Expulsion of a Shareholder from a Limited Liability Company on Substantial Grounds

Irakli Burduli
Natia Chitashvili

Faculty of Law,
Ivane Javakhishvili Tbilisi State University
Chavchavadze Ave. 3,
Tbilisi 0179, Georgia
Email: irakli.burduli@tsu.ge
Email: natia.chitashvili@tsu.ge

Abstract: The present article is devoted to the research on the admissibility of expulsion of a partner from a limited liability company (LLC) based on the ground that is not envisaged in the charter, and on respective dogmatic normative grounds in Georgian law. The importance of research in legal studies and judge-made law¹ is revealed in the fact that the situation in which the action of a partner is directed against the interests of the company and becomes an obstacle for the achievement of a common goal, and it becomes impossible to retain the partner remains outside of Georgian normative reality. The aim of the research requires an analysis of German law, assimilated in the context of the Georgian solution, as well as the description of civil legal grounds for exclusion and prerequisites for admissibility, a study of the legal nature of the society and dogmatic support to the application of the civil law regime for the termination of long-term contractual relations. The suggested Georgian solution in this matter shares the spirit of German law policy; however, it is outstanding in its individuality.

Keywords: *charter, expulsion of partner, partner acting in bad faith, substantial basis for expulsion, termination of long-term legal relations, the aim of company*

¹ The institute of expulsion of a partner from the company in German and American law was developed in the depth of judge-made law, see Scogin, 1993, p. 4.

1. Introduction and posing a question

In modern corporate law², the question of expulsion of a shareholder (partner) from the company is currently topical. In corporate practices, there are frequent occasions when the partners' personal relations in the company aggravate to the degree that the enterprise can practically no longer function, as the major body establishing the policy—through the general meeting—is “paralyzed” and cannot execute the function of the internal organizational will-formation. In similar cases, the legal resolution of the issue may affect the company's economic life—in the case of inability to proceed activity either the liquidation³ of the enterprise takes place and it is erased from the public registry, or the company removes the “stubborn” partner and continues to exist. The major legal form of corporate economy in Georgia is Ltd.⁴, and there are various reasons for this (Burduli *et al.*, 2019, pp. 6–10). In the existence of disputes, the judicial practice prefers to focus on Ltd. This article discusses the forced loss of membership status in an Ltd.

Georgian corporate law recognizes two major grounds for the expulsion of a partner from an Ltd. (Chanturia & Ninidze, 2003, p. 64ff; Burduli, 2013a, p. 87ff; Burduli & Magradze, 2019, pp. 25–49). The first one is related to the breach of obligation to pay contribution, and the second is related to causing damages. In regard to the first one, Georgia has legislative regulation and more or less common judicial practice.⁵ The legal outcome of the non-payment of contribution—losing the status of membership—is prescribed under the Law on Entrepreneurs (Law on Entrepreneurs of Georgia, 1994, no. 21–22), which is the main source of corporate law, whereas in regard to other grounds, the law is silent. Deriving from the principle of freedom of contract, inserting such a provision in the company's charter would be based on the autonomy of partners' will, which at the same time would be a prerequisite for the realization of the right to expel a partner from the company. In the mentioned case, the legal basis for the claim would be an

² Even though the present article discusses the question on the example of post-Soviet Georgian law, obviously it does not mean its non-relevance for the corporate law in general, which is evident in references to various sources in the article.

³ Or reorganization. However, the latter is difficult to carry out in a similar situation.

⁴ Ninety-five percent of incorporated/registered companies fall under Ltd. on private limited company shares.

⁵ Article 3 of the Law on Entrepreneurs. In relation to the subject, see also Georgian judicial practice: decisions of the Supreme Court of Georgia nos. 3/747-01 (“Argo” Ltd.), 3/530-02 (“Asilteminteri” Ltd.), 3k/303-01, 3k/861-01, 2001, AS-1060-1090-2011, AS-771-732-2013, AS-471-450-2015, AS-475-443-2017. These judgements are available in Georgian at www.supremecourt.ge.

infringement of a particular norm of the charter. However, the issue gets complicated when the charter does not entail any regulation thereof, and this establishes reasoning in two directions: (1) in case of no consideration in the charter (excluding the expulsion of a partner for non-payment of contribution envisaged under the law), it must be impossible to expel the partner from the company on significant grounds⁶, and (2) despite non-regulation of the question by the charter, expulsion of a partner on significant grounds would have been made possible based on judge-made law.⁷ Considering the legal reality of Georgian law, which does not envisage a direct normative provision stipulating expulsion of a partner based on a “significant ground”, the aim of the research is to identify which legal regime should be applicable in national law and to what extent could the German law model be implied and applicable for finding and interpreting the Georgian solution of the issue. Georgian private law manifests proximity with German law. Therefore, it would be interesting to see whether the German positive law solution could be used for Georgian law, or it could only become a basis for political-legal inspiration. The implementation of the mentioned research goal determines the applicability of historical, comparative, normative and dogmatic methodological foundations in the paper.

In the opinion of the authors of this article, not considering proper grounds in the charter shall not prohibit the expulsion of a partner. It is reasonable to make a choice in favor of further functioning of the company, as this organizational entity creates major social-material prosperity in the country and its successful operation shall not be harmed by a partner’s individual interests, whose unconscientious action makes it impossible to attain a common goal.

In the present article, several issues will be stressed: the reception of German law and its importance in the context of Georgian solution; description of the grounds for expulsion and prerequisites of admissibility; elements forming the company and the legal nature of the partnership agreement; the admissibility of a partner’s expulsion according to the private law regime in the termination of long-term contractual relations and modification of the classical nature of contract termination; the possibility to use infringement of duty of care and duty of loyalty as grounds for a partner’s expulsion.

⁶ As we will see below on the example of the Corporate Law of Austria.

⁷ As known in the doctrine of German law.

