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Nikoloz Simonishvili*

Fairness, as the Standard of Restriction of the Contractual Freedom

Contractual fairness is an important principle of civil law and plays essential role in the stability of civil relationships. Article 325 of the Civil Code of Georgia provides the requirement to determine the contents of obligation on the basis of fairness. It includes not only the contractual relations envisaged by the CCG, but also the various institutions of private law.

CCG establishes the definition of the content of the obligation on the basis of fairness when the content of the obligation is determined by one of the parties or by a third party of the contract.

In this case the party by whom the content is defined is obliged to determine the content of the contract on the basis of fairness. There are cases when the participants of civil relations are in a state of inequality and there is a threat of abuse of the right from the favored party. Thus, the stipulation of the principle of fairness of the contract in CCG is of a crucial importance in order to establish the fair balance between the participants of the civil relationships.

Regardless of importance of the above mentioned article, it has not been the subject of research in Georgian doctrine and its importance was not understood by the court either. The presented paper aims to examine importance of contractual fairness in the private-legal relations and the principles and prerequisites of the use of the provision of Article 325 of CCG in these relations.

Keywords: Fairness, Contractual Freedom, Contractual Fairness, Private Autonomy, Good Faith, Trust, Determination of Content of Obligation, Interpretation of the Will, Free Discretion, Contractual Party, Third Person.

1. Introduction

Contractual fairness is cornerstone to stability of civil relationships. According to the article 325 of the Civil Code of Georgia (hereinafter referred to as CCG), if the terms for performing an obligation are to be defined by one of the parties or third person(s), then it is presumed, when in doubt, that such definition shall be constructed on a fair basis. If the party considers that terms are unfair or their determination is delayed, the court shall make a decision.

The content of the article is of general nature and in some cases it is specified in the different fields of private law. However, these articles are not concrete, thus, they are subject of the court's interpretation.

Article 325 of the CCG together with the principles of good faith and trust is one of the ground for the restriction of the freedom of contract - one of the most important principles of civil code and it obliges the participants of the civil relationships, to define the content of obligation fairly.

Due to the frequent inequalities in civil relations, the legislator allows the court to intervene in the determination of the obligation. With this in mind, the authors of the first comments of CCG,¹ projected,

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¹ Zoidze B., Chanturia L., Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 81 (in Georgian).

that this article would be used often in practice, but unfortunately, this norm has not been examined by any doctrine, and for a long time in the practice of contract law, article 325, have not been understood appropriately.

Therefore, due to the general content of the article and non-consistent or wrong usage in practice. It is essential to define the legal conditions and criteria, which will enable the parties and the court to determine the liability or legal conditions fairly.

2. The Scope of Contractual Freedom in Private Law

According to the part 2 of Article 10 of the CCG, Participants in a civil relationship may exercise any action not prohibited by law, including any action not expressly provided by law. This provision constitutes the principle of private autonomy, which is the crucial principle as for the civil law, as well as for the private law. It implies the right of the participants of private relationships to carry out any action or conclude a contract that is not prohibited by law.²

The private autonomy means the right granted to a person within the limits of his/her capacity of right to conduct and regulate his/her issue through concluding various contracts.³ Principle of private autonomy in the Contract Law reflects in Article 319, which has proven to be a contractual freedom.

2.1. The Importance of Contractual Freedom

The contents of the obligation arising on the basis of the agreement shall be first and foremost determined by the agreement of the parties. On the basis of the principle of contractual freedom parties are free to define the content of the contract and make amendments to it.⁴

Parties are not obliged to define the contents of the contract exhaustively, it is sufficient if the content is definable. Regulatory holes can be filled with filler interpretation. Finally, it depends on the agreement of the parties, taking into consideration reasonable judgement, their interests,⁵ the principles of good faith, trust and their hypothetical wills.⁶ As long as the dispositive norms contain existing regulations of the CCG, the complementary definition of the contract is preferred.⁷

2.2. Restriction of Contractual Freedom

Parties are able to define the content of their contract according to their will on the basis of contractual freedom (private autonomy), which is stipulated in article 319 of the CCG. However, the

² *Khubua G.*, Theory of the Law, Tbilisi, 2004, 208 (in Georgian).

³ *Larenz K.*, AT, 7. Auflage, 40-41, see in: *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 57 (in Georgian).

⁴ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 231.

⁵ BGHZ 41, 271 (279).

⁶ BGHZ 84, 1 (7).

⁷ *Palandt/Heinrich*, §157, Rn 4 ff. see in: *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 230.

principle of pre-eminent contractual freedom can be restricted. These restrictions must be prescribed by law. For instance, when the content of the agreement is contrary to the current legislation or the norms of morality the freedom of contract is restricted.⁸ The right to define the content and form of the contract as well as the right to modify the content of the obligation can be subject to restriction.⁹

Determining the content of the obligation may be restricted by prohibitions of law, morals,¹⁰¹¹ public order,¹² provisions that promote civil law principles and other general norms.¹³ These issues have long been interpreted as limited,¹⁴ but now, the basic importance of the terms of the contracts for controlling the contents of the contract is reflected in the circumstances of prohibition of the inequality, taking into consideration the fundamental rights.

In civil law, contractual freedom is not an absolute notion and it is limited by contractual fairness. As parties enjoy equal contractual rights, the obligations should be determined on the basis of contractual fairness.¹⁵ Two points of view can be found in legal doctrine. According to one opinion, in order to be fair the decision, it must be based on the accounting rules and the requirements of the law, whereas, pursuant to another point of view the contents of the obligation cannot be restricted by the accounting rules, but the economic reality must be taken into account, so that the consumer is not deceived.¹⁶

3. Defining of the Content of the Obligation on the Basis of Fairness

The contents of legal obligation arise from a particular agreement or directly from the law.¹⁷ Under Part 1 of Article 317 of the CCG, for an obligation to arise there shall be a contract between the parties except when the obligation arises from tort (delictus), unjust enrichment or other grounds prescribed by law. Only when the content of the obligatory relationship is determined, the questions whether the obligation was terminated by the performance of the obligation, whether the ground for termination of the contract on basis of violation of obligation and thus, the right to claim damages exist.

The idea of social state includes the protection of the weak party of the contract and the obligation to define fair conditions.¹⁸ The standard of fairness of the contract, to some extent, is imposed by the CCG which establishes the protection of principles of good faith and trust.¹⁹

⁸ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 46.

⁹ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Heymans C., Verlkag, Rn. 233.

¹⁰ BGHZ 37, 319 (323);104, 279 (281); BGHZ 37, 319 (324).

¹¹ *Bydlinski P.*, Bürgerliches Recht, Bd 1, 5., aktualisierte Auflage, Wien, 2010, Rn. 7/39.

¹² *Mohr J.*, Sicherung der Vertragsfreiheit durch Wettbewerbs- und Regulierungsrecht, Verlag Mohr Siebeck, Bd. 196, 820.

¹³ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 238.

¹⁴ *Krammer*, MünchKomm, Verlag C.H. Beck, München, 2012, §145, Rn. 19.

¹⁵ *Chachanidze T.*, Contractual Freedom and Contractual Fairness in Modern Contract Law, Journal “Judiciary and Law” №3, Tbilisi, 2010, 24 (in Georgian).

¹⁶ *Zahid A.*, “True and Fair View” Versus “Fair Presentation” Accountings: Are They Legally Similar or Different? European Business Law Review, Kluwer Law International, 2008, 681.

¹⁷ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 69.

¹⁸ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 56 (in Georgian).

