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Unusual Standard Terms of Contract

The protection of contractual equality is of great importance within the private law framework, as its violation will lead to a breach of contractual fairness. To avoid such a result, civil legislation limits freedom of contract and sets a reasonable scope for participating parties, thus, taking a step towards the restoration of contractual equality and justice. As an example, we can cite a contract with standard terms.

The main prerequisite for limiting freedom of contract is content control when intervention (influence) occurs directly in the content of the contract. In case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of freedom of contract in the same dose, as it is possible in other cases, does not take place under standard terms. The principle of private law – everything that is not prohibited by the law is allowed, is applied to standard terms in a limited manner, which reinforces the need to control the content and the scope of its existence.

The subject of the research is not the standard terms of the contract in general; rather the unusual provisions of the standard terms of the contract provided for in Article 344 of the Civil Code of Georgia (hereafter CCG), which is "negative control of inclusion in the contract" and, accordingly, the correction of the result according to which the term "by itself" would have been valid if it were not unusual.

Keywords: *standard terms of the contract; unusual provisions of the standard terms of the contract; Articles 342-344 of the Civil Code of Georgia*

I. Introduction

Article 342 of the CCG reinforces the definition of the standard terms of the contract,[1] according to which, the standard terms of the contract are pre-formed, reusable terms that one party (the offeror) sets for the other party and through which rules different from or supplementing the norms established by law must be made. Determine. [2]

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1 Decision No. ას-237-2019 of May 17, 2019, of the Civil Affairs Chamber of the Supreme Court of Georgia, para. 58 (In Georgian).

2 *Sirdadze L.,* Reservation of Immediate Enforcement on the Entire Property of the Debtor in the Standard Terms of the Bank Credit Agreement, Journal of Comparative Law, 10/2022, 62; *Simonishvili N.,* Justice as a Standard for Limiting Contractual Freedom, "Journal of Law" of TSU, No. 1, Vol., 2018, 78; *Tsertsvadze L.*, in the book: *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contractual Law, Tbilisi, 2014, 203 (In Georgian).

Standard terms are mostly used by those[3] involved in civil relations, who enter into any contractual relations with contractors every day[4] and, therefore, use predefined contractual terms to facilitate this relationship.[5] This is why standard terms of contract are often referred to as contract accession terms.[6]

The standard terms of the contract are evolving daily. The proof of this is electronic contracts, which the business entities conclude with each other based on their business relationship. With such means, it is easier to conclude a contract, place an order, etc. The reservations in civil law should be used as the main regulator of a contract with a standard condition concluded by electronic means, within which the rights of the other party to the contract will be protected as much as possible.[7] The standard terms of the electronic contract are not regulated by separate articles in the Georgian legislation, and the rules of the standard terms of the CSC are used. [8]

When it comes to the determination of terms by one of the parties to the contract for the other, it is relevant to take into account the provisions of Article 325 of the Civil Code, because if the terms of the contract must be determined by the party, it is assumed that they must be determined based on justice.[9] Based on the above, to check the validity of the standard terms, it is necessary to evaluate them with the criterion of fairness.[10] Article 325 of the Civil Code prohibits dishonest and unfair contracting and establishes the rule of fair contractual relations as a whole.[11] According to the principles of European contract law, each party is obliged to act within the framework of good faith and fairness, which cannot be limited or excluded by the contract.[12]

II. Terms of Use

The scope of private autonomy, which is usually defined by law, is based on either the form of the transaction or the content of the transaction or other circumstances.[13] Within the framework of

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3 *Zerres Th.,* Principles of the German Law on Standard Terms of Contract, <http//:www..jurawelt.com/sunise/media/mediafiles/14586/German_Standart_Terms_of_Contract> [25.07.2024].

4 *Paterson M,* Standardization of Standard – Form Contracts: Competetion and Contract Implications, William&Mary Law Review, 52, №2, (2010), 331.

