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Diversified Practice of Lease Item Return

Leasing companies face a variety of objections when returning a lease item, which is also supported by the Court's diverse approach. When the main activity of a company is leasing property, their return is also part of the daily routine. In each case, assuming that the item was in the best condition, the calculation of the state duty would increase the company's expenses and threaten commercial activities. Writing the article was driven by the author's practical experiment, according to which, in spite of the market value of the lease item, a new judicial approach has been established when defining 60 GEL of state duty on its return in all cases and the leasing company has significantly saved finances. The purpose of this paper is to determine the value of the subject of dispute, the court, the state duty when returning the lease item, also facilitate the development of a unified approach on the basis of analyzing the practical difficulties and to inform the reader of the possible obstacles associated with the return of the lease item.

Key words: *Lease item value, determination of state duty by 60 GEL, separation of leasing from other contracts.*

1. Introduction

Leasing relationships are integral part of trade-economic and technological development. In countries like China and the United States, leasing is one of the broader sources of income that is less typical of developing countries¹. In Georgia, the most demanded leasing products are cars and construction equipment². Leasing financing is favorable for both small and medium-sized and large businesses, contributing to the growth of the economy. It is logical that state support for business development has direct affect³. For this reason, tax laws provide leasing companies with certain benefits⁴. For tax purposes, a leasing company is an enterprise whose leasing income during the calendar year is at least 70 percent of its whole income.⁵

The Civil Procedure Code also establishes favorable conditions for the lessor, in particular, the case of returning the lease item in the possession of the lessor is considered in a simplified manner, the state duty is halved, the operative consideration of the case is favorable for the party and for lightening the court's workload as well.⁶ Procedural benefits to the lessor are not due to business policy but to

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¹ *Qoqrashvili Q.*, International Financial Leasing and the Real Aspects of Its Establishment in Georgia, Journal "Law", № 3, 2001, 35, 38, 39 (in Georgian); *Wang G. J., Yang J.*, Financing without Bank Loans, New Alternatives for Funding SMEs in China, (Alternatives for Funding SMEs in Chinainah), Singapore, 2016, 109.

² *Barbakadze Kh.*, Leasing - Duty Process Optimization Tool, Tbilisi, 2017, 3, 4 (in Georgian).

³ *Boobyer Ch.*, Leasing and Asset Finance: The Comprehensive Guide for Practitioners, 4th ed., London, 2003, 303.

⁴ Article 202, Part 3, paragraph 31, Tax Code of Georgia, 17/09/2010.

⁵ Article 8, Part 39, Ibid.

⁶ *Tabagari A.*, Promoting Leasing Activities Processually, Journal "Man and Constitution", № 2, 2004, 97 (in Georgian).

the fact, that the cases of this category are not complicated, as the applicant's (lessor) property rights are clear and his/her sole claim is to return of owned property into his/her possession.

At first glance, return of a lease item is the most easy stage to overcome within the leasing relationships, but expectations are quickly dashed as soon as it comes to returning many assets at once. It can be said that the case law on the return of the lease item is diversified: the basis for different decisions on identical content contracts in a court of the same instance could be interpretation of the contract, as well as discussions on the issues of halving or limiting the state duty.

Thus, the purpose of the article is to facilitate development of a uniform judicial approach, as well as to inform the reader of the practical cases in which the lessor might be able to return the lease item into his/her possession at minimal cost. The article consists of two main parts. The first part deals with the basic grounds of interpretation of lease as a loan by Kutaisi Appeal Court, and the second part explains the expediency of setting the state duty at 60 GEL when returning a lease item.

2. Basics of Interpretation of Lease as a Loan

Recognizing the leasing relationship as a separate legal institution is a vacuum of uniform court practice. Frequently, separation of leasing contracts from the contracts such as: loans, tenancy and installment sale is questionable⁷. Leasing is a special kind of contract that incorporates elements similar to other contracts.⁸ Interestingly, the same court may have a different opinion on contracts of identical terms and conditions. For example, if Batumi City Court upheld the request to return the lease item⁹, on another case of similar content, the same court considered the lease as a loan¹⁰ and refused to satisfy the claim. A different decision of the court may be found on exactly the same case. In satisfying the claim in Zestafoni District Court¹¹, decision was not affected by the fact that the same case had previously been qualified as a loan in both Zestafoni District Court¹² and Kutaisi Appeal Court.¹³

According to court practice, it turns out that the fortunate luck of a return of a lease item depends on the judge's assessment and decision. If Tbilisi Appeal Court considers the relationship to be a lease and different discussions are due to the duty halving and subject of dispute¹⁴ value determining issues, the contracts of similar content were interpreted as loans at Kutaisi Appeal

⁷ Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 2.8-2.11. *Meshvelishvili S.*, The Essence of Leasing Relations, Historical Review of its Development, Peculiarities and Modern Definition, Journal "Justice and the Law", № 4 (39), 2013, 86-88 (in Georgian).

⁸ *Ghudushauri A.*, Leasing and its Opportunities, Journal "Law", № 11-12, 1993, 55 (in Georgian). *Lesni L. C.*, The Lease Contract, Contemporary Readings in Law and Social Justice, Vol. 4(2), 2012, 900.

⁹ Civil Cases Panel of Batumi City Court, Order of 11 September 2018 and Writ of Execution № 2-3724-18 .

¹⁰ Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 18 September 2018, № 2/B-839-2018.

