

Matter of Authenticity of Electronically Agreed Penalty as Similar in Writing

The modern world is increasingly consuming the Internet in everyday life. Through the Internet, people, among others, enter into consumer contracts. This circumstance gave rise to the need to adapt the relations to the legal norms, if necessary – to introduce new legislation. In the footsteps of the development of the Internet, an electronic form of contract was created, which was similar to a simple written form of contract. In this circumstance there arises a legal question – whether the electronically agreed legal category is equal to written one. The purpose of this article is, among others, to answer this question.

Keywords: *Electronic form of the contract, Written form of the contract, Penalty.*

1. Introduction

The modern rapidly evolving society of human beings is increasingly using the Internet in their daily activities. Internet contracting is especially common in the trade. E-commerce should be considered as a modern form of civil law, especially in the recent pandemic situation when businesses other than food traders were closed but courier services were not restricted.¹ Merchants were actively involved in online marketing and through websites or social networking customers were offered goods with increased intensity, sometimes, in addition to free courier services for the buyer.

The pandemic presented to both the supplier and the consumer the advantages of using electronic means in their relationship with the consumer, and highlighted the usefulness of this form for both parties.

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¹ By the 5864-ss, March 21, 2020 Resolution of the Parliament of Georgia was approved the Edict № 1 of the President of Georgia March 21, 2020 on the Declaration of the State of Emergency throughout the Whole Territory of Georgia (Legislative Herald of Georgia, website, 21/03/2020). By the № 181 Ordinance, 23 March 2020 of the Government of Georgia (Legislative Herald of Georgia, website, 23/03/2020, void, 23/05/2020) ‘in connection with the Declaration of a State of Emergency throughout the Whole Territory of Georgia’, On the basis of Decree № 1 of 21 March 2020 of the President of Georgia, ‘Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (COVID-19) in Georgia’ was approved. According to Article 7 of the Resolution of the Government of Georgia, the supply/sale of all goods/products has been suspended for a state of emergency, except for food and some other goods. The activities of restaurants, public catering facilities, ... / food establishments in organizations were allowed only with on-site delivery or delivery of the product by transport (...)

The large-scale development of technology has created the need to innovate and adopt new legislative norms.² The process of changes has started by the Georgian legislator and is progressing according to the European path. However, given the fact that, as a result of the universality of the Internet, the protection of consumer rights is easily accessible, it can be said that the Georgian online market, due to the lack of detailed legal regulations, has not suffered a setback. It should be noted that the EU has increasingly harmonized consumer protection legislation, which includes regulations on distance trade, unfair terms and consumer credit.³ In particular, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights⁴, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Given that directives do not have direct effect, Member States [as well as Georgia] are obliged to ensure their implementation in national law.⁵

Under Article 127 of an international “Association Agreement between the EU and the European Union on Atomic Energy and its member states, on the one hand, and Georgia, on the other hand,” (Association Agreement)⁶ both parties recognize that e-commerce increases trade opportunities in many sectors; the Parties agree to promote the development of e-commerce between them, in particular co-operation in matters arising from e-commerce. ...

The purpose of the article is to highlight the role that modern technology offers to consumers for greater flexibility of legal relationship, raise the question of whether it is necessary to impose a penalty as of securing a claim in a written form, whether there is a need to fill a legislative gap. Therefore, looking for an answer to the question, can it be considered that a contract concluded through the website is equal to a written contract? And when you agree to the terms of the agreement posted on the Website, which contains provisions on the possibility of accruing a penalty, whether or not it is agreed upon in compliance with the mandatory form of the penalty.

2. The Nature of the Penalty as a Means of Securing the Obligation to Secure the Claim

In order to protect the interests of the creditor, the Civil Code of Georgia provides the possibility of using various means to ensure the fulfillment of the contractual obligation. There are substantive and contractual means of securing the obligation^{7/8}. It seems that the classic form of means of securing a claim by the Civil Code of Georgia is considered to be substantive means, so non-material means, which, as mentioned, are also called contractals, are referred to by the Civil Code of Georgia as additional means of securing a claim.

² *Pachuashvili N.*, Contracts concluded by electronic means, grounds for their invalidity, termination, rejection and legal consequences, thesis, Tbilisi, 2019, 8 (in Georgian).

³ *Cortés P.*, Online Dispute Resolution for Consumers in the European Union, 2010, 6-7 <http://hdl.handle.net/10419/181972> [10.03.2022].

⁴ See <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011L0083>> [10.03.2022].

