Vakhtang Zaalishvili*

Certain Problematic Issue of Standard Terms – Freedom of Agreement and its Limits

Freedom of contract can not be perceived without autonomy in content formation of the agreement; Though, it is evident also, that the freedom at stake relates to all parties concerned, as usually, the term contract is applied to mean at least bilateral expression of wills. Real relations show that equality prescribed by the law is frequently limited due to certain circumstances. One of the parties' stronger position is also part of the range of those circumstances and it may induce, "coerce" others to agree to the unilateral, uncompromising terms offered. Such a practice concerns all societies with market economy both in the sphere of consumer or other types of legal interaction. Usage of standard terms is the most evident form to reinforce positions of stronger party through contractual ties and the legislator is opposing this with the tool of good faith equipped with additional features to confront abuse of power on different levels. Procedural and substantive control mechanisms for standard terms are part of Civil Code since its adoption based on realities of that time. Those realities as altered for now condition existing mechanisms to appear as less adequate; due to internal systemic inconsistencies and based on practical experience they seem no more convincing and effective. The present essay attempts to show existing normatives form different angle and through foreign practice background. This could be useful through the process of implementation of European principles into Georgian law.

Key words: Standard terms of the contract, ambigouos standrd terms, procedural fairness control, essential fairness control, *contra proferentem*, "grey" and "black" lists of standard terms, harmonisation with EU law

1. Introductıon

Freedom of contracting[1] is one of the central, crucial, irreplaceable cornerstones for civil circulation. It is constructed on core values[2] of individual freedom and free self-realization. Contract itself steams from the notion of transaction[3], which is described as expression of coinciding, uninfluenced wills by which parties undertake certain obligations to saitsfy certain interests. Contractual parties themselves decided its essence and form. Not to agree or to chose couterpart is a part of their

* Doctor of Law, Associate Professor at International Black Sea University and Caucasus School of Law, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

1 Civil Code of Georgia (CC), Art 319, I, first sentence: "Subjects of Private Law may Conclude Contracts within the Limits of llaw and Define its Content", <https://matsne.gov.ge/ka/document/view/31702>.

2 Arts. 14 ("Evry Human is Free by Birth...") and 16 ("Evrybody has a Right to Freely Development his Personality"), <https://matsne.gov.ge/ka/document/view/30346>.

3 See *Kereselidze D.,* General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 233 ff..

freedom. While formation of inner will and then fulfillment of the promise are completely upon the parties, the only thing that is left for state is to enforce promise if for whatever reason one of the parties is not willing any more to act as obliged. Parties are themselves guarantors of their contractual rights; Save the presumption of responsible conduct, parties are bearing the risk on content of expressed promise and the agreement itself implies fairness.[4]

Standard terms are providing for the part of the content of agreement; they are formed by the practice steaming form objective necessity of business. They illuminate the content by which one party is willing to contract and in variuous formes presented to potential counterparts; Frequently the market operator offering product or services to consumer or other counterpart on the market is contracting with multiple customers on a daily basis which means formig the consensus on essential terms each time from the legal viewpoint. Simultaneously, as a rule, the sales of producut at concrete moment can only be justified on certain terms and not the others from economic viewpoint for offeror; Thus it is in the interest of the business operator to put those favourable terms in the agreement and failing this concrete transaction may transform to unprofitable and unwanted. Obviously, the high volume of customers demand goods and services can be afforded by no trader if proceeded in a manner of negotiating each and every imortant term with anyone willing to contract. It is therefore why the business seeks to operate with preformulated contract terms.[5] This serves for saving time and economic resources.[67] Anyone tries to include the most beneficial terms into preformulated contract terms for himself.

On the other hand, contract as one of the expression of principle of freedom is also based on equality and state, is the gurantor of that value as well.[8] Once actual equality is ensured the existence of standard terms itself shall not create problems, however in consumer realations weak position of consumer leads to contrary result. The reasons of this are the strong economic position of business and less informed and motivation state of consumer[9] steamed form low value of routin transaction. The similar logic applies to transaction with non-consumer counterparts, where offeror posseses stronger market position.

Regulation of contractual relations, in general, which in Georgia is basically done by the Civil Code, does not imply the essential control of proportionality of obligations undertaken. Surely the

---

4 Cf. *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff.

5 Cf. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 2, <http://www.jura-welt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf>.

6 *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M.* (eds.), Universität Bielefeld, April 2007, 352, <http://www.eu-consumer-law.org/consumerstudy_part3a_en.pdf>.

7 On these and other advantages see *Kakoishvili D.*, Standard Terms of the Contract, Georgia Business Law Review, 2nd ed., Tbilisi, Center of National Business Law at Tbilisi Free University and the Judicial Independence and Legal Empowerment Project (JILEP) Academic Publication, 2013, 68, <http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf>.

8 Art. 1 of the CC.

9 Factors enumerated in *Reich N., Micklitz Hans-W., P. Rott, Tonner K.*, European Consumer Law, 2nd ed., Itersentia 2014, 127.

principle of good faith is aknowledged[10], but similarly to its German analog, limitation is directed to the manner of right's realisation and not to control of the content.[11] As a starting point, general norms on good faith, on the one hand, is provided for exceptional cases and illuminate negative attitude towards content control, on the other hand. Where, consideration for performance is present the adequacy of the latter with the former is practically out of policing. Despite this, special rules to ballance interests of the parties in the relations with particular character is also known in Georgian law and the mechanism of standard terms rewiev stands as one of the examples[12] for such allegation.

As partly mentioned above, it is obvious that party who prepared standard terms in advance is oriented to secure own interest and this is natural. However, if counterpart, despite this fact agrees on the proposal, general contract law logic dictates that problem is solved. But where factors like intense daily routine variety of goods and services which market offers come into play, it is not always reasonable to comprehensively negotiate every single term of the contract and arrive to consensus each time. This applies to both parties' positions. Thus, distinguished negotiation power leaves small chances for another to influence the offered content. Aim of the legislator therefore should be to reveal situations of this kind, take into account continuously altered forms and promote the balance the interests of each party.

Form different perspectives, usage of standard terms for the sole drafter's interest is limited on two stages. These mechanisms[13] were present in EU member states national laws before adopting common European instrument in 1990.[14] They were transposed into Georgian law with Art. 342 and ff.

Present study shall attempt to show up certain problematic aspects of current Georgian regulation in comparison with European mechanisms. Georgia signed Association Agreement with the EU[15] and undertook to make its legislation compatible with European standards. Partly these standards are at place in law, but since 1997 the practice shows that their comprehension and usage face difficulties. Draft law on consumer protection is under consideration[16], which provides for concrete additional regulation to "increase" standard terms control but it is limited to involvement of consumer rights organization into negotiations on standard terms used by dominant market actors. Hence, the purpose of the present study is not only to identify formulation deficiencies of rules in force, but also to illuminate those barriers which addressee of rules face through everyday life and court proceedings. By putting forward European

---

10 Art. 8, III ("Parties to Legal Relation are Obliged to Fairly Carry out their Rights and Duties") and Art. 115 ("Civil right shall be lawfully Realised. Realisation of right for the sole purpose to harm another is prohibited") of the CC.

