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Implication of the Principle of Nominalism upon Fulfillment of a Monetary Obligation

Monetary is the obligation¹, the object of which is the payment of a certain amount of money.² According to common understanding, money, as an economic category and an article of commerce, accomplishes certain duties in public relationships. The concept of money is a part of not only the economic life, but also of the legal world.³ The duties of the money are identical functions both in private and public law relations, encompassing the universal option of evaluation, transfer, and accumulation of values, being a settlement unit as well.

Based on the analysis of the doctrine and judicial practice the paper discusses not the specificities of fulfillment of a monetary obligation in general, but rather the legal nature of the so-called principle of 'nominalism' envisaged by Article 389 of the CCG. This rule aims at promoting the development of market economy and procurement for the sustainability of civil-law relations.⁴

Key words: *Monetary obligations; the principle of 'nominalism'; Article 389 of the Civil Code of Georgia (CCG).*

1. Introduction

Money is a universal medium of exchange in civil-law relations.⁵ Money is the phenomenon, the origin and existence of which depends on public and economic relations and it can operate only when such relations exist, within the frame of these relations.⁶ Money is what money does.⁷

Each and every participant of civil-law relations can acquire some property wealth against the payment of money⁸, which wealth will be transferred thereto by the counterpart of the relation in exchange of the paid money⁹. The buying power of money is based on the confidence, the participants

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¹ *Donnelly M.*, The Law of Banks and Credit Institutions, Dublin, 2000, 369.

² *Weiler F.*, Schuldrecht AT, Baden-Baden, Nomos, 2012, § 9, Rn 2.

³ *Mann F. A.*, The Legal Aspect of Money with Special Reference to Comparative Private and Public International Law, 5th ed., Oxford, 1992, 3.

⁴ *Meskhishvili K.*, Topical Issues of Private Law, Vol. I, GIZ, Tbilisi, 2020, 128 (in Georgian).

⁵ *Grüneberg Ch.*, in *Palandt O.*, BGB Komm., 78 Aufl., München, 2018, § 245, Rn. 2.

⁶ *Kakulia R., Khelaia G.*, General Theory of Money Circulation and Credit, Tbilisi, 2003, 18 (in Georgian).

⁷ *Omlor S.*, Geldprivatrecht Entmaterialisierung, Europäisierung, Entwertung, Mohr Siebeck, Tübingen, 2014, 51.

⁸ *Chanturia L.*, Credit Security Law, Tbilisi, 2012, 7 (in Georgian).

⁹ *Asatiani R.*, Money and Monetary Systems, Tbilisi., 1996, 31-32 (in Georgian).

of civil-law relations have in it.¹⁰ The value of a banknote, like the value of goods, is defined on the basis of demand-supply ratio and never is an absolute constancy.¹¹

The law cannot create an universal medium of exchange, as it is unable to define whether what the object of free-will transaction can be (principle of freedom of contract).¹² In civil-law relations in the case of a credit¹³ and transactions, that postpone the performance, a state is given an option to define the object that will act as a medium of fulfillment of the obligation.¹⁴ The legal medium of payment substitutes any object of obligation even when the fulfillment of obligation in kind deems impossible and does not exempt a debtor from the payment of relevant monetary compensation to a creditor.

The legal importance of the status of a legal medium of payment, delegated upon banknotes, is that the creditor's refusal to receive the legal medium of payment, constituting the object of fulfillment of the obligation, results in legal consequences, that are related to the default of the creditor (*mora creditoris*).¹⁵

As per Article 383 of the CCG, a monetary obligation is expressed in national currency. The parties are free to set monetary obligation in foreign currency as well, provided that the foregoing is not prohibited by law. Currency is the monetary unit of a country,¹⁶ underlying the monetary system of the country concerned.¹⁷ A monetary obligation can be either interest-free or interest-bearing (DCFR, Principle 1:104)^{18,19}, the amount of which can be defined by a contract (contract interest)²⁰ or by law (statutory interest).^{21;22}

¹⁰ Keynes J. M., Allgemeine Theorie der Beschäftigung, des Zinses und des Geldes, Aus dem Englischen neu übersetzt von Nicola Liebert, Buch V, Kapitel 19, Berlin, 2017, 145.

