



# Legal opinion on the judgment of the Grand Chamber in the case of Rustavi 2

GYLA, as well as the other representatives of Georgian civil society, actively monitored and repeatedly responded regarding the Court dispute over the shares of the TV Company Rustavi 2. The organization has repeatedly pointed out those shortcomings and circumstances, detected during the [Court proceedings](#) and in parallel to the Court proceedings, which raised questions regarding the [impartiality of the Court](#) in this dispute. These circumstances also led to the unequivocal perception that there was the [interest of the authorities](#) in the outcome of the case.

On April 4, 2017, the Grand Chamber of the Supreme Court of Georgia released the full version of its judgment in the case of Rustavi 2. This time, GYLA will provide the public the legal assessment of the substance of the decision.

Despite the fact that the Grand Chamber's judgment contains several interpretations that may be controversial, in the present opinion we will only discuss those important issues that have conditioned the final legal result.

## ***Brief Description of the Case***

In their claim, Kibar Khalvashi and Panorama LLC declared that the transaction related

to alienation of stakes of Rustavi 2 Broadcasting Company LLC had been made as a result of coercion and threats from high-ranking officials of the former government; that the prices provided for by the sales contracts were inadequately low compared with the real value of the stakes; and that amounts provided for in the sales contracts relating to alienation of the stakes had not been paid. The respondent didn't confirm any of the aforementioned circumstances, declaring that the present owners were acquirers in good faith and that there were no legal grounds for returning the stakes.

The court of first instance held that the disputed transactions constituted immoral transactions, because the disputed property had been transferred to the ownership of the respondents at an inadequate price. Accordingly, the court deemed the disputed transactions invalid, using the norms on unjust enrichment to justify the return of the property. The Tbilisi Court of Appeals fully agreed with the assessments of the court of first instance about the factual and legal circumstances of the case. The court noted that "Although the coercion against Kibar Khalvashi cannot be established, on the basis of the factual circumstances established in the concrete case, the Chamber developed an internal belief that the will expressed by the claimant is invalid, with the basis being the immorality of the transaction." The Grand Chamber held that the invalidity of the transaction was a fact that didn't need to be indicated as a demand in the claim. For this reason, the Grand Chamber revoked this part of the ruling of the Court of Appeals and adopted a new judgment.

## ***Legal Issues***

### **1. Distribution of the burden of proof**

In legal proceedings, achievement of a favorable result for a party is related to establishment or failure to establish those factual circumstances on which the parties base their claims and responses. In the given case, incorrect distribution of the burden of proof between the parties turned out to be of decisive importance.

Correct distribution of the burden of proof in the given case was important for making correct decisions on such issues as confirmation of coercion; deeming the coercion as a universally established factual circumstance; the good faith of the acquirer (as well as of those persons who were not invited as parties to the case); rescission by an authorized person within the period provided for by law.

According to the Grand Chamber, the respondents – specifically, Geo-Trans LLC and

HaidelbergCement Georgia LLC – failed to carry out qualified rescission in connection with the factual circumstances indicated by the claimant in the claim, which was the reason why the factual circumstances presented by the claimant were deemed undisputable.

The GYLA believes that such unequivocal assessment of this issue is unjustified.

**Failure to submit a response or submission of unqualified rescission by one concrete respondent in joinder of parties does not free the claimant from the burden of proof, and the court should not automatically consider all factual circumstances indicated by the claimant as established.** Even if a respondent fails to submit a qualified rescission, the court should assess **the extent to which the evidence submitted by the claimant is sufficient to establish the factual circumstances indicated by the latter**, in addition to assessing the legal norms regulating the disputed relationship.

