

## **Termination of Obligation by Deposit**

*One of the most important institutes of the law of obligations is the termination of an obligation. The obligation no longer exists after termination. Its participants are no longer bound by rights and responsibilities.<sup>1</sup> Termination of an obligation implies that the binding relationship is terminated in a narrow and/or broad sense and no longer exists.<sup>2</sup>*

*Based on the analysis of doctrine and case law, the paper discusses issues of theoretical and practical importance related to the deposit as one of the legal grounds for termination of an obligation, such as the basis for the deposit; deposit rule; deposit-related costs and their reimbursement; retention period of the subject of fulfillment.*

**Keywords:** *Deposit, Termination of Obligation, Articles 434-441 of the Civil Code of Georgia.*

### **1. Introduction**

The purpose of a legal relationship under an obligation law is for the parties to obtain fulfillment under the obligation, i.e. fulfillment achieves the goal set by the committed participants of obligation. After that, there is no longer a legal basis for continuing this relationship.<sup>3</sup> Termination of an obligation is caused by certain circumstances, which are called the grounds for termination of the obligation.<sup>4</sup> The Georgian Civil Code is a fulfillment-oriented act. Both its general and private parts are built on fulfillment mechanisms. The key is fulfillment, not responsibility.<sup>5</sup> While fulfilling the obligation, the respectable interests of either party are taken into account, regardless of the legal status.<sup>6</sup>

One of the grounds for termination of an obligation is a deposit. The debtor is usually interested in the proper fulfillment of the obligation, although in practice there may be times when the creditor delays the acceptance of fulfillment or the creditor's location is unknown to the debtor. In such case,

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<sup>1</sup> *Svanadze G., Dzlierishvili Z., Tsertsvadze G., Svanadze G., Robakidze I., Tsertsvadze L., Janashia L., Contract Law, Tbilisi, 2014, 310 (in Georgian).*

<sup>2</sup> *Svanadze G., Online Commentary on the Civil Code of Georgia, Article 427, Field 5, <www.gccc.ge> (in Georgian).*

<sup>3</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of March 4, 2021 on the case № AS-1288-2019. On this issue in German Law see: BGH NJW 1991, 1295; BGH NJW 1992, 2669; BGH NJW –RR 2008, 109; *Grüneberg Ch. in Palandt O., BGB Komm, 74. Aufl., München 2015, §362, Rn.1. Fetzer Rh. in: MüKo, BGB, 8. Aufl., München, Band 3, Schuldrecht- Allgemeiner Teil II, 2019, § 362, Rn. 3. Kropholler I., Study Commentary on the German Civil Code, §362, 2014, 262, GIZ / IRZ.*

<sup>4</sup> *Akhvlediani Z., Obligation Law, Tbilisi, 1999, 80 (in Georgian).*

<sup>5</sup> *Zoidze B., The Reception of European Private Law in Georgia, Tbilisi, 2005, 285 (in Georgian).*

<sup>6</sup> *Alessi D., The Distinction between Obligations de Resultat and Obligations de Moyens and the Enforceability of Promises, ERPL, Kluwer Law International, 5/2005, 657-692.*

according to Article 434 of the Civil Code, the debtor is entitled to keep the subject of enforcement in court or notary, and to deposit money or securities on the notary's deposit account. By depositing the debtor is released from the obligation before the creditor.

Deposit does not represent fulfillment within the meaning of Article 427<sup>7</sup> of the Civil Code.<sup>8</sup> Deposit is a surrogate for fulfillment.<sup>9</sup> If fulfillment represents an obligation of the debtor, the deposit is his right and not an obligation. The right to claim may be exercised against the obliged person only by a court in accordance with the law.<sup>10</sup>

“The provision of Article 434 of the Civil Code provides the debtor with the right to avoid the negative consequences of non-fulfillment of the obligation by depositing, if the following preconditions are provided: a) the debtor's will to fulfill the obligation to the creditor; b) delay in receipt of fulfillment by the creditor; c) depositing the amount owed by the debtor to the notary account.”<sup>11</sup>

The stipulations of Articles 390-393 of the Civil Code serve to protect the rights of the debtor in case of delay in receipt of performance by the creditor, however, they do not provide for exemptions from debt. Therefore, the deposit of the subject of fulfillment by the debtor on the basis of Article 434 of the Civil Code is aimed at the fulfillment of the obligation by the debtor. “In the present case, it is confirmed that the plaintiff mainly referred to the fulfillment of the contract and not to the facts arising from secondary claim. The plaintiff did not dispute the withdrawal of the creditor from the contract, nor did he indicate any facts that the Civil Code considers to be a termination of obligations through enforcement, for example, a deposit under Article 434 of the Civil Code.”<sup>12</sup>