¹¹ Issing O., Stabiles Geld – eine Illusion?, Mohr Siebeck, Tübingen, 2019, 5

¹² Zoidze B., Reception of European Private Law in Georgia, Tbilisi, 2005, 268 (in Georgian).

¹³ Chanturia L., Credit Security Law, Tbilisi, 2012, 7 (in Georgian).

¹⁴ Wittreck F., Geld als Instrument der Gerechtigkeit BRILL, Ferdinand Schöningh 2002, 165 ff, <<http://www.Schöningh.de/view/title/45057>> [20.03.2020].

¹⁵ Grüneberg Ch., in: Palandt O., BGB Komm., 78 Aufl., München, 2018, § 293, Rn. 10.

¹⁶ Lando O., H. Beale H. (eds.), Principles of European Contract Law, Parts I-II, Kluwer Law International, The Hague, 2000, 374.

¹⁷ Grüneberg Ch., in Palandt O., BGB Komm., 78 Aufl., München, 2018, §244, Rn 3; Smidt-Kessel M., in: Prütting H., Wegen G., Weinreich G., BGB Komm., 14. Aufl., Luchterhand Verlag, Köln, 2019, §244, 369.

¹⁸ Draft Common Frame of Reference – DCFR, as a project was launched by the EC in 2005. For the time present this document constitutes the collection of the key private law institutes, offering the overview of domestic law, doctrine and judicial practice of almost all the EU Member States. Schulte-Nölke H., Clive E., von Bar Cr. (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition, Munich, 2009.

¹⁹ Jansen N., Zimmermann R., Was ist und wozu der DCFR? NJW, 2009, 3401.

²⁰ Zoidze B., Chanturia L., Zoidze B., Ninidze T., Khetsuriani J., Shengelia R. (ed.), Commentary on Georgian Civil Code, Book Three, Tbilisi, 2001, Article 383, 267 (in Georgian).

²¹ With regard to interest in monetary obligations see: Shotadze T., Mortgage as a Security Mean for a Bank Credit, Tbilisi, 2012, 138-142 (in Georgian).

²² Meskhashvili K., Payment of Interest in the Case of Overdue Payment of Money (Theory and Judicial Practice), “Georgian Business Law Review”, V Issue, 2016, 7 (in Georgian).

2. Essence of the Principle of Nominalism

Of paramount importance in regard to the fulfillment of monetary obligations is whether the change (loss or gain) in monetary exchange rate (buying power) further results in the change of the quantity of the banknotes? According to commonly acknowledged opinion a debtor is required to repay the debt in the same quantity of banknotes, that corresponds the time of origin of the debt. This principle of fulfillment of a monetary obligation is called the *principle of minimalism* and is acknowledged by the law and judicial practice of all the advanced countries.²³

The principle of *nominalism* was first established by the English judicial Practice back in 1604, in *Gilbert v Brett Case*: the debt should have been paid in England by the unit of "Current and Lawful Money of England". By order of the Queen Elizabeth, the composition of coinage was debased before the payment fell due. However, the court obliged the creditor to accept debased coinage according to their denomination, i.e. according to value they had for the moment of origin of the obligation. This laid the foundation for making similar decisions by English courts in other cases as well.²⁴

"The change in the buying power of French monetary unit does not result in the change of the nominal amount of debt. This principle stems from the works of Aristotle and the XVI century French lawyer *Molinaeus*, and it became a legal principle after the adoption of the Napoleonic Code."²⁵ In the United States the principle of *nominalism* operates²⁶ on the basis of case law.²⁷ With regard to the principle of *nominalism* in German law see.²⁸

Under Article 389 of the CCG, if before the date when payment falls due, the monetary unit (rate of exchange) appreciates or depreciates, or if the currency was changed, the debtor shall be bound to make payment according to the rate corresponding the period of origin of the obligation. In the case of a change of the currency, the conversion relations shall be based on the conversion rate that existed between these currencies on the date of the change of the currency.