5 *Kakoishvili D.,* Standard Terms of Contract, Georgian Business Law Review, Tbilisi., 2013, 68. (In Georgian)

6 *Chanturia L.* in*: Chanturia L., Zoidze T., Ninidze T., Khetsuriani J., Shengelia R. (eds.),* Commentary on the Civil Code of Georgia, Book Three, Article 342, Tbilisi, 2001, 181 (In Georgian).

7 *Kim N.S.* The Duty to Draft Reasonably and Online Contrachts, Commercial Contract Law, Transatlantic Perspectives, Cambridge University Press, 2013, 185-186; *Paal P.B.,* Internetrecht – Zivilrechtliche Grundlagen, JuS, Heft 11, Verlag C.H. Beck, München, 2010, 956.

8 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

9 Decision No. ას-1-1-2016, of July 4, 2016, of the Civil Affairs Chamber of the Supreme Court of Georgia, para.43 (In Georgian).

10 *Kereselidze T.,* Control of the Content of Standard Terms in the Labor Contract, Labor Law (collection of articles) II, Tbilisi, 2013, 69 (In Georgian).

11 *Khunashvili N.,* Controlling and Limiting the Content of Standard Terms of Contract Based on Good Faith, TSU Law Journal No. 1, Tbilisi, 2013, 273 (In Georgian).

12 *Lando O.,* Is Good Faith an Over-Arching General Clause in The Principles of European Contract Law, Eoropean Review of Private Law, Kluwer law Internacional, 6-2007, 842.

13 *Chanturia L.,* General Part of Civil Law, Tbilisi, 2011, 94. (In Georgian)

private law, the protection of contractual equality is of great importance, which should be expressed both in the case of individual contractual relations when resolving an issue, and in the aspect of legislative regulation. Contractual freedom is possible within the framework of the contractual order, and if it is lost from there, anarchy and lawlessness will set in civil turnover.[14] Justice binds the legislator,[15] for example, we can cite a contract drawn up with standard terms.[16]

Freedom and justice – these two principles create a logical chain, based on which, within the framework of free realization, it is possible to establish a legal relationship.[17] It serves the purpose of equality of persons.[18] Contractual justice, first of all, is based on the main essence of private autonomy: the specific private legal relationship between the parties shall be based on equality,[19] and the agreement between them shall be led by the principle of justice and reasonableness.[20] The absence of such a provision may lead to unfair consequences for the parties participating in the legal relationship,[21] since it will be inconsistent with the essence of private law – individuals participating in it have equal rights at the beginning of the private legal relationship.[22]

Standard terms have been determined[23] as one of the manifestations of limiting freedom of contract.[24] The whole essence of standard terms is their frequent use. [25] It is this practical purpose and need that constitutes the necessity of separate regulatory norms for freedom of contract in the Civil Code.[26] The standard terms of the contract in Georgia are the result of the reception of European private law. [27]

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14 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 287 (In Georgian).

15 *Khubua G.,* Theory of Law, Tbilisi, 2004, 68 (In Georgian).

16 *Di Fabio U.,* Form und Freiheit, DNotZ, heft 5, Verlag C.H. Beck, München, 2006, 346.

17 *Jorbenadze S.,* Scope of Contractual Freedom in Civil Law, Tbilisi, 2016, 109 (In Georgian).

18 *Rödl F.,* Contractual Freedom, Contractual Justice, and Contract Law (Theory), Law&Contemporary Problems, Vol. 76 Issue 2.Sep., 2013, 59.

19 *Basedow J.,* Freedom of Contract in the European Union, European Review of Private Law, 6-2008, 906.

20 *Gelashvili I.,* Commentary on the Civil Code of Georgia, Book I, Chanturia (ed.), 2017, Article 319, Field 15 (In Georgian).

21 *Kerashvili S.,* Impact of Fundamental Rights on Contract Law, Tbilisi, 2018, 66 (In Georgian).