## **2. Ground for Deposit**

One of the grounds for deposit is the delay in receiving the performance by the creditor. Overdue by the creditor and the debtor are mutually exclusive concepts, that exclude each other. In a bilateral agreement, the same person is the debtor and the creditor. If this person does not fulfill the obligation on time, he is the debtor, and if he does not receive the fulfillment on time – then the creditor, who avoids the deadline for receiving the fulfillment. Although the Civil Code of Georgia calls both cases overdue, it is necessary to differentiate them. Articles 390, 392-393 of the Civil Code apply only if the receipt of fulfillment is a right, and the non-exercise of this right is a delay in receipt of fulfillment. And if the acceptance of fulfillment is an obligation, the timely non-acceptance of

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<sup>7</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article 434, Tbilisi, 2001, 532 (in Georgian).

<sup>8</sup> *Svanadze G., Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 340 (in Georgian).

<sup>9</sup> *Medicus D., Lorenz St.*, Schuldrecht I, Allgemeiner Teil, 21. Aufl., München, 2015, 130; *Grüneberg Ch.* in: *Palandt O.*, BGB Komm, 74. Aufl., München 2015, §372, Rn.1.; *Kropholler I.*, Study Commentary on the German Civil Code, §372, Field 1, 2014, GIZ / IRZ.

<sup>10</sup> *Zweigert K., Kötz H.*, Einführung in die Rechtsvergleichung, 3 Auflage, Tübingen, 1996, 497.

<sup>11</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-167-155-2015, May 14, 2015.

<sup>12</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-75-71-2017, March 31, 2017.

fulfillment constitutes an overdue period and it is subject to the grounds of Article 391 and other general requirements of the Civil Code (Article 394 of the Civil Code).<sup>13</sup>

“Because of the overdue of the creditor, the debtor does not acquire the right to refuse to fulfill the contract, otherwise the termination of the obligation would result in the debtor keeping the property that should have been transferred to the creditor. As long as it is impossible for the creditor to fulfill the obligation because of the overdue period by the creditor, it cannot be considered that the debtor has exceeded the period.”<sup>14</sup>

The Chamber of Cassation clarified that one of the grounds for termination of an obligation is a deposit (Article 433 of the Civil Code), however, in order to regulate the legal relationship by the above-mentioned norm, the debtor must have a substantial objection to the termination of the obligation. In the present case, the existence of the preconditions of Article 434 of the Civil Code is not disputed, but rather, the defendant wants to prove that the creditor refused to accept the fulfillment, which excludes further liability of the debtor.”<sup>15</sup>

“The Court of Cassation pointed out that the principle of conscientious performance of duties not only sets the standard for the debtor, but also the creditor, the standard of special care for another's property (Article 316.2 of the Civil Code). Thus, the fact that from deposited amount should be deducted the fee for notary services cannot be considered as a culpable act of the debtor in the context of Article 392 of the Civil Code. The Chamber of Cassation further noted that since the obligation between the parties was terminated by the deposit, the material means of securing the claim – the mortgage as an accessory right no longer exists (Article 153.1 of the CC), which is the basis for revoking the registration of the right.”<sup>16</sup>

“The Chamber emphasized the provision of Article 496 of the Civil Code, according to which, if the item is found to be defective during the warranty period, the seller is to be presumed to be at fault and the item sold to be defective, while the burden of proving the contrary rests with the seller. The Chamber also noted that the seller could return the item by deposit (Article 434 of the Civil Code).<sup>17</sup>

“Because the creditor refused to accept the amount imposed on the debtor by the court decision in his favor, the debtor placed the amount in the notary's deposit account; The application was accompanied by a notarial deed on receiving the amount in the deposit; In accordance with paragraph 2 of Article 434 of the Civil Code of Georgia, the party was explained by a notarial deed that he was released from the obligation to the creditor by depositing the amount.”<sup>18</sup>

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<sup>13</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article 391, Tbilisi, 2001, 357 (in Georgian).

<sup>14</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-464-2021, July 14, 2021.

<sup>15</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1071-991-2017, March 26, 2018.

<sup>16</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1013-974-2016, January 13, 2017.

<sup>17</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1020-963-2015, November 25, 2015.

<sup>18</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-67-61-2015, February 09, 2015.

Delays in receiving fulfillment should be real. It cannot be based on the debtor's misconceptions.<sup>19</sup>

By the deposit, the debtor can terminate the obligation even if the creditor's residence is unknown.<sup>20</sup> Lack of knowledge of the creditor's whereabouts can be caused by many reasons, for example, change of residence, long business trip in another country, etc.