2. German private law as a source of inspiration for Georgian law?

2.1 Grounds for expulsion and the German way for resolving the issue

German corporate law recognizes voluntary and forced types of concession of membership in an Ltd. (Lutter in Lutter & Hommelhof 2012, para. 34, note 18ff).⁸ There are several possibilities for the concession of shares against the will of the partner. Besides the expulsion of a partner from a company on a significant ground, all these possibilities are regulated by legislation. In the case of forfeiture on the ground of non-payment of contribution (*Kaduzierung*), we are dealing with a detailed regulation of paragraph 21 and the following paragraphs of the Ltd. Law (GmbHG, or *Gesetz ueber die Gesellschaften mit beschraenkter Haftung*). In the case of the so-called amortization (*Einziehung*) (Saenger, 2018, para. 17, note 763; Westermann in Scholz, 2018, para. 34, note 1), i.e. a forced withdrawal of a share (Lutter in Lutter & Hommelhof, 2012, para. 34, note 27ff), the matter, as a rule, relates to a particular share in the company and not the personality of the partner. For the realization of the amortization right, respective reservation (Greitemann in Saenger & Inhester, 2020, para. 34, note 8)⁹ must be indicated in the partnership agreement (Thiessen in Bork & Schäfer, 2012, para. 34, note 3). Otherwise, withdrawal of the share of particular class, which must be followed by the disappearance of the withdrawn share (*Vernichtung*), is void. Except expulsion of the partner from a company against his or her will, envisaged under the legislation, the German judge-made law, in case of the existence of a significant ground¹⁰, established the provision of the expulsion of a partner¹¹ and developed a doctrine based thereon: when there is a

⁸ Regarding the loss of the membership see Grunewald, 2017, para. 13, note 189ff.

⁹ Georgian law does not include a similar legislative regulation. However, this shall not rule out the inadmissibility of the provision of share withdrawal if there is a regulation in the charter related thereto. In case of voluntary amortization, the existence of a general entry in the charter is sufficient. As for the forced withdrawal (the so-called *Zwangseinziehung*), in such a case particular occasions of withdrawal must be considered under the partnership agreement, so that the withdrawal of shares is deemed valid. This could be desirable in light of the protection of the partner's right. If there are respective norms envisaged in the charter in relation to the forced withdrawal, it could be considered as having a kind of an overlap function for using the provision of voluntary withdrawal, as it is considered that inserting the forced withdrawal into the partnership agreement shall automatically mean the admissibility of voluntary withdrawal as well.

¹⁰ See the list of significant grounds, which are based on some infringement, with a reference to the judicial practice in Baumbach & Hueck, 2019, para. 34, note 3.

¹¹ See the reference to various literature and court judgements: Sandhaus in Gehrlein, Ekkenga & Simon, 2012, para. 34, note 77ff.

substantial problem in the partner's personality, unjustified resistance to coexistence with other partners, significant reason to believe that there is a threat to the achievement of a common goal and functioning of the company, it is possible to expel the partner from the company with the clause that the company will continue its activity, regardless of the fact that the norm establishing the realization of this right does not exist in the partnership agreement as a general or specific entry.¹²

The main dogmatic basis of the German justification of the issue is a legal interpretation of paragraph 140 of the Commercial Code and paragraph 737 of the German Civil Code (Kindl, 2019, para. 25, note 19). This is based on the paradigm that paragraph 705 of the German Civil Code, as abstract *bum mentis*, is applied in a narrow and wide/figurative concept of company (*Gesellschaft*), established through a consolidation of persons (Koch, 2019, para. 1, note 2, para. 3, note 1; PWW & Ditfurth, 2020, para. 705, note 1). It is true that the legal construction of civil law partnership (*GesbR*, or *Gesellschaft bürgerlichen Rechts*) implied with the direct significance of paragraph 705 creates the basic model of an amicable personified type of company (*Grundform*), in case of capital type company, a registered union (*e. Verein*) (Kindl, 2019, para. 2, note 3) the common norms prescribed for the company (BGB, para. 705ff), with some kind of “term of pulling down the dogmatic girdle”, also apply to the Ltd., as to the corporately arranged legal person. The “transitional” nature of the form of Ltd. must be also taken into account—its personal partnership structure and approximation to legal construction of amicable type company (cf. Windbichler, 2013, para. 22, note 26).

2.2 The adoption of German law and Georgian private law

In most countries formed after the dissolution of the Soviet Union, modern private law was developed by the reception of foreign law (e.g., Knieper, 2002, p. 53ff; Khamidov in Boguslavski & Knieper, 1998, pp. 86–88; Knieper, Chanturia & Schramm, 2008; see also Chochia & Popjanovski, 2016, pp. 197–208; Chochia, 2013, pp. 1–189) or by legal transplant,¹³ transfer of the law.¹⁴ This may be easily said about Corporate Law of Georgia as well, which was the area of law developed through a logical synthesis of German Commercial Law and Company Law, starting in the 1990s (Zoidze, 2005, pp. 182–188). During several years, the permanent “pseudoreforms” (Burduli, 2013b,

¹² Alternatively, see Lutter in Lutter & Hommelhof, 2012, para. 34, note 52ff.

¹³ In the context of the question see Kurzynsky-Singer in Kurzynsky-Singer, 2014, p. 4ff. Regarding the definition of the phenomenon, see, e.g., Mattei, 1994, p. 14.

¹⁴ Regarding its social-cultural phenomenon see Bregvadze, 2006, pp. 5–37.

pp. 28–35)¹⁵ led the process of the total transformation of law towards “necroreception”, i.e. born dead (Burduli in Prütting 2018, pp. 3–15), which has damaged the lawful image of Georgian corporate law (Burduli, 2019, pp. 1–25). This created a certain problem to the law application process, as judges were deprived of the instrument which enabled them to be more motivated to apply judge-made law (Burduli in FS Prütting, 2018, p. 11ff). The solution to the question must rely on practical rationality, derive from the national context and necessity, and create a certain preference for a company operating on the market and involved in the economic process. Due to the didactic and regulatory function of the law (Burduli in Pheradze, 2019, pp. 146–175), the existence of norms similar to the German legislation would assist a Georgian judge in resolving the question. In the case of non-existence, the contextual-systematic approach would have been sufficient for defining the legal policy. The norms regulating partnership in the Civil Code of Georgia (CCG, Art. 930ff) came from the German law. Particular legal norms differ from each other; however, private law systems are similar. The legal-material notion of the construction of a legal person is different in Georgian law, although in the case of a critical realization of its diffusional concept¹⁶ (Kiria in Burduli, 2011, pp. 17–56), it is possible to come to a conclusion that the legal definition of partnership (CCG, Art. 930), similar to the German one, must be shown as an abstract supra-notion which will be spread to the legal construction of Ltd. as well with its figurative meaning. Such understanding of the issue will assist us only in the determination of the essence and the legal nature of a partnership agreement; however, non-existence of the norm similar to paragraph 737 of the German Civil Code¹⁷ in the Civil Code of Georgia, would have created the risk of using the German solution directly in the Georgian law application process.¹⁸ It is important that the German law, along with the corporate legal norms of justifying expulsion of a partner on a significant ground, also points at paragraph 314¹⁹ of the Civil Code of Germany, which may be directly considered a legal basis of the claim in the Georgian law (CCG, Art. 399 II). Otherwise we

¹⁵ Regarding the stages of development see Burduli *et al.*, 2016, pp. 11–14. Regarding pseudoreforms in the economic context see Papava, 2015, p. 42ff.; Burduli, 2013, pp. 28–35.