Article 389 of the CCG can be conditionally divided into two parts: the first one can be the change in the buying power of the currency from the moment of origin of the obligation until the date of its fulfillment, and the second part - the change of the currency, i.e. the substitution of the old monetary unit with the new one. "The concept of "rate of exchange", given in brackets of the first sentence of Article 389 of the CCG is recognized as a legislative shortcoming."²⁹

²³ *Meskhishvili K.*, Online Commentary of the Civil Code of Georgia, Article 389, field 3, <www.gccc.ge> [30.03.2020] (in Georgian).

²⁴ *Dzlierishvili Z.*, Specificities of Fulfillment of Monetary Obligations, Tbilisi, 2005, 39 (in Georgian).

²⁵ *Lobzhanidze P.*, Exchange Rate in Monetary Obligations, Man and Constitution, № 3, 2000, 70 (in Georgian).

²⁶ *Lenihan N.*, The Legal Implications of the European Monetary Union under U.S and New York Law, 72, <http://ec.europa.eu/economy_finance/publications/publication11220_en.pdf> [30.03.2020].

²⁷ *Dzlierishvili Z.*, Legal Nature of Contracts on Transfer of Property under Ownership, Tbilisi, 2010, 330 (in Georgian).

²⁸ *Gruber G.*, Geldwertschwankungen und handelsrechtliche Verträge in Deutschland und Frankreich. Bestandsaufnahme und Aussichten für das europäische Währungs und Privatrecht, Berlin, 2002, 41.

²⁹ *Vashakidze G.*, Civil Code System of Complicated Obligations, Tbilisi, 2010, 98 (in Georgian).

"The Court explained that the content of Article 389 of the CCG provides for two legal preconditions, specifically: the application of the principle of *nominalism* in the case of devaluation of the currency (rate of exchange) and change of the currency."³⁰

"Denomination" means the amount of currency, depicted on a banknote (10 Lari, 50 Lari, etc.) and respectively, the debt should be repaid in the same unit. Hence, the object of obligation is a certain amount of currency and not the buying power of these units.³¹ "Currency fluctuation is quite a normal phenomenon in a market economy and principle of *nominalism* is the medium for maintaining financial stability just in such cases."³²

"A monetary obligation is construed fulfilled when covered in the amount of currency denominations and not on the basis of the buying power of the latter, what, as a general rule, is a category that changes over the time."³³ Smooth operation of international monetary system is associated with the stability of change in the exchange rate.³⁴ "Changes in the buying power of a currency does not change the amount of debt, does not constitute grounds for revaluation of the payable amount. Irrespective of these changes the buying power of money is defined according to nominal value. When speaking about the exchange rate of money, the account should not be taken of the exchange ratio of national currency with the foreign one, but rather the buying power of specific currency as a payment medium."³⁵ "Buying power depends on economic processes distinctive of market economy."³⁶

"The Court did not uphold the assertions of the employee regarding "inflation amount", as with this respect the Appellant failed to formulate his claim in a manner as to allow for comprehensive definition of normative content of the legal ground of the claim (e.g. Article 389 of the Civil Code of Georgia) and relevant scrutiny.³⁷ "The Appeals Chamber stressed that there are no conditions, prescribed by Article 389 of the CCG for claiming the compensation of additional amount due to GEL devaluation and, respectively, legal grounds for meeting this part of the claim."³⁸

³⁰ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

³¹ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 20 May, 2016.

³² *Tskepladze N.*, Payment of Monetary Obligations in the Case of Change of Currency Unit, "Georgian Law Review", № 1, 2003, 194 (in Georgian).

³³ *Fox D.*, The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations, *Cambridge Law Journal*, 70(1), March, 2011, 144-174.