3.1. General Grounds for Determining of Contents of the Obligation

In the case of a contractual obligation, the obligation must be defined or definable, and the agreement is deemed to be construed as if its contents are defined or at least definable.²⁰ In the case of indefinite obligation, a debtor cannot be required to perform the obligation,²¹ and it is practically impossible to enforce obligation.²²

Often the obligations are not determined by the parties, for example, when it comes to the subject and type of the obligation, the time and place of fulfillment. Nevertheless, the contents of the obligatory relationship are, of course, clear when the contents of the obligation are determinable. There are many ways to establish these objective circumstances, such as a price list when purchasing goods at the store, or market price of purchasing stock shares. Additionally, the legislative regulations will be taken into account when determining the content. For example, in accordance of part 2 of Article 630 of the CCG, if the amount of compensation is not agreed upon, a tariff rate shall be deemed to apply where such rate exists, but where no tariffs exist, a customary fee shall apply.²³ The identical content is the German Civil Code (hereinafter referred to as "GCC"), §632 II, which implies that if the item is to be repaired and the payment is not imposed, it is deemed to be conventional remuneration.²⁴

If the content of the agreement is not expressed clearly from the Agreement of the Parties, it may be possible to explain the interpretation of the will based on general norms (Article 52 of the CCG). There is same case, when contents of the obligation are unclear, ambiguous or mutually exclusive, as well as when its expressions demand amendment and completion.²⁵ If the explanation of the parties can not lead to a predetermined definition, then we should use the so-called methods of filling interpretations of the agreement. The purpose of determining the contents of the agreement by interpretation of the will is to determine whether or not a particular action has any value or what the content might be, when the purpose of the filling interpretations of the agreement is to eliminate the gaps of the contract.²⁶ It is linked to a purpose of the parties and is understood as a legal source from which the open-ended content can be filled with considering of good faith and trust.²⁷ When the filling interpretation of the contract the separate issues are missed or the terms of the contract are given in certain shortcomings. While interpreting the will the content of the internal will of the party with its expression has to be determined

¹⁹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 57 (in Georgian).

²⁰ BGHZ 55, 248, 250; BGH NJW-RR1990, 270, 271 (in Georgian).

²¹ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 45.

²² *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 69, Rn. 1.

²³ For example, we can also refer to Article 510 of the CCG for determining the price of redemption, in determining the cost of the cargo value of Article 692, the value of the cargo, for the determination of the amount of remuneration during the mediation of Article 744.

²⁴ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 1.

²⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia, 23.02.2015, № as-1144-1090-2014 (in Georgian).

²⁶ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Rolf Schmidt, 2005, Rn 46.

²⁷ BGHZ 9, 273ff; BGHZ127, 138, 142.

and thus the contents of the agreement will be defined.²⁸ After the expiry of this method, the content of the contract cannot be established, the dispositive norms of the CCG can be used.²⁹

3.2. Define the Contents of the Obligation by the Contracting Party or the Third Person

The Contents of the Agreement may be determined by the agreement of the Parties, and there is also the possibility that the Parties may leave the details open or specify details of the contract by one of the parties or by third person.³⁰ The contents of the fulfillment in such cases are not absolutely certain at the moment of concluding the contract, it must be determined after the concluding of the contract, before the commitment of the obligation.³¹ Such an agreement does not contradict the requirement of the determination of the contract, because this content in all cases is determinable.³²

The CCG allows the possibility that separate conditions of the contract may be determined by one of the parties or third person(s). In such case, it is essential that there must be agreement between the parties that there is such a contract on the determination of the obligation, and which party (the person) is authorized to make this determination.³³

To use of Article 325 of the CCG the contents of the obligation shall not be determined, and if the Parties specifically define terms of the contract or if it is determinable by other circumstances, Article 325 of the CCG is no applicable. Therefore, first of all, the content of the fulfillment cannot be determined by the agreement of the parties by the filling interpretation or by other regulations, but if it cannot be established in this way, Article 325 shall be applied.³⁴

Definition of the terms of the agreement on the basis of fairness is important to determine how well the obligation is fulfilled. The duly fulfillment of the obligation is mainly related to the subject of performance, in particular the debtor shall make fulfillment according to the agreement. If the concrete condition is not agreed or its determination is the prerogative of one of the parties, the performance shall be fulfilled in good faith and fair. In such a case, the assessment of these principles is a court authority and gives the opportunity to make a decision based on the principles of good faith and fairness.³⁵

If the Party does not consider the terms as a fair or their determination are delayed, the Court shall make a decision on basis of part 2 of Article 325. In addition, if the determination is delayed, there is a possibility to determine the content of obligation or require compensation for damage.³⁶

²⁸ Decision of the Civil Cases Chamber of the Supreme Court of Georgia, 23.02.2015, № as-1144-1090-2014 (in Georgian).

²⁹ Hütte F., Helborn M., Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 47.

³⁰ Ibid, Rn 50.

³¹ Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 2.

³² Hütte F., Helborn M., Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 50.

³³ Ibid, Rn 51.

³⁴ Ibid, Rn 52.

³⁵ Dzierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L., Contract Law, Tbilisi, 2014, 380 (in Georgian).

³⁶ Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 72, Rn. 9.

We also find similar content norms in the GCC, but the main difference is that this case is not regulated by one legislative norm. Determining the terms of the contract by the party is provided by §315 and the determination of the terms of the contract by the third person(s) is provided by §317.

The norms set out not only the basic criteria for determining the obligation, but also its rules and basis of authenticity of the agreement. According to the GCC §315 II, the determination is made by a statement to the other Party which has to be handed over to the other party and the withdrawal is not permitted.³⁷ There is no special form for revealing this will, unless it is established by the law.³⁸ According to GCC §315 III, if the definition is to be evaluated fairly, then the other party is obliged only if it is fair.³⁹

The GCC, unlike CCG, also regulates the case when condition is determined by several third persons. In such a case, in case of a dispute, it is assumed that it is necessary to make a joint decision.⁴⁰ More detailed regulation is included in the GCC §315 and §317 about rescission of definition, which is not regulated by the CCG.

3.2.1. Determine by the Contracting Party

The Parties may either directly or concisely agree that one of the parties shall be entitled to determine the subject and content of the obligation. In such case, questions arise what basis and rules of determining the content of the obligation need to be determined.⁴¹

3.2.1.1. Authorized Person to Determination

The type of performance or its procedure can be defined as the creditor's and the debtor's prerogative. German legislation in case of bilateral obligations also makes an exception: if the compensation for the performance is not determined, then the right holder is entitled to determine the remuneration.⁴² On the contrary, the CCG does not allow such exceptions and as it makes permissible to determine the any obligation by any party.

The creditor has the right to determine the obligation in cases when there is an agreement on leaving the price issue open or the change of price in case of specific circumstances, namely, the time of delivery of goods.⁴³ We deal the debtor's determination of the obligation, when employer promises to insure employees.⁴⁴

³⁷ BGH NJW 2002, 1424.

³⁸ Hütte F., Helborn M., Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 53.

³⁹ Kropholler J., Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 220 (in Georgian).

⁴⁰ Kropholler J., Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 221 (in Georgian).

⁴¹ Looschelders D., Schuldrecht AT, 3. überarbeitete Auflage, Heymans C. Verlkag, Rn. 241.

⁴² Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 3.

⁴³ Ibid, 71, Rn. 4.

⁴⁴ Brox/Walker, ErbR, Rn. 443; see in: Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71.

It should be noted that often defective obligation, the opposite performance can be interpreted by the explanation of the will. Consequently, in such case the relevant norms of determination are not applied.⁴⁵ If opposite performance is determined by the schedule or duties of the obligation, set with the minimum or maximum payments, a person with the right of claim can determine the bilateral limit.⁴⁶

3.2.1.2. Determination on Basis of Will of the Parties

According Article 52 of the CCG, the explanation of the will is to be established as a result of reasonable judgment, and not only from the literal meaning of the statement. When explaining the content of the agreement, first of all it is necessary to determine the true will of both parties.⁴⁷ In this explanation, the main problem is in impartiality and fairness of explanation,⁴⁸ so it is necessary to have specific criteria.

The reasonable judgment should be based on certain criteria, in particular the explanation of the will should be taken by the possibility of understanding (comprehension) of the receiver of the will. Besides, it is possible to use trade traditions and customs (Article 338 of the CCG), as well as principles of contractual law.⁴⁹ The explanation must be made as the person being in the place of the contracting party does.⁵⁰

The obligation shall be determined by revealing will by the authorized person. Revealing the will is not withdrawal, as well as expressing any will which became part of the contract. It does not require the form even when the contract or fulfillment requires the protection of the form. In this case, general norms of invalidity of contract are used.⁵¹

3.2.1.3. Determination on Basis of Fairness

First of all, it is important to define what conditions of the Article 325 of the CCG are applicable. Determination will be based on fairness unless otherwise agreed in the agreement. The second prerequisite of the norm is that determination should be carried out by either one of the parties or by a third party/person(s) or the determination to be delayed or unable to be established, and as regards the code entry, "in doubt", the value is no longer valid. Article 325 of the CCG sets out the possibility of

⁴⁵ BGHZ 94, 98, 101.