22 *Simonishvili N.,* Justice as a Standard for Limiting Contractual Freedom, TSU "Law Journal", No. 1, Vol., 2018, 60; *Rusiashvili G,* The Principle of Accessory on the Example of Mortgage and Surety, Journal of Comparative Law, 3/2019, 15 (In Georgian).

23 European Contracht Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, Sellier, European Law Publishers, Munich, 2008, 527-531.

24 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 292 (In Georgian).

25 *Gruneberg Cr*., in Palandt BGB, 74. Aufl., 2015, §305, Rn.3; *Brox H., Walker W-D.,* Allgemeines Schuldrecht, 34. Aufl, 2010, München, §4, Rn.32; *Köhler H.,* BGB Allgemainer Teil, 33. Ed. München, 2009, §16,Rn.1; *Grünewald B.,* Burgerliches Recht, 7.Aufl, 2006, München,§6, Rn.1. *Neumayer K-H.,* Contracting Subject to Standard Terms and Conditions, in International Encyclopedia of comparative Law, Volume VII, Contract in General, Chapter 12, Ed. K. Zweigert/ U. Drobing,1999, 12., BGHZ 104, 232, 236; BGHZ 98, 24, 28; BGHZ 2, 90.

26 *Chachanidze T.,* Contractual Freedom and Contractual Justice in Contemporary Contract Law, "Justice and Law", 3/2010, 26 (In Georgian).

27 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 287 (In Georgian).

The use of standard terms of the contract is one of the legal results of the development of the modern market.[28] It is used in a set of legal relationships.[29] Standard contract terms are one of the common examples of intervention in the nature of freedom of contract.[30]

In terms of consumer rights protection, in relation to standard terms, the European Union has developed[31] relevant directives for member states. [32] According to Directive 93/13/EEC (Directive on Unfair Terms in Consumer Contracts), for a standard term to not be considered invalid, it must be fair and made in good faith.[33]

Directive 93/13/EEC provides for three main mechanisms to protect consumers, a) when a term is not clearly unfair but is ambiguous/ambiguous and/or its content is suspicious, such term must always be interpreted in favor of the consumer (Article 5.1), b) unfair standard term is unconditionally invalid, it is not considered binding for the user from the moment of its conclusion. This does not apply to cases where the consumer does not request the invalidity of the condition (Article 6) and c) the consumer, who feels that he is a victim of an unfair condition, has the right to use an effective legal mechanism for protection against unfair terms.[34] "If the user requests the prohibition of further use of an unfair term, the term is considered invalid not only for this particular user but also for all other users who have concluded a contract with the supplier with the same content. "[35]

"In cases where the consumer participates, it is not the right, but rather the obligation of the court to check the validity of the standard terms on its initiative, otherwise, the main goal of the 93/13/EEC Directive – to protect the consumer as a less informed/weaker link participating in the contract – will remain unattainable. After the unfairness of a specific condition is determined, the court must assess on its initiative how much the contract can remain in force without the said condition." [36] "The burden of proof distribution standard is also noteworthy for consumer protection. According to the Directive, the supplier must prove that the disputed term is not an unfair standard term."[37]

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28 *Rusiashvili G, Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 342, Field 9 (In Georgian).

29 *Dzlierishvili, Z.,* Contract for Work (Theory and Practice), Tbilisi, 2016, 56 (In Georgian).

30 *Schmidt H.,* Einbeziehung von AGB im unternehmerischen Geschäftsverkehr, NJW, Heft 46, Verlag C.H. Beck, München, 2011, 3330.

31 *Maisuradze D., Sulkhanishvili E., Vashakidze G.,* European Union Private Law, Decisions and Materials, Part I, GIZ, Tbilisi, 2018, 30 (In Georgian).

32 Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, (1993) OJ L95/29; Directive 2011/83/EU Of The European Parliament and Of The Council of 25 October 2011 on consumer rights.