¹¹ Zestafoni District Court Order of 19 February 2019 and Writ of Execution № 2/71-2019.

¹² Zestafoni District Court Ruling of 2 April 2018, № 2/327-18.

¹³ Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 19 June 2018, № 2/B-494-2018.

¹⁴ Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 21 January 2019, № 2B/5748-18 on leaving the appealed ruling unchanged. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 10 January 2019, № 2/6929-18 on the satisfaction of a private complaint.

Court¹⁵. Despite this practice of Kutaisi Appeal Court, Kutaisi City Court Panels often satisfy the lessor's request. Based on the analysis of the practice, the main grounds were identified, in case of which the application to return the lease item was not satisfied and the lease contract was considered as a loan by Kutaisi Appeal Court.¹⁶

2.1. Variety of Lease Contract

Confusion the lease relationship with a loan is also associated with different types of leasing contract denial. In English literature, the term lease refers to a tenancy, rent¹⁷ and lease itself to separate it from the tenancy is referred to as a financial lease¹⁸. In the Georgian legal language, all three terms are so phonetically distinct that in practice, even in advertising campaigns, financial leasing is used to indicate one of the types of leasing contract and is referred to as a contract where the lessee has the right to purchase the lease if the obligation is fulfilled and where the lessee and the supplier (seller) are not the same person¹⁹. The Court's understanding of the general leasing relationship of financial leasing is not justified. The leasing contract without the right to purchase is quite different from financial lease and is called operating leasing.²⁰

In any leasing agreement, the lessor acquires property selected by the lessee. It is possible for the lessor to enter into a leasing agreement with the same person from whom the item was purchased.²¹ Where the supplier (seller) of the property is at the same time the lessee and the lease agreement is provided that, in the event of its execution, the ownership right will be transferred to the lessee, such agreement shall be referred to as inverse-lease²², in other terms, returnable lease.²³ It is regarded as a

¹⁵ Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph 4.29.2; Ruling № 2/B-839-2018 of 18 September 2018, paragraphs: 2.8-2.11, 4.13.1, 4.28.1, 4.29.2; Ruling № 2/B-706 of 19 September 2017; Ruling № 2/B-494-18 of 19 June 2018.

¹⁶ Ibid. Compare Orders and Writ of Execution of Civil Cases Panel of Kutaisi City Court of 7 March 2019, № 2/448-19; № 2/4-19 of 4 January 2019; № 5/3572-18 of 5 November 2018.

¹⁷ *Dzlierishvili Z.*, Legal Regulation of Leasing, Journal "Review of Georgian Law", № 5 (4), 2002, 506 (in Georgian).

¹⁸ *Iremashvili Q.*, Online Comment of the Civil Code of Georgia, Article 576, Line 13, 21, 71-72, <www.gccc.ge/ნიგნი-მესამე/კერძო-ნაწილი/კარი-ი-სახელმეკრულებო-სამ/თავი-iv-ლიზინგი/მუხ-ლი-576/>, [24.03.2019] (in Georgian).

¹⁹ Australian Accounting Standards Board, AASB 117, 14, 01/12/2009, <www.aasb.gov.au/admin/file/content105/c9/AASB117_07-04_COMPjun09_01-10.pdf>, [30.03.2019].

²⁰ *Imedashvili G., Kharashvili S.*, Aircraft Leasing Contract, Journal "Law", № 1-2, 2006, 39 (in Georgian); *Jankhoteli Sh.*, Leasing, Journal "Civil Law", October, 1998, 51-53 (in Georgian).

²¹ *Vial E. L.*, Georgia's New Law on Leasing - A Critical Analysis, Journal "Review of Georgian Law", № 5 (4), 2002, 530 (in Georgian).

²² *Gepheridze D.*, Aircraft Leasing under International Law, Journal "Law", № 11-12, 2003, 73, <www.intlaw.ge/old/publikaciebi/statia%206.PDF>, [21.03.2019] (in Georgian). *Chandraiah E.*, Evaluation of Lease Financing, New Delhi, 2004, 39.

²³ Desk Dictionary of an Official, UNDP, *Gurgenidze V.* (ed.), Tbilisi, 2004, 483 (in Georgian).

branch of financial lease.²⁴ Its distinctive feature is two kinds of agreements, lease and purchase agreements, concluded with the same person, that is why Kutaisi Appeal Court considers amount paid under purchase agreement as borrowed, lease property transferred under the lease agreement as secure measures and lease payments as loan return.²⁵

2.2. Putting on the Same Level of the Lease Item and Registered Mortgage

Leased property should not be considered as a form of request secure measure,²⁶ as the ownership of the lease item remains with the lessor throughout the leasing relationship. Use of the property owned by the debtor or third party and not the creditor is possible as the form of secure. Kutaisi Appeal Court considered the lease item as a registered mortgage and in relation to the property right stated that, instead of the lessor, the owner is the lessee on the basis of the decision of the Supreme Court of Georgia²⁷, by which a person may be considered as the owner of the vehicle without being registered with the relevant authority.²⁸

Neither the lessee shall be deemed to be the purchaser nor the lease item shall be deemed to be a registered mortgage because of the mentioned decision of the Supreme Court. First of all, the Supreme Court has used explanation of the optional registration issue as one of the arguments to recognize the person as an owner who was registered as such. Second, the said decision concerns the purchase and not the lease, and the parties did not sign any agreement. Thirdly, Supreme Court considered a tripartite relationship in which the original owner requested a third party to request an item that the buyer had transferred to a third person on the basis of a fraudulent power of attorney. The Supreme Court discussed whether the defendant could be considered as a good-faith buyer when he was unaware of the falsity of a notarized power of attorney.