The reason for the deposit may be the lack of information about the creditor, for example, if the creditor has died and the debtor does not know who his successor is,<sup>21</sup> or there is a dispute between the creditors over the debtor claim, so the debtor does not know in whose favor he should carry out the fulfillment,<sup>22</sup> or the absence (inaccessibility) of the legal representative of the creditor.<sup>23</sup>

In the case of joint entitlement, it is unlikely that all creditors will delay the fulfillment offered by the debtor or that the whereabouts of all of them will be unknown to the debtor, although such a situation is still theoretically permissible.<sup>24</sup> Execution performed in this way by one of the joint debtors will release all joint debtors from the burden of fulfilling the obligation by the force of law (*ipso iure*). The deposit will result in the termination of the entire obligation regardless of whether other joint debtors were informed about it.<sup>25</sup>

According to Article 371 I of the Civil Code of Georgia, if it does not derive from the law, contract or the nature of the obligation that the debtor must personally fulfill the obligation, then this obligation may also be fulfilled by a third party.<sup>26</sup> Subjects of fulfillment of the obligation may not coincide with the subjects of the obligation.<sup>27</sup> The subjects of the obligation are always the creditor and the debtor,<sup>28</sup> while the obligation can be fulfilled by another person instead of the debtor, or the fulfillment is received not by the creditor but by another person.<sup>29</sup> This issue was of great importance in Roman law.<sup>30</sup>

The problematic issue is that only the debtor has the right to fulfill the obligation by deposit, if under certain circumstances, then a third party as well.<sup>31</sup> “The Chamber pointed out that in the present

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<sup>19</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article 434, Tbilisi, 2001, 533 (in Georgian).

<sup>20</sup> *Dzlierishvili Z.*, Legal Nature of Property Transfer Agreements, Tbilisi, 2010, 375 (in Georgian).

<sup>21</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia (ed.)*, 2019, Article 434, Field 9 (in Georgian).

<sup>22</sup> *Grüneberg Ch.* in: *Palandt O.*, BGB Komm, 74. Aufl., München 2015, §372, Rn.4.

<sup>23</sup> *Fetzer Rh.* in: MüKo, BGB, 8. Aufl., München, Band 3, Schuldrecht- Allgemeiner Teil II, 2019, §372, Rn.1.

<sup>24</sup> *Robakidze I.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 458, Field 10 (in Georgian).

<sup>25</sup> *Böttcher L.* in: Ermann BGB Komm, 16. Neu bearbeitete Aufl., 2020, München, §422, Rn.8.

<sup>26</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of December 4, 2019 on the case № AS-559-2019.

<sup>27</sup> *Vashakidze G.*, System of Complicated Obligations of the Civil Code, Tbilisi, 2010, 211 (in Georgian).

<sup>28</sup> *Duncan W. D., Dixon W. M.*, The Law of Real Property Mortgages, Sydney, Federation Press, 2007, 194.

<sup>29</sup> *Medicus D.*, Schuldrecht, Allgemeiner Teil, 14 Neubearbeitete Auflage, Verlag C. H. Beck, München, 2003, 208-209.

<sup>30</sup> *Zimmerman R.*, The Law of Obligations, Roman Foundations of The Civilian Tradition, Chapter 2, Oxford University Press, Oxford, 2005, 58.

<sup>31</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article 434, Tbilisi, 2001, 535 (in Georgian).

case, the fulfillment of an obligation by a third party instead of the debtor could not have been regarded as incomplete fulfillment, although the legislature did not prohibit such fulfillment in litigation, there was a precondition for fulfilling the obligation by depositing under Article 434 of the Civil Code. In the court of first instance, the third party offered the plaintiff to fulfill the obligation instead of the debtor, therefore, the fulfillment of the obligation by depositing was the basis for the termination of the obligation in a particular case.<sup>32</sup>

According to Article 378 of the Civil Code, the debtor has the right to fulfill the obligation in parts (partial fulfillment of the obligation), if the creditor agrees to it. This provision is an exception to the general rule that an obligation must be fulfilled by the debtor as a whole.<sup>33</sup> If the creditor refuses to accept the debtors partial fulfillment of the obligation (Article 378 of the Civil Code), the debtor has no right to file a partial fulfillment in court or on the notary deposit.<sup>34</sup> In the event when the creditor refuses to accept the debtors partial fulfillment, and the debtor is liable to perform the obligation in full, the necessity to separate this obligation from the grounds for termination, such as a deposit, arises.<sup>35</sup>

Article 434 of the Civil Code does not explicitly state that a creditor's refusal to accept fulfillment is unlawful, although such a conclusion can be drawn from an analysis of the provisions of this norm. With respect to Articles 378 and 434 of the Civil Code, there is a terminological difference: Article 378 of the Civil Code deals with the right of a creditor to refuse to accept a partial fulfillment, and article 434 of the Civil Code deals with the avoidance of receiving fulfillment by the creditor, which is also related to exceeding the term by the creditor. As for the refusal of the creditor to accept a partial fulfillment, this is a legal action (excluding the exception provided for in Article 378 of the Civil Code) and does not constitute a case of exceeding the term by the creditor.