11 §242 German Civil Code (GCC): "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration".

12 E.g. the possibility of decrease of duty under the penalty clause as per art. 420 of the CC.

13 Directive 93/13/EEC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>. Further modified by 2011/83/EU Directive, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN>.

14 Prominent models prior to the adoption of the directive are discussed in *Reich N., Micklitz Hans-W., Rott P., Tonner K.,* European Consumer Law, 2nd ed., Itersentia 2014, 131.

15 Between the European Union (EU), its Member States and Georgia, in force from 1, May, 2016, <https://matsne.gov.ge/ka/document/view/2496959>.

16 On Legislative initiative and its status see <http://info.parliament.ge/#law-drafting/9950>.

model the attempt to highlight modern trends in regulation of contracts with standard terms herewith shall be made.

2. Scope of the Application of Standard Terms

The meaning of standard term shall be discussed prior of touching specific features of control mechanisms. In general, it is to be underlined that prime purpose of standard terms' control mechanism is to protect weaker party from relevantly stronger offeror and the genesis of norms steams from the necessity of policing consumer contracts. The same reason conditioned the formation of creation of common legal framework within the European ambit. Despite this the range of member states' laws[17] are not limited to the coverage of consumer contracts and it is deemd that any contract can be subject of control where there is superiority one party over another. It follows than that consequently contract under family, succession, labour (both collective and employment) and corporate laws can be agreed including standard terms. Such interpretation does not conform the aims and etimology of the mechanisms. Exclusion of these fields form regulation was resolved by explicit reference in Gemran law[18], though still in general, fairness test is applied to all types of contracts with standard terms.[19] Same can be equaly said about Georgian law as art. 342 if formulated in an abstract way. These norms[20] are placed in general part of contract law and hypotheticaly cover marriage[21] contracts, succession agreements and contracts regulated by corporate law[22] as well.

---

17 Germany, Netherlands, Protugal, see *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M.*(eds.), Universität Bielefeld, April 2007, 351.

18 Rule provided for in §310, IV of GCC. Though, it should be underlined here that application of it is subject to certain modifications (see 2nd and 3rd sentences of the rule referred).

19 See the comment related to §307 in European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, *Fauvarque-Cosson B.* and *Mazeaud D. Eds.,* Sellier, European Publishers, 2008, 527.

20 Despite systemic place, rules specially designed for consumer contracts (arts. 343, I; 347 and 348) are excluded; Typically standard terms are used in consumer transaction like sales and service/works contracts (however, in a broad terms others such as lease of an apapartment, consumer credit are in a same status) and this leaeves less chance for converage of transaction in succession, family and corporate matters, but they are not still completely out of circle of regulation.

21 Marriage contract as per art. 1174 of CC requires written form, which prescribes notary involvement in control of contractual content to conform requirements of law as provided by art. 115, I of 2010 Minister of Justice' Order №71 on Performance of Notarial Actions, <https://matsne.gov.ge/ka/ document/ view/ 1010061>. Though, notarial control does not go beyond such imperative on extreem disproportion of contractual obligations as in e.g. "...terms putting one of the spouses to grave position in relation to another one" – art. 1179, II of the CC "...terms putting one of the spouses in extreamly unfavourable position" - art. 1181 of the CC, leaving the room to agree on terms with lesser degree inconformity with good faith as per art. 346.

22 Judgement of Supreme Court №AS-28-25-2015 of 2015 is notable in this respect. Court of Cassation upheld the position of Appelate Court on art. 343 of CC to be applied as a legal basis for the following factual circumstances: the defendant, natural person purchased an apartment in multiple dwelling block. Sales contract provided for the clause that by acquiring the title on property purchaser automatically

3. Content of Standard Term

Regulation of contractual relations are first of all made by the agreement itself and if by chance there is lack of consensus on whatever part of it, provisions of law serve to fill up gap for conflict resolution; most of those provisions are dispositive (*ius dispositivum*).[23] Dispositive norms are "proposal" form legislator, which may be altered by the parties. Moreover, parties may agree on their own rules and it derives from the principle of freedom of agreement as per art. 10 of CC. Therefore, quite wide area of actions and degree of freedom allows party to offer terms unilaterally to another. This implies the possibility for creator of contractual terms to deviate from rules and where there is no legal regulation offer own standard of conduct. This is provided for in art. 342: terms "…by which the rules different form legal norms or supplementing them are to be created". It is therefore evident that contractual terms copying the rules of law shall not be considered as standard terms.

It is especially to be underlined that that at the moment consumer protection special legal framework is extremely minimized in Georgia. Legislator practically does not delimitate consumer and ordinary transactions made in between equal counterparts. Thus, Civil Code comprises norms of all types of private legal relations, where *de facto* equal status of actors is presumed and no one enjoy any preferences in the present context. This state of affairs runs since the cancellation in 1996 of Law on Consumenr Protection[24], which defectively, but still provided for protection mechanisms. Therefore, by usage of standard terms' control mechanisms leads to the result that the CC legal freamework comes into play when it substitutes contractual term of bad faith, though this seems not completely satisfactory compared to modern standars. To exemplify, the country has the obligation to transpose European

became a member of apartment owners' community and assumed all obligations as prescribed by statute of community. The community itself had before contracted with third party for the service maintenance common share parts of immovable and the cause of action related to payment of service price against the defendant. The Judgement deserves attention because of reference to art. 343 implying that rules under community Statute are perceived by the court as standard terms of (sales) contract. At the same time internal relations of apartment owners' community is in its essence similar to corporate relations. The matters are governed by special Law of 2007 №5277 on Apartment Owners' Community, <https://matsne.gov.ge/ka/document/view/19798>. The clause envisaged by sales contract is at the same time rule directly prescribed by the Law. Thus, the possibility of its coverage by art. 343 is strongly doubtful. The obligations undertaken by community against the third party is another matter and they can hardly but still be deemed as standard terms of the sales contract with the new owner. It is clear that failing to provide information to purchaser on such a legal "defect" in rights on a thing constitutes breach of pre-contractual obligation and it steams form art. 21, II, h) of the mentioned Law. This aspect can be reviewed for standard terms perspective what has actually been done by the Appellate Court and then upheld by cassation. Such qualification raises many questions, but one thing is clear that issue (standard terms application scope) is to be carefully reconsidered in terms of systemic regulation.

[23] Cf. *Chachava S.*, Concurrency in Between Causes Actions and their Legal Grounds in Private Law, dissertation, Tbilisi State University, 2010, 7-9, https://www.tsu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf. *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff. 46.