¹⁶ For the definition of legal person see Burduli & Egnatashvili, 2017, p. 186ff.

¹⁷ It was missed during the reception.

¹⁸ Article 939 of the Civil Code of Georgia envisages grounds for termination of a partnership, as of independently acting entity, and not during the existence of significant grounds for prospective expulsion of a partner.

¹⁹ The basis of the idea is the general principle of termination of long-term legal relations, which was still recognized by the imperial court (see Interpretation of Scholz on Case in Scholz, 1942, pp. 1667–1670) and this legal opinion is part of modern judicial practices (Baumbach & Hueck, 2019, para. 34, note 2).

could think of the way chosen by the judicial practice of Austria, where the expulsion of a partner on significant grounds, if the partnership agreement does not entail such entry,²⁰ is inadmissible.²¹ Despite the dominant opinion and critics expressed in legal literature,²² the Court of Austria has adopted a specific approach towards this issue which is explained by the conscious silence of legislation and motive for leaving open the lacuna (Decision OGH 1 Ob 135/06v).²³ Such an approach would not have been justified either with a historical definition or with the view of law policy.

3. The indigenous way of Georgia's law—the expulsion of a partner in the general private law regime of termination of long-term contractual relations

On the conceptual level, the way of solution by the Georgian law for the expulsion of a partner must entail the use of a legal regime of the termination of long-term contractual relations (CCG, Art. 399 II). Firstly, an analysis of this question requires modification of the classical definition of termination, its adaptation to the corporate law context, through depicting the dual legal nature of a partnership agreement (Schmidt, 2011, para. 105, note 114) and preserving the existentialism of the company.

3.1 The dual nature of a partnership agreement, elements creating a company and the modification of the construction of contract termination

An entrepreneurial company represents a type of consolidation of persons (Hopt in Baumbach & Hopt, para. 105, note 1ff). It is characterized by a supra-individual interest (Raiser & Veil, 2006, p. 8), where attaining of a common goal stands in the epicenter of the partners' will (Servatius in Henssler & Strohn, 2014, BGB, para. 705, note 2). The company itself is founded on the basis of contract law and establishes obligation law relations between its participants, the participants and the corporation, and the

²⁰ Despite the similarity of Austrian corporate law to the German law (cf., e.g., Kalss, Burger & Eckert, 2003, p. 35ff).

²¹ First of all, see Decision OGH 1 Ob 600/53.

²² Alternatively, see Korn, 2017, 49ff.

²³ Judicial practice does not allow the possibility of using Paragraph 140 of the Company Law of Austria (UGB) with analogy (OGH 6 Ob 80/11z, 14.9.2011).

corporation in a broader meaning and other stakeholders.²⁴ The company is considered a “long-term obligation law relation” (PWW & *Ditfurth*, 2020, para. 705, note 2), which, after the establishment of relations based on the law of obligations, transforms into an independently operating organizational entity. Therefore, the charter of a company is considered as the organizational contract²⁵ establishing association (Windbichler, 2013, para. 6, note 2). The problem existing in the personality of a partner may endanger the achievement of a common goal and bring the company to the termination of functioning. This would have been an irrational solution for a business entity, the activity of which is cost-effective and profitable, which has a wide circle of consumers, and employs a large number of employees. A company creates a social-material good on the market and it would be advisable that the judge rendered a decision based on case circumstances and unity of evidence, with regard to the expulsion of a partner from a company on significant grounds and maintenance of the further functioning of that company. Hence, it would be desirable to end relations based on the law of obligations with a problematic partner in a manner that the agreement made for the existence of a company could still remain in force. This could be possible only when we admit the dual nature of a partnership agreement.²⁶

The construction of a company according to private law cannot be based only on the narrow definition of civil law institutes without inserting specific corporate law segments therein, whereas in the case these are neglected, regulating specific social-legal relations would lack the practical rationality.

By inserting elements of association structure (*Verbandsstruktur*), a partnership agreement exceeds the orbit characteristic of a typical internal company (*Innengesellschaft*)²⁷ and it is not only based on the pure relations from the law of obligations in the context of the internal company, but it (the agreement) also represents a legal basis for the organizational structure of an independently operating entity, which appears as a subject having a legal capacity in relations with a third person. By virtue of the mentioned termination of agreement with a particular partner, it shall not result in a collapse of this agreement considering the supra-individual aim, which was reflected by the membership of the partners in the association. The fact

²⁴ Regarding the legal definition of the concept of the nexus of contract, rooted in economic science, see Kraakman *et al.*, 2017, pp. 7–12 (in the 2019 translation into Georgian).

²⁵ MünchKommBGB & Schäfer, para. 705, note 158, cited in Kindl, 2019, para. 5, note 13.

²⁶ Alternatively, see Roth in Roth & Altmeppen, 2012, para. 2, note 10.