³⁴ *Eichengreen B.*, International Monetary Arrangements for the 21st Century, Integrating National Economies, Washington, 1994, 29

³⁵ *Meskhishvili K.*, Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, 2016, 7 (in Georgian).

³⁶ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-870-1138-2005, dated 09 March, 2006.

³⁷ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1190-2018, dated 12 April, 2019.

³⁸ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1096-1125-2011, dated 6 October 2011.

"Changes in the buying power of the currency do not change the amount of debt, does not constitute grounds for revaluation of the payable amount. Irrespective of these changes the buying power of money is defined according to denomination."^{39;40} Upon fulfillment of a monetary obligation, the obligation should be covered according to borrowed amount, as the object of monetary obligation is the certain amount of banknotes."⁴¹

"The purpose of Article 389 of the CCG is to promote the development of market economy, procurement for the sustainability of civil-law relations. Upon repayment of a debt, the legislator focuses not on the buying power of the denomination, but rather the denomination itself and amount of currency units."⁴²

Worth mentioning with regard to the principle of *nominalism* in the legislation of advanced countries is the fact,⁴³ that after the introduction of the single currency unit - Euro, the problem of definition of the debt currency and payment currency in trade relations lost its practical importance in countries that joined the new currency system, as in such obligations the debt currency and the payment currency are the same.

However, many countries still have different monetary systems, the names of currency units of which do not coincide. Hence, in the case of devaluation or revaluation it is important to define, whether the currency of which country is the debt currency and the currency of which country is the repayment one as the principle of *nominalism* applies to debt currency and the change in the value of payment currency has no impact on the economic content of the obligation.⁴⁴

"If a monetary obligation, defined in a currency other than Euro, is to be fulfilled within the country, than the payment should be made in Euro,⁴⁵ except for the case, when paying in other currency is explicitly negotiated.⁴⁶ If a monetary obligation is defined in a foreign currency, a debtor is entitled to pay in currency of the country, where the payment is made if the parties have explicitly agreed about the foregoing (Article 84 of the Law of Obligations of Switzerland, judicial practice of the UK and Germany.), according to the exchange rate, existing for the date of payment.⁴⁷ Worth mentioning is that there might be an agreement between the states themselves for the maintenance of the stability of the currency and prevention of devaluation. There are such agreements entered between

³⁹ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 29 May, 2016.

⁴⁰ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-762-730-2016, dated 16 January, 2017.

⁴¹ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-347-323-2010, dated 19 July, 2010.

⁴² Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-130-122-2017, dated 23 March, 2017.

⁴³ *Weiler F.*, Schuldrecht AT, §9, Baden-Baden, Nomos, 2012, Rn 8.

⁴⁴ *Dzlierishvili Z.*, Contract Law (co-author), Tbilisi, 2014, 262 (in Georgian).

⁴⁵ *Grothe H.*, in: *Bamberger H. G., Roth H., Hau W., Poseck R.*, BeckOK BGB, 53. Aufl., München, 2020, §244, Rn. 1-3.

⁴⁶ *Grundmann St.*, in: MüKo, BeckOK BGB, 8. Aufl., München, 2019, §244, Rn. 2.

⁴⁷ *Dzlierishvili Z.*, Legal Nature of Contracts on Transfer of Property under Ownership, Tbilisi, 2010, 331 (in Georgian).

the certain EU Member States, aiming at Euro's stabilization.⁴⁸ The International Monetary Fund tries to act as a guarantor for the fulfillment of obligations, to ensure the stability of the international monetary system.⁴⁹

In monetary obligations, expressed in either national or foreign currency, money acts as a payment medium. In international commercial and banking practice currency is sometimes construed not as a payment medium, but rather as a generic thing, that can be bought. The basis of such relations are the currency exchange transactions.⁵⁰ Hence, it is necessary to differentiate between monetary obligations and currency exchange transactions as unlike monetary obligations, the principle of *nominalism* does not apply to currency exchange transactions.⁵¹