In the given dispute, the claimant demanded return of stakes, which implies invalidating the initial transaction. In such a case, the burden of proof is placed on the claimant, because, in general, when there is a transaction signed by parties, there is a presumption that the will expressed by the parties in the respective document (contract) is authentic, and it is incumbent on the party that demands the invalidation of the transaction to prove otherwise. Accordingly, **even if it is deemed that the respondent submitted a response in an unqualified manner or failed to submit it altogether, this is not sufficient grounds for confirming that the ownership right of the claimant was infringed upon through coercion, and the burden of proof for dispelling this idea should not necessarily be placed on the respondent.**

The Grand Chamber also points to the respondents' complicity in the coercion, which was manifested in **concluding the disputed transactions in a formal manner**, with the aim of preventing the claimants from recovering the property. According to the Court, "The chain of transactions involved interrelated persons, and their actions were coordinated; the registration of the disputed stakes as their property had a formal character, due to which they cannot be regarded as acquirers of the stakes in good faith." In connection with the recovery of the stakes, it also became necessary to seal the legal fate of the contracts that had been concluded after the first contracts, although the examination of the case didn't involve the persons who constituted parties of the transactions concluded between the first and last contracts. It follows

from the argumentation of the Grand Chamber that, by returning the stakes to the claimant, the Court deemed not only the first but also all the subsequent transactions as sham transactions, without giving all parties of the transactions an opportunity to prove their conscientiousness. The Grand Chamber's argumentation on this issue is superficial and incoherent. At the same time, the concept of "interrelated persons" needs to be specified, and it is unclear on what grounds the Court deemed the participants of the transaction as such, which ultimately influenced not only the legal grounds, but also the resolution of the issue of correct distribution of the burden of proof.

### 1. **Whether the coercion against Kibar Khalvashi is a universally known fact**

According to the Grand Chamber, the coercion against Kibar Khalvashi is a universally known fact. The Court indicates that the aforementioned has been stated publicly on several occasions, including in a 2009 report of the U.S. State Department; on April 21, 2009, the claimant was granted political asylum by the Federal Republic of Germany, and on December 5, 2012, **he was recognized as a political refugee by the Parliament of Georgia.**

It should be noted that the U.S. State Department report only points to the fact that in December 2008 Kibar Khalvashi applied to the Prosecutor's Office and the Parliament, stating that he had been forced to abandon the stake in the TV station under pressure from high-ranking officials of the government. The State Department report does not say that the coercion of Mr. Khalvashi into abandoning his property is a confirmed fact.

The GYLA believes that the circumstances cited by the Grand Chamber cannot turn the coercion into a universally confirmed fact. According to the law, the parties are freed from the obligation to submit evidence to confirm facts that a court considers as universally known. The court may consider the fact that various reports and acts of the Parliament talk about coercion against Kibar Khalvashi and his persecution on political grounds as a judicial notice, although this cannot become the grounds for considering the coercion as a universally established fact. Recognizing a person as a political refugee does not automatically create the grounds for arguing that he was subjected to coercion when he was concluding disputed contracts, the more so when civil proceedings are separated from criminal proceedings and even a verdict

delivered in a criminal case does not free a person from the burden of proof in a civil dispute.

### 1. **Limitation period for rescission**

In order to achieve a legal result in a case involving a disputed transaction concluded through coercion, it is necessary to carry out a legally valid rescission. The main function of setting a limitation period for rescission is to ensure that if an authorized person fails to make use of this statutory remedy (rescission), the disputed transaction will become valid and take legal effect. The validity of rescission is related to its becoming known to another party. In the given case, the Grand Chamber found that the claim filed by the claimant in the Prosecutor's Office of Georgia on December 1, 2008, constituted rescission. However, applying to the Prosecutor's Office cannot be regarded as rescission towards the respondent, because the claimant (Kibar Khalvashi) filed a claim in the Prosecutor's Office, and we don't know when the expression of this will became known to the respondent or whether or not it became known at all. In order for rescission to take place, the expression of the aforementioned will was to become known to the respondent, and the Court has not inquired whether this has taken place in the given case.