This Supreme Court decision was established into practice²⁹, but has become the object of criticism in scientific environment³⁰. Uniform practice of optional registration of vehicle ownership to

²⁴ *Cuming C. C. R.*, Model Rules for Lease Financing: A Possible Complement to the UNIDROIT Convention on International Financial Leasing, Unif. L. Rev. n.s., Vol. 3, 1998, 378.

²⁵ Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.3-4.29.9; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 4.29.6.

²⁶ Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.3-4.29.9; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 4.29.6; Ruling of 19 September 2017, № 2/B-706.

²⁷ Decision of 9 September 2002, Civil Cases Chamber of Supreme Court, № 3K-624-02.

²⁸ Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.29.7, 4.29.8, 4.29.10.

²⁹ *Zarandia T.*, Transfer of Ownership on Moving Items. Origin of Ownership of Mechanical Motor Vehicles. Collision of Norms, Foundations of Georgian Civil Law in Georgian Judicial Practice, *Zarandia T.* (ed.), Tbilisi, 2016, 68-70 (in Georgian). Civil Cases Chamber of Supreme Court, Ruling of 25 September 2018, № AS-899-2018, paragraph: 14.3; Decision of 5 December 2014 of the same court, № SD-658-625-2014.

³⁰ *Takashvili S.*, Legal Regulation of the Origin of a Movable Property Right under Georgian Law, Besarion Zoidze 60, Anniversary Edition, *Gegenava D., Jorbenadze S.* (ed.), Tbilisi, 2013, 51-53 (in Georgian).

purchase property rights is the only lever to maintain the stability of the civil movement in a society where the purchase agreement of a vehicle is concluded generally verbally or without registration. Therefore, the practice discussed here regulates car sales cases, and putting on the same level leasing with them is an attempt of excluding leasing relationship from the legal space.

2.3. Redeem, Purchase and Lease Annual Interest Rate

Due to the radical incompatibility³¹ of redemption and leasing, the “redemption right” referred to in the leasing regulating Articles of the Civil Code has been replaced by the “right of purchase”. It is not justified by the court to put on the same levels the lease agreement and redemption³².

Considering a lease as loan due to the high lease payments is the subject of a separate discussion. Leasing is one of the sources of income. While agreeing on the lease payment, the focus is made on the existing and possible future condition of the item, the term of the contract. Based on the relevant data, the parties try to analyze which type of leasing contract is appropriate for their economic calculations. The definition of a leasing relationship carries different risks. If a financial lease is made for a significant period of time of the economic viability of the item, the contractual term for an operating lease is usually less³³. In the case of financial lease, the lessee may incur insurance, tax and other financial expenses³⁴. Financial expense is the general concept and is part of the effective annual interest rate. Each term is explained in the order³⁵ of the President of the National Bank of Georgia, which are to be considered on the level of principles for a non-entrepreneur lessor³⁶. Considering a lease as a loan, is not justified due to the absence of legislative annual interest rate, lease price rates, advance fee or penalties³⁷. It is the publicly acknowledged fact, that leasing is not less expensive than

³¹ *Dzlierishvili Z.*, Legal Regulation of Leasing, Journal “Review of Georgian Law”, № 5 (4), 2002, 510 (in Georgian).

³² Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph: 2.7; Ruling of 18 September 2018, № 2/B-839-2018, paragraph: 2.10; Ruling of 19 September 2017, № 2/B-706.

³³ *Vial E. L.*, Georgia's New Law on Leasing — A Critical Analysis, Journal “Review of Georgian Law”, № 5 (4), 2002, 532.

³⁴ *Iremashvili Q.*, Online Comment of the Civil Code of Georgia, Article 576, Line 13, 21, 71-72, <www.gccc.ge/ნიგნი-მესამე/კერძო-ნაწილი/კარი-ი-სახელმეკრულებო-სამ/თავი-iv-ლიზინგი/მუხ-ლი-576/>, [24.03.2019] (in Georgian). *Guzhva V. S., Raghavan S., D'Agostino D. J.*, Aircraft Leasing and Financing: Tools for Success in International Aircraft Acquisition and Management, 2018, 86, <www.efinancemanagement.com/sources-of-finance/difference-between-operating-and-financial-lease>, [24.03.2019].

³⁵ Article 2, Order of the President of the National Bank of Georgia on the “Approval of the Procedure for Calculating the Annual Effective Lease Rate, Fee, Financial Cost, Penalty and/or Any Form of Financial Sanction for the Purpose of Article 576”, № 18/04, 05/02/2019.

³⁶ Article 576, section 6, Civil Code of Georgia, 26/06/1997.