[24] <https://matsne.gov.ge/ka/document/view/37780>, (document is under processing as archived).

Directive 1999/44/EC[25] on certain aspects of the sale of consumer goods and associated guarantees according to the Annex XXIX of Association Agreement. Art. 3.3 of the Directive provides for cure of the defect of product by repair or substitution as remedies for consumer. He is entitled to make choice between these two provided if it incures "unreasonable" expencess for business as compared to other altermative. Art. 490, III of the CC applies identical approach[26] but lacks an essential factor for the assessment of "reasonableness", which is inherent to Directive's model: this factor is a "significant inconvenience" that consumer may suffer if other party objects to the chosen remedy. It comes therefore that significant discomfort deprives seller the right to object and this is the special protection mechanism in consumer sales. Such factor is not taken into account with ordinary sales. It follows then that similar gaps in Georgian regulation affects final legal result as general rules apply where substituting void standard term.

Where one party alters legislative rule, he considers that standard of fairness and ballance, which legislator prescribed relevant, does not fit his requirements and thus is unacceptable. It is clear that there is already a danger of ignoring other party's interests. Regulation different from legal rule usually comes to exclusion clauses, however there are also examples of alteration of place and time of performace and creation of different format. Extremely radical exclussion clauses, in general, are usually barred by imperative rules form legislator,[27] but exclusion causes in a form of trandard terms come under special regulation.[28] These clauses in a contract are similar in essence with the notion of debt forgiveness. The latter is separately regulated as one type of transaction. Such agreements are admissible and moreover, they are not subject to any formal requirements; their essence may even be established by interpreting concludent action.[29] Thus it follows then that the purpose which a party applying standard term may have, can be achieved by separate agreement on debt forgivness. However, correctness of such conclusion in relation to standard terms with liability exclusion effect seems doubtful. One of the main features of standrad term, further discussed in detail below, is that addressee is unable to influence on its content. The debt forgiveness, on its part, is the key subject matter of the consensus and the lack of the latter leads to inexistance of the agreement. Hence, the achievement of (in advance) debt forgiveness through standard term unconditionally shall not be possible; As a prerequisite the assessment of fainess

25 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN>.

26 For alternative opinion on holder of right to claim as per art. 490 see *Chachava S.*, comm. on art. 490 of the CC, 17th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), <http://www.gccc.ge>.

27 E.g. art. 495 of the CC – voidance of term prescribing the exclusion of liability for the defect of a thing in case of intentional conduct.

28 Common law approach on such contractual clauses discussed in *Treitel G.*, The Law of Contract, Eleventh Edition, Sweet and Maxwel, 2003, 215 ff.

29 See *Svanadze G.,* comm. on art. 448 of the CC, especially 12th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), <www.gccc.ge>.

of such term shall be subject to the test in art. 343 following norms as those are special rules in relation to provisions on debt forgiveness.[30]

On the other hand, when we speak on autonomus regulation of matter not covered by law, it is relevant to mention that innovation is not itself dangerous. Party's aspiration may have mutually beneficial character and new rule invented could not lead to the nessecity of special control. [31] Here we mean unilaterally created and offered term advanced to other party and the latter lacks the possibility to change its content.[32] This character itself implies that offeror is not in a willing position to change despite objection from potential counterpart and the latter is leaded to "consent", it could be out of his interest.[33]

3.1 Essential Terms

Art. 327 of the CC prescribes for the rule that contract is only concluded, when parties agree on its essential terms. At the same time, art. 62 provides for that invalidity of any term of transaction does shall not lead to invalidity of entire transaction if the latter could survive without invalid part. Control mechanism of standard terms either completely excludes integration of a term into agreement or invalidates the one coming in contradiction to good faith.

Hence, it is crucial point whether essential term can be qualified as standard term as questioning the existence of such a term may entail the questioning of the existence of entire contract. Georgian scholars expressed the opinion that any contractual term can be qualified as standard, including price, time of performance or other.[34] Legislator considers the term essential if it is prescribed by law and serving for diferenciating various contracts or one of the party considers considers it as decisive to agree on.[35] For example, in sales contract[36] description of an object[37] (on which seller undertook to transfer

---

30 This issue has tight connection with the question whether essential terms prescribed in art. 327 of the CC of the cotratct can be considered as standard terms..

31 Art. 342, II of the CC. Individually negotiated clause is not considered as standard term. In contrast, prior to the adoption of the Directive, French model subjected individually negotiated clauses to statutory control. Notwithstanding the fact that some of the enumerated rules in contract may be individually negotiated, the others do not lose the status of standard terms – art. 3.2 second indent of the Directive 93/13/EC, <http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_ of_Contract_Thomas_Zerres.pdf>.

32 Art. 3.2 of the Directive 93/13/EEC. The CC does not explicitly provide for this criteria, but can be logically derived from art. 342, III.

33 So called "take it or leave" manner. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 3.

34 *Zoidze B.*, comments on art. 342 of the CC, Comments on Georgian Civil Code, third Book, General Part of Law of Obligations, Samartali, 2001, 182; See also *Aladashvili A.,* comments on art. 342 of the CC, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), www.gccc.ge.

35 Art. 327, II of the CC.

36 Art. 447, I of the CC.

37 Greaten Britain shows an interesting approach to the issue by the 2015 Act on Consumer Rights (consolidating basic consumer rights; Schedule 2 – the so called grey and black lists of contractual terms –

title) is a term disappearance of which is unimaginable. In addition to it the assessment of its fairness leads to the question of adequacy of consideration – i.e. price. Adequacy of price itself it can be said that the desired quantity can be imposed to weak party by offeror, but at the same time, its subjection to control mechanism seems not to be the reasonable approach if it is clear, unambigious and definit. Price is a constitutive part of synallagmatic agreement. Art. 343 of the CC provides for the mechanism of inclusion of standard term into the contract; the rest of the provisions are for the assessment of fairness. Both cases require to have valid agreements as prerequisite. Invalidity of prerequisite or its inexistence entails the disappearance mentioned "standard" term and there is nothing left to control. Thus, it is essential that invalidity or non-inclusion of the term could be cured by interpretation. Otherwise relation transforms from contractual to legal obligatory one.

It certain cases, as an exclusion, legislator tends to be liberal on demanding consensus on price at the moment of agreement: in sales contract[38], as per art. 447, III it is immaterial to have concrete price defined at the moment of conclusion and allows parties to agree on it later, though the latter point shall be subject of consensus. Where definition of concrete price is dependent upon objective criteria (future event, e.g. world market quotation for a concrete moment), problem is solved.; If definition of the price is up to third party or one of the counterparts, art. 325 of the CC comes into play prescribing for good faith to be applied taking into account the fact that clause unilaterally defined does not stand the test of art. 346 of the CC.

