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Functions of the Form of Transaction

The article provides analysis of the purposes of form of transaction. Number of most important functions discussed in the work clearly demonstrates purpose of each of them in contemporary law, among them, in the context of E-commerce. Finally, based on the performed study, the conclusion that each form of transaction is intended for simultaneous realization of several functions could be shared.

Key words: *form of transaction, function of the form.*

1. Introduction

In the philosophers' opinion, there are some rules providing to individuals more or less beneficial instruments allowing creation of the structure of rights and obligations that helps him to live within the legal scopes. These are the rules entitling individuals to make agreements, wills, deeds, and generally, make legal relations with the others. These are the rules allowing person exercising and protecting their rights.¹

In the context of social sciences, law is impossible without formalization and to demonstrate this, the form theory should be built so that it did not contradict to the content at all. If the law formalism is useful, it should be useful as long as it achieves something with respect of the content. There the form does not correspond to the content, formalism is a pathology; it will never have any desired effect and therefore, overall, it will be unstable. Formalism and formalization serve to maintaining of what is substantial in the content. Where formalization works well, its purpose is the same as of the entire content.²

Naturally, compliance with the certain contractual form, specified by the law or by the agreement between parties prevents prompt and flexible development of the contractual relations to certain extent.³ On the other hand, formality is associated with additional inconvenience of losing time and money; in many cases, erroneous form can invalidate absolutely seriously expressed will. And finally, the forms easily freeze, stay behind the time requirements and become unpopular. In such cases here is a discrepancy between the norm requiring compliance with the form and civil turnover attempting avoidance thereof.⁴ Though, requirement of the written form does not cause only incon-

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¹ *Hart H.L.A.*, Positivism and the Separation of Law and Morals, in: *Dworkin R.M.* (Ed.), *Philosophy of Law: A Very Short Introduction*, Tbilisi, 2010, 10-11 (in Georgian).

² *Stinchcombe A.L.*, *When Formality Works: Authority and Abstraction in Law and Organizations*, University of Chicago Press, Chicago, 2001, 2-3.

³ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, *Contract Law*, Tbilisi, 2014, 89 (in Georgian).

⁴ *Dernburg H.*, *Pandects*, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian). See also: *Chanturia L.*, *Commentary on Georgian Civil Code*, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian);

venience and limitations for the parties. Positive aspects of the written forms of the deals should be appreciated as well. By adoption of the requirement of written form of the whole set of the transactions the legislator attempts to protect the interests of civil turnover participants, ensure stability and security, protect the inexperienced subjects from the abuse from the side of unfair participants of civil law relations.⁵ Hence, the legislator sets certain rules with respect of the contract form in cases where there is such need to ensure stability of the contractual relations and establishing of the form has respective purpose.⁶

Contract law within both, civil and common law systems there were long lasting historical trends weakening significance of the contractual formality. Earlier legal systems were formalist and “objectivist” nature. Such antique formalism was associated with magic thinking and this can still seen in certain rules from early period of antique Roman law.⁷

Formality requirements can perform different functions; not all of them are related to protection of individuals from self-damaging contracts. They are the policy instruments and their function is to complicate contract execution and thus make it more prudent (autonomous) and overall, welfare improving to greater extent. Most legal regimes require compliance with the formality requirements to ensure validity and enforceability of the certain contract categories.⁸

In overview of the formal requirements adopted modern contractual law, *Zimmerman* mentioned that all these requirements were adopted to ensure achievement of certain legislative goals: facilitation of the transaction evidencing, possibility of making well-reasoned agreements and thus prevention of making immature and unreasonable statements; or, in case of notarization requirement – ensuring legal consultation.⁹

For certain transactions the legal systems set the relatively strict formality requirements, such as unilateral obligations or transaction of great significance, mostly related to marriage and inheritance.¹⁰

Though established measures differ with jurisdictions, formality requirements are always stricter where the transaction has great impact. This deals with extremely personal decisions, where particular significance is linked with the autonomy and reasoned judgment of choice, like some deals related to surrogate motherhood, marriage or heritage. As already stated by *Austin, Savigny, Jhering* and other classicists of jurisprudence, legal formalities are useful to protect individuals from imma-

Chanturia L., Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, “Sani” Publishers, Tbilisi, 2004, 70 (in Russian); *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 55-56 (in Russian).