²⁷ Regarding the inside and outside companies, see Henssler & Strohn, 2014, BGB, para. 705, note 7; Kindl, 2019, para. 2, note 9; on the context of comparing with *societas*, see Koch, 2019, para. 2, note 2.

that the organizational agreement somehow infringes the purely obligations law paradigm, is also clearly visible in the doctrine of defective association (so-called *die fehlerhafte Gesellschaft*),²⁸ which has a huge significance in corporate law. In this way, the company formed with fault in view of a third party is considered as faultless, in order to possibly ensure the idea of the stability of civil circulation and the aim of legal security. This is why there are discussions in the legal literature that the association incorporated in the organizational agreement in balance with the “ordinary” obligations law relations and formed upon this basis, is characterized by more stability, “existential sustainability” (*Bestandskraft*) (Kindl, 2019, para. 5, note 13).²⁹

Taking into account the necessity of preserving the existential aim of a company and the mixed nature of an organizational agreement, the regime of the termination of long-term contractual relations with the partner must be modified and adapted to the peculiarities of corporate law. In particular, the termination of binding relations with the partner infringing an obligation may not affect the entire agreement of the partnership and could result in a dissolution of the organization. In this way, only the layer of connection deriving from obligations law is damaged between the company and the particular partner, but the general founding source of the company is preserved—in the form of the partnership agreement. Georgian law supports the theory of the objective definition of agreement, in which the determination and implementation of the common intent of parties, the purpose of the agreement, is decisive (Klass, 2018, p. 1; Bachiashvili, 2013, p. 6). Hence, the peculiarity of the termination of the agreement, the modification of its traditional nature, implies preservation of the company and its activity, the implementation of the partners’ founding will that is prescribed in the charter. Prerequisites for the termination of the agreement remain unchanged, however the legal grounds of the company do not split, as the main purpose of ending the agreement with the partner is to save the company. Termination of the agreement with a particular partner must be defined and qualified, taking into account this corporate need, with the general conceptual teleological view of this legal protection mechanism.

²⁸ Alternatively, see, e.g., Gummert & Weipert, 2009, para. 47, note 4.

²⁹ Regarding the theory of faulted company, see Kindl, 2019, para. 13, note 1ff.

3.2 Breach of duty as a general normative prerequisite of termination of a long-term contractual relation

The issue of expelling a partner by using the mechanism of termination of the agreement definitely requires an analysis of the normative prerequisites for termination of an agreement.

Freedom of enterprise recognized under the Constitution of Georgia is realized by the private law principle of freedom of contract. Freedom of contract is considered the basis for a market-oriented competitive economic order; however, the contract may not handcuff the parties and become an obstacle for the subjects' economic activities (Zoidze, 2005, pp. 283, 291). That is why freedom from the contract is also an element of the freedom of contract, which considering the contractual binding, especially in any performance-oriented Continental-European legal order, is only possible when the normative and strict prerequisites for contract termination exist and are envisaged in the law.

In most legal orders, a substantial and fundamental breach of an obligation is the general ground which transposes the contract law relation to the legal regime of terminating/revocation of a contract. For the purpose of terminating a contract, the qualitative criterion infringing the contractual interest is important, which is expressed in Georgian law with the concept of a "significant breach of obligation" (Chitashvili, 2016, pp. 49–93) and primacy of performance in additional time (CCG, Arts. 399 II; 405 I), a fundamental breach in unified law (see PECL 8:103, DCFR 3:502) and some legal orders, and additional performance in German law (*Nachschrift*).

In Georgian law, the termination of a long-term contractual relation is admissible considering a substantial, significant breach (CCG, Art. 399 II), as well as honorable interest (CCG, Art. 399 I). However, taking into account the spirit of the adopted German legal order and the legal orders of all other countries, which recognize a forced expulsion of a partner on significant grounds envisaged under the charter, only a substantial breach of an obligation may be a basis for the termination of contractual relations with a partner. Therefore, the issue of expelling a partner in Georgian law must be analyzed on the basis of Article 399 II and must be limited to the breach of obligation.

In the case of expulsion of a partner, the exclusion of using the provision of revocation/repudiation of the reciprocal contract (Fastrich in Baumbach & Hueck, 2019, para. 2, note 6) and exiting from (avoidance of) the contract

(CCG, Arts. 405 I; 352) must be underlined, as during the termination of a contract, as usual, there is no retreat of performance and profit, obligations of the parties are refuted with the *ex nunc* effect. Using the regime of termination of the contract is admissible in case of unilateral obligation (Vashakidze in Chanturia *et al.*, 2019, p. 660). Using the regime of termination of an agreement with a partner, instead of repudiating, exiting or revoking the agreement, is determined by the non-reciprocal nature of a partnership agreement (Hopt in Baumbach & Hopt, 2018, para. 105, note 47).

3.3 Breach of the duty of care as a significant ground for the expulsion of a partner

Significant grounds for the expulsion of a partner from the company envisaged in the charter is a breach of obligation in the form of a general prerequisite. However, it is important to distinguish which type of breach, which scale of illegal action, is defined as a sufficient ground for expulsion. It must be determined whether it is possible to consider the obligor's duty to take account of and be considerate with regard to the other party's rights and property ("duty of extraordinary care"; see BGB paras. 241 (II), 311 (II); CCG, Art. 316 II), as a normative precondition of contract termination. This kind of ancillary duty is not directly prescribed in the agreement or charter, but derives from the content and nature of an obligation. Therefore, it is necessary to seek the dogmatic basis for recognizing a breach of the duty of care as an independent type of obligation in German, unified and Georgian law.

According to the reform of law of obligations carried out in Germany in 2002 (Zimmermann, 2002, pp. 1–5), the unification of the concept of breach of obligation and legislative regulation of conceptual spirit of unified legal institutes (CISG, UNIDROIT Principles, PECL) was ensured. Compared to the regulation prior to reform, any breach of obligation was gathered under one notion (Löwisch, 2002, p. 144)—breach of obligation (*Pflichtverletzung*), which included four types of non-fulfilment: 1) Exceeding the terms of the debtor; 2) Inability to fulfil obligation; 3) Faulted fulfilment; 4) Obligation to protect material goods and interests of the contractor (duty of care) (Zimmermann, 2002, p. 24). In Article 241 II of the Civil Code of Germany, duty of care³⁰ was defined as a duty not considered in the contract, but at the same time implied a category, the infringement of which was deemed as

³⁰ Regarding a similar term duty of care and protection, see Dannemann & Vogenauer, 2013, p. 240.

a breach of ancillary obligation (Markesinis, Unberath & Johnston, 2006, p. 283; Reimann, 2009, p. 888) and it was grouped in the united system of types of breach of obligation as an independent and complete type of breach of obligation, alongside the core types of breach of obligation (Markesinis, Unberath & Johnston, 2006, p. 379). Duty of care is equaled to a breach of other core obligations with the possibility to impact derivation of the right of secondary claim—in this case, the right to terminate the agreement (see PECL 1:301 (4)).

The composition of a breach of the duty of care is measured by the infringement of a company's interest, which it may have considering the common existential purpose (CCG, Art. 24 I) (Dalley, 1999, p. 190). Protection of a company's supra-individual purpose is having the private, individual interests of a partner prevail, and this is the implied idea of a partnership agreement, even if it is not indicated in the agreement as a core obligation.