"In the case concerned the sales contract set the price in the USD, while the obligation was fulfilled - the amount was paid - in GEL. The Appeals Chamber stresses that the application of Article 389 of the CCG is not relevant with regard to this case as the normative content of Article 389 of the CCG regulates such legal relations, when the case concerns monetary obligations, when the amount of monetary obligation is defined, however the currency exchange rate or currency unit has changed from the date of origin of the obligation before the date of fulfillment thereof."⁵²

"Irrespective of applicants' claim, that the currency unit suffered inflation since the date when they transferred money and thus, the payment obligation was to be imposed on the defendant in the USD. The court stressed, that the applicants made contributions to partnership at different times in the national currency - GEL and respectively, the defendant was to be imposed the payment of money in favor of the applicants in GEL".⁵³

"The Court stressed, that upon compensation of damages, the damages in expert opinion, that Court relied on, were calculated in the national currency (GEL), respectively this is not the case of appreciation, depreciation or change of currency."⁵⁴

Article 389 of the CCG can also be applied in the case of denomination⁵⁵ (appreciation or depreciation of currency unit) or hyperinflation or change of currency."⁵⁶

⁴⁸ *Hofmeister H.*, Goodbye Euro: Legal Aspects of Withdrawal from the Eurozone, European Legal Studies Center, Columbia University Columbia Journal of European Law, Fall, 2011, <<http://www.lexisnexis.com/hottopics/lnacademic/>> [30.03.2020].

⁴⁹ *Feibelman A.*, Europe and the Future of International Monetary Law, Symposium Issue: The European Sovereign Debt Crisis: A Critical Assessment of the Euro & European Monetary Union, Transnational Law & Contemporary Problems, 22Spring, 2013, <<http://www.lexisnexis.com/hottopics/lnacademic/>> [30.03.2020].

⁵⁰ *Dzlierishvili Z.*, Specificities of Fulfillment of Monetary Obligations, Tbilisi, 2005, 25 (in Georgian).

⁵¹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 248 (in Georgian).

⁵² Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

⁵³ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-762-730-2016, dated 16 January, 2017.

⁵⁴ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-217-207-2016, dated 20 May, 2016.

⁵⁵ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case №3/K428, dated 05 April, 2000.

"The Appeals Chamber stressed, that Article 389 of the CCG cannot be applied in the case of normal depreciation of the currency exchange rate, as this process is distinctive of every country: it is applied when the face value of the state money is changed or there is a case of hyperinflation (very high level of inflation, which is often defined as inflation, the monthly level of which exceeds 50% over a long period of time). When the case does not concern the change of the denomination by the state or hyperinflation, Article 389 of the CCG cannot be applied."⁵⁷

3. The Principle of *Nominalism* as the Manifestation of Public Order in Civil-law Relations

The principle of *nominalism* can be regarded as the manifestation of public order in civil-law relations⁵⁸. "Public order promotes the establishment of moral and fair civil-law relations. The freedom of civil-law relations is limited and is bound by certain public interests."⁵⁹ "Public order is also a set of rules, embodying the core and fundamental interests of the state, the stability of the state is based on."⁶⁰

According to the principle of *nominalism*, 1 Lari is always 1 Lari, in any situation, irrespective of loss or gain in buying power of the money. If parties provide for potential change in money exchange rate, they may safeguard themselves against negative consequences through various stipulations. If this is not the case, owing to objective will of law, *nominalism* will act as a presumable norm and, respectively, the parties will assume the risk of potential negative consequences resulting from this norm: if there is a gain in buying power of the money for the moment of repayment of the debt, this will act in favor of the creditor and the debtor has no right to rely on this situation to his own benefit. And if there is a loss in the buying power of the money for the moment of debt repayment, the creditor mechanically becomes the bearer of this risk and neither the latter is entitled to use this situation against the debtor.⁶¹ Sometimes the principle of *nominalism* places a creditor in a grave position and creates certain benefits for a debtor.⁶²

The Appeals Chamber stressed that "Article 389 of the CCG cannot be applied in the case of nominal depreciation of money exchange rate. Correlation between GEL and some foreign currency cannot be taken as a criterion for GEL depreciation as it is a well-known fact that GEL rate against

⁵⁶ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March 2019.