⁵ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 56 (in Russian).

⁶ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 89 (in Georgian).

⁷ *Cserne P.*, Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 106.

⁸ *Cserne P.*, Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 107.

⁹ *Zimmermann R.*, The Law of Obligations: Roman Foundations of the Civilian Tradition, Cape Town, Wetton and Johannesburg, 1990, 86.

¹⁰ *Cserne P.*, Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 107-108.

ture decisions. From the point of view of soft paternalism, formality works as indicator of serious attitude. The main economic function of formal requirements is to make contract execution more difficult and thus more prudent and, as a result, achieve greater probability of welfare improving.¹¹

According to assessments of some authors, the form is not a goal, rather, it is the instrument for achievement of various goals and it is conditioned by such goals.¹² Hence, we should share the view that study of transaction form functions allows better understanding of the goals achievable by virtue of the law or through establishing of certain means for expression of will by the agreement between parties.¹³

The article provides analysis of the purposes served by the transaction form, what its functions are, especially in the sphere of e-commerce.

2. Characterization of Separate Functions of the Form of Transaction

Below are discussed some functions having certain significance characterizing one or another contract form established by the law.

2.1. Function of Clarity

Execution of written agreement allows the parties to accurately distinguish the process of negotiations from the fact of making contract. In case of verbal expression of the will (especially in case of long discussion of the contractual terms and conditions), the dispute may arise, whether each of the parties desired to bind himself with contractual relations with the other party, when expressing his opinion about contracting or only the question of potential contract was discussed. Requirement of making written contract allows better establishing of the fact of contracting as such, ensures clarity of the fact of contracting (*Abschlußklarheit*).¹⁴

In its attempts of stimulating of private persons to ensure that the act of expression of their will stated their intention with sufficient accuracy and clarity to ensure uniform understanding and perception of the transaction contents at all times and by all interested parties, including the court, the legislator adopts the requirement of executing of one or another agreement in simple written form.¹⁵

¹¹ Cserne P., *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach*, Palgrave Macmillan, New York, 2012, 108.

¹² Kereselidze D., *General Systemic Doctrines of Private Law*, Tbilisi, 2009, 285 (in Georgian).

¹³ Tatarikina K.P., *Form Requirements in the Russian Civil Law*, TUSUR Publishing, Tomsk, 2012, 64 (in Russian).

¹⁴ Tatarikina K.P., *Form Requirements in the Russian Civil Law*, TUSUR Publishing, Tomsk, 2012, 57-58 (in Russian). This is the function implied where mentioned that the formal deal distinguishes the deal conclusion from preliminary negotiations: Dernburg H., *Pandects*, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian). See also: Chanturia L., *Commentary on Georgian Civil Code*, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian); Chanturia L., *Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch*, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

¹⁵ Belov V.A., *Civil law, General Part*, Vol. 2, Persons, Goods, Facts, "Yurayt" Publishing, Moscow, 2011, 635 (in Russian). See also: Todua M., Willems H., *Law of Obligations*, Tbilisi, 2006, 106 (in Georgian); Khubua G., Totladze L. (Eds.), *Comprehensive Legal Vocabulary*, Berlin, 2012, 114 (in Georgian); Treitel G., *The Law of Contract*, 11th Ed., Sweet & Maxwell, London, 2003, 176.

Written form of the contract may assist the parties to distinguish terms and conditions provided for by the contract in written and those agreed upon verbally. In addition, it is useful for finding out the extent to which the agreements not provided in written could be applied for the purpose of contractual relations. Clearly formulated written contract allow the parties to act in accordance with the contract terms and conditions.¹⁶

2.2. Function of Serious Intention/Warning Function

In the opinion of some authors, formal agreement has numerous advantages. Parties better understand the seriousness of the act and preliminary negotiations are put into certain order.¹⁷