Significant infringement of the duty of care, as a separate type of a breach of obligation, leads right to the termination of a contract also in Georgian law (analogy with Article 399 II indicates Article 405 on the revocation/repudiation of contract), which derives from Articles 405 III (b), 316 II, and 405 III (a). Breach of obligation of the duty of care, stipulated in Article 316 II of the Civil Code of Georgia, which brings into the orbit of normative protection an exceptional protection of the contractor's rights and property, has such an importance that it may be opposed by the heaviest (*ultima ratio*) legal protection mechanism, remedy in the form of termination of a contract (Macharadze, 2008, p. 129; Kropholler, 2014, p. 220). Thus, the difference between the breach of the duty of care (CCG, Art. 316 II) and other core obligations does not exist in terms of accessibility to the right of termination of the contract (Graffi, 2003, p. 349). A breach of the duty of care is a sufficient ground for termination of an agreement and does not need cumulative existence of the breach of a core obligation (for instance, paying contribution, or others). However, if it is possible to protect the interests of the company with less strict sanctions corresponding to the violation, then the contract must be retained (Vashakidze in Chanturia *et al.*, 2019, p. 670, citing Schmidt in Beck OK BGB, para. 323, note 39). For example, if the damaging partner is simultaneously the director of the company and for the neutralization of substantial harm for the company it is enough to move the director from the managing position, then expulsion shall not be defined as a corporate sanction proportionate to the infringement. The particularity of a long-term relation deriving from the law of obligations is that it creates wider obligations for protecting the legal good and the duty of care. Therefore,

in case of absence of contractual or legislative regulations, it is possible to terminate them because of the breach (Kropholler, 2014, p. 109). A breach of the duty of care may intrude the trust and result in the loss of interest in future performance in a way that in the Civil Code of Germany the legislator often excludes the obligation of setting an extra term and directly gives the creditor the right to claim for damages in lieu of performance.³¹

While terminating a contract on the basis of a breach of the duty of care, the creditor must prove that he or she has lost trust in his or her contractor, and thus maintenance of the contract may not be claimed. Besides, it is not necessary that debtor infringes the major performance obligations (Vashakidze in Chanturia, 2019, p. 668). Similarly, in German law, the expulsion of a partner is mainly related to the personal factor of a partner, which provides his or her non-acceptance for the partners and company (Scogin, 1993, p. 4). A breach of the duty of care must be so substantial that it destroys trust in personality, the professional skills of the debtor. The unity of non-substantial but long-lasting infringements may also evoke the right to contract termination, if after cautioning of debtor infringements will be repeated. Especially in long-term relations, the trust factor and nature of the relations must be taken into account, which will justify the legitimacy of terminating a contract because of the breach of the duty of care (Vashakidze in Chanturia *et al.*, 2019, p. 669).

Setting an additional term as a prerequisite for terminating a long-term contractual relation with the partner, the general rule of mandatory cautioning (CCG, Art. 399 II) recognizes reasonable exceptions determined by law and deriving from case individualization (CCG, Art. 405 II). The rationality of an extra term is evaluated objectively, comparing the interests of the creditor and the debtor (Macharadze, 2008, p. 135) and considering the particularity of obligation (Zoidze, 2001, p. 441). In the case of passive obligations, a claim for an extra term is substituted with a warning. However, paragraph (c) of Article 405 II justifies immediate termination of the contract summarizing mutual interests and instances where delay may cause more damage (Vashakidze in Chanturia *et al.*, 2019, p. 668). If a breach of obligation by a partner is expressed with deliberate action and the partner categorically, clearly refuses to revise this action or points to a firm decision of carrying out actions resulting in damage, then by virtue of Article 405 I, the necessity of repeated action after the warning is excluded for the termination of the contract. In the same logic, the necessity of setting

³¹ See the provision of restitution of damages instead of performance in CCG, Art. 394 II, and the paragraph of Article 282 in the Civil Code of Germany in relation to paragraph I of Article 241.

an extra term is excluded if the debtor does not respond to the claim of the creditor within a reasonable time, such inactivity will be equal to a clear refusal (Vashakidze in Chanturia *et al.*, 2019, p. 667, citing Schmidt, Beck OK BGB, para. 323, note 21).

Termination of a long-term contractual relation with the partner, or expulsion, must be admitted also in the case of prospective infringement, anticipated breach (*antizipierter Vertragsbruch*; CCG, Arts. 323, para. 4; 405 IV; cf. BGB para. 323 (4)). This construction gives the creditor a right to terminate the contract before the performance of obligation is due if it is evident that the ground for the termination of the contract will arise. Using this construction relates only to such obligations which are defined by the term of performance and the debtor clearly refuses their fulfilment, the purpose of conducting illegal actions is declared and the inevitability of a prospective, anticipated breach is obvious (Mossler, 2002, pp. 1831, 1835).

It must definitely be considered that the creditor has an obligation to avoid and reduce the breach of obligation or damage, taking into account the scope of his or her sphere of control (CCG, Art. 415 II), which, if violated, evokes the issue of mixed responsibility. Hence, the company is obliged not to bring the partner's action to the irreparable aggravation of the company's activity and execute the expulsion of the partner on the basis of the inevitable presumption of a substantial infringement of the company's interests. It is recognized that the protection of the company's interests is a collateral obligation of position of each partner and represents the main concern of each member of the corporation (Burduli, 2010, p. 23, further reference Reinisch, 1992, p. 13). In this case, the burden of proof of the company is so high that it must clearly show the inevitable risk of achieving the purpose of the company as complementary of the partner's prospective malicious action.

3.4 Infringement of the duty of loyalty as a possible ground for expulsion and its relation with the infringement of the duty of care

The obligation of a partner to behave in good faith derives from the normative principle (CCG, Art. 8 III) prescribed by the Civil Code of Georgia and covers relations established by the partners' agreement (Dalley, 1999, p. 193; Johnson, 2002, p. 4; Butler & Ribstein, 1990, p. 2; Roche, 2003, p. 3). However, in this case, compared to the general norm of good faith, the duty of care has a particular content, as it puts into the protection orbit the company's interests and the special protection obligation towards material

rights. The principle of good faith cannot independently ensure special protection of the company's interests, which in some cases is determined by the predominance of the company's interest over the individual interests. The preferential protection of interests of the company is attained by realization of the duty of care and a more precise obligation of loyalty (Gartenberg & King, 2003, p. 98). Along with the general legal obligations of good faith and the duty of care, it is necessary to analyze the fiduciary duties of the partner,³² which, on the one hand, are expressed in loyalty (accountability, prohibition of orientation on individual interest and competitive actions, obligation of providing information), and on the other hand, in the duty of care towards the company and partners (Gartenberg & King, 2003, p. 95).