⁵⁷ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-54-54-2018, dated 13 February 2018.

⁵⁸ *Meskhishvili K.*, Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, 2016, 3 (in Georgian).

⁵⁹ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-501-475-2015, dated 31 March, 2016.

⁶⁰ *Chanturia L.*, General Part of Civil Law, Tbilisi, 2011, 357 (in Georgian).

⁶¹ *Zoidze B., Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (ed.)*, Commentary on Georgian Civil Code, 3rd Book, Tbilisi, 2001, Article 383, 348 (in Georgian).

⁶² *Meskhishvili K.*, Impact of the Change of Currency Rate on Civil Relations, Georgian Business Law Review, V Issue, Tbilisi, 2016, 2 (in Georgian).

foreign currencies is fluctuating, it may gain with regard to some foreign currency and lose with regard to some other. However, insofar as the guarantor was supposed to perform his obligation according to the USD exchange rate existing for the moment of payment, the principle of *nominalism*, envisaged by Article 389 of the CCG does not apply."⁶³

Dispositional nature of the rules, establishing the principle of *nominalism*, allows the parties to apply legal remedies, developed by civil-law and trade relations, aiming at the protection against currency devaluation. The legal remedies are applied by the court of law and due to prior agreement of the parties (protective stipulations); or without prior agreement of the parties (compensation of damages in the case of overdue payment, resulting from currency devaluation, etc.).⁶⁴

"The Appeals Court explained, that if parties provide for potential change in monetary rate, they may protect themselves against negative consequences through various stipulations. If this is not the case, owing to objective will of law, *nominalism* will act as a presumable norm and, respectively, the parties will assume the risk of potential negative consequences resulting from this norm."⁶⁵

4. Relation of the Principle of Nominalism with Contract Adjustment due to Changed Circumstances

A matter of practice is whether or not the principle of *nominalism* is applied in the case of adjustment of a contract due to changed circumstances.⁶⁶ By means of Article 389 of the CCG the legislator has already regulated the exemption, which aims at procuring for the stability of prices and protection of the consumers. In the case of conjunction of Article 389 of the CCG (payment of monetary obligation in the case of change in currency rate) and Article 398 of the CCG (adjustment of a contract to changed circumstances), it is not justified to give preference to Article 389⁶⁷. When discussing this issue, it should be evaluated on a case-by-case, whether to what extent and when should the change of currency unit or in currency rate be regarded as such a change that has an essential impact on the content of a contract⁶⁸. Specifically, whether this change is such a circumstance for the parties that, if accounted for, both or either of them would not have entered into this contract or made it under different conditions.⁶⁹ Was the change of the circumstance concerned predictable by the

⁶³ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-130-122-2017, dated 24 March 2017.

⁶⁴ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

⁶⁵ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

⁶⁶ *Lorenz St., Bamberger H. G., Roth H., Hau W., Poseck R.*, BeckOK BGB, 53. Aufl., München, §313, Rn. 2-3.

⁶⁷ *Chachava S.*, Competition of Claim and Grounds for Claim in Private Law, Doctoral Thesis, TSU, Tbilisi, 2010, 71 (in Georgian).

⁶⁸ *Chitashvili N.*, Adjustment of a Contract to Changed Circumstances as a Legal Consequence of Complication of Fulfillment of an Obligation, Law Journal, № 1, 2014, 204.