If the debtor has the right to fulfill the obligation in parts, then he should be allowed to deposit<sup>36</sup> part of the fulfillment<sup>37</sup> if the relevant preconditions exist.<sup>38</sup>

In one of the cases, the Chamber of Cassation pointed out that the plaintiffs had transferred part of the amount to the creditor in order to fulfill the contractual obligation (Article 378 of the Civil Code). The Cassation Chamber did not share the creditor's view, that the plaintiffs' obligation was not terminated by placing money in the court deposit account, because must have deposited the amount in the notary's deposit account (Article 434.1 of the Civil Code) or transferred directly to the creditor (Article 427 of the Civil Code). The Chamber of Cassation emphasized that it is true that the obligated persons did not deposit this amount in the notary's deposit account (the first sentence of Article 434 of

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<sup>32</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-551-522-2015, August 14, 2015.

<sup>33</sup> *Chechelashvili Z.*, Contract Law, Tbilisi, 2008, 138 (in Georgian).

<sup>34</sup> *Dzierishvili Z.*, Fulfillment of Obligation, Tbilisi, 2006, 69 (in Georgian).

<sup>35</sup> *Gernhuber J.*, Die Erfüllung und ihre Surrogate Sowie das Erlöschen der Schuldverhältnisse aus anderen Gründen, Handbuch des Schuldrechts, Bd 3, neubearbeitete 2. Auflage, Tübingen, 1994, §21.

<sup>36</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article 434, Tbilisi, 2001, 535 (in Georgian).

<sup>37</sup> *Grüneberg Ch.* in: *Palandt O.*, BGB Komm, 74. Aufl., München 2015, §372, Rn.5.

<sup>38</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 434, Field 4 (in Georgian).

the Civil Code), but legally this may not be crucial because they showed a clear will to fulfill the obligation, and the creditor's conduct did not even correspond to the fundamental principle of civil turnover – conduct of good faith and solidarity. The creditor was obliged to act diligently and responsibly and receive fulfillment {Articles 8.3 and 361.2 of the Civil Code}.”<sup>39</sup>

### **3. Deposit Rule**

The deposit rule varies depending on what is being deposited. According to Article 434 of the Civil Code, the subject of deposit may be only movable items, money or securities.<sup>40</sup>

If the subject of fulfillment is a movable item, then it is deposited in court or with a notary. The subject must not be corrupt. The deposit is made in the court of first instance (district or city).<sup>41</sup> As for money or other securities, they are deposited by the debtor in the notary deposit account.<sup>42</sup>

“The Court of Cassation clarified that if the seller does not receive the fulfillment – does not return the painting, the plaintiff can keep the subject of the fulfillment in court / deposit. By depositing, the debtor is released from the obligation to the creditor (Article 434.2 of the Civil Code). Once the plaintiff delivers the painting or deposits it to the defendant and obtains the receipt, he or she will be able to demand a refund of the purchase fee of \$ 13,000 from the defendant. In case the defendant does not voluntarily fulfill the obligation imposed on him, the plaintiff may use the law on enforcement proceedings in accordance with the rules established by the Law of Georgia.”<sup>43</sup>

If the subject of the fulfillment is a perishable item, in compliance with the principles of civil law (good faith and diligence), the debtor must alienate it by auction or other means, and deposit money received from such alienation into notary deposit account. (In Germany, this issue is resolved by Articles 383-386 of the German Civil Code).<sup>44</sup>

The transfer of the subject of fulfillment by the debtor to a judge or notary, gives them obligation to transfer the subject of fulfillment to the creditor. The court or notary notifies the creditor of the receipt for storage of the subject of fulfillment and requires him to take the subject. (Article 438 of the Civil Code).

“In one of the cases, it was the subject of the assessment of the Court of Cassation, whether the notary has violated the obligations provided by law during the performance of his official activities, in the process of returning the deposited money to the debtor, and whether the said action caused property damage in the form of unearned income. Pursuant to paragraph 6 of Article 3 of the Law on

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<sup>39</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1212-1138-2015, June 06, 2015.