One of the bases for making formal transactions is the legislator's attempt to "induce in the persons exercising the act absolutely balanced serious will"¹⁸. If the law or agreement between the parties provides for written form of the contract, the participants have to spend certain time and efforts for its execution (formulation of the contract text and agreement thereupon, its signature and in some cases – notarization). It is implied that in such cases the parties perceive the legal act performed by them more seriously. Accidentally said words or even promise given as a joke may be understood by the contractor as an expression of serious will, while, actually, this is not the case. In making written document, the turnover subjects, normally, understand that the document signed by them is intended for achievement of the legal results. The parties are not always ready to confirm their verbal promises in written. Requirement of written contract prevent the parties from expression of the immature will or making unreasonable agreements; it confirms serious nature of the parties' intentions (*Übereilungsschutz*).¹⁹

Formal requirements were adopted for three political reasons. First of them is that the form is intended to warn the parties (or one of them) that they are going to perform significant act and it is referred to as the warning function (*Warnfunktion*).²⁰

The other author calls given function of the regulation establishing the form to ensure that the contents of the expressed will is sufficiently understood by the person stating this will as the preventive function.²¹

Thus, written form of the contract has the warning function²². The contract exists in a tangible form. Thus, to make decision on whether to sign the contract or not, the parties have the opportunity

¹⁶ Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L., Contract Law, Tbilisi, 2014, 89 (in Georgian).

¹⁷ Dernburg H., Pandects, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian).

¹⁸ Mityukov K.A., A Course of Roman Law, Typolithography of the Partnership "I.N. Kushnerev and Co.", Kiev, 1902, 43 (in Russian), Cited: Tatarikina K.P., Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 58 (in Russian).

¹⁹ Tatarikina K.P., Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 58 (in Russian).

²⁰ Markesinis B.S., Unberath H., Johnston A., The German Law of Contract: A Comparative Treatise, 2nd Ed., Hart Publishing, Oregon, 2006, 84. In the action, signature serves to improvement of awareness, for which a person gives his/her consent, and this property in German law literature is mentioned as the function of warning (*Warnfunktion*): Laborde C.M., Electronic Signatures in International Contracts, Peter Lang GmbH, Frankfurt am Main, 2010, 29.

²¹ Kropholler J., German Civil Code: Study Commentary, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

²² According to Fuller's classical differentiation, the warning function is one of the three functions of contractual formality, implying that the formality makes the parties wait and think of what are they doing: Cserne P., Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach, Palgrave Macmillan, New York, 2012, 110.

to think and analyze, whether they need to execute the contract with given terms and conditions or not²³. The warning effect of the form is that an individual can think more, before he formalizes properly and makes document with the signature and seal, than he would think, before making verbal promise²⁴.

Frequently, the regulation requiring compliance with the form performs the function of confirmation of the serious nature of the intention, i.e. protects inexperienced businessmen from immature decisions. Its substance is to ensure that these people had sufficient time to think about the terms and conditions and formulate them, so that the contract was regarded as made according to the serious intention and hence, its enforcement could be ensured by the court. For many people and especially those, who are not professionals, the written form means that the period of oral discussion has ended and the parties face necessity of confirmation of the serious nature of their intentions²⁵.

Where the norm is intended to protect the parties from immature decisions, in making significant contract or that, containing some danger, a person, whose protection was intended by the regulation, is left without any protection of he/she makes verbal agreement²⁶.

Supreme Court of Georgia, in one of its decisions, emphasized confirmation of the serious nature of intention as one of significant aspects of contract form. In particular, written form is intended to protect the contracting parties from immature decisions. Reading of the written document and sense of responsibility caused by its signature should make any reasonable person think. Though, practically, this is not always the case. Though in one of the other decisions, the Supreme Court has regarded signature on the written document as the evidence that the transaction participant was aware in the contents of the contract, the practice frequently shows just the opposite. Especially, where standard contract terms and conditions are applied and the contract party, usually, signs it blindly. Nevertheless, the written form is a significant precondition for seriousness.²⁷

²³ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.* Contract Law, Tbilisi, 2014, 89 (in Georgian). See also: *Chanturia L.*, Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian); *Chanturia L.*, Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

²⁴ *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176. It should be noted that in accordance with German Law, electronic form is excluded in certain legal actions, where the protection from the immature decision is of primary significance (so called preventive function of the written form): *Kropholler J.* German Civil Code: Study Commentary, Tbilisi, 2014, §126a, Rn. 1, 54 (in Georgian).