⁴⁶ Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 4.

⁴⁷ Zoidze B., Jorbenadze S., Akhvlediani Z., Ninidze T., Chanturia L., Comments on Civil Code of Georgia, 1st Book, Tbilisi, 2002, 299 (in Georgian).

⁴⁸ Canaris C-G., Grigoleit H.C., Interpretation of Contracts, Towards a European Civil Code, 3rd Edition, 2004, 449. See in: Bachiashvili V., Definition of the contract according to the principles of the European Contract Law and the expediency of its implementation in the Georgian legislation, "Journal of Law" №1, Tbilisi, 2013, 10 (in Georgian).

⁴⁹ Decision of the Civil Cases Chamber of the Supreme Court of Georgia, 23.02.2015, №as-1144-1090-2014 (in Georgian).

⁵⁰ Lando O., Beale H.G., Principles of European Contract Law, Parts I and II, Kluwer Law International, London/Boston, 2000, 289.

⁵¹ Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 5.

determination of content of contract on basis of fairness in valid contract and it is not ground of the invalidity of the agreement because of the unfairness, even though there was the case when the court considered the contract unfair⁵² and immoral, which contradict to the conditions, because unfair conditions in the invalid contract cannot be discussed.

If the definition does not fit in fairness, then it is not a barrier to the party of the contract.⁵³ The party must protest determination, which should be expressed by applying a claim to the court by the authorized person.⁵⁴ Before the decision is made by the court, determination of content of the contract is active.⁵⁵ However, there is an opinion in the legal literature that the determination is made by the court itself and not by the party. In case of invalidation of the determination, the condition shall be determined by a court decision.⁵⁶ This is possible even when the determination of the terms of the contract is delayed by the party (lagging).

The fairness gives the party the ability to make decisions, but the decision is based on the criteria of fairness, the consideration of the interests of the parties and the study of the specific case.⁵⁷ The authorized person on defining the performance has a reasonable assessment of the action area and may not have only one "correct" result. Determination is made by the court when the borders of fairness are overcome and not when the court considers that the other definition is correct.⁵⁸

In accordance with part 2 of Article 319 of the CCG, if one of the parties to a contract holds a dominant position in the market, then it shall be bound by the obligation to enter into a contract in this field of activity. This party may not unjustifiably offer unequal contractual terms to another contracting party. The mentioned norm represents classic example of the obligation to contract, when the market dominant entity is obliged enter into a contract with a customer, but at the same time the provision in the second sentence will strengthen the principles of fairness as the stronger party will not be able to determine the conditions of the obligation only after own interests.⁵⁹

There is a difference of opinions whether the contractor is obliged to the other party in determining the terms of the contract. The answer to this question is unimaginable. In order to determine whether such obligation exists, it is to be defined by each specific case, but generally we should agree with it, if the party is directly interested in the performance of the contract.⁶⁰ The question of discussion is of particular importance to the results of the delay.⁶¹ The lawmaker wanted to introduce this line by opening

⁵² Decision of the Civil Cases Chamber of Tbilisi City Court, 03.11.2015, №2/15651-15 (in Georgian).

⁵³ *Kropholler J.*, Study Comment of the German Civil Code, 13th edition, translation of Darjania T. and Chechelashvili Z., Tbilisi, 2014, 220 (in Georgian).

⁵⁴ *Palandt/Heinrichs*, §315 Rn. 6. See in: Looschelders D., *Schuldrecht AT*, 3.überarbeitete Auflage, Carl Heymans Verlkag, Rn. 243.

⁵⁵ OLG Frankfurt am Main, NJW-RR 1999, 379.

⁵⁶ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 6.

⁵⁷ *Hütte F., Helborn M.*, *Schuldrecht AT*, 3. Auflage, Verlag Dr. Rolf Schmidt, 2005, Rn 53.

⁵⁸ BGHZ 41,280; BGH NJW-RR 1991, 1248.

⁵⁹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, *Contract Law*, Tbilisi, 2014, 380 (in Georgian).

⁶⁰ *Hütte F., Helborn M.*, *Schuldrecht AT*, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 54.

⁶¹ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 7.

a simple way of defining the contents of the contract. Without this division, the case should go through the procedure of the claim and its execution.⁶² The Contracting Party may also specify the term of the contract as a special requirement.⁶³

3.2.1.4. Determination on Basis of Free Judgment

The GCC⁶⁴ and Legal Literature distinguish the definition based on fairness and free judgment. If the Parties agree that the obligation shall be determined on the basis of free judging of one of the Parties, the norms for determining the obligation on the basis of fairness are not applicable.⁶⁵ In the case of a valid agreement on defining the terms of the agreement on the basis of free judgment, the decision of the court cannot be based on fairness.

To verify whether the Parties have agreed on the determination of the obligation on basis of fair or free judgment, they should pay attention not to the literal meaning of wording, but to the contents of the agreement. It is assumed that there is an agreement on the definition on basis of fairness, for example, the condition is given in the contract: "The agreement on the price is openly left".⁶⁶

3.2.2. Determination by a Third Person(s)

Due to the provisions of Article 325 of the CCG, the parties may also agree that the content of the performance is determined by a third person(s). Such a case occurs when special knowledge is required for determination of performance⁶⁷ and at the same time, the contractual obligation must be decided by a person with a trust.⁶⁸ In such a case, there is a need for an agreement that the right to determine the obligation is transferred to a third person (or several third parties).

In a contract that is concluded by a third person, the beneficiary third party is not a party of the contract. Nevertheless, it will not be understood for the purposes of a norm as a third party, as it has the authorities to determine the performance of the agreement as a party of the contract.⁶⁹

3.2.2.1. The Contents of the Legal Norms for Determination of Performance

In the literal sense, the third persons must be given the right to determine the performance; under this, it is also meant to determine the possibility of one performance only. For example, we can consider the case where "a" and "b" make a purchase agreement on the picture provided that "c" should define the purchase of agreement on a painting and place of fulfillment.

⁶² *Brox/Walker*, ZVR, Rn. 1065 ff.

⁶³ Compare: BGH NJW 1983, 2934.

⁶⁴ §319 II GCC.

⁶⁵ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 71, Rn. 8.

⁶⁶ *Ibid.*

⁶⁷ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 56.

⁶⁸ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 10.

⁶⁹ BGH NJW-RR 2003, 1355.

Often the third person is not obliged to complete the non-existing performance in order to make an indefinite agreement real, but rather intentionally, but only to determine the contents of the contract or to set certain conditions, which are indirectly intended to determine the content of the performance (mediator in a narrow sense).⁷⁰

There is the third person arbitrator, when he parties agreed with the sale price and the third person must determine the value. We have similar results even, when dividing property between "a" and "b" is distributed by "c". If the "b" disagrees with any of the rules of division, and "c" decides to divide the property by another rule, "a" is not obliged to agree with this rule of division and, moreover, "c" should take into account the interests of the parties and the principle and rules of fair decision. Such agreements are called the expert decision (Schiedsgutachtenvertrag). Such an agreement is aimed at binding definition of obligation by the competent third person, in actual circumstances. Theoretically there is only one correct decision, but in reality, the third person has a large area of action for decision-making.⁷¹ The terms of the Article 325 shall apply to the agreement on the expert in such a way that the strict separation is not obligatory.

It should be distinguish from the mediator in accordance with Civil Procedure Code.⁷² In such case, instead of court, the mediator shall decide the issues relating to the contract, in which are not used Article 325 of the CCG. For the separation it is crucial not the will of parties of contract, but the will of third person. The third person establishes only the elements of actual circumstances, so that the decision on the request is protected by the court, while mediator decides the legal relationship between the parties directly.⁷³

3.2.2.2. Determination on Basis of Fairness

Definition of a liability by a third person, as well as determining the obligation of one of the Parties, shall be carried out by the application of one of the contracting parties to the other⁷⁴ and shall not be withdrawn.⁷⁵ If the determination of performance is to be made by a third person, in case of suspicion or dispute, it is assumed that the determination shall be based on justification. If the determination of his obligation is obviously unfair, then it has no power to bind the party. In such a case, definition should be based on a court decision. If we compare a determination by third person to the contracting party's determination in connection of non-binding of obligation because of unfairness, we conclude that different regulation is caused by the fact that the third persons determine the content of obligation with more accuracy and there is better guarantee than by determination of performance by the contractual party⁷⁶ The Court's decision shall be apply instead of the third person' determination, when the third

⁷⁰ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 11.

