknowledged groundlessly. The foregoing is directly linked with Article 986 of the Civil Code of Georgia, under which Article, a person, who pays off the debts of the other person by mistake, is entitled to claim the compensation of his expenses from that person.

In the case concerned the existence of debt was acknowledged through fulfilment, however, later its groundlessness was established. Although the obligation to compensate damages really existed, obliged was not the person, who did the compensation. As a result of such fulfilment the assets of the other person were saved, respectively, the latter should return the fulfilment.

Fulfilment through acknowledgement, which has no legal grounds, will be returned under the provisions on unjust enrichment.

As regards the acknowledgement of causal debt, it may also become grounds for unjust enrichment, The foregoing will be the case when the law-of-obligations relationship, on the basis of which the acknowledgement was made, turns out to be void. Hence, the return of fulfilment made through void acknowledgement of debt will be claimed from fake creditor on the basis of unjust enrichment.

Prescription period provides for different consequences for a creditor and a debtor. "Lapse of prescription period of a claim does not mean the termination thereof. The claim still exists and the debtor is still able to fulfil this obligation on a voluntary basis. But the creditor loses opportunity to demand forced fulfilment of this claim from the debtor."<sup>18</sup> This means that after the lapse of the period of limitation the creditor loses "opportunity to claim forced fulfilment through court or other authority, but not the right to apply to the court or other authority."<sup>19</sup>

Hence, a debtor is not restricted and can acknowledge the existence of debt irrespective of its age. If the debt was acknowledged through fulfilment, this will become grounds for termination of the obligation, while acknowledgement in any other manner - grounds for termination of the flow of the period of limitation (Article 137, Civil Code of Georgia). Such acknowledgement is the guarantee for future fulfilment of the obligation. Respectively, the flow of the period of limitation starts anew as a result of acknowledgement of debt.

Furthermore, the debtor is entitled to acknowledge the debt after the lapse of the period of limitation, amongst them, through fulfilment; however, as per Article 144 of the Civil Code of Georgia, "If the obligor has performed the obligation after the lapse of the period of limitation, then he has no right to revoke the fulfilment, even if at the time of fulfilment he did not know that the period of limitation was expired."

Fulfilment through acknowledgement may be disputed in some cases and become subject to revocation on the basis of the provisions on unjust enrichment.

It is possible to claim back whatever was performed through acknowledgement, if it was possible to offset this fulfilment.

The foregoing is regulated by Article 443 of the Civil Code of Georgia, under which Article the lapse of the period of limitation does not exclude the setoff of the obligation if the period of limitation had not elapsed when its offset was still possible. I.e. fulfilment made by one of the parties through acknowledgement can be claimed back on the basis of requirements of Articles 443 and 976 of the Civil Code of Georgia.

Hence, if in the case of a bilateral obligation any of the parties performs his obligation through acknowledgement, but he would not have made this fulfilment had he known that it was possible to perform obligation through a setoff, he should have the right to claim back whatever was performed and this claim should be satisfied on the basis of unjust enrichment.

Although a person performs an obligation through acknowledgement at his own free will, it wrongfully thinks that the obligation is not performed. Hence when the other party also defaults with his obligation, fulfilment made for him through acknowledgement of debt should be considered as unjust enrichment and the latter should be charged with the return of the performed to the performer.<sup>20</sup>

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<sup>18</sup> Chanturia L., General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 2011, 122 (in Georgian).

<sup>19</sup> Akhvlediani Z., Commentary on the Civil Code of Georgia, I Book, Article 128, Samartali Publishing House, Tbilisi, 1999, 317 (in Georgian).

<sup>20</sup> For details, see Chitoshvili T., Content and Types of Obligations, Stemming from Law-of-Obligations Relationship, Unjust Enrichment, Bona Causa Publishing House, Tbilisi, 2015, 98-107 (in Georgian).

## 8. Conclusion

Acknowledgement of the existence of debt, as abstract debt, is an important law-of-obligations relationship, which should equally protect the rights and obligations of the parties, meaning that the other party should not be entitled to reject the intent declared by first party with no reason. In the case of rejection, person, who acknowledged the existence of debt, should be able to freely enforce his intent. The intent, legally declared by the other person, should not be rejected at the expense of restriction of the freedom of the latter and breach of rights.

The intent about the existence of debt, unilaterally declared in full compliance with form, is not always regarded void and it causes relevant legal consequences. In most cases the acknowledgement of debt is a unilateral contract, which is a special case of origin of an obligation. Fulfilment of this contract and the consequences thereof are regulated on the basis of both general and special rules.

It is the case of acknowledgement of debt, when the grounds for satisfaction of creditor's claim have seized to exist and acknowledgement is still done.

Acknowledgement of some change in the course of fulfilment of basic obligation is causal and is different from the acknowledgement of debt, envisaged by Article 241 of the Civil Code of Georgia.

Of major practical importance is the acknowledgement of existence of debt, what may become grounds for unjust enrichment. Respectively, the regulation of its consequences on the basis of general and special norms is of paramount importance.

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