The duty of loyalty envisages a subordination of personal interests to the best interests of the company (Coffee, 1989, p. 1) and the protection of general rules of fairness in the process of accomplishment of the relation (*Pepper v. Litton* [1939], 308 U.S. 295, 311). Based on the fiduciary duty, a partner is prohibited to create such a condition which may endanger the company, its interests, property, and collaterally consolidated common interests of partners (Dalley, 2001, p. 3). From this perspective, the duty of loyalty *per se*, considering the scale of its normative protection, comes close to the general legal obligation of the duty of care (CCG, Art. 316 II), though it is more specific as it establishes a higher standard of protection. The duty of loyalty, which relates to the company and is harmfully infringed with more severity (Moore, 2000, p. 3) must represent the ground for expulsion. A partner's expulsion on such a ground is familiar to the German judicial practice as well.³³

4. Conclusion

In regard to the expulsion of a partner from the company on significant grounds, not envisaged in the charter, the German law became only a source of analysis and solution of the legal policy for Georgian law. With the impact of an episodic, fragmented reception analyzed in this paper, the identical sharing of the German positive law solution for the issue would

³² The element of trust is crucial in the American judicial practice: *Leff v. Gunter* [1993] 33 C3d 508, 514, 18 CR 777; *BT-I v. Equitable Life Assur. Soc'y* [1999], 75 CA 4th 1406, 89 CR2d 811; *AB Group v. Werthur* [1997] 75 CA 4th 1022, 69 CR 2d 652; *Donahue v. Rodd Electrottype Co. of New England, Inc.* [1975] 328 N.E.2d 505. See also Decision AS-390-741-07; Ruling AS-556-939-06.

³³ With reference to judicial practice see Saenger, 2018, para. 17, note 765.

be evidence of the incompatibility with Georgian normative reality and would not organically fit the national legal body and legislative context. The contextual-systemic, historical-explanatory approach toward the Georgian legal order proves that the systemic architecture of German law is preserved in Georgian law. This is expressed in the recognition of the respectful interest towards the expulsion of a partner invading a company's (partners' common) purpose. However, this interest is executed with a modified regime envisaged for the termination of a long-term relation deriving from the law of obligations, because of the nonexistence of proper grounds in the norms regulating partnership in the Civil Code of Georgia.

The dogmatic support of the solution to the issue was attained by an integration of corporate and civil law provisions, which is evidence of the similar systematics of German and Georgian private law. The legal policy in corporate economy, which shows the advantage of the continuation of a company's further activity and the sustainability of its existence in comparison to the termination of the company's activity and its liquidation, must be justified. This becomes possible by the expulsion from the company of a partner acting in bad faith, by a legitimate interference of judge-made law in the existence of a significant ground.

Irakli Burduli, PhD, is professor and deputy dean at Ivane Javakhishvili Tbilisi State University (TSU) Faculty of Law (Georgia), head of the Accreditation Council of Higher Educational Programs in Georgia, head of TSU National Centre for Alternative Dispute Resolution, head of the Center of Law and Economics at Tbilisi Open University, head of the Institute for Corporate, Banking and Economic Law, and a member of the Reform Group on Draft Law on Entrepreneurs of Georgia.

Natia Chitashvili, PhD, is associate professor at Ivane Javakhishvili Tbilisi State University (TSU) Faculty of Law (Georgia), a member of the Institute of Contemporary Private Law at TSU, an executive director at TSU National Centre for Alternative Dispute Resolution, a certified mediator, a member of the Executive Council of Mediators Association of Georgia.

Bibliography

- AB Group v. Werthur* [1997], 75 CA 4th 1022, 69 CR 2d 652.
- Bachiasvili, V.** (2013), 'Defining contract according to the principles of European contract law and advisability of its implementation into Georgian legislation,' [in Georgian] *TSU Faculty of Law Journal of Law*, no. 1.
- Baumbach, A. & Hopt, K. J., eds.** (2018), *HGB Kommentar*, 38. Auflage, Munich: C. H. Beck.
- Baumbach, A. & Hueck, A., eds.** (2019), *GmbHG Kommentar*, 22. Auflage, Munich: C. H. Beck.
- Boguslavski, L. & Knieper, R., eds.** (1988), *Wege zu neuem Recht*, Berlin: Arno Spitz GmbH Verlag.
- Bork, R. & Schäfer, C., eds.** (2012), *GmbHG Kommentar*, 2. Auflage, 2012, Cologne: RWS Verlag.
- Bregvadze, L.** (2006), 'Legal culture between globalism and localism: for the functional definition of legal transfers' [in Georgian], *The Herald of State and Law Institute of T. Tsereteli*, no. 1, pp. 5–37.
- Brinkmann, M.; Völmann-Stickelbrock, B.; Effer-Uhe, D. O.; Wesser, S. & Weth, S., eds.** (2018), *Dogmatik im Dienst von Gerechtigkeit, Rechtssicherheit und Rechtsentwicklung*, Festschrift für Hans Prütting zum 70. Geburtstag, Köln: Carl Heymanns Verlag.
- BT-I v. Equitable Life Assur. Soc'y* [1999], 75 CA 4th 1406, 89 CR2d 811.
- Burduli, I.** (2010), 'Legal outcome of non-payment of contribution: the utopic point on the expulsion of a partner from joint stock company' [in Georgian], *TSU Faculty of Law, Journal of Law*, nos. 1–2.
- Burduli, I., ed.** (2011), *Corporate Law Collection* [in Georgian], Tbilisi: "Meridiani".
- Burduli, I.** (2013a), *Foundations of Joint Stock Company Law* [in Georgian], Tbilisi.
- Burduli, I.** (2013b), 'Gesellschaftsrecht in Georgien und seine Entwicklungstendenzen,' *Kieler Ostrechts-Notizen*, vol. 16, no. 1, pp. 28–35.
- Burduli, I. & Magradze, G.** (2019), 'Grounds for expulsion of partner from Ltd.,' *Yearbook of the Center for Law and Economics*, pp. 25–49.
- Burduli, I.; Makharoblishvili, G.; Egnatashvili, D. & Giguashvili, G.** (2016), *Development of Modern Georgian Company Law* [in Georgian], Tbilisi: "World of Lawyers".
- Burduli, I.; Makharoblishvili, G. & Magradze, G.** (2019), *Closely Held Corporations in Georgia: Existing Reality and Regulatory Deficit* [in Georgian], Tbilisi: "World of Lawyers".
- Burduli, I. & Egnatashvili, D.** (2017), *Commentary to the Civil Code of Georgia* [in Georgian], Book I, Tbilisi.