²⁵ *Zwaigert K., Kötz H.*, An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 53 (in Georgian). See also: *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.* Contract Law, Tbilisi, 2014, 191 (in Georgian); *Bölling H., Lüttringhaus P.*, Systematic Analysis of Separate Grounds of Claim of the Civil Code of Georgia, Tbilisi, 2009, 30 (in Georgian); *Mariamidze G.*, Law of Obligations, General Part, Book One, 1st Ed., Tbilisi, 2011, 37 (in Georgian). To ensure that the acceptor of will expression was sure in seriousness of will expression, this should be done in a visually recognizable manner, e.g. with the seal or scanned signature, dated and other similar methods: *Kropholler J.*, German Civil Code: Study Commentary, Tbilisi, 2014, §126b, Rn. 4, 56 (in Georgian).

²⁶ *Chanturia L.*, Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 112 (in Georgian). See also: *Bölling H., Chanturia L.*, The Method of Making Decisions in Civil Cases, 2nd Ed., Tbilisi, 2004, 232 (in Georgian).

²⁷ *Chanturia L.*, General Part of the Civil Law, Tbilisi, 2011, 336-337 (in Georgian).

2.3. Accuracy Function

Advantage of the written form is that this means of expression of will makes the transaction parties to formulate its contents more accurately. In addition, as reasonably stated, “if the details of verbal agreement..., after certain time period, can be lost from the memory of its participants and other persons, written text allows recollection of the contract terms and conditions at any time needed”²⁸. There is a presumption that what is objectively written on the paper reflects the will of a contracting person. Necessity of written execution of the will expression can impact the contents of the contract, as, in many cases, the parties, in making written documents, attempt to formulate their will more accurately, clearly and unambiguously. Necessity of written formalization may stimulate the parties to agree upon the terms and conditions that would not be provided in case of verbal agreement; i.e. written form ensures accuracy of formulation of the contract contents (*Inhaltsklarheit*).²⁹

Civil Code of Georgia regards that the contract is made if the parties have agreed upon all substantial terms and conditions thereof, in a form provided for this. Substantial terms and conditions shall be formulated in the objective form provided for by the law, ensuring their adequate understanding and interpretation. Naturally, if the accurate content of the contractual terms and conditions is impossible, discussing their legal outcomes become senseless³⁰. Thus, the function of the contract form is to adequately state the parties’ will and establish them legally. Contract form establishes the expression of the will by the contract parties and fully reflects it.³¹

Overall, providing of the form provides relative protection of the contract parties from the expected misunderstanding. They will have less problems with mutually excluding and ambiguous statements, unusual provisions, unclear standard terms and conditions and interpretation.³²

2.4. Evidentiary Function

One of the main functions of the written form of the contract is the evidentiary function (*Beweisfunktion*). In executing of written document the parties’ will finds its objective expression and is established, for the long period of time. Contents of the expression of will could be established not only in given moment but with time, after it. Document created by the parties expressing the will of contracting parties is the evidence of contracting, confirming not only the fact of cont-

²⁸ Pokrovski B.V., The Concept and Significance of Written Form of Transaction in the Soviet Civil Law, in: Proceedings of the Institute of Philosophy and Law of the Academy of Sciences of the Kazakh SSR, Vol. 4, Alma-Ata, 1960, 164 (in Russian), Cited: *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59 (in Russian).

²⁹ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59 (in Russian). Thus, the requirement of document also simplifies the problem of finding out of the agreement content: *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176.

³⁰ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 52 (in Georgian). Thus, purpose of compliance with the requirement of written form of the contract is accurate determination of the contract content: *Khubua G., Totladze L.* (Eds.), Comprehensive Legal Vocabulary, Berlin, 2012, 114 (in Georgian).

³¹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 149 (in Georgian).