In consumer contracts, European perspective is clear: Art. 4.2 of the Directive of European Council 1993/13/EEC on Unfair Terms in Consumer Contracts excludes the fairness assessment of main subject matter and price/remuneration. The purpose of the rule bar control of disproportion of price clause.[39] Contrary could lead us to market price control mechanism.[40] Court does not need standard term control mechanism to evaluate whether consumer concluded good or bad deal in terms of price.[41] Such policy is preconditioned by the preposition that price is simply and clearly set. This implies that vague price term is still under control. Itself the latter rule is not entirely clear and free from inconsistencies because of one of the criteria for standard terms incorporation into contract – clearness/transparency. We shall revert in detail to the latter point in the present paper.

Directive is not completely barring the price control, as art. 8 leaves the member states the possibility to introduce more stringent provisions for control.[42]

---

is supplemented with (12th) rule, which enables trader to alter characters of main object, after the moment of contract comes effective, <http://www.legislation.gov.uk/ukpga/2015/15/schedule/2>. See also Guidance on the unfair contract terms provisions in the Consumer Rights Act 2015, Competition and Markets Authority <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf>.

38 There is similar situation in contract on works: art. 630 of the CC.

39 Cf. *Weatherill S.*, EU Consumer Law and Policy, Elgar European Law, 2005, 121.

40 Cf. *Treitel G.*, The Law of Contract, 11th ed., Sweet and Maxwel, 2003, 217.

41 Cf. *Markesinis B., Unberath H., Johnston A.*, Cf. *B. Markesinis, Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff. 175.

42 Besides, art. 32 of the Directive 2011/83/EU (this Directive supplements the Directive 1993/13/EC with art. 8a) setting the information supply requirement for member states on any further changes on various issues including control of adequacy of price.

Policing of the spheres, where statutory formation of price is made, should be outside of application scope[43], these are so called communal expences: e.g. supply of water (including draining part of the price), natural gas[44], electricity[45], as well as services associated. Statutory price itself contains elements of public interest and in the democratic society abuse of public power conceptualy goes beyond pure private law regulation area.

In practice exclusions form general rule on impossibility of control of essential terms are quite a number. They are mainly directed to those contractual clauses, which are changeable unilaterally after conclusion and on which consumer agreed in advance.[46]

3.2 "Prepared in Advance...by One Party"

Quite an important feature of standard terms provided for in art. 342 is that it should be elaborated in advance, though it also should be supplemented with the second feature – it only should be done by offeror. It is necessary to exclude apllication of protection mechanisms to those cases, where term was eleborated by both parties in advance and the expressions of consent follows after while e.g. by signitures on one ducument. It is based on the logic that term can only qualify as standard if it protects only on eparty's interest. It is true as steams from the art. 342, III ("mutually agreed term" is separated as specifically). This is further connected to the combination where written term is later on changed by oral agreement. It is to be underlined that change should be effective even if written agreement specifies for the change only in a written form.[47]

3.3 Multiple Use

Addittional criteria for qualification of standard term is provided for in art. 342 – for multiple usage; this is an indicator that offeror attampts to carry out business in somewhat uniform, standardised manner and where it is clear that deals are to be made with different kind of potential customers relocation and thus minimisation of contractual risks is vital, to be on a save side. It does not itself unconditionally imply stronger position of offeror, though creates doubt that such an approach could hardly be changed during negotiation process. Hence it is an author's opinion that only the lack of discussed fiture could not serve as a ground for exclusion standard term status of a clause. This character

---

43 Such approach is provided for in §310, II the GCC.

44 E.g. 2011 №18 Ordinance of National Regulatory Commission of Energy and Watersupply of Georgia on Tarrifs of Water Supply, <https://matsne.gov.ge/ka/document/view/1498805>.

45 2008 №33 Ordinance of National Regulatory Commission of Energy and Water supply of Georgia on Tarrifs of Electricity, <https://matsne.gov.ge/ka/document/view/80698>.

46 For the example see *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 175-176.

47 See *Kropholler J.,* comments on §125, 12th indent, Study Comments of German Civil Code, 13th ed., transl. by *Chechelashvili Z.*, Georgian Young Lawyer's Association Publication, for GIZ, Tbilisi, 2014, 52.

is not a necessary attribute in the Directive 1993/13/EC, but is provided by German model,[48] where at least three times application of the term is accented. It makes purpose clear. However, it is also immediately underlined that the very first application already qualifies clause as a standard one.[49] Both the commentaries[50] and case law unambiguously refers to multiple usage in Georgia.[51] Simulteniously in a somewhat strange way, court of cassation provides in its Judgement №AS-376-357-2013 that "similarities in forms" of contract concluded with two separate customers do not create enough ground for the conclusion that text was supposed to be used multiple times. This contradicts not only German practice but also the part of the comments stipulating that more than one application of same terms with even one customer refers to the relevant purpose. Essence lies not in multiplicity of usage but in necessity of protection in case of danger of abuse of contractual freedom by one party. The relevant proof can be made not only by reference to the fact of multiple usages.[52, 53]

If we turn back to consumer transaction, contrary argument to criteria of multiple usage becomes evident. European legislator intentionally rejects such criteria as indicative as it not to be turned as

---

48 *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 352. Also see *Aladashvli A.*, comments on the art. 342, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG). Terms should be intended to be applied for more than one time even with the same customer.

49 *Kropholler J.,* comments on §305, 1st indent, Study Comments of German Civil Code, 13th ed., transl. by *Chechelashvili Z.*, Georgian Young Lawyer's Association Publication, for GIZ, Tbilisi, 2014, 186.

50 *Aladashvili A.,* comments on the art. 342, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2.

51 E.g. Judgments of Supreme Court №AS-376-357-2013 and №AS-755-811, where the court of cassation referrs to the importance of obligatory character of multiple usage; See also Supreme Court Judgement №AS-1225-1245-2011 of 2011, where claimant, the bank argued that the clause in contract on commercial lease of immovable property with natural person (owner) was unfair standard term. The cassation court paid the attention to the fact that there were no evidence provided to prove usage of clause in other transaction. It was underlined therefore that the critera of multiple usage was of indicative nature.

52 Here two principle approaches are dealt with: one is based on German model, where all, busines-to-consumer, business-to-business and consumer-to-consumer transactions' standard terms are controlled and multiple usage criteria serves as a sort of a filter; on the other hand, there is so called French model based on "abuse theory", where no classification of transactions is made; crucial point is to have one party's stronger position and attempt of its undue application. It implies then that individually negotiated term equaly comes under control. Euroean Court of Justice is for the "abuse theory" in the joint cases C-240/98 to C-244/98 - Océano Grupo Editorial SA v. Murciano Quintero [2000] ECR I-04941, also in the case C-168/05 – Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I-10421. Cf. *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 351-353.