³⁷ Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 2.5, 4.5.3, 4.10, 4.27.3, 4.29; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 2.9-2.11; Ruling of 19 September 2017, № 2/B-706.

a bank loan. Anyone with a special calculator available on the leasing companies' website can calculate it approximately by the value of the leasing asset and the term of the contract.³⁸

2.4. Depreciation Expense

An additional reason why the court does not recognize the agreement as a lease is the fact that the lease expense do not consider the depreciation expenses. The term “depreciation” is deleted in the Civil Code Leasing Regulating norms. In the Ottawa International Convention of 28 May 1988, determination of lease payments considering the depreciation expense³⁹ is stated at the level of the principle and under Roman Model Law, it depends to the will of the parties⁴⁰. The term “depreciation” is used in the Tax Code and reduces the taxpayer's taxes⁴¹. Therefore, it is decisive whether the lessee is the sole proprietor, since depreciation is charged to the lessee in the case of financial lease, and in the case of operating lease to the lessor⁴². Calculating depreciation expense requires the professionalism of a financier. In the context of freedom of contract, it is not fair for the court to order the parties to deduct depreciation expense from the lease payments⁴³. Prior to the leasing relationship, the lease payment is determined by the current, possible future condition of the item and the term of the contract.

In case of simplified return of the lease item, the subject of dispute is only the return of item into possession due to the non-payment of the amount specified in the schedule. The purpose of the court should not be a comprehensive analysis of the monthly lease payments.

If the defendant considers that the contract was not properly executed due to an unjustifiably high fee or if the lease item was improperly seized, he/she may appeal to the superior court with a private complaint.

³⁸ <www.turbo.ge/>, [25.03.2019]; <www.agleasing.ge/ge/calculator>, [25.03.2019].

³⁹ Article 1, paragraph 2, sub-paragraph c, Ottawa Convention of 28 May 1988 on “International Leasing”, 28/05/1988.

⁴⁰ Article 2, paragraph c, Model Law of Rome, 13/11/2018.

⁴¹ Article 111, 112 and etc., Tax Code of Georgia, 17/09/2010. *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.*, Comment on Tax Code of Georgia, Book I, Tbilisi, 2012, 108, 421 (in Georgian).

⁴² Order of the Head of the Accounting, Reporting and Audit Supervision Service N-26 on “Introducing International Financial Reporting Standards (IFRS) into Georgian Language”, 26/12/2017. International Financial Reporting Standard (IFRS) for SMEs, paragraphs: 20.12 and 20.26, <www.saras.gov.ge/Content/files/Final-IFRS_for_SMEs_2017_%2017-october.pdf>, [28.03.2019]. The concept of financial and operating lease in the international standard is translated as a lease.

⁴³ Different Opinion see, Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.15, 4.15.2; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 4.19.; Ruling of 19 September 2017, № 2/B-706.

2.5. Purchase Obligation in Exchange for the Right

Kutaisi Appeal Court does not recognize the lease agreement, by which, after the full payment, the purchase of the item is the obligation of the lessee and not the authority⁴⁴. The Court's reasoning is based on the interpretation of paragraph 3 of Article 1 of the Ottawa Convention, although this Article of the Ottawa Convention generally describes the types of leases and does not prohibit the parties, the right to purchase an item to be defined as the obligation of the lessee.

Civil Cases Chamber of Kutaisi Appeal Court recognizes as loans those leasing contracts entered into force with the purchase obligation, that even Administrative Cases Panel consider as leasing. According to the resolutions of the Administrative Cases Panel, penalties written on behalf of the lessor, as the owner, if the vehicle is owned by the lessee, are canceled due to the failure to undergo the technical inspection. The Administrative Cases Panel and Kutaisi Civil Cases Chamber, based on the same source, explain differently the leasing contract entered into force with the purchase obligation.⁴⁵

2.6. Commercial Purpose

A lease contract may be concluded for both entrepreneurial and non-entrepreneurial purposes, and when returning the lease item, the court's emphasis on such a purpose is unnecessary⁴⁶. The importance of the commercial purpose is more important publicly and legally, as the leasing companies are obliged to provide information⁴⁷ in an appropriate form⁴⁸ to the Financial Monitoring Service of Georgia⁴⁹ about the agreement which:

- **are concluded for commercial purposes**,⁵⁰ and therefore,
- The deal is **expensive, unlikely or unusual**.⁵¹

⁴⁴ Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraphs: 4.15, 4.15.1; Ruling of 18 September 2018, № 2/B-839-2018, paragraphs: 4.23.2.; Ruling of 19 September 2017, № 2/B-706.

⁴⁵ Administration Cases Panel of Tbilisi City Court, Resolution of 4 December 2018, № 4/8878-18. Administration Cases Panel of Tbilisi City Court, Resolution of 26 November 2018, № 4/8876-18, paragraph: 6.3. Administration Cases Panel of Tbilisi City Court, Resolution of 15 October 2018, № 4/7503-18, paragraph: 6.3.

⁴⁶ Different Opinion — Civil Cases Chamber of Kutaisi Appeal Court, Ruling of 8 January 2019, № 2/B-1246-2018, paragraph: 4.4.2.

⁴⁷ Article 2, paragraphs “d” and “z”, article 3, paragraph “l”, Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

⁴⁸ <www.fms.gov.ge/records/data/help/uguide_registration.html>, [22.03.2019].

⁴⁹ Article 4, paragraph “b”, article 5, Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

⁵⁰ Order № 2 of the Head of the Financial Monitoring Service of Georgia on Approval of the Regulation on Receipt, Systematization, Processing and Transmission of Information by Leasing Companies to the Financial Monitoring Service of Georgia, Article 1, Paragraph 1, 05/09/2013.