⁷¹ *Looschelders D.*, Schuldrecht AT, 3. überarbeitete Auflage, Heymans C. Verlkag, Rn. 252.

⁷² *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 73, Rn. 11.

⁷³ BGHZ 6, 335.

⁷⁴ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 57.

⁷⁵ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 12.

⁷⁶ *Ibid*, Rn. 13.

person by impartial and competent observer's estimation⁷⁷ will violate the credibility of the trust and good faith,⁷⁸ which may misuse the right granted to him.⁷⁹

Determination of liability is based on a court decision, even if the third person fails to decide or does not want to decide whether or when it is delayed. This regulation corresponds with the views of the Parties: When a third person determines the obligation on the basis of fairness, it depends on the trust of this person⁸⁰ as well as the decision on the subject. That is why the court can make a decision on defining the obligation instead of third person.⁸¹

The difference between the party and the third person in determining the obligation is that in the case of the latter, the court makes a decision when determination is grossly unfair. This step is based on the idea that the third person is usually neutral and has knowledge of the subject, which, in the case of a small scale of unfairness, should not be invalid.⁸²

3.2.2.3. Determination on Basis of Free Judgment

The parties may also agree that the third person will make a decision based on free judgment. In such a case, the determination of the obligations under the court's decision is not acceptable, as the parties attach importance to the decision of the third person. If the third person fails to define or delay it, the contract will not be true.⁸³ However, the parties may agree that in this case the court will determine the performance on basis of fairness.⁸⁴ In the event that a third person decides on determining the obligation, it shall be deemed to binding the parties in the frames of law and morality, even when defined content is unfair⁸⁵

3.2.2.4. Determination of Performance by Several Third Parties.

If the obligation is determined by several third persons, it is necessary to take the joint decision (§317 II GCC).⁸⁶ If there is no joint decision, its legal consequences are identical to the fact that it has not been determined at all.⁸⁷ In this case the court will decide.⁸⁸

⁷⁷ BGH, NJW 1991, 2761.

⁷⁸ Compare: BGH NJW 1958, 2067; 1991, 276; *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlag, Rn. 248.

⁷⁹ *Bydlinski P.*, Bürgerliches Recht Bd 1, AT, 5. aktualisierte Aufl., Wien, 2010, Rn. 3/19.

⁸⁰ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlag, Rn. 247.

⁸¹ Prot I, 468 f.; Mot. II, 193. see in: *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 14.

⁸² *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 59.

⁸³ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 75, Rn. 15.

⁸⁴ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlag, Rn. 249.

⁸⁵ Hk-BGB/Schulze §319 Rn. 6; see in: *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlag, Rn. 249.

⁸⁶ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. *Schmidt R.*, 2005, Rn 58.

⁸⁷ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 75, Rn. 16.

⁸⁸ *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.* Verlag, Rn. 251.

Nevertheless, there is a case in the German judicial practice when the majority principle is used.⁸⁹ As for the case when determining the amount of money and given the different amount of money, in case of the dispute the average amount is implied.⁹⁰

3.3. Invalidation of Determination of Contents of the Obligation

The CCG does not regulate the request of a party or a third person to rescind and invalidate this condition when determining the condition of the obligation. In contrast, the issue of rescission of the fulfillment of obligation by a party or a third person in a particular way is regulated by the German law.

Determination of the terms of the contract is the reveal of the will and is a transaction in the sense of Article 50 of the CCG. Consequently, the determination of the obligation is related to general norms on the invalidation of the legal transaction, but the right to claim has only contractual party, because they are the carriers of the legal burden of the transaction, not the third party.⁹¹

Rescission may be due to error, threatening or deceiving, but the right to claim is only for contractual party.⁹² The third person cannot request rescission because he/she does not have legal interest in it. Rescission on the basis of deceiving or error should be made immediately, after having learned about the grounds for rescission (§318 II GCC).⁹³

If it becomes clear that the parties agree on determination of conditions of obligation on the basis of free discretion or fairness, the question arises whether this agreement is valid, or creditor is entitled to define the term on basis of fairness and if such an agreement may be invalidated on the basis of §138 GCC (Invalidation of the agreement due to immorality; for example, condition for the debtor by determining the price by the seller).⁹⁴ The agreement on determination is not valid and therefore will not be a binding if it is contrary to the §134 GCC (invalidation of the agreement is due to its illegality).⁹⁵

4. Cases of Defining the Contents of the Liability in Private-Legal Relations

Article 325 of the CCG is placed in the first general part of the third book of the CCG, which establishes the unity provisions of the obligatory-legal relationship. The general part of the obligatory law consolidates the general norms which regulate the obligatory relations in private law, when special norms does not exist. Article 325 of the CCG is placed in the CCG, but its field of action is larger and includes private law.

The content of the obligation is determined on the basis of fairness not only in civil law but in labour, corporate, consumer protection, or competition law, which will be discussed below.

⁸⁹ BGHZ 22, 343 (346).

⁹⁰ *Looschelders D.*, Schuldrecht AT, 3. überarbeitete Auflage, Heymans C. Verlkag, Rn. 251.

⁹¹ *Hütte F., Helborn M.*, Schuldrecht AT, 3. Auflage, Verlag Dr. Schmidt R., 2005, Rn 58.

⁹² §318 II GCC.

⁹³ *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 74, Rn. 12.

⁹⁴ *Ibid*, Rn. 16.

⁹⁵ *Ibid*, Rn. 9.

4.1. Defining the Contents of the Liability in Contracts Envisaged by the CCG

The private autonomy of the parties envisaged by the CCG, allows the parties to specify the contents of the Agreements, however, in some cases the Code establishes the rules, according to which the certain conditions should be determined by one party. In such cases article 325 of the CCG is applicable. For instance, during travelling, the time limit for the elimination of the shortcoming of the travel is set by tourist (Article 659 CCG)⁹⁶. There is a similar solution if the time for the fulfillment of the obligation is not agreed, creditor determines according to the Article 365 of the CCG⁹⁷, however, “the term set by one party should also respect the interests of the other”.⁹⁸ As mentioned above, the autonomy of the parties is decisive factor, while determining the terms of the contract, but the contractual freedom is limited by contractual fairness and does not allow the side to abuse the right.⁹⁹ We meet another expression of this principle in the subparagraph "a" of Article 347 of the CCG, which prohibits the standard conditions by which the offeror fixes unreasonably long or obviously insufficient periods of time for accepting or refusing to accept an offer, or for performance of certain actions.¹⁰⁰

Moreover, the CCG contains other legal cases, when the determination of the obligations on the basis of fairness, and, thus, the usage of corresponding provisions is essential.

4.1.1. Self-Contracting

Part 1 of Article 103 of the CCG allows the contract to be made through a representative, except when due to the nature of the contract, it should be concluded by a particular person, or when the law prohibits the making of a contract through representative.

The aforementioned provision is stipulated in Article 114 of the CCG, which prohibits self-contracting. According to the article 114, unless otherwise provided by the consent, representative is not allowed to make any legal transaction on the behalf of the principal with himself/herself, either in his own name or as an agent of a third party, except when the legal transaction already exists for the performance of certain obligations. This provision prohibits conclusion of a contract when one side of the transaction and the other party's representative is the same person. However, the ban on self-contracting has an exception, namely, if the representative acts on the behalf of the power of attorney, or if he/she fulfills the obligation.¹⁰¹

The exception of Article 114 of the CCG provides that if the principal has granted representative the right to make an agreement with himself/herself, then he/she appears to be both parties of the

⁹⁶ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 416 (in Georgian).

⁹⁷ *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 287 (in Georgian).

⁹⁸ *Ibid.*, 57 (in Georgian).

⁹⁹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 415 (in Georgian).

¹⁰⁰ *Ibid.*

¹⁰¹ *Zoidze B., Jorbenadze S., Akhvlediani Z., Ninidze T., Chanturia L.*, Comments on Civil Code of Georgia, 1st Book, Tbilisi, 2002, 299 (in Georgian).

contract, therefore, the content of the obligation will be defined by himself/herself only. In such case, the parties have not directly agreed obligation to be determined by one person only, however, due to the specificity of this legal relationship, it is deemed that the power of attorney granted representative the power to determine the contents of the obligation.