⁶⁹ *Chachava S.*, Competition of Claim and Grounds for Claim in Private Law, Doctoral Thesis, TSU, Tbilisi, 2010, 72 (in Georgian).

parties? Furthermore, the change of circumstances should be apparent and should result in grave consequences for the debtor. "The institute of impossibility to perform does not apply to monetary obligations (*Geld muss man haben*). The impossibility to perform a contractual obligation may become a ground for exemption of a debtor from liability only in cases, explicitly prescribed by law."⁷⁰

Stipulation of Article 389 of the CCG should basically be regarded as an exemption rule with regard to Article 398 of the CCG as it regulates different legal consequences in the case of change of the currency unit (rate).⁷¹ The key precondition for the application of Article 398 of the CCG is such an apparent change of circumstances after the execution of the contract, in the case of accounting for of which, the interest of the parties (or either of them) to enter into a contract would be less probable. The change of the circumstance should be deteriorating the position of one of the parties to such an extent that claiming unconditional performance of obligation from the latter should disproportionately violate his interests.⁷² Respectively, if the aforementioned preconditions are present in terms of the change of monetary unit, its rate or the currency, the purposes of both rules should be followed.

"The impossibility of adjustment of a contract to changed circumstances constitutes the statutory precondition for the termination of a long-term contract (Article 399 of the CCG)."⁷³ "Article 389 of the CCG can be applied in long-term relations only in the case of essential change of circumstances (Article 398 of the CCG), when it becomes necessary to adjust the contract to changed circumstances."⁷⁴ Article 389 of the CCG applies when a party bears the obligation to pay money."⁷⁵ "The Appeals Chamber explained, that as concerns the application of Article 389 of the CCG, in long-term relations (payment according to exchange rate existing for the moment of origin of the obligation) it can be applied only in the case of essential change of circumstances (Article 398 of the CCG), when it becomes necessary to adjust contract to changed circumstances."⁷⁶ "According to the judgment of the Appeals Court, in the case concerned, the position of the debtor has not deteriorated to the extent for claiming unconditional performance of the contract from him to disproportionately impair his interests, respectively, the preference is to be given to the principle of *nominalism*, prescribed by Article 389 of the CCG."⁷⁷

"The Appeals Chamber explained that the principle of nominalism applies only to the change in buying power of the currency and the question of application of this principle should not be raised

⁷⁰ *Vashakidze G.*, Civil Code System of Complicated Obligations, Tbilisi, 2010, 96 (in Georgian).

⁷¹ *Ibid*, 98.

⁷² Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22, March 2019.

⁷³ *Meskhishvili K.*, Impact of the Change of Currency Rate on Civil Relations, "Georgian Business Law Review", V Issue, Tbilisi, 2016, 3 (in Georgian).

⁷⁴ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1153-1173-2011, dated 31 October, 2011.

⁷⁵ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-239-564-09, dated 17 September, 2009.

⁷⁶ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-147-143-2016, dated 20 May, 2016.

⁷⁷ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1162-2018, dated 08 February, 2019.

when the case concerns damages, resulting from national currency rate fluctuation with regard to foreign currency exchange rate."⁷⁸

5. Change of Currency before the Debt Become Due

Different from the change in buying power of the money are the cases when the currency is changed, i.e. the old currency unit is substituted by the new one (e.g. coupon was substituted by lari)⁷⁹, what constitutes one of the types of money reform.⁸⁰ In this case focal is the question, whether according to what rate is the debtor required to repay the debt? In the case of change of currency unit, the exchange relations should be based on the exchange rate, set by the National Bank of Georgia existing between these currency units for the date of change in currency.⁸¹

"By Resolution N246 of the Cabinet of Ministers of Georgia, dated 24 March, 1993, On Emission of the Coupon of the National Bank of the Republic of Georgia for the Circulation on the Territory of the Republic of Georgia, "coupon" was introduced as a payment medium." According to Paragraph 2 of the above Resolution, correlation between coupon and maneti was set at 1-1. By Ordinance N262 of the Head of the Government of Georgia, dated 16 September, 1995, On Putting the National Currency "Lari" into Circulation, national lari was declared as the sole legal mean of payment on the territory of Georgia starting from 2 October, 1995 and coupon exchange rate for lari was set at 1 million coupons for 1 GEL. Respectively, as a result of money reforms the payment medium and correlation between them was set in Georgia.⁸²

According to the UN Convention on the International Sales of Goods (CISG) the obligation is to be fulfilled in the currency, defined by the contract, but the payment cannot be made in such currency, the payer cannot refer to the impossibility to make the payment, if the alternative currency allows for the payment to be made."⁸³

⁷⁸ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

⁷⁹ *Chantladze M.*, Definition of the Declaration of Will, Reduction of Forfeit, Principle of Nominalism, Georgia law Review (journal), № 1, 2002, 172-174 (in Georgian).