The deal will be considered expensive if the value of the leased property exceeds 30,000 GEL. In carrying out this obligation, the concept of a leasing company is identical to a concept of a tax code⁵². Leasing company law does not directly oblige to inform the state if the lessee is an entrepreneur, the deal is expensive and the and non-entrepreneur purposes are indicated in the contract, but the idea of unusual and suspicious deals is so vague that informing the government for prevention purposes is advisable. For defense purposes, it is also advisable, when interpretation of the expensive, pay attention to the amounts specified in the lease agreement (the total amount of which is usually greater than the cost of the lease item) and not the market value of the lease item.

In the case of a non-entrepreneur lessee, where the purpose is non-entrepreneurial and the amount of the contract exceeds 30,000 GEL, financial monitoring involvement will be appropriate. If it is impossible to use the item for non-commercial purposes due to the characteristics of the lease item (for example leasing, saddle-quad, elevator and other construction machinery units). The lessee might not be an entrepreneur and the item might be used non-commercially, although it may be risky not to notify the state if the amounts agreed under the contract exceed 30,000 GEL.

2.7. Interim Report

A study and analysis of the various practices of the Courts of Appeal on the return of the lease item revealed that the agreements of the same content would have different effects in different parts of the State. Unpredictable decisions can damage the lessor. The refusal to accept the return proceedings of the lease shall be subject to a private appeal, on which the Court of Appeal makes a final ruling and not subject to appeal. In the light of the above-mentioned, after the refusal from Kutaisi Court of Appeal, the only way for the lessor is to file a lawsuit, make a double resources and forcefully recognize the agreement as a loan agreement that the Tbilisi Court of Appeals considers as lease. The problem becomes even more profound if the leasing company is a company, whose core business is leasing hundreds of assets on daily basis and being forced to evaluate its business differently in front of the court. The only way to avoid litigation is for the applicant to seek a renewal of the proceedings under the newly established circumstances, which in practice ended with the Supreme Court ruling⁵³ of returning the lease item⁵⁴.

⁵¹ Article 2, paragraphs “h” and “i”, article 3, article 5, paragraph 13, sub-paragraph “c”, Ibid. Order of the President of the National Bank of Georgia № 1/04 on Facilitating the Prevention of Illicit Income On the establishment of a list of zones for the purposes of the Law of Georgia, 09/01/2017.

⁵² Article 2, paragraph “z”, Law of Georgia on Facilitating the Prevention of Illicit Income Legalization, 06/06/2003.

⁵³ Civil Cases Chamber of Georgian Supreme Court, Ruling of 4 May 2018, № AS-267-267-2018.

⁵⁴ Civil Cases Chamber of Kutaisi Appral Court, Ruling of 15 November 2018, № 2/B-706.

3. Judgment and Halving of the State Duty while Returning a Lease Item

The application for the return of the lease item shall be submitted to the court based on the defendant's place of residence. In this respect, the place of performance of the contract is irrelevant and on applications, being a non-actional claim, don't apply special jurisdiction⁵⁵. If the defendant's factual and legal address differs, the applicant chooses the court to consider the case⁵⁶.

The lease item return proceedings being in the possession of the lessor, is dealt with a simplified manner by filing an application, while the simplified proceeding is under the jurisdiction of the Magistrate courts and the state duty is halved. Cases of this kind are usually heard by magistrate judges, no matter how expensive the subject matter of the lease is and whether it costs more than 5,000 GEL⁵⁷. In this regard, judicial practice is being developing⁵⁸, which is actively supported by the Supreme Court of Georgia⁵⁹. The question of halving the duty also applies to lowering its upper and lower limits. In the first instance, when filing an application for the return of the lease item, the amount of the duty shall not exceed 1,500 GEL for individuals and 2,500 GEL for legal entities⁶⁰, while the minimum amount shall be 50 GEL instead of 100 GEL. The private appeal duty on the application will also be halved. In calculating the state duty, the issues under questions should not be raised, but there are still precedents when the cost of lease item has become the basis of considering the case as Non-magistrate⁶¹. Sometimes the court still rejects the order on return of the lease item because the state duty has been halved and indicates to the applicant that in the case of simplified proceeding of the return of lease item, the state duty should be calculated at 3% of the value of the litigation item instead of 1.5%⁶².

⁵⁵ Civil Cases Panel of Tbilisi City Court, Ruling of 31 January 2019, № 2/1431-19. Different opinion see, Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on issues of Civil Procedure Law, Tbilisi, 2010, 105, 106, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [09.03.2019] (in Georgian).

⁵⁶ Civil Cases Panel of Tbilisi City Court, Ruling of 31 January 2019, № 2/1431-19.

⁵⁷ Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 29 November 2018, № 2B/5741-18. Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on issues of Common Procedure Law, Tbilisi, 2010, 27, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [01.03.2019] (in Georgian).

⁵⁸ Civil Cases Panel of Tbilisi City Court, Order of 25 February 2019 and Writ of Execution № 2/3730-19. Civil Cases Panel of Batumi City Court, Order of 22 February 2019, Writ of Execution № 2-439/19. Civil Cases Panel of Tbilisi City Court, Order of 9 January 2019 and Writ of Execution № 2/30-19.

⁵⁹ Practical Recommendations of the Supreme Court of Georgia on issues of Common Procedure Law for Judges of Common Courts, Tbilisi, 2010, 26, 27, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [01.03.2019] (in Georgian).