³² *Pepanashvili N.*, Business Law (Regulation of International Business), Tbilisi, 2011, 148 (in Georgian).

racting but also the terms and conditions agreed upon by the parties. Written form as the instrument for creation of the evidence is of particular significance in case of contracts significant not only for the parties but for the third persons as well.³³

Where the parties achieve certain agreement as a result of long verbal negotiations and call such agreement a contract, naturally, certain contractual relations will be made between them. In many cases, the process accompanying the contractual relations and their outcome is certain dispute between contracting parties. The subject of dispute may be even whether the fact of contracting has occurred or not. Naturally, the parties need to have some evidence. Hence, in such cases, written form accepted for certain types of contracts is the best evidence with respect of all contract-related issues.³⁴

Adopting legal regulations necessitating compliance with certain formal requirements in contracting the legislator has certain intention.³⁵ In such case the function of the norm establishing the form is to make evidencing of expression of will easier.³⁶

Written form is an additional condition of contract validity and it was adopted in the law to prevent abuse of testimonies in the process of evidencing.³⁷ Exclusion of the testimonies should be dictated, with respect of legal policies, by poor reliability of given means of evidencing.³⁸

Thus, the purpose of the form is to guarantee evidencing of expression of will. In case of form absence, no one can prove that it had ever existed.³⁹

Supreme Court of Georgia has emphasized facilitation of evidencing as one of important aspects of the form functions and mentioned that the existence of written document certainly facilitates identifying of the will of contracting parties and thus – the process of evidencing.⁴⁰

2.5 Function of Consultation

In some cases, for contracting, the law requires not only execution of the written document, embodying the parties' will but also participation of a person with special legal knowledge, such as a notary. Involvement of the notary in the contracting process guarantees that the parties received ex-

³³ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 59-60 (in Russian). This is the form function implied where there is specified that formal contract makes the evidence of the contract more persuasive: *Dernburg H.*, *Pandects*, Vol. I, General Part, Tiflis, 1928, 243 (in Georgian).

³⁴ *Dzlierishvili Z.*, *Tsertsvadze G.*, *Robakidze I.*, *Svanadze G.*, *Tsertsvadze L.*, *Janashia L.*, *Contract Law*, Tbilisi, 2014, 89 (in Georgian). See also: *Todua M.*, *Willems H.*, *Law of Obligations*, 2006, 106 (in Georgian); *Chanturia L.*, *Commentary on Georgian Civil Code*, Vol. 3, *Law of Obligations, General Part, Article 328*, Tbilisi, 2001, 110 (in Georgian); *Khubua G.*, *Totladze L.* (Eds.), *Comprehensive Legal Vocabulary*, Berlin, 2012, 114 (in Georgian); *Chanturia L.*, *Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch*, "Sani" Publishers, Tbilisi, 2004, 70 (in Russian).

³⁵ *Zwaigert K.*, *Kötz H.*, *An Introduction to Comparative Law: The Institutions of Private Law*, Vol. II, *Contract, Unjust Enrichment, Tort*, Tbilisi, 2001, 60 (in Georgian).

³⁶ *Kropholler J.*, *German Civil Code: Study Commentary*, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

³⁷ *Chanturia L.*, *Commentary on Georgian Civil Code*, Vol. 3, *Law of Obligations, General Part, Article 328*, Tbilisi, 2001, 108 (in Georgian); *Chanturia L.*, *Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch*, "Sani" Publishers, Tbilisi, 2004, 68 (in Russian).

³⁸ *Zwaigert K.*, *Kötz H.*, *An Introduction to Comparative Law: The Institutions of Private Law*, Vol. II, *Contract, Unjust Enrichment, Tort*, Tbilisi, 2001, 60 (in Georgian).

³⁹ *Zoidze B.*, *Constitutional Control and Order of Values in Georgia*, Tbilisi, 2007, 26 (in Georgian).