- Butler, H. N.; Larry, E. & Ribstein, L. E.** (1990), 'Opting out of fiduciary duties: a response to the anti-contractarians,' *Washington Law Review*, vol. 65, no. 1.
- Chanturia, I., ed.; Gelashvili, I.; Rusiashvili, G.; Aladashvili, A.; Meskhishvili, K.; Motsonelidze, N.; Batlidze, G.; Jorbenadze, S.; Svanadze, G.; Gatserelia, A. & Robakidze, I.** (2019), *Commentary to Civil Code of Georgia* [in Georgian], Book III, Tbilisi.
- Chanturia, L. & Ninidze, T.** (2003), *Commentaries to the Law on Entrepreneurs* [in Georgian], Tbilisi.
- Chitashvili, N.** (2016), 'Concept of fundamental breach in comparative perspective and its impact on Georgian law,' *Polish-Georgian Law Review*, Faculty of Law and Administration University of Warmia and Mazury in Olsztyn Faculty of Law Ivane Javakhishvili Tbilisi State University, no. 2, pp. 49–93.
- Chiusi, T. J. & Burduli, I.**, eds. (2019), *Rechtsvergleichung und Privatrecht im deutsch-georgischen Diskurs*, Saarbrücken: Verlag Alma Mater.
- Chochia, A.** (2013), *Models of European Integration: Georgia's Economic and Political Transition*, PhD thesis, Tallinn University of Technology, TUT Press.
- Chochia, A. & Popjanovski, J.** (2016), 'Change of power and its influence on country's Europeanization process. Case study: Georgia,' in T. Kerikmäe & A. Chochia (eds.) *Political and Legal Perspectives of the EU Eastern Partnership Policy*, Cham: Springer International Publishing.
https://doi.org/10.1007/978-3-319-27383-9_13
- Coffee, J. C.** (1989), 'The mandatory/enabling balance in corporate law: an essay on the judicial role,' *Columbia Law Review*, Contractual Freedom in Corporate Law; Articles & Comments, vol. 89, no. 7, pp. 1618–1691.
<https://doi.org/10.2307/1122814>
- Dalley, P. J.** (1999), 'The law of partner expulsions: fiduciary duty and good faith,' *Cardozo Law Review*, vol. 21, pp. 181–210.
- Dalley, P. J.** (2001), 'To whom it may concern: fiduciary duties and business associations,' *Delaware Journal of Corporate Law*, vol. 26, no. 2, pp. 515–561.
- Dannemann, G. & Vogenauer, S.** (2013), *The Common European Sales Law in Context, Interactions with English and German Law*, Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199678907.001.0001>
- Decision of the Austrian Supreme Court of Justice, OGH 1 Ob 135/06v., 17.10.2006.
- Decision of the Austrian Supreme Court of Justice, OGH 1 Ob 600/53, 25.11.1953.
- Decision of the Austrian Supreme Court of Justice, OGH 6 Ob 80/11z., 14.9.2011.
- Decision of the Supreme Court of Georgia, Civil, Company and Insolvency Law Cases Chamber on the case no. AS-390-741-07.
- Decision of the Supreme Court of Georgia, Chamber for Company Law and Insolvency Cases on the case no. 3/747-01, 2.11.2001.
- Decision of the Supreme Court of Georgia on the case no. 3/530-02.
- Decision of the Supreme Court of Georgia on the case no. 3k/303-01.

- Decision of the Supreme Court of Georgia on the case no. 3k/861-01.
Decision of the Supreme Court of Georgia no. AS-475-443-2017.
Decision of the Supreme Court of Georgia no. AS-471-450-2015.
Decision of the Supreme Court of Georgia no. AS-771-732-2013.
Decision of the Supreme Court of Georgia no. AS-1060-1090-2011.
Donahue v. Rodd Electrototype Co. of New England, Inc. [1975], 328 N.E.2d 505.
Draft Common Frame of Reference (2009) 'Termination of Fundamental Non-Performance' 3:502 in C. von Bar *et al.* (eds.) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Munich: Sellier.
- Gartenberg, E. & King, T.** (2003), 'Fiduciary duties in partnerships and limited liability companies under California law,' *California Business Law Practitioner*, Fall 2003, pp. 93–104.
- Gehrlein, M.; Ekkenga, J. & Simon, S.**, eds. (2012), *GmbHG Kommentar*, 1. Auflage, Cologne: Karl Heymanns.
- Graffi, L.** (2003), 'Case law on the concept of "fundamental breach" in the Vienna Sales Convention,' *International Business Law Journal*, no. 3, pp. 338–349.
- Grunewald, B.** (2017), *Gesellschaftsrecht*, 10. Auflage, Tübingen: Mohr Siebeck.
- Gummert, H. & Weipert, L.**, eds. (2009), *Münchener Handbuch des Gesellschaftsrechts*, Band 1, 3. Auflage, Munich: C. H. Beck.
- Henssler, M. & Strohn, L.**, eds. (2014), *Gesellschaftsrecht*, 2. Auflage, Munich: Verlag C. H. Beck.
- Johnson, S.** (2002), 'Duties under the Utah Revised Limited Liability Company Act: analysis of a statutory conflict,' *Utah Law Review*, vol. 551, p. 551.
- Kalss, S.; Burger, C. & Eckert, G.**, eds. (2003), *Die Entwicklung des österreichischen Aktienrechts: Geschichte und Materialien*, Vienna: Linde Verlag.
- Kindl, J.** (2019), *Gesellschaftsrecht*, 2. Auflage, Baden-Baden: Verlag Nomos.
- Klass, G.** (2018), *Interpretation and Construction in Contract*, Georgetown University Law Center, pp. 1–48. <https://doi.org/10.2139/ssrn.2913228>
- Knieper, R.** (2002), 'Das neue turkmenische Zivilgesetzbuch im Überblick,' *Wirtschaft und Recht in Osteuropa (WiRO)*, vol. 2/2002.
- Knieper, R.; Chanturia, L. & Schramm, H. J.**, eds. (2008), *Grundlagen des Zivilrechtsordnung in den Staaten des Kaukasus und Zentralasien in Theorie und Praxis*, Berlin: BWV.
- Koch, J.** (2019), *Gesellschaftsrecht*, 11. Auflage, Munich: C. H. Beck.
- Korn, S.** (2017), *Der störende GmbH-Gesellschafter*, Hamburg: Diplomica Verlag.
- Kraakman, R.; Armour, J.; Davies, P.; Enriques, L.; Hansmann, H.; Hertig, G.; Hopt, K.; Kanda, H.; Pargendler, M.; Ringe, W.-G. & Rock, E.** (2017), *The Anatomy of Corporate Law*, Oxford: Oxford University Press.
<https://doi.org/10.1093/acprof:oso/9780198739630.001.0001>