⁵ *Lakerbaia Th.*, European standard for informed consumers, Journal of Law, #1, 2015, 145 (in Georgian).

⁶ Legislative Herald of Georgia, website, 11/09/2014.

⁷ *Akhvlediani Z.*, Obligation Law, Tbilisi, 1999, 76 (in Georgian).

⁸ *Tchanturia L.*, Credit Security Law, Tbilisi, 2012, 15 (in Georgian).

Thus, the contractual legal remedies for securing a claim are: a penalty, an earnest, a debtor's guarantee, which is characterized by accessory, and a non-accessory bank guarantee⁹, which in practice is used to secure contracts concluded through relatively high cost and by announcing an electronic tender on budget management.¹⁰

The penalty will be imposed in case of breach of obligation and it is usually a common means of securing a monetary claim.¹¹ According to the will of the legislator, a necessary precondition for the imposition of a fine is the observance of the written form of the penalty agreement and the breach of the obligation for which the penalty was used.

As mentioned, the penalty is of an accessory nature,¹² which means that the obligation to pay the penalty does not exist without the existence of a basic contractual obligation. The invalidity of the basic obligation will also result in the invalidity of the additional obligation, while the invalidity of the collateral agreement will not invalidate the underlying obligation.¹³

The agreement on the fine requires the expression of mutual will. Unilateral confession does not really reflect the will expressed in the fine and, consequently, does not give rise to the right to claim it.¹⁴

The specificity of the penalty as one of the means of securing the claim is that the possibility of imposing it must be provided in the contract.

The occurrence of the obligation to pay a penalty is related to the breach of a contractual obligation, therefore, a necessary condition for the application of a penalty is a breach of the obligation. "A penalty is a produced obligation, therefore, the right to claim it is possible only after the violation of the basic obligation."^{15/16} If the breach of the obligation is not established by the authorized person, there is no basis for imposing a penalty.

3. The Form of the Penalty

3.1. Written Form according to the Legislation of Georgia, in General

According to Article 418(2) of the Civil Code of Georgia,¹⁷ the agreement on the penalty requires a written form.

⁹ *Lipartia N.*, Bank Guarantee, Modern Theory and Practice, Tbilisi, 2020, 75 (in Georgian).

¹⁰ See Order № 12 of 14 June 2017 of Chairman of the State Procurement Agency On Approval of the Rules for Conducting Electronic Tenders, Legislative Herald of Georgia, website, 15/06/2017.

¹¹ *Tchanturia L.*, Credit Security Law, Tbilisi, 2012, 16 (in Georgian).

¹² *Meskhishvili K.*, Topical Issues of Private Law, Theory and Case Law, Vol. I, Tbilisi, 2020, 89 (in Georgian).

¹³ *Akhvlediani Z.*, Obligation Law, Tbilisi, 1999, 76 (in Georgian).

¹⁴ *Meskhishvili K.*, Topical Issues of Private Law, Theory and Case Law, Vol. I, Tbilisi, 2020, 91 (in Georgian).

¹⁵ Decision on the case № as-335-2021 of the Civil Cases Chamber of the Supreme Court of Georgia of June 25, 2021, § 30.

¹⁶ Decision on the case № as-1482-2018 of the Civil Cases Chamber of the Supreme Court of Georgia of May 8, 2020, § 38.

¹⁷ Gazzete of Parliament of Georgia, 31, 24/07/1997.

It should be noted that a written form is required regardless of the form of the main obligation.¹⁸

According to the Civil Code of Georgia, a transaction may be concluded orally or in writing (Article 68(1)). Pursuant to Article 319(1) of the Civil Code of Georgia, freedom of contract is defined in several aspects. These are: freedom to determine the content of the contract, freedom to choose a contractor, freedom to choose the form of the contract, freedom to choose the type of contract and freedom to enter into a contract.¹⁹ However, the principle of freedom of form derives only indirectly from the wording of Article 68.²⁰ The existence of a form of contract (transaction) is a common manifestation of interference with the freedom of private autonomy. For example, the need for a written form. It arises from a separate contractual relationship. In the event that such an obligation is not provided by law, the parties may, at their discretion, choose the type of form. For example, the electronic form, which is a subspecies of the written form.²¹ The imposition of a mandatory written form of the penalty agreement is an exception, which proves the non-absoluteness of the principle of freedom of contract.