53 Supereme Court Judgement №AS-1225-1245-2011 (note 50), in addition to multiple usage, cassation draws attention to the fact that bank was an entity, sufficiently strong, possessing "enough resources at the moment of the conclusion of the contract to receive qualified legal consultation". By this the court underlined the main purpose of establishing weakness of contractual party as a crucial preposition for fairness control.

hindering point for protection of weaker party. §310, III, 2 of the GCC is an example of aknowledgment of the argument: the rule is to reject the criteria for consumer contracts in German model. It is logically based on rebutable presumption that in consumer transactions the positions of consumer is unequal to that of the business and it does not matter for how many times business intends to use standard term. Theoretically in between of equal parties unequality should be established each time in each case.

Kind of detalisation is not possible with the formulation currently provided by art. 342 of the CC.

3.4 Suprimacy of Individualy and in Detail Negotiated Terms; Form

Art. 342 provides for the rule that in detail negotiatied clauses are not considered as standard terms (par. 2), on the one hand and on the other side, individually negotiated clauses are superior over terms prepared in advance (par. 3).

Par. 2 is in tight connection with offering of the term with the requirement to give consent where there is no room influencing the content. Thus, offeror does not even admit to negotiate and arrive to consensus. It is therefore true that only presenting the term can not speak itself that addressee could change the content and there should be something more to prove that offeror was ready to negotiate.[54] Par. 3 steams form the logic of par. 2, stating that individually negotiated terms are superior. Evidence presented at court proceedings showing the content beneficial for offeror is hardly rebuttable and thus, the rule above would loose all its meaning if burden of proof that he lacked possibility influence content is on addressee. Hence, the fact that the term was individually negotiated is to be proved by offeror. European legislator shifts that burden of proof to business by art. 3.2 of the Directive 1993/13/EC. It comes further that addressee shall only prove that the term was presented to him by the other party. Then it is up to defendant to argue that he gave possibility to the counterpart to take account of his own iterest in the clause.

One aditional conclusion steams from the above analysis: all kind of evidence from negotiation process has to have equal value.

Further it is interesting how this rules affect state of affairs form offeror's perspective. This issue shall be considered in relation to form. There comes no restriction from legislator related to formal validity (thus, the term can orally be agreed). Written text of the contract or linked to it standard terms in any form are the evidence of the kind showing sufficiently persuasive picture on completeness, integrity and conclusiveness of the consensus. It means therefore that the offeror always will underline that clear, unambiguous signed by addressee is the final agreement. The same can less be possible if the term can be differently iterpreted, though this case is related to the criteria of transparency and shall be separately discussed. If the written term is unambiguous the contrary can be proved by the same manner in written

---

54 *Kropholler J.,* comments on §305, 2nd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 186.

with parties in equal position in the deal and no other evidence shall be admitted. In contrary to this, where addressee argues that the document was presented to him by the other party, shift of the burden of proof comes into play and addressee would not further try to collect additional evidence. The presumption to apply presented written memorandum and standard term offeror's mere clarifications shall not suffice.

Terms with the listed characteristics further undergo bi-level assessment. a) Procedural and b) substantive fairness tests.

4. Procedural Fairness Test

4.1 Separation of Deals of Different Type

Art 343 introduces two tests taking into acount whether addressee is consumer or entrepreneur. It is not directly shown in par. 1 that it applies to consumer transaction, but multiple usage terms, usually are prepared by business which it uses in everyday transactions. Thus, it is clear that the most of the deals to which par. 1 applies are deals with consumer. Besides, the existance of arts. 347 and 348 (including phrase "...to natural perosns, which do not pursue entrepreneurial activities") reinforces this logic. Teleologic interpretation leads us to the same direction. Legislator aimed at exactly to cover "unordinary" daily (meaning fast transactions of small value within the personal consumption context and in the environment precluding the negotiations on all point of deal) situations. Covers or not par. 1 deals in between businesses is debatable as multiple usage criteria should be of effect of their exclusion. Though cases envisage by "abuse theory" may well exist even here.

Art. 343, II provides for less stringent test for inclusion of standard term against business than it is envisaged in first par.

4.2 Consumer Transactions

Procedural fairness test in consumer transaction means the assessment of those preconditions which shall be present the standard term to be integrated in contract. The preconditions to be discussed shall cumulatively be present.[55] They can be devided into two groups – "transparancy" and "voluntariness". Transparancy itself is present when standard term is specifically referred[56] and

[55] *Aladashvili A.,* comments on the art. 343, 1st indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 1.

[56] Art. 343 – visible script and reference. This means that e.g. in case of written memorandum referece to aditional terms shall be made on first or on the page which consumer reads in detail for sure; offeror shall specifically refer to those terms (in contracts automatically concluded e.g. carwash service terms shall be

explained to consmer and it at place and is easily accessable before conclusion of contract[57]; content of the contract shall be visually well perceptable (where verabaly communicated perceptability is dependent on factual circumstances) meaning that ordinary consumer can read it;[58] content shall be formulated in comprehensibe and undestandable way for a person without special knowledge. In particular, the rule and its consequences shall be clear, thus complicated legal terminology and cross referenes in the text is impermissable. Defence of offeror in this regard shall be the allegation that addressee, despite the presumption on cumsumer's weaker postion possessed enough legal competence to properly understand complicated construction. Transparency created to time factor as well: before conclusion consumer shall be given enough time to understand terms. If the requirement is fulfilled shall be assessed on each ocasion.

Finally, it is necessary that addressee give consent, which may be expressed concludently.[59, 60] In proving the consent, e.g. in a written contract, siganature of consumer on the page where standard terms are printed is vital. Even in case of body text (signed) refers to volumnous annex signature of which is impracticable, business caries out the risk refered text could be left out the contract and cannot for its part; it is therefore the burden of proof is on him and it is quite high.

4.3 "Non-consumer" Transactions

The procedure for integration of stanard terms into contract with entrepreneur addressee of is considerably simplified by art. 343, II. To include them in contract it suffieces the offeror to give clear reference on usage of such terms and make them reachable in any of the form.[61] This is justified by

placed on clearly visible place). Addressee shall have clear understanding that proposed document deals with rules regulating the relations.

57 For example, printing of terms on paycheck or its back side or information memo-paper, receipt paper shall not be claimed to be as perceptable. First, it is the availability of term prior consent and second it is to be ensured that the documetn used can fit content of the term in full. Besides, duty of care of offeror is so high that he shall take into account all possible obstacle the comprehension of the term may face: e.g. vision hadicaps, iliteracy, ect. Italian and English practice can be seen in *Nebbia P.*, Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 46-48

58 Relevantly inordinarily small script may raise doubts.

59 See *Aladashvili A.,* comments on the art. 343, 3rd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2. Concludent actions are not deemed to equate with consent by scielence; E.g. if on the request of consumer business refers to standard term in responce on acceptance of order, consumer's scielence is not an "expression" of consent.

60 In general, control of standard terms shall not only be carried out in relation to consumer contract, but also in relation to others . Procedural control test relevantly implies increased care form business (compared to consumer). See art. 343, II.