<sup>40</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 436, Field 1 (in Georgian).

<sup>41</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article. 437, Tbilisi, 2001, 539; *Kropholler I.*, Study Commentary on the German Civil Code, §372, Field 2, 2014, GIZ / IRZ (in Georgian).

<sup>42</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 435, Field 2 (in Georgian).

<sup>43</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1069-1028-2016, July 07, 2017.

<sup>44</sup> *Fetzer Rh.* in: MüKo, BGB, 8. Aufl., München, Band 3, Schuldrecht- Allgemeiner Teil II, 2019, §383, Rn.1.

Notaries, a notary is liable for damages caused by his / her official activities. According to Article 22 of the same law, a notary is liable for property damage caused by his intentional or negligent action. According to Article 435 of the Civil Code, the deposited property must be handed over by the notary to the creditor. The notary will select the storage, and the documents will remain with him. Pursuant to Article 438 of the Civil Code, the notary notifies the creditor about the receipt for storage of the subject of fulfillment and requests him to receive the subject. The Cassation Chamber considered that in the case under consideration the preconditions provided by law for the imposition of damages on a notary were met.”<sup>45</sup>

Given that the court or notary office are not savings institutions, therefore, according to Article 435 of the Civil Code, they are obliged to transfer the deposited property to the storage until the creditor receives the fulfillment or the statutory deposit period expires.<sup>46</sup>

The place of performance of the obligation<sup>47</sup> is also of great importance when terminating the obligation by deposit.<sup>48</sup> The obligation must be fulfilled in the proper place.<sup>49</sup> The place of fulfillment of the obligation<sup>50</sup> is the place<sup>51</sup> where the debtor performs<sup>52</sup> the last action to fulfill the obligation.<sup>53</sup> Some peculiarities are observed with regard to the issue<sup>54</sup> of the place of performance<sup>55</sup> of the monetary<sup>56</sup> obligation.<sup>57</sup>

According to Article 437 of the Civil Code,<sup>58</sup> storage must be done according to the place of fulfillment.<sup>59</sup> If the debtor makes a deposit at a place other than the place of fulfillment, it will still

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<sup>45</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-468-468-2018, March 12, 2020.

<sup>46</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article. 435, Tbilisi, 2001, 537 (in Georgian).

<sup>47</sup> UNIDROIT, Principles of International Commercial Contracts, Rom, 1994, Uniform Law Review, 2004.

<sup>48</sup> *Zarandia T.*, Place and Terms of Fulfillment of the Contractual Obligation, Tbilisi, 2005, 4 (in Georgian).

<sup>49</sup> *Brox H., Walker W-D.*, Allgemeines Schuldrecht, 43. Aufl., München, 2019, 110.

<sup>50</sup> *Lando O., Beale H. (eds.)*, Principles of European Contract Law, Full Text of part I and II, London, Boston, 2000, 329.

<sup>51</sup> *Worlen R., Metzler-Muller K.*, Schuldrecht AT, 11 völlig überarbeitete und verbesserte Auflage, München, 2013, 55; *Krüger W.* in: Münch. Komm. BGB, 6. Aufl., München, 2012, §269, Rn.4.

<sup>52</sup> *Hartkamp A. (ed.), Hesselink M. W., Hondius E., Du Perron E.*, Towards a European Civil Code, 4<sup>th</sup> ed., Wolters Kluwer, The Netherlands, 2010, 51.

<sup>53</sup> *Weiler F.*, Schuldrecht Allgemeiner Teil, 2. Aufl., Baden-Baden, 2014, §10, Rn. 15; *Krüger W.* in: Münch. Komm. BGB, 6. Aufl., München, 2012, §269, Rn.2.

<sup>54</sup> *Eccher R.*, Der Erfüllungsort für Euro-Sulden, Wien, 2001, 1125.

<sup>55</sup> *Weiler F.*, Schuldrecht, Allgemeiner Teil, 5. Aufl., Nomos, 2019, 108.

<sup>56</sup> *Grüneberg Ch.* in: *Palandt O.*, BGB Komm, 74. Aufl., München 2015, §270, Rn 21; *Schwab M.*, Geldschulden als Bringschulden?, NJW 2011, 2833; *Joussen J.*, Schuldrecht I, Allgemeiner Teil, Stuttgart, 2008, 79; *Unruh M. M.*, Bankenaufsicht im Bereich elektronischer Zahlungsmöglichkeiten, Münster, 2004, 20.

<sup>57</sup> *Worlen R., Metzler-Muller K.*, Schuldrecht AT, 11. völlig überarbeitete und verbesserte Auflage, München, 2013, 64.