If there is a mandatory form for the contract, then the application (offer) for the contract and the acceptance of it needs to follow the established form.²² It should be noted that the parties may agree on a fine, both under the main contract and, independently of it, by an additional contract. The latter must be in writing even if the main contract is oral. However, the binding form of the transaction may be determined by the parties themselves when the law itself does not prescribe any binding form for the transaction.²³

Particular importance is attached to how the written document itself is constructed, since the purpose of the binding form is reflected in it.²⁴ In the case of a written form, the expression of will directed to the origin of the transaction must be expressed in alphabetical letters.²⁵ According to Article 69(3) of the Civil Code of Georgia, in the presence of a written form of the transaction, the signature of the parties to the transaction is sufficient. Signature means signing a document specially prepared for the transaction. In case of a unilateral transaction, the signature of one person is sufficient, and in case of a bilateral or multilateral transaction – the signature of two or more persons is required.²⁶

Thus, a written contract is a document containing a text composed of letters with the signatures of the party or parties.

It's interesting – which type of a contract an electronic text contract should be considered? Is it a kind of written form, or something new that is not considered as a written form? In the recent past, it

¹⁸ *Akhvlediani Z.*, *Obligation Law*, Tbilisi, 1999, 79 (in Georgian).

¹⁹ *Jorbenadze S.*, *Freedom of Contract In Civil Law*, Tbilisi, 2017, 103 (in Georgian).

²⁰ *Comments on Civil Code, Book I, General Provisions of Civile Code, Tchanturia L. (ed.)*, Tbilisi, 2017, 368, field 1 (in Georgian).

²¹ *Jorbenadze S.*, *Freedom of Contract In Civil Law*, Tbilisi, 2017, 131 (in Georgian).

²² *Comments on Civil Code, Book I, General Provisions of Civile Code, Tchanturia L. (ed.)*, Tbilisi, 2017, 388, field 4 (in Georgian).

²³ *Ibid*, 390, field 8.

²⁴ *Ibid*, 390, field 8.

²⁵ *Ibid*, 391, field 9.

²⁶ *Tchanturia L.*, *General Part of Covil Law, Manual*, Tbilisi, 2011, 340 (in Georgian).

was indicated in Georgia that an electronic contract does not traditionally belong to any form of a transaction.²⁷

3.2. Written Forms of Contracts in European Legislation

In the process of drafting the unified European Purchase Law, formed in early 2006 by the “Correction and Unification Team” Draft Common Frame of Reference (DCFR)²⁸ was established. DCFR is a comprehensive set of central areas of private law, intended to be used in relation to transnational disputes; its goal was to use it in connection with transnational disputes. The DCFR is also a draft of the Comprehensive Code of Inheritance Law for EU countries or the so-called “Basic Law”. Although the team working on the DCFR project mainly wanted to present the academic nature of the paper, this practice could not be implemented and the DCFR still became part of the political process in the future.²⁹ The DCFR-related text layers were originally released in May 2011, while the revised version was released in August 2011. Finally, this was the basis for the development of the Common European Procurement Law, issued in October 2011³⁰. Although the European Commission launched the European Procurement Law in 2015, renowned German law researcher Reinhard Zimmermann believes that “it is in the hands of science to do everything possible to set and give us the key directions for future development.”³¹

According to Article I.1:106, – “Draft Common Frame of Reference” – A reference to a person’s signature includes a reference to that person’s handwritten signature, electronic signature or advanced electronic signature.³²

According to Article 126(1) of the German Civil Code, if a written form is prescribed by law, then the document must be signed by the compiler himself or his notarized initials must be made on it. According to Article 126(3), the written form may be changed electronically, unless otherwise provided by law.³³

Pursuant to Article 13(1) of Amendments to the Swiss Civil Code of 30 March 1911 (Part Five: Obligatory Law) a contract for which a written form is required by law must be signed by all parties to the contract who will be obliged.

Article 14(1) of the same law stipulates that the signature must be done by hand. According to paragraph 2bis of the same article, a handwritten signature is equated with an authentic electronic

²⁷ *Benashvili K.*, E-Commerce – The Challenge of Modernity in Private Law, *Private Law Review*, № 2, 2019, 90 (in Georgian).

²⁸ *Zimmermann R.*, The Textual Layers of European Contract Law, *Katamadze N. and Ustiashvil G. (translators) Gegenava D. (ed.)*, Sul Khan-Saba Orbeliani University, 2019, ii (author's foreword), 29 (in Georgian).

²⁹ *Ibid*, 32.

³⁰ *Ibid*, 36.

³¹ *Ibid*, ii (author's foreword).

³² Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Articles and Comments, Prepared by the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), 56, <<https://bit.ly/3KC1nzM>> [10.03.2022].

³³ *Kroppholler I.*, Civil Code of Germany, Study Comment, *Darjania Th., Tchetchelashvili Z. (translators), Chachanidze E., Darjania Th., Thothladze L. (ed.)*, 13th ed., Tbilisi, 2014, 53 (in Georgian).

signature associated with an authentic time stamp within the meaning of the Federal Law on Electronic Signature of March 18, 2016. A different legal or contractual settlement of this issue is allowed.³⁴

According to Article 6: 227a of Title 6: 227a of the Civil Code of the Netherlands, "Contracts Concluded by Electronic Means of Communication": If the contract is concluded through electronic means of communication and: a. The contract is and remains available to the parties; b. The authenticity of the contract is sufficiently guaranteed; c. The moment of concluding the contract can be determined by sufficient credibility, and d. The parties can be identified with sufficient certainty.³⁵

To summarize, it should be noted that European legislation recognizes the written form of a contract and equates the written form with the textual form without signature, given the circumstances in which it is possible to determine the identity of the parties to the treaty and the will expressed by them.

It should also be noted that the Law of Georgia on Electronic Documents and Electronic Trust Services is in force in Georgia.³⁶

According to this law, electronic signature is a set of electronic data that is attached to or logically linked with an electronic document and is used for signing the electronic document. According to the article 3.1. of the same law, a qualified electronic signature shall have the same legal effect as a handwritten signature.

It should be noted that this law offers the possibility of concluding a contract remotely, as well as the possibility of convincing in the real will of the party, which contributes to the simplification and rapidity of the relationship.

In the financial market, along with banks, other non-bank lending institutions have recently increased significantly, not to mention the individuals who issue the interest-bearing loans, including those secured by real estate. The proliferation of consumer loans, which are characterized by high interest rate accruals, has necessitated the introduction of certain rules by the regulator. Accordingly, by the order of the President of the National Bank of Georgia № 151/04 of December 23, 2016, the rule of protection of consumers' rights while providing services by financial organizations was approved, attached, along with the principle of calculating the effective interest rate of a loan.³⁷

The purpose of the rule was to promote the financial stability and transparency of the financial sector, as well as to increase public confidence in the financial sector, maximize the protection of consumer interests and transparency of information about financial products on the market. Which, in turn, should significantly contribute to the active use of new financial products by the consumer, as well as to reducing the various risks associated with them.

³⁴ Swiss Civil Code (As of 1 January 2017), *Tchetchelashvili Z. (translator)*, Tbilisi, 2018, 264-265, <https://www.notary.ge/res/docs/gare/Swiss_Civil_%20Code.pdf> [10.03.2022] (in Georgian).

³⁵ Civil Code of the Netherlands (As of 1 January 2019), *Tchetchelashvili Z. (translator)*, Tbilisi, 2021, 520, <https://www.notary.ge/res/docs/gare/Dutch_Civil_%20Code.pdf> [10.03.2022] (in Georgian).

³⁶ Legislative Herald of Georgia, website, 10/05/2017.

³⁷ Order № 151/04 of 23 December 2016 of Chairman of the Georgian National Bank, Legislative Herald of Georgia, website, 28/12/2016.

Under the rule, the financial organization is obliged to conclude the contract – regardless of whether the contract is made remotely (online) or materially (at a branch of a financial institution), also in the process of offering a product, inform the customer of the significant risks associated with the desired product. Such a risk may be, for example, the risk of an increase in the amount payable on a loan, which may arise if the customer has income in GEL, borrows in foreign currency, and the GEL depreciates against foreign currency. Also, the risks associated with non-payment of the loan (for example, the imposition of a penalty, the seizure of current accounts, the possible sale to repay a loan owned by real estate or movable property owned by him).

Pursuant to Article 5 of this Rule, the financial institution is obliged to make a contract for specific financial products, which must have a mandatory title – “Significant terms of the contract” and must contain information in a font size easily accessible to users, but not less than 12. The rule also stipulates that an agreement on specific financial products, both in material and electronic form, must include, among other provisions, an agreement on possible fines (Rule 6.3 (h)).

Thus, the rule echoes the reality that a loan agreement can be concluded remotely and makes it permissible to agree remotely on the terms of the financial product, including secure electronic channels. In such a case, prior to the entry into force of the Agreement, the financial institution shall ensure that the user receives and discloses the information provided by it in accordance with this Rule, as well as agrees to the terms and conditions offered. After confirmation of the user's consent, the agreed terms enter into force (Article 3.8 of the Rule).