⁶⁰ Civil Cases Panel of Tbilisi City Court, Order 11 February 2019 and Writ of Execution № 2/2270-19.

⁶¹ Tkibuli Magistrate Court Ruling of 1 February 2018, № 2/5-18. Civil Cases Chamber of Kutaisi Appeal Court Ruling of 12 April 2018, № 2/B-232.

⁶² Civil Cases Panel of Batumi City Court, Ruling of 28 December 2018, № 2/5351-2018. Civil Cases Panel of Tbilisi City Court, Ruling of 26 July 2018, № 2/22321-18. Civil Cases Panel of Rustavi City Court, Ruling of 28 May 2018, № 2-1582-18.

4. State Duty Standard when Returning a Lease Item an Established Approach

To calculate the State duty, it is important to determine the value of the lease item, the following methods are used: the property is valued at the pre-leasing condition when the item was still owned by the lessor (at that time it may be possible to submit a purchase agreement whereby the item was subsequently leased⁶³) or observe the market value of the family property. For example, they apply to a private expert appraiser who assesses the lease item with the assumption of material flawlessness⁶⁴ of the item. With the rare exception⁶⁵, the court does not require the assessee to prove his/her competence.⁶⁶ Certificate issued by a person accredited by the Unified National Accreditation Body⁶⁷ is satisfactory for being considered as a licensed expert. The grounds for refusing to accept the application are hardly become the assessment of the lease item in foreign currency by an expert⁶⁸. It is possible to determine the market value by buying and selling ads⁶⁹ on the intermediate web site.

It is clear that the subject of the dispute is hypothetically determined by the idealistic-theoretical assumption that it is in working condition and / or at least has been maintained the conditions prior to transfer to the lessee with respect to natural depreciation.

4.1. Incorrectness of an Established Approach

The value of the leased item depends on its proper use, quality of maintenance. Due to the tremendous treatment of the lessee, the property may have unambiguously lost its functional purpose and value. In this case, the lessor has to pay one or twice of state duty, because under the established theoretical valuation method, he/she has to imagine that its item is in the same condition as the other family properties or is in identical condition before signing the contract. Even so, the lessor requests

⁶³ Kobuleti Magistrate Court Order of 16 October 2018 and Writ of Execution № 2/691-2018.

⁶⁴ Civil Cases Panel of Tbilisi City Court, Order of 6 November 2018 and Writ of Execution № 2/32279-18. Khulo Magistrate Court Order of 6 November 2018 and Writ of Execution № 2-96/18. Kutaisi City Court Order of 5 November 2018 and Writ of Execution № 2/3572-18. Batumi City Court Order of 2 November 2018 and Writ of Execution № 2-4520/18. Tianeti Magistrate Court Order of 2 November 2018 and Writ of Execution № 2/103-18. Civil Cases Panel of Rustavi City Court, Order of 31 October 2018 and Writ of Execution № 2-2929-18. Civil Cases Panel of Tbilisi City Court, Order of 25 October 2018 and Writ of Execution № 2/30879-18. Civil Cases Panel of Batumi City Court, Order of 19 October 2018 and Writ of Execution № 2-4304/18. Lagodekhi Magistrate Court Order of 18 October 2018 and Writ of Execution № 2/251-18. Tbilidi City Court Order of 23 October 2018 and Writ of Execution № 2/30413-18.

⁶⁵ Civil Cases Panel of Tbilisi City Court, Ruling of 5 November 2018, № 2/31985-18; Ruling of 24 December 2018, № 2/36933-18.

⁶⁶ See, Footnote 64.

⁶⁷ Civil Cases Panel of Tbilisi City Court Ordner of 25 February 2019 and Writ of Executions, № 2/37561-19 and № 2/1089-19.

⁶⁸ Marneuli Magistrate Court Ruling of 20 April 2018, № 2/163-18.

⁶⁹ Supreme Court Ruling of 30 October 2015, № AS-901-851-2015.

with claim the property transferred directly to the contractor, and not the family property similar to it, which is very similar to vindication.

The issue is especially relevant if the usual business of the leasing company is leasing cars. Overpricing payment of state duty on the objective value of the subject matter of the dispute and the lump sum flow of the company in large quantities makes the stability of the enterprise under the question. Returning the leased item into a substantially defective state can be the cause of a lawsuit⁷⁰, failure to find a lease item or return of a lease item in the form of scrap⁷¹ might become a prerequisite for starting an investigation the execution stage, which increases the cost. If the application is satisfied, the remuneration shall be borne by the losing party, but a decision that comes into force cannot always guarantee a refund. The objective and fair calculation of the State duty required the introduction of new practices that would not threaten the applicant to pay more.

4.2. Inability to Determine a Real Value of a Subject of Dispute

The lessor regarding the return of lease item into his/her possession shall apply to the Court with the sole request to return the item having the specific characteristics specified in the leasing contract. Under the established approach, the lessor is obliged to determine the value of the item of the dispute so as he/she owns the item directly and know its real value. It is not justified for the lessor to conceive of himself/herself as operating within the area of rights and the failure of it's performance has led to a claim to the court. According to the established practice, the lessor acts from the owner's point of view to determine the price of the item as close as possible with its real value, which is illogical, since the lessor can have no real idea about the item's condition until the object is returned to the owner.

Imaginary reasoning about the value of an item for the lessor is due to the fact that the lessee continuously owns the lease item during the term of the contract. Moreover, the lessee has the right to terminate the contract if he/she is incapable to use the lease item.