- Kropholler, J.** (2014), *German Civil Code: Study Comments* [in Georgian], Tbilisi.
- Kurzynsky-Singer, E.** (2014), 'Wirkungsweise der legal transplants bei den Reformen des Zivilrechts,' in E. Kurzynsky-Singer (ed.) *Transformation durch Rezeption? Beiträge zum ausländischen und internationalen Privatrecht*, no. 102, Tübingen: Mohr Siebeck.
<https://doi.org/10.1628/978-3-16-153320-4>
- Law on Entrepreneurs of Georgia, Records of the Parliament of Georgia, no. 21–22, 28.10.1994.
- Leff v. Gunter* [1993], 33 C3d 508, 514, 18 CR 777.
- Lutter, K. & Hommelhof, B.**, eds. (2012), *GmbH-Gesetz Kommentar*, Cologne: Otto Schmidt.
- Löwisch, M.** (2003), 'New law of obligations in Germany,' *Ritsumeikan Law Review*, no. 20, pp. 141–156.
- Macharadze, M.** (2008), 'Exiting and termination of the contract—difference and legal outcomes' [in Georgian], *Georgian Law Review*, Special Edition, no. 125, pp. 129, 135.
- Markesinis, S. B.; Unberath, H. & Johnston, A.** (2006), *The German Law of Contract—A Comparative Treatise*, 2nd ed., Oxford & Portland, OR: Hart Publishing.
- Mattei, U.** (1994), 'Efficiency in legal transplants: an essay in comparative law and economics,' *International Review of Law and Economics*, vol. 14, no. 1, pp. 3–19.
[https://doi.org/10.1016/0144-8188\(94\)90032-9](https://doi.org/10.1016/0144-8188(94)90032-9)
- Moore, T. S.** (2000), 'The policy of opting-out of the fiduciary duties in a limited liability company: *McConnell v. Hunt Sports Enterprises*, 725 N.E.2D 1193 (OHIO CT. APP. 1999),' *South Texas Law Review*, vol. 42, p. 183.
- Mossler, P.** (2002), *Rücktrittsrecht vor Fälligkeit bei solvenzbedingten Zweifeln an der Leistungsfähigkeit des Schuldners* (para. 323 IV BGB), ZIP.
- Papava, L.** (2015), *Economy of Georgia, Reforms and Pseudo Reforms* [in Georgian], Tbilisi.
- Pheradze, G.**, ed. (2019), *Studies of History of Law and Political Thinking* [in Georgian], Book IV, Tbilisi: "Meridiani".
- Pepper v. Litton* [1939], 308 U.S. 295, 311.
- Principles of European Contract Law (PECL), Art. 8:103 Fundamental Non-Performance, Art. 1:301 (4) Meaning of Terms, European Union.
- Prütting, H.; Wegen, G. & Weinrich, G.**, eds. (2020), *BGB Kommentar*, 15 Auflage, Cologne: Verlag Luchterhand.
- Raiser, T. & Veil, R.** (2006), *Recht der Kapitalgesellschaften*, 4. Auflage, Munich: Verlag Franz Vahlen.
- Reimann, M.** (2009), 'The good, the bad, and the ugly: the reform of the German law of obligations,' *Tulane Law Review*, vol. 83, pp. 877–898.

- Roche, V. M.** (2003), “Bashing the corporate shield”: the untenable evisceration of freedom of contract in the corporate context,’ *The Journal of Corporation Law*, vol. 28, no. 2, p. 289–310.
- Roth, H. & Altmeyen, G.**, eds. (2012), *GmbHG Kommentar*, 7. Auflage, Munich: C. H. Beck.
- Ruling of the Supreme Court of Georgia on the case no. AS-556-939-06.
- Scogin, H. T., Jr.** (1993), ‘Withdrawal and expulsion in Germany: a comparative perspective on the “close corporation problem”,’ *Michigan Journal of International Law*, vol. 15, no. 1, pp. 127–188.
- Saenger, I.** (2018), *Gesellschaftsrecht*, Munich: Verlag Vranz Vahlen.
- Saenger, I. & Inhester, M.**, eds. (2020), *GmbHG, Handkommentar*, 4. Auflage, Baden-Baden: Verlag Nomos.
- Schmidt, K.**, ed. (2011), *Münchener Kommentar zum Handelsgesetzbuch*, 3. Auflage, Munich: Verlag C. H. Beck.
- Scholz, F.** (1942), *Ausschliessung und Austritt aus der GmbH*, Cologne: Bachem.
- Scholz, F.** (2018), *GmbHG Kommentar*, 12. Auflage, Cologne: Verlag Otto Schmidt.
- Windbichler, C.** (2013), *Gesellschaftsrecht*, 23. Auflage, Munich: Verlag C. H. Beck.
- Zimmermann, R.** (2002), *Breach of Contract and Remedies under the New German Law of Obligations*, Saggi: Conferenze e seminari, Roma: Centro di studi e ricerche di diritto comparato e straniero.
- Zoidze, B.** (2001), *Commentaries to the Civil Code* [in Georgian], Book III, Tbilisi.
- Zoidze, B.** (2005), *Reception of European Private Law in Georgia* [in Georgian], Tbilisi.