33 Court of Justice European Union (ECJ), Case C-415/11, Judgment of 14 March, 2013, §76; Commission of the European Communities v Kingdom of Sweden, Case C-478/99 (2002) ECLI:EU:C:2002:281, Judgment of 7 May 2002.

34 Court of Justice European Union (ECJ), Case C-137/08 (2010) ECLI:EU:C:2010:659, Judgment of 9 November, 2010, §49.

35 Court of Justice of the European Union (ECJ), Case C-472/10(2012) ECLI:EU:C:2012:242, Judgment of 26 April, 2012.

36 Court of Justice of the European Union (ECJ), Case C-397/11(2013) ECLI: EU:C:340, Judgment of 30 May, 2013, §38.

37 Court of Justice of the European Union,(ECJ), Case C-243/08, Judgment of 4 June, 2009, §28.

The supplier is not bound to the conclusion of the contract as much as a consumer[38], therefore, they can impose their own terms on the consumer.[39] This is where the supplier's economic advantage lies.[40] When offering a standard condition, fully informing the person as an indicator of good faith is also shared by the 2016 UNIDROIT PRINCIPLES, namely 2.1.20. According to the article (Surprising Terms), a condition that is of a standard type and has such a character that the other party did not reasonably expect it, has no force, unless the said condition was clearly accepted by the other party.[41]

III. Limits on Freedom of Standard Terms of the Contract

When discussing the standard terms of the contract and the limitation of freedom of the contract, we should highlight the main principles that regulate the legal institution at the legislative level: a) adherence to the principle of good faith and the legal prerequisite of nullity; b) content control; c) guarantor of consumer rights protection.

Typically, the terms specified in a standard contract are valid, though there are exceptions in particular cases. Each mechanism of protection is aimed at the realization of the rights of the contracting party, as well as at the proper conduct of practice and economic activity.[42]

When talking about the control of the content of the standard terms of the contract, we should touch upon (and at the same time, the standard terms of the contract) the three main characteristic issues: a) its purpose, b) the competition of norms concerning other legal institutions of the CCG, and c) the relationship between freedom of content and control of content.[43]

The main purpose of controlling the content of the standard terms of a contract is to protect the basic principles of private autonomy for the persons who buy services, products, etc. [44]

In case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of freedom of contract in the same dose, as it is possible in other cases, is not found under standard terms.[45]

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38 *Sir Markesins B., Unberath H, Jonston A.,* The German Law of Contract, Hart Publishing, Oxford and Portland, Oregon, 2006, 267; *Henrich D.,* Verbraucherschutz: Vertragsrecht im Wandel, in festschrift für Dieter Medicus zum 70. Geburstag, Köln, 1999, 200.

39 *Rühl G.,* Consumer Protection in Choice of Law, Cornell International Law Journal, Vol. 44, Issue 3, 2011, 571.

40 *Lakerbaia, T.,* European Standard of the Informed Consumer, TSU "Law Journal" No. 1, Tbilisi, 2015, 144; *Zaalishvili, V.,* Systemic Features of the Regulation of Consumer Private Legal Relations in Georgian Legislation, TSU "Law Journal", No. 1-2, issue, 2010, 56 (In Georgian).

41 UNIDROIT PRINCIPLES of International Commercial Contracts 2016, Published by the International Institute for the Unification of Private Law, (UNIDROIT), Rome, 69.

42 *Lakies T.,* AGB-Kontrolle von Vertragstrafenvereinbarungen, ArbR Akyuell, Heft 13, Verlag C.H. Beck, München 2014, Rn.313.

43 *Jorbenadze S.,* Scope of Freedom of Contract in Civil Law, Tbilisi, 2016, 189 (In Georgian).

44 *Hellwege P.,* Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre Verlag Mohr Siebeck, Tübingen, 2010, 138.

45 *Schade F.,* Wirtschaftsprivatrecht: Grundlagen des bürgerlichen Rechts sowie des Handels- und Wirtschaftsrechts, 2. Auflage, Verlag A. Kohlhammer GmbH, Stuttgart, 2009, Rn.178-181.