Proceedings on the return of the lease item into the lessor's possession are treated not in a actional but in a simplified manner by filing an application⁷². The applicant seeks to return possession on the item transferred directly to the defendant and should not assign importance to the market situation of similar, family property items.

4.2.1. Determination of a Lease Item Value at 4,000 GEL

In the case of return of the leased item, the amount of the dispute shall be estimated at GEL 4,000 (Article 41.1 (j) of the Code of Civil Procedure) for two main reasons:

⁷⁰ Civil Cases Panel of Tbilisi City Court, Act of 25 January 2019, № 2/942-19.

⁷¹ Criminal Cases Investigation, pre-trial and substantial discussion Panel of Tbilisi City Court Ruling of 13 February 2019, № 11A/2244-19.

⁷² *Khurtsilava R.*, Simplified Production in the Georgian Civil Process, Tbilisi, 2009, 177 (in Georgian).

A. The value of the leasing item cannot be determined because of limited ownership. Since the lessor transfer the property to the lessee, he/she will not be able to take back the leased item⁷³, even for the purpose of determining the market value and/or in case of a car, for the purpose of carrying out technical inspections⁷⁴, because the legislator grants the lessee with the right to terminate the lease contract if the lessee is "Is not able to perform his/her ownership rights on the lease item"⁷⁵. Both the Ottawa Convention and Rome Model Laws affirm the right of the lessee to use the lease item without delay⁷⁶. In the event of failure to reach an agreement, the lessor might only request the return of lease item into his/her ownership on the basis of an order and an writ of execution or lease certificate.

B. Even if the lessor has the ability to determine value, it should not be given any importance. The purpose of the leasing is to return the item into ownership only and it doesn't argue on the payment of the amount, the recognition of the owner or the change of property with a family property item. When dealing with the return of a leased item, as well as at the time of vindication⁷⁷, the party should not be required to determine the actual status of the disputed item. It is in the interest of the lessor to make full use of the property and not to compensate for the damage, to change the property with a family property item or to recognize himself/herself as owner. The applicant requests the return of a particular item transferred to the defendant, having certain characteristics, with an identifiable asset, such as in the case of a vehicle, with unique identification and state number. Just with it, the return of a lease item of an obligatory-legal leasing is similar to property-legal vindication lawsuit⁷⁸, but they differ radically through litigation. In order to recover an item from unlawful possession, it is necessary for the item to be belonged to the applicant and the defendant shall not have the ground of owning an item.⁷⁹

In determining the value of a subject of dispute, the Supreme Court states: "When the legal status of ownership of an item is certain, the owner of the item is known and is only prevented from using and disposing of his/her property, and the owner also seeks separation from his/her co-owner, the value of the subject of dispute shall be determined by Article 41 (1) (k) of the Code of Civil Procedure it means, by 4000 GEL.⁸⁰" The amount of subject of dispute should be set at "4,000 GEL If

⁷³ Article 580⁶, Civil Code of Georgia, 26/06/1997.

⁷⁴ Administration Cases Panel of Tbilisi City Court Resolution of 4 December 2018, № 4/8878-18 and Resolution of 15 October 2018, № 4/7503-18. According to the Resolutions, the court canceled the leasing company's fine imposed by the patrol police for failing to carry out technical inspections on the leasing vehicle. The legal basis for the cancellation is that the lessor is denied the right to ownership during the term of the lease agreement.

⁷⁵ Article 580⁵, section 2, Civil Code of Georgia 26/06/1997.

⁷⁶ Article 8, paragraph 2, Ottawa Convention (give full name, if applicable), 28/05/1988. Article 16, Model Law of Rome, 13/11/2008.

⁷⁷ Civil Cases Chamber of Supreme Court, Ruling of 13 December 2018, № AS-1580-2018, paragraphs: 63, 64. Decision of 20 March 2017 of the same Court, № AS-1165-1120-2016, paragraph 2.1.

⁷⁸ *Qochashvili Q.*, Ownership as a Basis for Presumption of Property (Comparative Jurisprudence Study), Tbilisi, 2012, 140 (in Georgian).

⁷⁹ *Zoidze B.*, Georgian Property Law, Tbilisi, 2003, 97 (in Georgian).

⁸⁰ Georgian Supreme Court Ruling of 11 January 2008, № AS-645-1022-06.

it is impossible to determine the value of the subject of dispute in a property-legal dispute (encroachment or other interference, neighborhood dispute, etc.)".⁸¹ There is a property-legal dispute over the return of the lease item⁸². Dispute is property-legal even if the claim applies to the property right or items having a monetary value. The return of the lease item will be brought to court by filing an application, though the simplified proceeding does not amount to undisputed proceeding.⁸³

The so called principle of *Numerus Clausus* doesn't effect the 4 000 GEL defining norm. The wording: "... encroachment or other interference, neighborhood disputes, etc." implies an inexhaustible list and includes all property disputes on which the value of the subject-matter of the dispute cannot be objectively determined.

Since the state duty on the return of ownership of the lease item is 1.5% of the value of subject of dispute (of GEL 4,000), 60 GEL should be set as the standard of the state duty.