61 *Aladashvili A.,* comments on the art. 343, II part, 4th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2; See also *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 9.

stronger position of enrepreneur compared to that of the consumer. His duty of care is higher. His standard of behaviour may well be conditioned by customs of the sphere in which he acts.

Consent component is also to be mentioned here: while there is consent requirement to be made by consumer specifically to standard terms, it is only needed to make reference (to those terms) with an entrepreneur. In some specific circumstance the silence[62] is deemed to be the acceptance.[63]

5. Unusual Standard Term

The same logic is applied to filter the so called unusual standard terms.[64] Standard term is unusual if its content is though related to the subject matter of the contract, but still taking into account of the purpose and other circumstance of the case may well be unexpected for consumer. Unexpected effect relates not only to the content and remoteness of the obligation in essence, but also technically to its place in the text of agreement. E.g. inclusion of the rule under inapropriate title is uncexpected as ussually consumer does not read the text in detail and relies on counterpart.[65]

In case the standard term successfully passes procedural fairness test its usage is nevertheless questioned in terms of substantive fairness. But before that one issue shall be separately addressed as it bears characteristics of both procedural and substantive fairness tests.

6. Ambiguous Standard Term

Art. 345 of the CC deals with interpretation of ambiguous standard terms. Wording is not directly referring to the substantive fairness test, though the latter can become a passageway through which the applicable rule is deduced in certain situations.

Sort of generalized classification of ambiguity cases can appear as follows: ambiguity can steam either from the possibility to interpret wording differently or from incompleteness of formulation or from indeterminacy of rule's scope of application.[66]-[67] The term itself may also be clear, but raise questions in combination with other clauses of the contract.

---

62 Consent by silence discussed in *Baghishvili E.,* comments on art. 334, especially 8th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2. See also *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 2.

63 Arts. 334 and 335 of the CC. These cases are associated to the problem of so called "battle of forms". Solution is of a quite rigid one – "last shot" principle: see *Treitel G.*, The Law of Contract, Eleventh Edition, Sweet and Maxwel, 2003, 20 ff.; See also *Charman M.*, Contract Law, Fourth Edition, Willan Publishing, 2007, 15. The same result is reached in fact by Georgian law, as if offeror of standard terms is answered positively in essential elements of the deal but altered own standard terms and the offeror starts performance not paying attention to counteroffer he in fact agrees by concludent actions.

64 Art. 344 of the CC.

65 *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 11.

66 *Oughton D., Davis M.*, Sourcebook on Contract Law, 2nd ed., Cavendish, 2000, 205.

In such a cases, obviously the term needs to be interpreted in order the rule to be applied and relevant legal consequences determined. In general, interpretation of contract is made on objective basis, giving priority to real meaning of content over internal will attached to the expression.[68] Art. 345 provides for special method of interpretation (overriding the general one) – the so called *contra proferentem* rule – interpretation in against offeror. It modifies the mechanism of contract interpretation. This is reinforced by the text of the Directive for consumer contracts with applying phrase "most favourable" instead of "favourable".[69] In case of standard terms starting point of analysis is that they either alter dispositve rules of law or create new ones in a way to be beneficial for the offeror; thus, it should be presumed that statutory (provided for by the dispositive legal regulation) rule is more favorable for consumer.[70]-[71] In case of lack of statutory rule, where offeror himself creates new rule and integrates it into the contract the situation starts to complicate; where for the classification given above the phrase is ambiguous, interpretation shall be made according to the meaning attached to it at common residence of the parties (if they reside in different places, then the meaning at consumer's residence place is decisive); where formulation is incomplete or scope of application is doubtful, the necessity of interest balancing arise, i.e. principle of good faith comes into play. This should mean application of substantive fairness test (art. 346), because there is not an ordinary clause at stake but standard term and the addressee had no influence on the content during negotiations. It is further tightly connected to the transparency criteria to be satisfied by standard term for its integration into contract. These requirements can emerge as unavoidable obstacle for the term to become a part of agreement. Thus, there comes a

---

67 See also Judgment of the Supreme Court №AS-291-273-2014 from 2014. Court of cassation did not accept for review the decision of appellate court, where the main reason for ambiguity of term in insurance contract was the phrase "other similar considerable breaches". The term was related to release of insurance company from payment obligation in cases listed in contract, in case of fault of driver. The (appellate) court considered that "fault component [was] evaluative category" and "reasonable natural person, who aimed at insuring risks at a maximum and thus reverting to big prestigious insurance company with the [relevant] history as a reliable partner", was not able to adequately assess difference in cases listed in contract and real insurance case as to the above component.

68 The general mechanisms of will interpretation are – objective, perceptible for addressee meaning of the content Art. 52 of the CC is an exclusion, where true inner will is paid attention ("established by objective assessmemt", [and] "not by the exact meaning of wording"), as a rule, this provision is applicable to the unilateral expression not be communicated to addressee; Art. 325 regulates the establishment of the meaning of the term on the basis of principle of good faith to be unilateraly prescribed by one of the parties (or third party); Arts. 337–339 provide for objective criteria of interpretation (meaning assigned at common place of residence of offeror and accepter – in case of ambiguity of expression; closest meaning to the content overall of the contract – in case of contradictory clauses in contract; trade customs and traditions – in need of determination of parties' rights and obligations), where objective evaluation method is applied and only that could have been desirable for the parties is decisive.

69 Art. 5 of the Directive 93/13/EEC.

70 Cf. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 9.

71 Current provisions in contract law are basically designed to regulate transactions between equal parties and legislator distributes risks, rights and obligation on that basis. This in fact means that general dispositive rules are not designed to regulate consumer relations and thus in interpretation filling gaps with general rules may not lead to the result appropriate for the adequate protection of "weaker" party.

question: what should be assessed and on which stage? If a standard term is designed for atypical case and do not alter statutory rule and simultaneously is ambiguous, can it be integrated into contract?[72] If the term itself is clear, but contradicts to another one in the contract, then as per general rules on interpretation (art. 338) one shall use the meaning mostly corresponding to the contract, but at the same time there is a possibility not to consider inconsistent clauses not to form the part of agreement due to failure to pass procedural fairness test. Any of the clear term which may still remain as part of the contract is further subject to substantive fairness test under art. 346. In any case, at least, substantive fairness test shall be applied, otherwise it will contradict to the legal result prescribed in art. 345. Here comes another distinctive case where due to any of the methods described above, the term is invalidated and there exists is neither statutory rule nor the clear agreement. This is the most complicated situation which should be resolved by the so called "gap filling interpretative" method[73]. The detailed analysis of the latter seems to go beyond the scope of present research.

It is provided in the doctrine that special rule of interpretation is to induce business to draft and include clear, precise and just term in the contract.[74] Otherwise, offeror shall lack the possibility to rely on a clause which is only favourable to him.