The definition of the standard terms of the contract has a great practical purpose. It establishes the scope of the parties' freedom of action, the purpose of which is to entail contractual terms based on the principle of good faith and autonomy of will in standard contracts.[46]

IV. Scope of application of Article 344 of the Civil Code

According to Article 344 of the CCG, provisions of the standard terms, which are so unusual in form that the other party could not have taken them into account, [47] do not become a part of the contract.[48] (A similar arrangement is provided by article §305c 1 of the German Civil Code.)[49]

According to the provisions of Article 344 of the CCG, a mechanism is created to protect the offeror's counterparty from unusual and unexpected terms – the so-called "prerequisite for negative inclusion" – the condition must not be unusual, otherwise it cannot form part of the contract. It appears as one of the demonstrations of the principle of clarity operating in the law of standard terms.[50] This rule applies equally to the standard terms imposed on both the consumer and the entrepreneur as the entrepreneur does not have an optional obligation to read the standard terms in full should the negotiation in this regard emerge.[51]

Checking the circumstances, whether the standard condition is present at all (Article 342 of the CCG) and, in case of confirmation, whether it becomes a constituent part of the contract (Article 343 of the CCG), systematically precedes checking the provision of Article 344 of the CCG. According to Article 344, control is a "negative control of inclusion in a contract" and therefore a correction of the result under which the condition would have been valid "in itself" had it not been unusual.[52]

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46 Sir *Markensinis B., Unberath H., Jonston A.,* The German Law of Contract A Comparative Treatise, Hart Publishing, Oxford and Portland, Oregon, 2006, 170; *Krampe C.,* Auslegung und Inhaltskontrolle Inhaltskontrolle im nationalen und europäischen Privatrecht, Schriften zum europäischen und internationalen Privatrecht Schriften zum europäischen und internationalen Privat-, Bank- und Wirtschaftsrecht, Band 33, *Reisenhuber K., Karakostas I.K. (Hrsg.),* De Gruyter Rechtswissenschaften Verlags- GmbH, Berlin, 2009, 22.

47 *Sirdadze L.,* Reservation of Immediate Enforcement on the Entire Property of the Debtor in the Standard Terms of the Bank Credit Agreement, Journal of Comparative Law, 10/2022, 65. *Tsertsvadze L.*, in the book: Dzlierishvili, Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L., Contractual Law, Tbilisi, 2014, 208-209 (In Georgian).

48 Decision No. ას-712-682-2016, of February 8, 2017, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

49 *Becker J,* in Beck OK BGB, 45. Aufl, 2016, §305c, Rn.2; *Bazedow J,* MüKo BGB, 7. Aufl., 2016, §305c, Rn.11; *Looscheldes D.,* Schuldrecht AT, 14. Aufl., 2016, §16Rn. 334; *Gruneberg Cr*., in Palandt BGB, 74. Aufl., 2015, §305, Rn.5; *Lindacher W., Hau W.*, in Wolf/Lindacher/Pfeiffer AGB – Recht, 6.Aufl, 2013, §305c, Rn.4; *Berger Kl.-P.*, in Prütting/Wegen/Weinreich, BGB Komm., 5.Aufl. 2010, §305c, Rn.18; BGHZ, Urteil vom 08.07.2020 – VIII ZR 163/18, MDR 2020, 1051; BGHZ, Urteil vom 05.10. 2016 –VIII ZR222/15, NJW 2017, 1596; BGH, NJW, 2003, S. 1237; BGH, NJW 2010, 1131., BGH, NJW 2001, S. 2165;

50 *Kakoishvili D.,* Standard Terms of Contract, Georgian Business Law Review, Tbilisi, 2013, 79 (In Georgian).

51 *Rusiashvili G, Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 344, Field 2 (In Georgian).