4. Judicial Practice

It should be noted that among the civil cases reviewed by the Common Courts of Georgia, the cases arising from the loan (bank credit) dispute under the category of liability, under the agreement, are distinguished by the obvious dominance in terms of number. According to the statistics of cases reviewed by the Supreme Court of Georgia, published by the Supreme Court of Georgia, during 2020³⁸ Of the 116,310 civil disputes under consideration, the apparent majority were legal liabilities – 92,677, of which 65,350 were disputes arising out of the loan agreement, while, for example, there were only 2 disputes over tourism services and 4 over disputes over transport expeditions.³⁹

Nevertheless, the case law of Georgia is not distinguished by the abundance of court decisions on contracts concluded in electronic form. The practice of the Supreme Court of Georgia so far contains only scanty definitions of e-contracts. This may also be due to the fact that no legal irregularities were allowed by the courts of lower instance in resolving the relevant cases or no substantiated cassation claim was filed.

In the case N as-898-848-2015 of the Civil Cases Chamber of the Supreme Court of Georgia of March 9, 2016 (§ 57), the Cassation Chamber did not share the Cassator's view that with the offer made electronically by the applicant for sale and its acceptance by the potential buyer, the purchase agreement between the parties is considered concluded. This finding of the Court of Cassation cannot

³⁸ Modern data is not published at the time of writing this Article (Author's note).

³⁹ Statistics of the Common Court Cases of Georgia is available at the website <<https://www.supremecourt.ge/statistics/2020/>> [10.03.2022].

be considered logical, given its following definition: “59. ... In modern practice, the so-called Concluding electronic contracts. The parties enter into contracts on a daily basis through various e-commerce channels. An agreement entered into in this form shall be deemed to be an agreement equal to an agreement entered into in simple written form.”⁴⁰ It seems that the Court of Cassation justifies its conclusion with this reasoning: “the Chamber of Cassation considers that in the absence of the use of electronic signatures, the electronic auction system fails to provide any possibility of identifying the person wishing to alienate and the potential buyer during the auction process, which precludes the performance of certain actions by an unauthorized person. This is the reason for the need to conclude an additional agreement between the parties.” However, it should be noted that the use of an electronic signature would not have been sufficient if the signatures had not been verified, given the complex written protection requirement for concluding a real estate transaction. Accordingly, the Court of Cassation should have pointed out that even with the use of an electronic signature, a transaction in respect of an immovable property would not be genuine, as the parties' will was not certified by a notary or an authorized person of the registering authority.

The explanations set out in the decision of the European Court of Justice may have an indirect but recommendatory effect on the case law of Georgia. On the case *Home Credit Slovakia, a.s. v Klára Biróová*, N C-42/15, by the Judgement of November 9, 2016⁴¹ the Court ruled that when a credit agreement does not include all the information required under Article 10(2) of the directive [2008/48/EC of the European Parliament and of the Council of 23 April 2008]⁴², the agreement is to be deemed interest-free and free of charges.

5. Conclusion

In conclusion it should be noted that modern European legislation considers it permissible and equates the written form of a contract with the electronic text form.

Certain norms of the current legislation of Georgia (the Law of Georgia on Electronic Documents and Electronic Trust Services, the order by the President of the National Bank of Georgia № 151/04 of December 23, 2016) also declares an electronic form permissible in relation to a separate financial agreement. Therefore, it should be noted that Georgian legislation has not lagged behind the modern European trend and it can be said that the electronic text form is a form of written contract. In view of these circumstances, it would be appropriate if the relevant amendments were made to the Civil Code of Georgia and, in particular, the written form of the contract is interpreted not only as a text form with the signatures of the party(s), but also as a form agreed via electronic channel with formally agreed provision on penalty, even if the parties do not put an electronic signature on the relevant text form. All the more so given that Georgia has committed itself to promoting e-commerce within the framework of the Association Agreement. The penalty agreement, which is used to secure

⁴⁰ Decision on the case № as-898-848-2015 of the Civil Cases Chamber of the Supreme Court of Georgia of 9 March, 2016.

⁴¹ Judgement of the ECJ on *Home Credit Slovakia, a.s. v Klára Biróová*, № C-42/15, 09.06.2016 <<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-42/15>> [10.03.2022].

⁴² <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0048> [10.03.2022].

monetary claims, is an accompanying issue for such activities. Possible changes should concern Article 69.1 and Article 418.2 of the Civil Code of Georgia.

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