<sup>58</sup> *Dzierishvili Z.*, Fulfillment of Obligations, Tbilisi, 2006, 49 (in Georgian).

<sup>59</sup> *Meskhishvili K.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 363, Field 13 (in Georgian).

lead to the termination of the obligation,<sup>60</sup> but if due to the change of place of fulfillment, the creditor incurs additional costs for receiving the deposited property, these costs must be reimbursed by the debtor. The issue is similarly resolved in German law.<sup>61</sup>

#### **4. Deposit-Related Costs and Their Reimbursement**

Storage costs include all costs incurred in the process of depositing the fulfillment item, in particular, the fee for storage of the item, notary fees, shipping costs, postage costs, etc.<sup>62</sup> Reimbursement of costs related to storage, according to Article 439 of the Civil Code, is incumbent on the creditor. “The Court of Cassation shared the Cassator's instruction that from the amount to be returned by the notary should be deducted the bank service fee provided for the transfer of money from the deposit account to the plaintiff's account. According to Article 439 of the Civil Code, all costs related to the storage of deposited property are imposed on the creditor. And according to Section 3 of Article 440, if the debtor takes back the item, then the storage costs are also imposed on him. The Court of Cassation clarified that the costs of maintaining the deposited property (money) include any costs associated with the storage of such property, including the costs of bank service when transferring funds from a deposit account to a debtor's account.”<sup>63</sup>

Article 439 of the Civil Code regulates only the internal relationship between the debtor and the creditor. The debtor and not the creditor is directly involved in the relations related to the storage of the subject of fulfillment, however, under Article 439 of the Civil Code, the creditor will have to reimburse the costs incurred by the debtor, unless, in accordance with Article 440 of the Civil Code, the debtor takes back the object transferred for storage.<sup>64</sup>

Although a notary is not considered a public servant and is a person of a more materially free profession, he carries a certain guarantee of independence and impartiality in the activities carried out by him. The use of this guarantee is largely due to the rewarding nature of the activities of a notary. The form of notary fee and the basis for its adoption (determination) are predominantly legislative norms.<sup>65</sup>

“In one of the cases, the main claim of the cassation appeal filed by the cassator was related to the issue of determining the notary fee for the performance of notarial acts when receiving money for a deposit. The conditions for calculating and paying the fee for performing notarial acts are determined

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<sup>60</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Article. 437, Tbilisi, 2001, 539 (in Georgian).

<sup>61</sup> BeckOK BGB, Dennhardt, 57. Ed., 01.02. 2021, BGB, §374, Rn.1.; *Fetzer Rh.* In: MüKo, BGB, 8. Aufl., München, Band 3, Schuldrecht- Allgemeiner Teil II, 2019, §374, Rn.1; *Grüneberg Ch.* in: *Palandt O.*, BGB Komm, 74. Aufl., München 2015, §374, Rn.1.

<sup>62</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 439, Field 2 (in Georgian).

<sup>63</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-468-468-2018, March 12, 2020.

<sup>64</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Art. 437, Tbilisi, 2001, 541 (in Georgian).

<sup>65</sup> *Burduli I.*, On the Issue of Finance of the Notary Bureau and Remuneration of a Notary, “Journal of Law”, № 2, 2011, 36 (in Georgian).

by the rule approved by the Resolution of the Government of Georgia №507 of December 29, 2011, “On Approval of the Amounts of Fee for Notary Services and Fee Due to the Notary Chamber of Georgia, the Procedure of Payment Thereof and the Terms of Service”. Together with Articles 434-441 of the Civil Code of Georgia, from the systematic and targeted definition of the above-mentioned articles of the rule, it follows that the notary fee when accepting a money deposit consists of two components: A. From the amount set forth in Article 29 (2) (a) of the Rule, which will be paid upon depositing money; And B. In accordance with paragraph 3 of Article 29 of the Rule, from the total amount of interest accrued on the deposited money each month, which the notary receives during the entire period of existence of the amount on the deposit. Accordingly, such an interpretation of Article 29 of the Rule, that the amount specified in sub-paragraph (a) of paragraph 2 is not paid once, but monthly for depositing money on a deposit, is contrary to the content of paragraph 3 of the same article, which considers the interest accrued on the money deposited on a monthly basis as an integral part of the notary fee. Receipt of money on deposit is a one-time action, for which the notary receives a one-time fee specified in Article 29, paragraph 2, sub-paragraph “a” of the Rule; and the interest accrued on the money placed on the deposit is a fee for the actions, the obligation of which is performed by the notary after receiving the amount on the deposit. As for the entry in Article 29 (2) (a) of the Rule that the notary fee should be set at least 4 GEL for each month, it implies that the one-time fee for a notary should not be less than 4 GEL for each month when dividing the total amount of time to the deposit, otherwise, the amount of the fee will be calculated on the basis of the corresponding months multiplied by 4 GEL.”<sup>66</sup>