52 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

Those provisions of standard terms that unexpectedly impose additional obligations on the other party to the contract or substantially change the agreed performance and the party to the contract could not have taken them into account are deemed unusual.[53]

"Due to unfoundedness, the cassation chamber did not share the cassator's opinion about the invalidity of the clause of the contract, as an unusual standard provision provided for in Article 344 of the CCG, as, in this case, it is not a credit agreement, which, as a rule, depending on the specifics of the bank's activities, may provide for pre-established, multiple-use provisions, but there is a strictly individualized, negotiated provision of the rental agreement, which fully meets the general conditions for concluding the agreement (transaction).[54]

Determining what constitutes an unusual standard contract term requires a comparison with the "usual" regulation, which raises the question of whose perspective should be taken to determine what constitutes a "usual" rule. When determining the content of the expression of will, it is not the offeror's but the receiver's point of view that is decisive. [55] Importance is not granted to the subjective attitude of the specific other party but to the expectations formed based on the principle of good faith. For the implementation of Article 344 of the CCG, the unusual provision of the standard condition of the contract must be unexpected at the same time, that is, it must have the so-called "coming out of the blue" effect. The circumstances under which a separate contract entered into force shall also be considered, including the conduct of the offeror. [56] In addition, the circumstances under which these provisions were included in the contract, and the mutual interests of the parties and others should be taken into account.[57]

"In the case at hand, it was established that the plaintiff (bank) explained to the defendant (client) by e-mail that in order to "take care" of them, they were offering a three-month "grace period," which would come into effect if the defendant did not reject the offer by going to the relevant link. Based on the standard of the average person, it is logical that the content of the SMS, according to which the bank "in order to take care of the customer, offered the customer a grace period..." would have created a positive expectation regarding the grace period. Taking into account the mentioned circumstances, new terms of the contract, according to which the defendant extended the period of fulfillment of the obligation by more than three months, and at the same time significantly increased the amount of the obligation, should be evaluated as an unusual condition provided for by Article 344 of the CCG, which unexpectedly imposed an additional obligation on the defendant. Thus, the claimant's "loan product deferment terms", as an unusual standard provision offered by the bank to the defendant, according to Article 344 of the CCG, does not become a constituent part of the contract and is not valid, unless the offeror dispels the effect of surprise through a qualified reference. For the

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53 *Chanturia L.,* in: Chanturia/Zoidze/Ninidze/Khetsuriani/Shengelia (ed.) Commentary on the Civil Code of Georgia, Book Three, Article 344, Tbilisi, 2001, 190 (In Georgian).

54 Decision No. ას-738-700-2015 of December 18, 2015, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

55 *Becker J,* in Beck OK BGB, 45. Aufl, 2016, §305c, Rn.14.

56 *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, *Chanturia L. (ed.),* 2019, Article 344, Field 18 (In Georgian).

57 Decision No. ას-1585-2022, of June 12, 2023, of the Supreme Court of Georgia (In Georgian).

offeror to negate the surprise effect of the standard term, it is necessary to intelligibly indicate and inform the defendant about the unusual provision of the standard term of the contract. The court noted that the plaintiff's burden of proof was to prove the fact that they fully fulfilled their obligation to inform the defendant about the "terms of deferment of credit products" and that consent to the said condition was the borrower's informed will, however, he failed to submit such proof to the court. The plaintiff (bank) failed to confirm that the changes made in the contract and, accordingly, in the payment schedule, which increased the amount of the obligation and the period of obligation fulfillment, were available and/or explained to the defendant (client) in a special manner. In the absence of such proof, the "terms of deferment of credit products", on the basis of which the defendant's liability was increased, are invalid according to Articles 344 and 346 of the CCG. [58]

The offeror has the opportunity to negate the surprise effect of the standard condition. For this, first of all, it is necessary to explain the regulatory content of the condition or unequivocally describe the statutory or typical contractual alternative regulation. Only in this case, the counterparty can consciously decide whether the condition is worth including in the contract or not. The moment of surprise does not occur when the parties have discussed the unusual provision in detail prior to concluding the contract. The offeror and in no case the other party to the contract has the obligation of clear reference and explanation.