7."Grey" and "Black" Lists of Unfair Terms

Evaluation of the fairness of standard term is made by two level tests (arts. 347 and 348 of the CC). Precondition for the application of both tests is that there should be consumer-to-business relation, while art. 346 (general test of fairness for standard terms) applies to all transactions. One of these two can only conditionally be named as a test, because the content of the contractual clause is simply compared to the list provided by the law. It is named as "black list"[75] and is given in art. 348 of the CC. The term within the list is *ex lege* void and does not require further assessment. The norm is more special than the general fairness test for standard terms (art. 346 of the CC) and has the supremacy over it. It conditions the sequence of its application in assessment of substantive fairness. Wording in force is deficient as the descriptive part of art. 348 of the CC does not avail to identify that terms enlisted there are void without

---

72 This problem was initially evident though analysis of 93/13/EEC Directive's implementation process into national law of member countries. See *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 347.

73 "Ergänzende Vertragsauslegung". For detailed description see *Kropholler J.,* comments on §157, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 77.

74 *Aladashvili A.,* comments on art. 345 of the CC, 16th indent, I part, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 1.

75 The term is frequently used by scholars. For example, see *Tichŷ L.,* Unfair Terms in Consumer Contracts, Sourcebook on Contract Law, Second Edition, Cavendish, 2000, 63.

further aditional check.[76] Conclusion, that terms in art. 348 are different rather then those in the list of art. 347 can be derived from the content of black list terms, at least with cases[77], where they deprive addressee stututory rights. Argument is fragile and theoretocal view could be doubted, thus the problem remains to be solved.

However, distinctive from art. 348 of the CC, art. 347 of the CC (grey list) evidently shows the need of further evaluation as legislator uses the categories of comparative nature: "irrelevanly high", "irrelevanly long", "unjustifiably".[78] Term in this list are not considered *a pirori* void and their permissibility is assessed through formula in art. 346 of the CC taking into account of other circumstances. Formulation of art. 348 isteslf clearly shows that legislator had in mind pure limitation clauses where no room is left for the evaluation.

8. "General"[79] Fairness Test

Art. 346 of the CC provides for the "general" test controling all standard terms integrated into contract. There obviously should be two things to compare. One is the clause in the contract and second is the rule to which the validity of the former is assessed; The second should logically be better for addressee. Hence, the position of addressee should be worsened. While the standard term deviates from dispositive rules of law effect of worsening should be compare to these norms.[80]

Rule discussed herewith contains inner contradiction by phrases used and commenters also point out this: "...contrary to good faith it is detrimental…". Problem underlined by scholars is that if term is detrimental it is automatically contrary to good faith – it is not possible the detriment to be fair. Thus the construction is ambiguous.[81]

---

76 Only one distinction in between descriptive parts of arts. 347 and 348 is the word "also", which literarily refers to additional terms.

77 Not considering pars. a), b), g) 2nd part.

78 Cf. also *Kropholler J.,* comments on §307, 2nd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 190.

79 Term "genereal" is meant to show the relation to arts. 347 and 348 of the CC.

80 Cf. §307, II, 1 of GCC. See also *M. Ebers,* Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 385.

81 Ibid, *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.),* Universität Bielefeld, April 2007. Despite this there is a detailed explanation as what caused to maintain this criterion in the text. Argument is based on the proposition that good faith component relates not to the detriment but to all the circumstance of the case as a whole. It means that entire scenario shall be taken into account and the evaluation of detrimentally of the agreement for consumer should not refer to content of concrete deal but should count all circumstances and reasons why parties decided to conclude such a deal. See *Nebbia P.*, Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 145-149; argumentation is based on recital 16 of the Directive 1993/13/EC.

When there is no corresponding to standard term statutory rule there should exist disproportion between parties' rights and obligation.[82]

Degree of worsening of consumer's position is the most interesting. Georgian law refers to mere "detriment". In contrary the as per the Directive 1993/13/EC[83] there shall be "significant imbalance" in parties' rights and obligations. The term "significant" indicates that minor imbalance does not count. It may be possible that certain obligation undertaken by consumer with the standard term is compromised e.g. by low price and in this case there will be no imbalance as to general concept of good faith. On the other hand, there is a view that concrete obligation should be measured as against its synallagmatic part attached to business and if, in spite of imbalance between them, other consumer would not conclude the same deal in that situation, then there imbalance exists. Argumentation varies from country to country both as to context and degree. Positions on significant imbalance are not homogeneous and subject to many critics.[84] One thing is clear that minor disproportion can not ground invalidation of standard term.

Art. 346 of the CC refers to the detriment without amplification by "significant". With rough look Georgian version is less stringent than European one, though this can be debated as reliance and good faith also is related to the concept.[85] Art. 115 of the CC limits the enforcement of right if it is done purely to the detriment of other. On the other hand, parties to the relation are to take into account each other's interests and act faithfully as per art. 8 of the CC. Application of these rules are considerably limited: first, they are rarely reverted to;[86] besides, reference is made to obvious injustice;[87] aim of pure detriment as per art. 115 significantly limits the scope of application[88]-[89].

Second sentence of art. 346 of the CC is alleviating proof of unfairness in case of standard terms. In particular, the criteria on which assessment should be made are circumstances at the moment of

---

82 For the regulation of these cases §307, II, 2 of the GCC provides for more concrete rule stating that "endangering attainment of contractual purpose" is one of the criteria for the evaluation of the degree of detrimennt.

83 Art. 3.1.

84 For details see *Nebbia P.,* Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 148-152.

85 Despite literal meaning of the wording, scholars pursue the same line. Cf. *Aladashvili A.,* comments on art. 346 of the CC, 11th indent, , mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5.

86 *Chanturia L.,* Commets on art. 8 of the CC, 2nd part, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5.

87 Ibid, 11th indent.

88 *Chachava S.,* Comments on art. 115, II part, 4th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2.

89 For German regulation see *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 130. Control of contractual terms is possible only in extreme cases, when enforcement of right is grossly unfair. See also *Kereselidze D.*, General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 95.

conclusion of contract, interests of the parties[90], "etc.". Balance of the interests of the parties are dependent upon distribution of rights and obligations between parties; its analysis is made in relation to fairness evaluation in any case for the purpose of determination of degeree of imbalace as inherent component. Court is directly authorized to take into account of circumstances existent at the time of conclusion of the contract and thus, this part of the rule is quite significant.

9. Conclusion

Analysis provided for in the present paper reveals range of problems, which are inadequately resolved by the current rules and in specific cases, require complicated interpretation of statutory rules to achieve satisfactory legal results. In particular:

- Scope of application of norms on standard terms are to be clearly outlined. Case law is unconvincing in this regard. For example, contracts of corporate or similar nature are enough specific not to be covered by the rule under consideration herewith.

- Criteria of multiple usage is still applicable as a general one, while European experience neglects it at least for consumer transactions. It is referred not only in the Directive 1993/13/EC to be implemented in Georgian law, but also by national laws of member countries.