According to Article 440 of the Civil Code, the debtor has the right to demand the return of the stored item before it’s received by the creditor, if he did not refuse to take it back from the beginning. If the debtor demands the item back, then it is considered that the storage has not taken place. The debtor can take back the transferred subject if the creditor refuses it or the term defined by Article 441 of the Civil Code has passed. If the debtor takes back the item, then the storage costs will be imposed on him as well.<sup>67</sup> This issue is similarly resolved under German law.<sup>68</sup>

“In the present case, the Chamber noted that the amount taken back by the debtor from the deposit was on the basis of Article 440, Part 2 and Article 441 of the Civil Code of Georgia, and not on the basis of Article 440, Part 1 of the same Code.”<sup>69</sup>

## **5. Retention Period of the Subject of Performance**

It is impossible to keep the subject of fulfillment indefinitely, therefore the legislation sets a maximum period during which the court or a notary are obliged to ensure the storage of the deposited

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<sup>66</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-468-468-2018, March 12, 2020.

<sup>67</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.)*, 2019, Article 440, Field 1 (in Georgian).

<sup>68</sup> *Dennhardt J.*, BeckOK BGB, Bamberger/Roth/Hau/Posek, 57. ed., 2021, §376, Rn.1.; *Fetzer Rh.* in: MüKo, BGB, 8. Aufl., München, Band 3, Schuldrecht- Allgemeiner Teil II, 2019, §376, Rn.2.

<sup>69</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1751-1732-2011, February 02, 2012.

object, in particular, according to Article 441 of the Civil Code, a court or notary retains the subject of fulfillment for a period of up to 3 years. If the creditor does not receive the item within this period, the debtor will be notified and required to take the stored object back. If the debtor does not receive the object of fulfillment within the period required for the return, it will be considered as state property.

In the case provided for in Article 441 of the Civil Code, two legal consequences arise: a) the obligation is terminated, even though the subject of fulfillment has not been handed over to the creditor; B) the subject of fulfillment becomes the property of the state if the debtor does not retrieve it.<sup>70</sup>

According to the mentioned norm of the law, after the notary receives the deposited money, he is obliged to take certain actions. In particular, he is obliged to transfer the deposited amount to the creditor. To do so, he must notify the creditor of the receipt of the fulfillment object for storage and request that he collect that object. If the creditor refuses to accept the object of fulfillment, or the three-year period of keeping the money on deposit has passed, the notary is obliged to inform the debtor about it and request him to retrieve the delivered object.<sup>71</sup>

This obligation is regulated in more detail by Article 97 of the Order №71 of the Minister of Justice of Georgia of March 31, 2010 “On Approval of Instructions for Notarial Act Performance Procedure”, according to which, if the creditor refuses to receive the money, the notary notifies the debtor and demands him to collect the deposit. A waiver will be considered if the creditor does not accept the subject of the deposit within three years of its filing. The notary shall set a deadline for the return of the debtor's deposit, which may not be less than three months. If the debtor does not collect the deposit within the given period or if he refuses to collect it, then the subject of the obligation will be considered as state property. Unclaimed deposit amounts will be transferred to the state budget by a notary, except for the amount deducted for the performance of notarial acts.

Articles 441 of the Civil Code of Georgia and Articles 97 of the “Instructions” do not directly stipulate the time limit for the implementation of the above-mentioned actions by a notary. “The Court of Cassation clarified that the content of Articles 441 and 97 of the Civil Code implies the obligation of the notary to act immediately upon the expiration of the three-year term, which includes: A. Send a notice to the debtor immediately upon expiration of the three-year period; B. Determining the repayment period for the debtor by this notice, which should not be less than three months; C. In case the debtor expresses his will to collect the amount, the obligation to return the said amount to him immediately, as well as the debtor's right to express the will to collect the amount within less than 3 months, at any time; D. Immediate transfer of funds to the state budget, if the debtor does not collect the deposit within the period specified by the notary or refuses to collect it. The Court of Cassation did not share the reasoning of the cassator (notary) about the possibility of such notification orally. The Court of Cassation agreed with the cassator's argument that Article 441 of the Civil Code and Article 97 of the “Instruction” do not directly impose an obligation on a notary to give written notice to the debtor, however, the Chamber of Cassation considered that this was unequivocally derived from the essence of the obligation itself. Pursuant to Article 441 of the Civil Code, the notary must not only

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<sup>70</sup> *Chanturia L.*, Commentary on the Civil Code of Georgia, Book III, Art. 441, Tbilisi, 2001, 543 (in Georgian).