In case of self-contracting, definition of the contents of the obligation entirely depends on the representative. This makes it possible to abuse the right and use it for receiving the personal benefits, against the interests of the principal. Thus, principal is entitled on the basis of Article 325 of the CCG to demand the fair determination of the content of the agreement and failing that, he/she is entitled to apply to the court.

4.1.2. Adjustment of the Terms of the Contract to the Changed Circumstances

In accordance with Article 398 of the CCG, if the circumstances that were the grounds for the conclusion of a contract have evidently changed after the conclusion of the contract, and, the parties would not have concluded the contract or would have executed it with different contents, if they were aware of such changes, the modification and adaptation of the contract to the changed circumstances can be demanded by each party. Failing that, taking into account individual circumstances, a party to the contract may not be required to strictly observe the unchanged contract.

For appliance of the provision must be fulfilled these preconditions: after the conclusion of the contract, the circumstances must be changed and the parties would not have concluded the contract or would have executed it with different contents.

The second part of Article 361 of the CCG establishes the presumption of duly performance of the obligation, which implies that the obligation must be fulfilled, but this provision is not an absolute in its character, as the circumstances may clearly change and the parties may not be liable for undue burden.

As it is known, contractual freedom includes not only the conclusion and determination of its content but also the freedom to amend it.¹⁰² The order prescribed by the CCG provides for protection of contractual fairness. Article 398 of the CCG guarantees contractual fairness when the parties may change the conditions which are unfair for them, due to the modification of the circumstances.¹⁰³ The changed circumstance makes impossible to fulfill the terms of the contract and demanding to remain it in force without adaptation contradicts the principles of fairness and good faith – the cornerstones of the civil circulation.¹⁰⁴

In case of change of circumstances, Article 398 of the CCG determines rule of expected behavior of the parties and its legal consequences. The Parties must first try to adjust the agreement with the changed circumstances. If it is impossible to adapt the contract to the changed circumstances, or the other party disagrees with it, then the party, whose interests have been infringed may refuse the contract.

¹⁰² *Looschelders D.*, Schuldrecht AT, 3.überarbeitete Auflage, *Heymans C.*Verlkag, Rn. 231.

¹⁰³ *Tabatadze D.*, Adjusting the Terms of the Contract to the Changed Circumstances, *Georgian Bussines Law Review*, 2nd edition, Tbilisi, 2013, 30 (in Georgian).

¹⁰⁴ Decision of the Civil Cases Chamber of the Supreme Court.of Georgia, 06.07.2010, №as-7-6-2010 (in Georgian).

If the circumstance has changed, one party of the contract addresses the other party for the amendment of these conditions. In case if the Parties fail to agree on the adaptation of specific terms, the party who considers that his/her rights are breached is entitled to refuse the fulfillment of the contract, which is followed by a bilateral restitution According to the article 352 of the CCG.¹⁰⁵

In most cases when the circumstances of the contract change, one party of the contract is more likely to suffer damage than the other. Thus, restitution is impossible and continuation of the contract with the modified conditions which apply to the changed circumstances is more beneficial. There can be a case when the parties agree on the need of adjusting the contract to the new circumstances, however, specific conditions hamper their agreement. In both cases, special importance should be given to the crucial principle of law, which states that “the obligation must be fulfilled”.¹⁰⁶ In the first case, determination of fulfillment of the obligation largely depends on the party which is better positioned compared to another party, and in the second case due to the disagreement of the parties, the determination of the specific content of the obligation is delayed. In both cases, the court must guide with Article 325 (2) of the CCG, to determine most fair condition in relation to the changed circumstances¹⁰⁷ and thus, restore the contractual fairness.¹⁰⁸

4.1.3. Defining Standard Conditions of the Contract on Basis of Fairness

Article 342 of the CCG establishes the definition of the standard of contractual conditions. Standard contract terms are provisions prepared in advance for repeated use that one party (the offeror) proposes to the other party, and which lay down rules that deviate from, or supplement statutory provisions.

There is the standard condition if it is set by one of the contracting parties, intended for multiple use and is determined by the terms of the law or its complementary conditions. From this definition it becomes clear that the standard conditions are used by the persons participating in civil relations, who are in the many contracts daily, and thus, in order to facilitate this relationship, use the previously agreed terms of the contract.¹⁰⁹ This is not surprising, because a person who has a lot of legal relationships every day thinks to make these procedures easy to pass because the definition each contract definition will take much time. That is why standard terms of the contract are often referred to as conditions for accession to the contract.¹¹⁰

¹⁰⁵ Decision of the Civil Cases Chamber of the Supreme Court of Georgia, 06.07.2010, №as-7-6-2010 (in Georgian).

¹⁰⁶ *Legashvili D.*, Impact of Changed Circumstances on Contractual Relations, “Journal of Law” №2, Tbilisi, 2013, 80 (in Georgian).

¹⁰⁷ Compare: *Chitashvili N.*, Complication and Impossibility of Performance of Changed Circumstances, “Journal of Law” №2, Tbilisi, 2011 (in Georgian).

¹⁰⁸ *Tabatadze D.*, Adjusting the Terms of the Contract to the Changed Circumstances, Georgian Business Law Review, 2nd edition, Tbilisi, 2013, 30 (in Georgian).

¹⁰⁹ *Kakoishvili D.*, The Standard Conditions of Contract, Georgian Business Law Review, 2nd edition, Tbilisi, 2013, 68 (in Georgian), <http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf>, [10.04.2018].

¹¹⁰ *Zoidze B., Chanturia L.*, Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 181 (in Georgian).

When it comes to determining conditions for one of the contracting parties, it is necessary to consider the provisions of Article 325 of the CCG. Therefore, it is necessary to verify the authenticity of the standard conditions on the basis of the criterion of fairness.¹¹¹

When using the standard conditions, the contractor's condition may have a risk that this right may be used in an unfair manner, prohibited to the Article 346 of the CCG. The principle of good faith is, first of all, involving the interests of the other party, in the absence of which the right is abused.¹¹² It is a civil law assessment criterion according to which, by distinguishing of fair and unfair, the person makes the fairest decision by the estimate of objective observer.¹¹³ In accordance with the Austrian case law, the standard condition of the contract contradict the principles of trust and good faith if it is against the buyer in accordance with the Austrian Civil Code (ABGB) §879 III. §879 The ABGB defines that the agreement is invalid, in which the contractual parties are in unequal conditions and considering all circumstances, is contrary to the other party.¹¹⁴

According to the Principles of the European Contract Law (PECL), each party must act in accordance with good faith and fair dealing, which cannot be restricted or excluded from the contract.¹¹⁵ The principle of good faith and trust is regarded as a comprehensive principle, if there is no specific provision for a specific case.¹¹⁶ The principle of good faith and trust differs from fairness, but in this case, Article 325 fills Article 346 of the CCG, prohibits dishonest and unfair contracting and establishes the rule of fair dealing.¹¹⁷

4.1.4. Determining the Amount of Penalty by the Court

According to the Article 416 of the CCG, parties may take into account the kinds of additional remedies for securing the performance of obligations: penalty, advance payment or a debtor's guarantee.

With regard to Article 417 of the CCG, the penalty is an amount of money determined by agreement of the parties to be paid by the debtor in the case of non-performance or improper

¹¹¹ *Bauer J., Koch M.*, Arbeitsrechtliche Auswirkungen des neuen Verbraucherschutzrechts, DB 2002, 45. See in: *Kereselidze T.*, Control of content of Standard conditions in Labour Contracts, Labour Law (Collection of Articles) II, Tbilisi, 2013, 69 (in Georgian).

¹¹² Decision of the Civil Cases Chamber of the Supreme Court of Georgia, 29.06.2015, №as-1338-1376-2015 (in Georgian).

¹¹³ *Kereselidze D.*, General Systemic Concepts of Private Law, Tbilisi, 2009, 83 (in Georgian).

¹¹⁴ OGH № 2Ob73/10i, 22.12.2010. <http://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20101222_OGH0-002_0020OB00073_10I0000_002/JJR_20101222_OGH0002_0020OB00073_10I0000_002.pdf>, {20.10.2015}.

¹¹⁵ Principles of European Contract Law (PECL), Art. 1:201.