⁴⁰ *Chanturia L.*, *General Part of the Civil Law*, Tbilisi, 2011, 336-337 (in Georgian).

planation of the legal significance of their will expression and the outcomes thereof and this, as such, is intended for prevention of abuse from the side of more competent party in legal respect. Notary's participation allows ensuring equality of the contracting parties and thus protecting the interests of the party that has poorer legal awareness. In general, requirement of contract notarization is intended for prevention of possible legal errors in making complex contracts. This function is characteristic for the most strict, notarized form of the contracts and it is called the function of consultation (*Beratungsmöglichkeit*).⁴¹ Thus, the function of the form regulating norm can be ensuring of the party's awareness in the legal outcomes of expression of its will.⁴²

Requirement of the form compliance has the function of the intention confirmation, where stating that the given transaction shall be attested by the independent official with legal education.⁴³ The legislator provides for the notarized form for the transactions with particular significance for civil turnover or playing the key role for the contracting parties, as well as for the contract made in the special circumstances.⁴⁴

In accordance with German law, the notary, by public notarization, attests that the signature, or in case of voting – hand rising has taken place or was recognized in his/her presence and that in case of the person expressing his/her will, this is about the person mentioned in the confirmative statement. The confirmative statement is the evidence of the signature validity; it does not deal with the content of the expression of will; thus, expression of will in the written form exists as the private document. Public notarization is particularly required by the law in cases that are subject to registration with the Public Registry. In this way, the unauthorized person will be deprived of the opportunity of fraudulent registration enjoying public trust.⁴⁵

In making particularly complicated contracts or those with the outcomes of legal significance, the legislator desires to ensure that the parties received the consultation and explanations for the outcomes of the action performed by them in relation with the contract, from the neutral expert well aware in the law.⁴⁶ Thus the notary, in addition to the performing of the notary's action, is entitled to provide legal consultation to a person about the “scopes” and outcomes of the contractual relations. The notarized form reduces the risk of invalidation of the contract, by his/her participation in the undisputed cases, by providing unbiased consultations to the parties, preparation of the authentic documents, the notary contributes to development of the system of legal safety.⁴⁷

The opinion that the function of consultation of the notarized form is the most substantial one should be shared but this form performs the other functions as well. In particular, notarization en-

⁴¹ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 60-61 (in Russian).

⁴² *Kropholler J.*, German Civil Code: Study Commentary, Tbilisi, 2014, §125, Rn. 1, 50 (in Georgian).

⁴³ *Zwaigert K., Kötz H.*, An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 53 (in Georgian).

⁴⁴ *Belov V.A.*, Civil law, General Part, Vol. 2, Persons, Goods, Facts, “Yurayt” Publishing, Moscow, 2011, 635 (in Russian).

⁴⁵ *Kropholler J.*, German Civil Code: Study Commentary, Tbilisi, 2014, §129, Rn. 1, 57 (in Georgian).

⁴⁶ *Bölling H., Lüttringhaus P.*, Systematic Analysis of Separate Grounds of Claim of the Civil Code of Georgia, Tbilisi, 2009, 232 (in Georgian).

⁴⁷ *Shotadze T.*, Property Law, Tbilisi, 2014, 456 (in Georgian).

sures clarity of contracting, accuracy of formulation of the content thereof, protects the parties from making unreasonable, immature deals and performs the evidencing function. Though, for the given form the function of consultation is the decisive one.⁴⁸

2.6. Information Function

Written execution of the contracts is sometimes intended for protection of the third parties interests, i.e. the written form performs the information function (*Erkennbarkeit für Dritten*).⁴⁹ The exact translation of „*Erkennbarkeit für Dritten*“ is “recognizable for the third parties” though some authors think that such name does not correspond to the function content. Therefore, it seems that it would be more reasonable to call this function of written form the information function.⁵⁰

One of the significant purposes of written contracts is providing legal information to the user. In particular, the contractual formulary contains numerous legislative norms for distinguishing of the rights and obligations of the contracting parties. Therefore, contemporary laws, for the purpose of protection of the user interests, provide for numerous contracts with mandatory written form.⁵¹

The purpose of informing could be explained so that each type of contract shall contain the norms thoroughly explaining the legal issues of certain nature. Necessity of the mentioned explanation can be caused by the status differences between the contracting parties, e.g. the contract between bank and common citizen shall contain explanations dealing with the interests, the penalties imposed for non-fulfillment of the contract, the fines and other substantial issues.⁵²

To justify the information and documenting purposes of the norm, the contents of the will expression shall be recorded by means of the typed symbols (letters and numbers) so that it was suitable for permanent reproduction. Together with the document, any other means allowing storage and reproduction of the statement by the person expressing his/her will. Normally this includes hard copies and electronic documents, as well as the tele- and computer facsimile notifications, e-mail, data stored as the files and web sites that, normally, are suitable for storage.