<sup>71</sup> *Svanadze G.*, Commentary on the Civil Code of Georgia, Book III, *Chanturia (ed.)*, 2019, Article 441, Field 1 (in Georgian).

notify the debtor of the expiration of the 3-year period, but must also demand the return of the deposited subject and determine the relevant period for it. At the same time, in case of non-compliance with this deadline, state ownership of the property arises. Accordingly, with this notification, on the one hand, the debtor has the right to return his property, and on the other hand, the notary has the obligation to determine the relevant term, and finally, the state has the right to acquire ownership of the property. Consequently, all parties (notary, debtor, state) have a legitimate interest in such notification being carried out in a way that allows the parties to define their rights and obligations and the deadlines for their implementation accurately and clearly. This is not possible with oral communication. The Court of Cassation also did not share Cassator's reasoning on the legality of suspending the amount on deposit by a notary for three months, because the mentioned term arises in case the notary determines it by notifying the debtor, which was not confirmed in the present case.<sup>72</sup>

## **6. Conclusion**

Deposit is not a fulfillment within the meaning of Article 427 of the Civil Code. Deposit is a surrogate for fulfillment. If fulfillment is an obligation of the debtor, the deposit is his right and not an obligation.

The provision of Article 434 of the Civil Code equips the debtor with the right to avoid the negative consequences of non-fulfillment of the obligation by depositing, if the following preconditions are provided: A) the will of the debtor to fulfill the obligation to the creditor; B) delay in receipt of fulfillment by the creditor; C) depositing money in a notary deposit account by the debtor.”

The provisions of Articles 390-393 of the Civil Code serve to protect the rights of the debtor in case of delay in receipt of fulfillment by the creditor, however, they do not provide for exemptions from obligation. Therefore, the deposit of the subject of fulfillment by the debtor is aimed at the fulfillment of the obligation by the debtor.

One of the grounds for deposit is the delay in receiving the fulfillment by the creditor. Delays in getting fulfillment should be authentic. It cannot be based on the debtor's misconceptions. By depositing, the debtor can terminate the obligation even if the creditor's whereabouts are unknown.

The problematic issue is that only the debtor has the right to fulfill the obligation by deposit, if under certain circumstances, a third party as well.

In case the creditor refuses to accept the debtor's partial fulfillment, and the debtor was obliged to fulfill the obligation in full, the necessity to separate this obligation from the grounds for termination, such as a deposit, arises.

The deposit rule is different depending on what is being deposited. The place of fulfillment of the obligation is also of great importance when terminating the obligation by deposit.

Expenses related to storage include all costs incurred in the process of depositing the fulfillment object, in particular, the fee for storing the item, the notary fee, the cost of transporting the item, postage, etc. Reimbursement of costs related to storage, according to Article 439 of the Civil Code, is

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<sup>72</sup> Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-468-468-2018, March 12, 2020.

incumbent on the creditor. Unless, in accordance with Article 440 of the Civil Code, the debtor takes back the object transferred for storage.

Although a notary is not considered a public servant and is a person of a more materially free profession, he carries a certain guarantee of independence and impartiality in the activities carried out by him. This guarantee is largely due to the rewarding nature of the activities of a notary. The form of notary fee and the basis for its adoption (determination) are predominantly legislative norms.

It is important to determine the notary fee for the performance of notarial acts when receiving money on deposit.

In the case provided in Article 441 of the Civil Code, there are two legal consequences: A) the obligation is terminated, even though the subject of fulfillment has not been handed over to the creditor; B) the subject of fulfillment becomes the property of the state if the debtor does not take the subject back.

Pursuant to Article 441 of the Civil Code of Georgia and Article 97 of the Order №71 of the Minister of Justice of Georgia of March 31, 2010 “On Approval of Instructions for Notarial Act Performance Procedure” the obligation of the notary to act immediately upon the expiration of the three-year term is implied, which includes: A. Send a notice to the debtor immediately upon expiration of the three-year period; B. Determining the repayment period for the debtor by this notice, which should not be less than three months; C. In case the debtor expresses his will to collect the amount, the obligation to return the said amount to him immediately, as well as the debtor's right to express the will to collect the amount within less than 3 months, at any time; D. Immediate transfer of funds to the state budget, if the debtor does not collect the deposit within the period specified by the notary or refuses to collect it.

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