⁸⁰ *Meskhishvili K.*, Online Commentary of the Civil Code of Georgia, Article 389, field 23, <www.gccc.ge> [30.03.2020] (in Georgian).

⁸¹ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1298-2018, dated 22 March, 2019.

⁸² Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-870-1136-2005, dated 09 March, 2006.

⁸³ *Atamer Y. M.*, in: *Kröll St., Mistelis L., Viscasillas P. P.*, UN-Convention on the International Sales of Goods (CISG), <https://beckonline.beck.de/?vpath=bibdata/komm/kroemivicisg_1/unkaufmue/cont/kroemivicisg.unkaufmue.a79.glii.gli1.glb.glibb.gliii.htm&pos=0&hlwords=monetary%03%90obligation%03%90+monetary%2cobligation+%03%90+monetary+%03%90+obligation+%03%90+monetaryobligation+#xhlhit> [30.03.2020].

"Parties to legal relationship cannot be the bearers of the risk of changing currency, thus the law regulates the method of calculation. Specifically, the obligation should be fulfilled according to the rate, that existed for the date of change of the currency."⁸⁴

"As per the judgment of the Chamber, it is a commonly acknowledged fact, that there was a hyperinflation in the country in 1993-1995. Commodity prices and the currency in circulation were increasing at an extremely high speed, what resulted in dramatic devaluation of the currency unit, disequilibrium of the balance of payments and disruption of normal economic relations. Although it was presumed, that the official rate was established, the country, in fact, had market and commercial rates, the money exchange was based on. Consequently, in the case concerned the relationship between the parties was not to be regulated according to the principle of *nominalism*, but rather according to market rate."⁸⁵

"The Appeals Court stressed, that decisive in the case concerned was the situation, the origin, and consequently, the determination of the amount of obligation was related to. According to the note, issued by SAKSTAT, 111 maneti was equal to 92.59 GEL as of 05.11.2014, accounting for consumer price index. The Cassator failed to present any evidence to the contrary. the Appeals Court has not upheld Cassator's opinion about the necessity of application of Ordinance N363 of the Head of the Georgian State, dated 16 September, 1995 and Article 389 of the CCG."⁸⁶

6. Conclusion

Article 389 of the CCG can be conditionally divided into two parts: the first one can be the change in the buying power of the currency from the moment of origin of the obligation until the date of its fulfillment, and the second part - the change of the currency, i.e. the substitution of the old monetary unit with the new one.

The purpose of Article 389 of the CCG is to promote the development of market economy, procurement for the sustainability of civil-law relations. Upon payment of the obligations this principle, embodied in the law of global civilized countries, focuses not on the buying power of the payable denomination, but rather on the denomination itself and the amount of currency units. According to the principle of *nominalism*, the object of obligation is the amount of currency units and not the buying power of the money.

It is necessary to differentiate between monetary obligations and currency exchange transactions as unlike monetary obligations the principle of *nominalism* does not apply to currency exchange transactions.

The principle of *nominalism* can be regarded as the manifestation of public order in civil-law relations. However the dispositional nature of the rules, establishing the principle of *nominalism*,

⁸⁴ *Meskhishvili K.*, Online Commentary of the Civil Code of Georgia, Article 389, field 24, <www.gccc.ge> [30.03.2020] (in Georgian).

⁸⁵ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1512-1427-2012, dated 01 December, 2014.

⁸⁶ Ruling of the Civil Chamber of the Supreme Court of Georgia in the Case № AS-1269-1189-2017, dated 15 December, 2017.

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