⁴⁸ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 61 (in Russian).

⁴⁹ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 61-62 (in Russian).

⁵⁰ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62 (in Russian).

⁵¹ *Chanturia L.*, Commentary on Georgian Civil Code, Vol. 3, Law of Obligations, General Part, Article 328, Tbilisi, 2001, 110 (in Georgian). See also: *Chanturia L.*, Freedom and Responsibility: Law and Judiciary of the Post-Soviet Epoch, “Sani” Publishers, Tbilisi, 2004, 70-71 (in Russian). Thus, in such case, the form has a protective function, as it serves to protect the weaker party to the contract, guaranteeing that such party has written records of the contract terms and conditions. For example, the employee shall be informed in written about the details of his/her employment: *Treitel G.*, The Law of Contract, 11th Ed., Sweet & Maxwell, London, 2003, 176. According to the assessments of some authors, in the old forms here were closely linked ritual nature and attempt to state the contents accurately and clearly. But soon the protective function of formality was brought forward. This explains the fact that the only known formula of post-classic period was documentary record of the transaction and in many cases this is the typical requirement for various forms of the transactions: *Zwaigert K., Kötz H.*, An Introduction to Comparative Law: The Institutions of Private Law, Vol. II, Contract, Unjust Enrichment, Tort, Tbilisi, 2001, 52 (in Georgian).

⁵² *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 90 (in Georgian).

It should be taken into consideration also that where the addressee has no technical capabilities for receiving of the expression of the will, the problem is not non-compliance with the form but rather the problem of statement delivery. Similar to the electronic form, a person participating in civil turnover shall allow exercising of expression of the will in relation to him/her by providing e-mail address or fax number.⁵³

2.7. Control Function

As specified in the literature, the written form of the contract performs the control function (*Kontrollfunktion*) as well. Some authors mention that written form “facilitates control over the legality of the concluded contracts”⁵⁴. Indeed, if written contract is made, to get familiarized with its terms and conditions and identification of the potential incompliance with the law one can simply read the text. Only a person not interested in the contract and not participating therein may control and supervise lawfulness of the contract between parties. Therefore, written form provides the control function only if supervision over the compliance is performed by the special subject. In case of notarization requirement, this is the notary or any other person entitled to perform the notary’s actions and he/she shall examine compliance of the draft contract. In case of execution of the simple written contract the parties may make the written document independently, without participation of any special subject. Therefore, at one glance, it seems that the simple written form does not provide the control function. Though in case of dispute, the parties apply to the court for resolution. Court shall thoroughly investigate and assess the evidences provided and examine, whether the contract complies with the requirements of the law. If the court establishes that the contract does not comply with the legal requirements, is void, the court shall take this into consideration and do not uphold any claim based thereon, even if none of the parties has claimed that the contract is void. Consequently, the simple contract form, similar to the notarized form, provides the control function.⁵⁵

2.8. Function of Identification

Signature put by the own hand provides number of functions. Primarily, it serves to identification of the signatory and thus linking of the document with the person. For example, signature on the check serves to identification of the issuer; signature on the painting shows the identity of a painter. In such cases identification is possible as the signature is made by a specific person’s own hand. On one hand, each person chooses the way how to write his/her name independently and creatively and on the other hand and what is most important, the signature is unique characteristic of each person allowing accurate identification of the signatory and distinguishing valid signature from

⁵³ *Kropholler J.*, German Civil Code: Study Commentary, Tbilisi, 2014, §126b, Rn. 2, 55-56 (in Georgian).

⁵⁴ *Pokrovski B.V.*, The Concept and Significance of Written Form of Transaction in the Soviet Civil Law, in: Proceedings of the Institute of Philosophy and Law of the Academy of Sciences of the Kazakh SSR, Vol. 4, Alma-Ata, 1960, 164 (in Russian), Cited: *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62-63 (in Russian).