¹¹⁶ *Lando O.*, Is Good Faith an Over-Arching General Clause in The Principles of European Contract Law?, European Review of Private Law, 6-2007, Kluwer Law International, 842.; Compare: *Beale H.*, General Clauses an spesic rules in the Principles of European Contract Law: the good faith Clause in S. GRUNDMANN & D. MAZEAUD (eds.) General Clauses and Standards in European Contract Laws – Comparative Law EC Law and Codification chapter 12.

¹¹⁷ *Khunashvili N.*, Control of Standard Conditions of Contract and Restriction on Basis of Good Faith, "Journal of Law" №1, 2013, 273 (in Georgian).

performance of an obligation. The penalty is an additional remedy for securing the performance of obligation¹¹⁸ which has two main purposes: first - stimulate the debtor to fulfill the obligation properly and secondly, compensate the alleged damage to the creditor.¹¹⁹

According to Georgian legislation, penalty can be expressed only in monetary form and can be determined in two terms: one time payable (fine) or the sum for violation of timeframe (penalty for daily basis).¹²⁰

Relating to the Article 420 of the CCG the court is entitled to control amount of the penalty and taking into account the circumstances of the case, court may reduce a disproportionately high penalty.¹²¹ “when the penalty reduction, court takes into account the economic conditions and other circumstances, namely, whether the performance of the obligation and the ratio of damage caused due to its non-compliance or improper performance, to the amount penalty, as well as, - economic interest of creditor.”¹²² The penalty is disproportionately high when its sum will significantly exceed the possible damage caused by the failure of the obligation.¹²³ The legitimate aim of reducing the penalty is to protect the "weak side" of the contract from possible inappropriate obligations¹²⁴ so that the creditor does not get much more penalty for alleged damage.¹²⁵

When dealing with the proportionality and reasonableness of the agreed penalty,¹²⁶ Article 420 of the CCG directly relates to Article 325, when the creditor determines the amount of penalty, which defines the terms of the contract on the basis of fairness by the court,¹²⁷ if the agreed condition disproportionately obliges the debtor and therefore, it is unfair.¹²⁸

4.1.5. Definition of the Excessively Obligation in the Debtor's Guarantee

The parties may agree to a debtor's guarantee as an additional means of securing an obligation. According article 424 of the CCG debtor's guarantee is an undertaking to perform an unconditional action or an action that is beyond the scope of the contract.

¹¹⁸ Chanturia L., Security Interest Law, Tbilisi, 2012, 234 (in Georgian).

¹¹⁹ Zoidze B., Chanturia L., Comments on Civil Code of Georgia, 3rd Book, Tbilisi, 2001, 488 (in Georgian).

¹²⁰ Akhvlediani Z., Obligatory Law, Tbilisi, 1999, 78-79 (in Georgian).

¹²¹ The Court can reduce only Contractual Penalty and not the normally established. See in: Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 25.12.2013, №2b/6267-13 (in Georgian).

¹²² Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 12.09.2012, №as-819-771-2012 (in Georgian).

¹²³ Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 30.11.2011, №2b/2103-11 (in Georgian).

¹²⁴ Meskhishvili K., Penalty (The Theory and The Case Law), 10 (in Georgian), <http://www.library-court.ge/upload/pirgasamtekhlo_k.meskhishvili.pdf>, [10.04.2018].

¹²⁵ Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 17.02.2015, №2b/4400-11 (in Georgian).

¹²⁶ Decision of the Civil Cases Chamber of the Supreme Court.of Georgia 15.11.2011, №as-988-1021-2011 (in Georgian).

¹²⁷ BGH NJW 1994, 45, 46.

¹²⁸ Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 12.02.2016, №as-896-746-2015 (in Georgian).

The Parties can freely define the contents of the debtor's guarantee, but it is not absolutely free, since the debtor's guarantee is not valid if it contradicts the law or obliges excessively the debtor (Article 425 of the CCG). Thus, the contractual freedom in this field is bound by the values recognized by the law, and whether it obliges a guarantee excessively, each case is to be judged by the court.¹²⁹

When we discuss about the debtor's guarantee, it is important to refer to its essence and place in civil legislation, and thus establish its scope and legal basis for restricting. According to German law, additional remedy for securing the performance of obligation are placed in one general part¹³⁰ of the GCC and referred to as a contractual penalty.¹³¹ This institution implies the agreement of the parties that, in case of violation of the obligation, the debtor is obliged to pay a certain amount of money¹³² or to perform any action.¹³³

If we compare the norms of the law with Georgian law, the CCG envisages only monetary payment and thus the Article 417 of the CCG corresponds to the context of §339 of the GCC, while the debtor's guarantee implies the performance of the action, which is equivalent to the alternate contractual penalty provided by §342 of the GCC. In both cases the GCC envisages a reduction of the agreed contractual penalty¹³⁴ if it is disproportionately high.

Article 425 of the CCG contains identical content as it is in the Article 420 of the CCG, which allows the possibility to reduce the penalty if it is disproportionately high. As the penalty and debtor's guarantee have general basis and differ only in form, it is necessary to consider the criteria set out in Article 420 in relation to Article 425 as well as the GCC.

As mentioned in the previous section, one of the indicators of determining the disproportion of the penalty is Article 325 of the CCG and the contractual fairness. That is why the Article 325 of the CCG may be used to fill the Article 425 and if the Court considers, that debtor's guarantee obliges excessively the debtor and it is unfair, court can reduce it on basis of fairness. Of course, we must use the criteria referred in Article 420 to determine the fairness of the claim and this issue shall be settled on the basis of the confrontation the creditor and the debtor's legitimate aims.

4.1.6. Insurance Relations

According to the part 1 of Article 799 of the CCG, insurer shall be obligated to compensate the insured for the damages resulting from the occurrence of an insured event, subject to the terms of the contract. The first Article regulating the insurance contract indicates that regulation of this contract is mostly entrusted to the agreement of the parties and they must define the substantive terms of the contract.

¹²⁹ Decision of the Civil Cases Chamber of the Supreme Court. of Georgia 19.10.2010, № as-379-352-2010 (in Georgian).

¹³⁰ GCC §336-§345.

¹³¹ Vertragsstraffe.

¹³² GCC §338.

¹³³ GCC §342; *Brox/Walker*, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 101.

¹³⁴ GCC §343.

One of the parties to the Insurance Agreement, the insurer, under the Insurance Law, is organized under the legal form of either limited liability company or joint stock company,¹³⁵ meets the requirements of the National Bank of Georgia¹³⁶ and its financial solidarity is guaranteed by share capital, insurance reserves and reinsurance systems.¹³⁷ Depending on the above, it is obvious that insurance companies (insurers) are financially strong subjects and in insurance relationships with consumers as a strong party of the contract, and therefore it is important to ensure fair balance between the parties of the contract.

An essential instrument of securing a fair balance in the insurance relations is Article 800 of the CCG, which states that a person who publicly offers an insurance contract, is obliged to conclude this agreement if there is no significant ground for refusal. This article is a special case of obligation to contract, which aims to prevent the insurer from failing to conclude the contract and in case the insurer still refuses to conclude the contract, the person may apply to the Court and on basis of Article 325 (2) of the CCG demand the determination of contents of contract fairly.

Together with the discussed issue, it is important to ensure that the contents of the terms in the contract are fair. The contents of the contract must be maximally exhaustive and comprehensive, due to the fact that according first part of the article 799, the payment of insurance reimbursement depends on the agreement of the parties.

Regardless of this norm of the law, it is difficult to find a contractual relationship that will be perfectly regulated and defined without law. In the practice of common courts there was the case when the parties agreed for the compensation of the cost of replacement parts in the case of car damage, but by the contract it was not regulated the case when the replacement of damaged parts were impossible.¹³⁸

In this case, the Court came out of the essence of the CCG and explained that the principles of good faith and contractual fairness are based on the principle of contractual freedom, based on which the court can set new rules of conduct. The Court pointed out that the insurer in the insurance contract is a "strong party", which proceeds to offer the terms of the contract and thus has more influence on their content. The terms of contract were not exhaustive and did not allow the insured for the compensation that was unfair to this party, therefore the court considered that it had the right to determine the conditions of contract itself, which were based on the principle of good faith of the civil relations.¹³⁹ It is also noteworthy that the decision of court was appealed by the insurer, but the Supreme Court threw out this appeal.¹⁴⁰

4.2. Labour Relations

The Labour Code of Georgia ("LCG") considers the principle of the CCG in relation to contractual freedom and according to second section of Article 2 of the LCG, labour relations arise on the basis of

¹³⁵ Law on Insurance, Article 2, subsection "g.a".