- Possibility to qualify essential terms as standard should be reasonable in liberal market economy settings. Though, such exclusion can easily be made by systemic interpretation of existing provisions without extra legislative interference. Notwithstanding this, where the necessity of interpretation arise, there the clarity and predictability of law decrease. Thus, it negatively serves stability of civil circulation.

- It is evident that there is a lack of special regulation of consumer relations. This issue itself is one of wider than scope of the present paper, but with the present context it reveals the problem that interpretation mechanism of standard term turns less effective; Stronger party to a deal retains stimulus to careless approach drafting of standard terms, feeling that in case of ambiguity applicable regime shall nevertheless leave him in favorable position due to statutory norms created for the purpose of regulation of relations with in fact equal parties.

- Descriptive parts of arts. 347 and 348 of the CC need changes as by existing formulations enough clarity is hardly achievable. It is not evident which of the list provides terms unconditionally void and requiring no further evaluation.

- General fairness test provided for in art. 346 of the CC raises questions on cumulative application of general evaluation criteria for good faith (arts. 8 and 115 of the CC) and detrimentality. In case of standard terms, it is initially evident that inequality exist already on the level of negotiations, because addressee is unable to influence on the content; relience in everyday transactions may be doubted as well. Thus, to introduce element of significance with the component of detriment could resolve the inconvenience related to reliance and good faith.

[90] Example of usage of this criteria is provided in Judgment of Supreme Court №AS-291-273-2014 (note 67).

Bibliography

1. Association Agreement between the European Union, its Member States and Georgia, in force from 1, May, 2016, <https://matsne.gov.ge/ka/document/view/2496959> (in Georgian).
2. Law №5277 on Apartment Owners' Community <https://matsne.gov.ge/ka/document/view/19798> (in Georgian).
3. Civil Code of Georgia, <https://matsne.gov.ge/ka/document/view/31702> (in Georgian).
4. Constitution of Georgia, < https://matsne.gov.ge/ka/document/view/30346> (in Georgian).
5. Draft Law on Consumer Protection, <http://info.parliament.ge/#law-drafting/9950> (in Georgian).
6. Law on Consumer Protection (repealed), <https://matsne.gov.ge/ka/document/view/37780> (in Georgian).
7. Order of Minister of Justice №71 on Performancece of Notarial Actions, <https://matsne.gov.ge/ka/document/view/1010061>.
8. Ordinance of National Regulatory Commission of Energy and Watersupply of Georgia on Tarrifs of Water Supply №18 from 2011, <https://matsne.gov.ge/ka/document/view/1498805>.
9. Ordinance of National Regulatory Commission of Energy and Water supply of Georgia on Tarrifs of Electricity №33 from 2008, <https://matsne.gov.ge/ka/document/view/80698>.
10. Civil Code of German Republic, <https://www.gesetze-im-internet.de/englisch_bgb/> (English translation).
11. Council Directive 93/13/EEC on unfair terms in consumer contracts, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>.
12. Directive of the European Parliament and of the Coincil 2011/83/EU on consumer rights, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN>.
13. *Aladashvili A.,* comments on art. 342 of the CC, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 1, 2 (art. 343), 2, 3 (art. 342), 1 (art. 345), 5 (art. 346), www.gccc.ge> (in Georgian).
14. *Baghishvili E.,* comments on art. 334, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2, <www.gccc.ge> (in Georgian).
15. *Chachava S.*, Concurrency in Between Causes Actions and their Legal Grounds in Private Law, dissertation, Tbilisi State University, 2010, 7-9, <https://www.tsu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf> (in Georgian).
16. *Chachava S.,* comments on art. 490, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 4-5, <www.gccc.ge> (in Georgian).
17. *Chachava S.,* comments on art. 115, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG) , 2, www.gccc.ge (in Georgian).
18. *Chanturia L.,* commets on art. 8 of the CC, 2nd part, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5, <www.gccc.ge> (in Georgian).

19. *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M.* (eds.), Universität Bielefeld, April 2007, 347, 351-353, 385, <http://www.eu-consumer-law.org/consumerstudy_part3a_en.pdf>.
20. *Fauvarque-Cosson B., Mazeaud D. (e*ds.), European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Sellier, European Publishers, 2008, 527.
21. *Kakoishvili D.*, Standard Terms of the Contract, Georgia Business Law Review, 2nd edition, Tbilisi, Center of National Business Law at Tbilisi Free University and the Judicial Independence and Legal Empowerment Project (JILEP) academic publication, 2013, 68, <http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf> (in Georgian).
22. *Kereselidze D.,* General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 95 (in Georgian).
23. *Kropholler J.,* comments on §125, 12th indent, Study Comments of German Civil Code, 13th edition, transl. by *Chechelashvili Z.*, Georgian Young Lawyer's Association Publication, for GIZ, Tbilisi, 2014, 233 ff. (in Georgian)
24. *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff., 130, 175-176.
25. *Nebbia P.*, Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, Oxford, Portland (Oregon), 2007, 46-48, 145-152.
26. *Oughton D., Davis M.*, Sourcebook on Contract Law, Second Edition, Cavendish, 2000, 205.
27. *Reich N., Micklitz Hans-W., Rott P., Tonner K.*, European Consumer Law, 2nd ed., Itersentia, 2014, 127-131.
28. *Svanadze G.,* comm. on art. 448 of the CC, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5-6, <www.gccc.ge> (in Georgian)
29. *Tichŷ L.,* Unfair Terms in Consumer Contracts, Sourcebook on Contract Law, Second Edition, Cavendish, 2000, 63.
30. *Treitel G.*, The Law of Contract, 11th, Thomson/Sweet and Maxwel, Gloucester (UK), 2003, 20, 215, 217.
31. *Weatherill S.*, EU Consumer Law and Policy, Elgar European Law, Cheltenham (UK), Northampton (USA), 2005, 121.
32. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 2, 3, 9, 11, <http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf>.
33. *Zoidze B.*, comments on art. 342 of the CC, Comments on Georgian Civil Code, third Book, General Part of Law of Obligations, Samartali, 2001, 182 (in Georgian).
34. Guidance on the unfair contract terms provisions in the Consumer Rights Act 2015, Competition and Markets Authority, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf>.
35. Judgment of the Supreme Court of Georgia №AS-755-811.
36. Judgment of the Supreme Court of Georgia №AS-1225-1245-2011.
37. Judgment of the Supreme Court of Georgia №AS-376-357-2013.
38. Judgment of the Supreme Court of Georgia №AS-291-273-2014.
39. Judgment of the Supreme Court of Georgia №AS-28-25-2015.
40. Joint cases C-240/98 to C-244/98 - Océano Grupo Editorial SA v. Murciano Quintero [2000] ECR I-04941.
41. C-168/05 – Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I-10421.