The argumentation of the Grand Chamber about the termination of the limitation period for rescission is also unsubstantiated. The Grand Chamber indicates that if a party has not carried out rescission, it is entitled to demand damages on the basis of norms on tort law. The Supreme Court also regards compensation with the disputed property as compensation of damage. Such interpretation of norms of tort law renders meaningless the imperative obligation of rescission in relation to disputed transactions, which is established by the Civil Code, and, in view of this interpretation, a party can demand compensation of damage (including compensation with disputed property) even if it has not carried out rescission. This contradicts the essence of disputed transaction and the consequences of failure to carry out rescission. In the event of failure to carry out rescission, the transaction becomes valid, and, accordingly, it is unclear how it is possible to litigate about compensation of damage in the case of a valid transaction.

### 1. **Legal grounds for satisfying the claim**

The Grand Chamber's judgment contains a vague reference to the legal grounds for

satisfying the claim, saying that it is possible to satisfy the claim on the basis of Articles 992, 998, and 408 of the Civil Code (tort), as well as on the basis of Article 172 of the Civil Code (vindication). The Supreme Court itself indicates that in the given case there is a competition of grounds for satisfying the claim and that at this time the Court is obliged to use one of the grounds. The Grand Chamber notes that in the given case it is using Articles 992, 998, and 408 of the Civil Code as the legal grounds for satisfying the claim, although it does not explain why it ruled out the possibility of using Article 172, which it has cited itself.

It is important to substantiate this issue, as the aforementioned two grounds entail different limitation periods and pre-conditions for satisfying claims. Considering that the interpretations of the Supreme Court of Georgia are binding on the common courts of all instances, **such vague reference to the legal grounds for satisfying the claim raises questions about substantiation and legal correctness of the judgment and creates uncertainty about which norm the courts should use when they decide on similar disputes in the future.**[\[1\]](#)

It is also noteworthy that, by the judgment delivered in this case, the Tbilisi City Court had satisfied the claim on the basis of Article 976 (unjust enrichment) of the Civil Code of Georgia. Accordingly, the Grand Chamber should have deliberated on why the norms regulating unjust enrichment should not be used.

It is especially noteworthy that on April 28, 2017, after the Grand Chamber of the Supreme Court had delivered the judgment (March 2, 2017), the Supreme Court of Georgia adopted a ruling in a similar case (case no. AS-224-213-2017) which contradicts the interpretations of the Grand Chamber. In particular, the ruling confirms that in cases when a transaction is invalidated, property should be returned under the norms on unjust enrichment – on the basis of Articles 976 and 978. It should be noted that two of the three judges who adopted this ruling were members of the Grand Chamber when the judgment on Rustavi 2 was delivered, although they did not file a dissenting opinion. In addition, in the ruling adopted on April 28, 2017, the Supreme Court notes that there was no need to deliver a new judgment, because the judgment delivered by a lower court reflected the firmly established judicial practice.

The said interpretation raises questions about the conformity of the subsequent practice of the Supreme Court with the Grand Chamber's interpretations. In the case of Rustavi 2, the Grand Chamber revoked the ruling of the lower court in the part of

invalidity of the transactions and, for this very reason, delivered a judgment instead of a ruling, whereas in a different case of the same type, on April 28, 2017, the Supreme Court upheld a judgment of a lower court and adopted a ruling instead of a new judgment. This decision is very important in terms of procedures, because if the Grand Chamber of the Supreme Court had adopted a ruling, instead of a judgment, in the case of Rustavi 2, then – in the event of the European Court of Human Rights establishing a violation of requirements of the Convention – the Tbilisi City Court rather than the Supreme Court would be entitled to examine the case for a second time.<sup>[2]</sup>

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<sup>[1]</sup> According to Paragraph 5 of Article 17 of the Organic Law of Georgia on Common Courts, “Legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court shall be binding upon the common courts of all instances.”

<sup>[2]</sup> According to Paragraph 1 of Article 424 of the Civil Procedure Code of Georgia, “An action for annulment or an action for retrial due to newly discovered circumstances shall be filed with the court that delivered the decision (judgment). The court that has delivered the decision shall also review the action when there is a judgment entered by a higher instance court confirming this decision. The court of appeals or the court of cassation shall review an action for annulment or an action for retrial due to newly discovered circumstances only if the action is brought against the decision delivered by it.”