¹³⁶ Law on Insurance, Article 16.

¹³⁷ Law on Insurance, Article 14.

¹³⁸ Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 08.05.2014, №2b/6571-13 (in Georgian).

¹³⁹ Decision of Civil Cases Chamber of Appeal Court of Tbilisi, 08.05.2014, №2b/6571-13, 4.1 (in Georgian).

¹⁴⁰ Decision of the Civil Cases Chamber of the Supreme Court of Georgia 20.10.2014, № as-698-668-2014 (in Georgian).

the parties' equality, by the agreement reached through the free expression of the will. It is clear from the provision that conclusion of the contract and determination of its contents depend on the will of the parties, but we should pay attention to the second first of Article 2, which states that labour relations shall be performance of work by an employee for an employer under organised labour conditions in exchange for remuneration. Therefore, the equality of parties existing before the contract shall be transformed into subordination for the employee.¹⁴¹ Thus, "in this relationship the preeminent position of the employee is "weak" in relation to the employer, which is undoubtedly the "strong" party and may abuse of the rights".¹⁴²

The protection of equality between the "strong" and "weak" party in labour law is mostly ensured by the contractual fairness and the norms for determining the content of the obligation on the basis of fairness,¹⁴³ prescribed in Article 325 of the CCG. The applicability of the norm also indicates that section 2 of Article 1 of the LCG states that the issues relating to labour relations not regulated by this Code or other special law, are regulated by the norms of the CCG. Thus, the necessity of using Article 325 of the CCG indicates the principles of labour law and possibility of use of Article 325 of the CCG envisaged by the LCG.

On June 12, 2013, amendments were made to the LCG,¹⁴⁴ which made significant steps for protection of employees' rights and ensure fair environment in the labour relations. A significant part of the amendments touched upon the work time and overtime work and the issues of its remuneration, although by the legislative amendments was not be perfectly established the contractual fairness in labour relations.

The duration of the overtime work was defined by the legislative amendments. Overtime work shall be deemed the work performed by an employee under agreement between the parties in the period of time, the duration for which exceeds 40 hours a week for an adult, 36 hours a week for a minor between the ages of 16 and 18, and 24 hours a week for a minor between the ages of 14 and 16.¹⁴⁵ According to section 2 of Article 4 of the European Social Charter,¹⁴⁶ with a view to ensuring the effective exercise of the right to a fair remuneration, the parties undertake to recognize the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases. Taking into consideration, the sections 4 and 5 of Article 17 of the LCG defined the forms of compensation for overtime work, in particular in one case it could be a monetary remuneration,¹⁴⁷ and in the second case

¹⁴¹ *Adeishvili L., Kereselidze D.*, The Draft Law of Labour Code and Several Principles of States of Continental Europe, *Georgian Law Review*, №6/1-2003, Tbilisi, 2003,10 (in Georgian).

¹⁴² Decision of the Civil Cases Chamber of the Supreme Court of Georgia 23.03.2010, №as-1261-1520-09 (in Georgian).

¹⁴³ *Bamberger/Roth*, BGB Kommentar, 3. Auflage, Verlag C.H. Beck, München 2012, §315, Rn 6.

¹⁴⁴ Organic Law №729-III, 12.06.2013, which come into force 04.07.2013.

¹⁴⁵ Article 17, section 3 of LCG.

¹⁴⁶ Ratified by the Resolution of Parliament of Georgia №1876, 01.07.2005.

¹⁴⁷ Directive 2000/EEC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organization of working time to cover sectors and activities excluded from that Directive, <<http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:32000L0034>>, [10.04.2018].

the parties may agree to give an employee additional time off in lieu of overtime pay. In both cases, what kind of overtime work will be “paid” depends on the agreement of the parties.

In the first case, overtime work shall be paid in an increased amount of the hourly rate of pay and conditions for which shall be determined by agreement of the parties. In the second case, the employee may be given additional holidays, in relation to which the Code does not have any other provisions but its amount is also determined by the parties’ agreement.

In both cases, which of them should be agreed upon to pay for overtime work, its specific capacity is not established by the LCG. Subsection “v” of section 9 of Article 6 of the LCG, considers the rule of payment for overtime work as an essential condition of the labour agreement and defining this condition is necessary. However, in most cases, this condition may not be regulated either by the contract or because of the dominant position of the employer, it is regulated by the work rules and regulations, the terms of which are entirely determined by the employer.

If the rule for remuneration of the overtime work is not contracted, it will not result in annulment of the contract, and in respect of Article 17, section 4, the condition on compensation for overtime work shall be deemed to be agreed,¹⁴⁸ but its specific amount shall not be determined. In particular, it will not be specified how much of the increased amount of wage rate will be paid by the employer for overtime work, or how much he/she can benefit from the right for leisure time. Under the EU regulations, the internal legislation of member States establishes fair compensation for overtime work, from 25% to 150% increased amount of hourly salary, by considering the volume, hardness, and spent time of overtime work.¹⁴⁹

Unlike foreign legislation, the LCG does not include the amount of compensation for the overtime work and it depends on the agreement of the parties, but in case of non-existence of such an agreement or it is determined by the employer, it is relevant to use Article 325 of the CCG and condition must be determined on basis of fairness, taking into consideration the volume and specificity of the work. In case the amount of compensation cannot be reached between the parties, the court makes a decision on the basis of fairness and determines its amount (Article 325, Part 2). The question as to which form of overtime “pay” should use the employee, should be resolved taking into account to the employee and employer interests on basis of fairness, as it is the employer’s interests to give leisure time instead of paying monetary compensation and thus conserve financial resources, but the employee may be restricted to receive remuneration by less work.¹⁵⁰

4.3. Corporate Law

Corporate-legal relations, are characterized by certain specificities and thus, they are subject to special regulations. Majorly, these regulations are dispositive, however, the principles of good faith, trust and fairness still apply.

¹⁴⁸ Brox/Walker, Allgemeines Schuldrecht, 37. aktualisierte Aufl., München, 2013, 70, Rn. 1.

¹⁴⁹ <http://ilo.org/wcmsp5/groups/public/---ed_project/---protrav/---travail/documents/publication/wcms_161734.pdf>, see in: Mazanashvili M., Overtime Job and its Remuneration/Compensation, Labour Law (Collection of Articles) III, Tbilisi, 2014, 383 (in Georgian).

¹⁵⁰ Mazanashvili M., Overtime Job and its Remuneration/Compensation, Labour Law (Collection of Articles) III, Tbilisi, 2014, 387 (in Georgian).

On 24 June 2005, the Law on Entrepreneurs (Legislative Amendments, Law No. 1781-RS)¹⁵¹ was enacted and Article 53³ was added about the mandatory sale of shares. This law envisaged exclusion of minority shareholders by the majority of shareholder in the way that the minority shareholders were obliged to sell their shares in fair price to the shareholder with the majority shares. The above mentioned provision is an example of special regulation imposed in corporate law.

Such legislative regulations are common for legislation of developed countries, including the member States of European Union.¹⁵² In 2004, the European Union adopted the Directive on takeover of Enterprises. The deadline for the implementation of Directive was established until 20 May 2006.¹⁵³

In order to harmonize with EU legislation, the amendment was introduced to the Law on Entrepreneurs and the legislative regulations for mandatory sale of shares were stipulated. The first sentence of section 1 of Article 53³ of the Law on Entrepreneurs provided that if the shareholder had more than 95% of shares with the right to vote, then this shareholder (buyer) had the right to redeem other shareholders' shares, according to the rules envisaged by Article 53², but the minority of shareholders were entitled to get fair price for shares. According to the content of the section 2 of Article 53² if the rules for determining fair price was not stipulated in the Charter of the Company, it should have been defined by an independent expert or brokerage company. The law set the minimum margin of fair price, according to which the offered redemption price must have been no less than the maximum price that the redeeming shareholder has paid within the last 12 months for the company's share of the same class.