⁵⁵ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 62-63 (in Russian).

the false one. In addition, the signature confirms the signatory's will and intent to become bound with the written document, i.e. the intent of the signature. By signing the document the signatory expresses his/her acceptance of the document's content.⁵⁶

The above provides two main functions of the signature: identification of the signatory and establishing of the intention. Though, in the contract the signature provides the other function as well. In particular, the signature contributes to the entirety of the document. Normally, the signature is in the end of the document and any records below the signature are of no value. In German legal literature this function of the signature is mentioned as the function of document ending (*Abschlussfunktion*).⁵⁷

Purpose of the electronic signature is providing of the same functions as in case of the signature made by a person's own hand, though it is adjusted to the characteristics of the electronic transactions. Signature made by a person's own hand and electronic signature, though apparently different, serve to achievement of similar goals in the different media. UN International Trade Law Commission applied the term "functional equivalence" to emphasize this feature. In this case attention is paid not to the form of the signature but rather to the functions performed by it. Thus, in case of electronic signature, the main requirement is that it could provide identification⁵⁸ of the signatory and establishing of the intention⁵⁹. According to German law, the of the document shall put on his/her statement the qualified electronic signature as per the Law author on Electronic Signature. This corresponds to the signature made by one's own hand in case of the usual document and therefore ensures correspondence of the content of expression of the will with the content of the relevant document.⁶⁰

2.9. Function of Enforceability

According to *Fuller's* classical differentiation, the contractual formality provides one more function known as channeling function. In particular, formality is the simple and cheap test of enforceability, It is the signal for the court and non-professionals that the contract is good and enforceable. The form is most useful for the parties desiring to achieve agreement enforceable by the court. In the other words, if one desires to give legally binding promise, whether this is the promise giver or promise acceptor, form application would be very useful.⁶¹

In the literature, the similar name denotes the other function of the form. In particular, the form can serve to what is called a "channelling" purpose, i.e. use of certain form can help in differentiating one transaction type from the other.⁶²

⁵⁶ *Laborde C.M.*, *Electronic Signatures in International Contracts*, Peter Lang GmbH, Frankfurt am Main, 2010, 27-28.

⁵⁷ *Laborde C.M.*, *Electronic Signatures in International Contracts*, Peter Lang GmbH, Frankfurt am Main, 2010, 28.

⁵⁸ Indeed, with technologies development, this issue becomes more and more significant for the transactions of e-trade as in such transactions there is a danger that a person made error, with respect of the identity of desired contractor: *Amiranashvili G.*, *Mistake as to the Identity of a Contracting Party – Feature of the Regulation in the Georgian Legislation*, "Journal of Law", №2, 2013, 27 (in Georgian).

⁵⁹ *Laborde C.M.*, *Electronic Signatures in International Contracts*, Peter Lang GmbH, Frankfurt am Main, 2010, 29-30.

⁶⁰ *Kropholler J.*, *German Civil Code: Study Commentary*, Tbilisi, 2014, §126a, Rn 2, 54 (in Georgian).

⁶¹ *Cserne P.*, *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach*, Palgrave Macmillan, New York, 2012, 110.

⁶² *Treitel G.*, *The Law of Contract*, 11th Ed., Sweet&Maxwell, London, 2003, 177.

3. Conclusion

To study the legal significance of the contract form numerous opinions of various authors were compared and analyzed and this contributed to making of the entire picture. In addition, this has confirmed the fact that study of specific functions of the contract form allows better understanding of the legislator's intention when adopting the specific formal requirements.

The article offers discussion of number of the most important functions of the contract form and this has clearly demonstrated the purpose of each function of the form in contemporary law, among them, in the context of technological development. Analysis of the contract form functions, overall, allows sharing of the conclusion that each form of the contract is intended for simultaneous realization of several functions. It would be wrong to regard that the form requirement is intended for ensuring only any one of the functions.⁶³

⁶³ *Tatarkina K.P.*, Form Requirements in the Russian Civil Law, TUSUR Publishing, Tomsk, 2012, 64 (in Russian).