4.2.2. Adopt a New Standard of State Duty in Judicial Practice

In applying 60 GEL state duty standard, the Court's opinion was divided into two.⁸⁴ The practice was established by the Tbilisi Appeal Court, which out of the five cases, in all of them,⁸⁵ satisfied the private complainant requests with 4 000 GEL of lease item and and therefore, on determination of state duty by 60 GEL, it canceled the City Court's rulings on rejecting the application and remitted the cases to the same court for re-consideration. Following the first ruling of the Court of Appeal, while defining the duty at 60 GEL, there was a clear positive trend towards satisfying the application⁸⁶, which was reinforced by further rulings and established as a new practice.

⁸¹ *Khurtsilava R.*, Simplified Procedure in the Georgian Civil Process, Tbilisi, 2009, 177, 187 (in Georgian).

⁸² Civil Cases Chamber of Supreme Court Ruling of 14 February 2011, № AS-1323-1166-2010, the part of motivation.

⁸³ Tbilisi Appeal Court Ruling of 26 November 2012, № 2B/3630-12, 5.

⁸⁴ Civil Cases Panel of Tbilisi City Court, Order of 17 October 2018 and Writ of Execution, № 2/29925-18. Civil Cases Panel of Batumi City Court Order of 11 September 2018 and Writ of Execution, № 2-3724-18. Different Opinion see, Civil Cases Panel of Tbilisi City Court, Ruling of 17 October 2018, № 2/29921-18; Ruling of 15 October 2018 of the same court, № 2/29775-18.

⁸⁵ Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 10 January 2019, № 2B/6929-18 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 27 June 2019, № 2B/4296-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 9 August 2019, № 2B/4479-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 9 August 2019, № 2B/4852-19 on satisfaction of a private compliant. Civil Cases Chamber of Tbilisi Appeal Court, Ruling of 17 September 2019 on satisfaction of a private compliant, N 2b/5183-19.

⁸⁶ Civil Cases Panel Orders of Tbilisi City Court and Writ of Executions of 25 March 2019, № 2/5856-19; № 2/5421-19 of 20 March 2019; № 2/5384-19 of 19 March 2019.

4.2.3. The Supreme Court Recommendation on a New Standard

The rule of determining the value of the lease item by GEL 4,000 is also supported by the Supreme Court of Georgia. In 2008 and 2010, the Supreme Court of Georgia issued a recommendation to judges on civil procedural law, according to which a return of a lease item can be judged by a magistrate judge, even if the item could be assessed as overly expensive. According to the same recommendation, the calculation of the state duty depends on the validity of the leasing contract⁸⁷. In particular, the value of the subject of the dispute shall be set at 4,000 GEL only if the return of lease item is required after the expiry of the contract. In case of early termination of the contract, to calculate the duty it is recommended to use Article 41.1 (g) of the Civil Procedure Code, which regulates early termination of the tenancy agreement and sets the cost of subject of dispute to the lessor in the total amount payable for the remaining time (no more than three years).

It should be emphasized that Article 41.1 (g) applies directly to tenancy and should not be confused with all contracts under which the payment is in accordance with the schedule. The use of Civil Code with its current version is unjustified, as the lease agreement was considered a form of tenancy at the time the recommendation was issued⁸⁸. Since the tenancy rules are no longer applicable in terms of leasing, while in determining the value of the subject of dispute, it is no longer relevant whether the contract has been terminated prematurely and the leased property should in all cases be valued at 4,000 GEL.

5. Conclusion

A different interpretation of the agreements concluded with the same terms in the east and west of Georgia at the same time impedes the development of the lease sector at the outset. A uniform court approach is needed in order for the lessor to be able to conduct a stable business. When returning a lease item, the applicant's sole interest is to return exactly the item that was leased to the lessee. Upon return of the lease item, the lessor's claim might not be a request on change of item with a family property item or refund. The subject of dispute shall not be assessed on the basis of the assumptions that it is materially flawless or at the market value of similar family property items. On the basis of the arguments discussed, Tbilisi Appeal Court out of five attempts, in all cases shared the author's argument on the establishment of a new standard of state duty and while returning a leased property

⁸⁷ Practical Recommendations of the Supreme Court of Georgia to Judges of Common Courts on Civil Procedure Law, Tbilisi, 2010, 105, <www.supremecourt.ge/files/upload-file/pdf/Praqtikulirekomendacebi6-12-2010.pdf>, [09.03.2019] (in Georgian). Practical Recommendations of the Supreme Court of Georgia to the Magistrate Judges on Civil Procedure Law, Tbilisi, 2008, 101, <www.supremecourt.ge/files/upload-file/pdf/rek2008.pdf>, [01.04.2019] (in Georgian).

⁸⁸ *Iremashvili Q.*, Online Comment of the Civil Code of Georgia, Article 576, Line 13, <<http://www.gccc.ge/წიგნი-მესამე/კერძო-ნაწილი/კარი-ი-სახელმეკრულებო-სამ/თავი-iv-ლიზინგი/მუხლი-576/>>, [17.03.2019] (in Georgian). *Dzlierishvili Z.*, Legal Regulation of Leasing, Journal “Review of Georgian Law”, № 5 (4), 2002, 508, (in Georgian).

with a simplified manner (by application), the value of the subject of dispute under Article 4 (1) (j) of the Civil Procedure Code is set at 4,000 GEL in all cases, with GEL 60 being the standard for state duty, since the case duty belonging the Magistrate Court is calculated by the halved quantity (1.5%) of the value of subject of dispute.

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