Article 53³ of the Law on Entrepreneurs was appealed at the Constitutional Court of Georgia and the Court made a decision on 28 May 2007 and Article 53³ of the Law on Entrepreneurs was recognized as unconstitutional.¹⁵⁴ The Court ruled that mandatory sale of shares sets obligation of contracting for minority shareholders and the regulatory provisions of this procedure must comply with the constitution and its principles.¹⁵⁵

The Constitutional Court ruled that the legislator had to establish the rules of mandatory sale of shares so that the possibility of abuse of economic power of the shareholder with majority of shares was excluded. However, in the aforementioned case the interests of shareholders was not balanced and they favored majoritarian shareholder.¹⁵⁶ Furthermore, the establishment of the procedures for determination

¹⁵¹ < <https://matsne.gov.ge/ka/document/view/26860#>>, [10.04.2018].

¹⁵² *Burduli I.*, Tender Offer, Mandatory Sale of Shares: Abuse of Right or Necessary Precondition for Capital Market Development, Journal "Judiciary and Law", №2, Tbilisi, 2007, 10 (in Georgian).

¹⁵³ *Gotschev/Staub*, GesKR 2006, 266; See in: *Burduli I.*, Tender Offer, Mandatory Sale of Shares: Abuse of Right or Necessary Precondition for Capital Market Development, Journal "Judiciary and Law", №2, Tbilisi, 2007, 30 (in Georgian).

¹⁵⁴ Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia (in Georgian).

¹⁵⁵ Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 10 (in Georgian).

¹⁵⁶ *Ibid*, 28 (in Georgian).

of fair price, which would be unambiguous and clear was essential. The case when the offered price was not acceptable for a minority shareholder should have been the subject of regulation.¹⁵⁷

On the basis of the decision of the Constitutional Court of Georgia, the regulatory norms for the mandatory sale of shares were established in the new edition of Article 53⁴ of the Law on Entrepreneurs and the XXXIV² Chapter of the Civil Procedure Code enacted under the Law of 11 July 2007 (Law No. 5286),¹⁵⁸ through which the mandatory sale procedure and the determination of fair price became completely subject of judicial control.

As the Constitutional Court stated in its decision, these provisions imposed the obligation to contract in corporate law, when the minority shareholder was obliged to sell the shares and get fair price.¹⁵⁹ The mandatory sale of shares implied the need of bilateral contract on the sales of shares and receiving the fair compensation, where the essential condition of the obligation, such as the amount of the price, depended on the third person, independent expert or brokerage company. These persons were special knowledge holders in the relevant field and according to the legislation, majoritarian shareholder applied to them to determine the fair price. According to a determined price of independent expert or brokerage firm, the transaction was made on the mandatory sale of shares. The liability was set by the third person, hired by the shareholder with the majority of shares.

Article 325 of the CCG is applicable not only for the obligation-legal relations regulated by CCG, but for the private law as well, if no special provision exists.¹⁶⁰ According to the first part of the above mentioned article, if the conditions for the fulfillment of the obligations are determined by one of the parties or third person(s), then it is suspected that such a definition should be based on fairness. This provision corresponded to the Law on Entrepreneurs, namely, Article 53³ before the amendment. Thus, the contents of this obligation should have been fair, but in case if the determined price was unfair and substantially violated the legitimate interests of minority shareholders, part 2 of Article of the CCG was applicable. Namely, if the party considered that the terms were unfair or their determination was delayed, it should fall under the competence of court.

Thus, the Constitutional Court's reference to the argument that the legislation did not provide for a minority shareholder the right to protest against a certain price, lacks the legal basis. Constitutional Court dismissed Article 325 of the CCG, especially the Part 2 of this Article, through which the minority shareholder was granted the right to apply to the court in case if shareholder considered offered price to be unfair.

¹⁵⁷ Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 32 (in Georgian).

¹⁵⁸ <<https://matsne.gov.ge/ka/document/view/19846#>>, [10.04.2018].

¹⁵⁹ Decision of Constitutional Court of Georgia 28.05.2007, №2/1-370,382,390,402,405, on Case: Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and Public Defender of Georgia against Parliament of Georgia, II, 10 (in Georgian).

¹⁶⁰ *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 85-86 (in Georgian).

4.4. Consumer Rights Protection Law

Fairly defining the contents of the obligation is particularly relevant to the Consumer Protection Law. It is noteworthy that the protection of consumers' rights in Georgia was made law “on Consumer Rights Protection” of 20 March 1996.¹⁶¹ The current product security and free circulation code does not provide for protection of the rights of the consumer in terms of the fair provision of the contract, but it is envisaged by the provisions of the standard conditions of the CCG.

The fact that consumers' rights are especially important when using standard conditions is indicated by Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.¹⁶² According to Article 3 of the directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Such a condition is not binding for the parties (Article 7).¹⁶³ In Particular it elaborated on the concept of “good faith”, holding that the assessment of that criterion requires the court to determine whether the seller or supplier dealing fairly or equitable, could reasonable assume that the consumer would have agreed to the term concerned in individual negotiations.¹⁶⁴ These provisions are envisaged in the new draft law on consumer protection rights,¹⁶⁵ in the first section of Article 12, which is identical to the European directive.

Furthermore, the 6th paragraph of the law on Austrian Consumer Protection Law,¹⁶⁶ which explicitly suggests that an unfair or vague agreement will be understood against the party which has entered into the agreement.¹⁶⁷

4.5. Competition Law

Establishing the terms of the contract on basis of fairness is not unknown to competition law. The Law on Competition defines the principles of protection against free and fair competition from unlawful restrictions, which are the basis for the development of free trade and competitive market.¹⁶⁸ The object of protection from unfair competition is not only the interests of the entrepreneur's competitor or his/her partner but also the interests of the public.¹⁶⁹

¹⁶¹ Invalid – Law №6157, 25.05.2012, <<https://matsne.gov.ge/ka/document/view/1659419>>, [10.04.2018].

¹⁶² *Erman* BGB Kommentar, Bd 1., 12. Aufl, Köln 2008, Anh. §305-310.

¹⁶³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>>, [10.04.2018].

¹⁶⁴ Case C-415/11, Mohamed Aziz, [2013] ECR; Case C-408/08, Caja de Ahorros, [2010] ECR; Case C-240/98, Océano Grupo, [2000] ECR; Cases C-541/99 and C-542/99, Cape and Idealservice, [2001] ECR; Case C-237/02, Freiburger Kommunalbauten, [2004] ECR; Case C-191/15, VKI V Amazon, [2016] ECR.

¹⁶⁵ <<http://info.parliament.ge/file/1/BillReviewContent/120599?>>, [10.04.2018].

¹⁶⁶ KSchG §6.

¹⁶⁷ *Simonishvili Z.*, Das Transparenzgebot im Sinne der Rechtsfertigung beiderseitiger Interessen und dessen Verhältnis zu den Vertragsauslegungsregeln des ABGB, Graz, 2012, 75.

¹⁶⁸ Law on Competition of Georgia, Article 1, section 1.

¹⁶⁹ *Hefermehl W., Baumbach A.*, Wettbewerbsrecht, 15., neubearbeitete Aufl., München 1988, 168, Rn. 41.

Taking into consideration these interests, Article 6 of the Law on Competition states that Any abuse of a dominant position by one or more undertakings (in the case of joint dominance) is prohibited. One of the manifestations of misuse of the dominant position, in accordance with subsection "a" of Article 2 of the same article, may be regarded either imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions.

In this case, based on the claim of a consumer or competent economic agent affected by a dishonest competition, the court may, define fair price or fair trade conditions on basis of the Article 325 of the CCG.

5. Conclusion

Contractual freedom is of great importance for all private law, it is one of its main principle and provides contractual equality. In order to ensure fair dealing with the latter, the contractual freedom became the subject of self-control, the basis of which was the contractual fairness.

The providing of fairness in contractual relations is mainly specified by article 325 of the CCG, which establishes the obligation of justifying the contents of the obligation in the case of predefined preconditions. For using of this provisionf, is necessary that the content cannot be determined by the explanation of will or filling interpretation. Also, there shall be agreement of the Parties that the content is determined by one of the parties or third parties. Norm may also be used when a party or a third person fails to define the contents of the obligation and thus the determination of the contents of the contract is delayed. It is noteworthy that article 325 of the CCG is the basis for determining the content of the obligation, and not the ground for the invalidation of the unfair agreement. If the contract or its condition is unfair, the court can determine this condition fairly. It is noteworthy that the use of article 325 of the CCG is especially important when protecting the weak party of the contract.

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