In one of the cases, the Supreme Court of Georgia made an important clarification on the unusual standard term in the suretyship agreement. The cassator's main cassation claim was related to the invalidity of the application of Article 344 of the CCG by the appellate court in the case at hand, in particular, the appellate chamber considered that in this case, the knowledge of the legal difference between "subsidiary surety" and "solidary surety" is beyond the knowledge of a non-lawyer, an average person. And within the scope of "reasonable judgment" and the ordinary reasonable consumer it is less likely to know the essential difference between these two legal relations. Accordingly, the articles of the suretyship contract, which establish the joint suretyship of the guarantor, are unusual terms of the standard contract, since on their basis the guarantor's responsibility is expanded in the sense that the bank is equipped with the authority to satisfy the demand directly from the guarantor without taking any enforcement measures against the main borrower, which is unexpected for the guarantor. Concurrently, the suretyship agreement is in fine print, and the provisions specified in those articles of the agreement, which stipulate the joint liability of the guarantors and the authority of the bank to meet the demand directly from the guarantors, even without attempting to enforce it against the borrower, are not bolded or presented differently in any way, which undoubtedly complicates its perception by the party to the contract and strengthens the position of the appellant surety that they were not informed about the joint suretyship. The cassation chamber explained that the problem of protection of fundamental rights and the protection of human beings as the most important value is relevant in those contractual relations that carry a special risk towards one of the parties to the contract. The most important thing in the contract of suretyship is the will expressed by the guarantor that they undertake an obligation to fulfill the borrower's obligation to the creditor. In the case of

[58] Decision No. ას-1029-2023 of October 13, 2023, of the Supreme Court of Georgia (In Georgian).

suretyship, it refers to the obligation of performance unilaterally assumed by the guarantor, separate from the main obligations. The guarantor fulfills the personal obligation, after which the main claim is transferred to him according to Article 905 of the Civil Code, therefore, the guarantor and the main debtor cannot be considered as joint and several debtors. The cassation chamber noted that, based on its content, the suretyship agreement is unlikely to bring any kind of material or immaterial benefit to the guarantor. It is related to such an important obligation in case of breach, as fulfillment on behalf of the debtor. The cassation chamber pointed out that for the emergence of any contractual relationship, it is necessary to show the relevant true will by a person. The Court explained that with respect to the limiting freedom of contract, standard terms were defined as one of the manifestations. The definition of the standard terms of the contract has a great practical purpose. Since the definition is always derived from a subjective view, its legal basis shall stem from an "objective definition". This is not the individual views and representations of the parties on the issue; rather the perception based on the objective circumstances established for the contractual relationship. The court shall build from the "objective definition" when considering the cases. This kind of definition contributes to the matter of defining standard terms in each specific case, and at the same time, it establishes the scope of freedom of contract for the parties, the purpose of which is to entail contractual terms based on the principles of good faith and autonomy of will in standard contracts. In the case at hand, the cassation chamber considered it appropriate to refer to the provisions of Article 344 of the CCG, which appears to us as one of the illustrations of the principle of clarity in the law of standard terms. The cassation chamber explained that under Article 344 of the CCG, control means a "negative control of inclusion in the contract" and therefore a correction of the result under which the condition would have been valid "in itself" if it had not been unusual. The Chamber of Cassation noted that the exercise of the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms largely depends on and implies the adoption of a reasoned decision by the court, based on the comparison of evidence. The role of the burden of proof is particularly evident in civil proceedings, where the autonomy of the will of the parties is of crucial importance. The party's request may be well-founded, but the party cannot make its favorable decision if it cannot prove favorable circumstances as per the procedure established by procedural law. Therefore, one of the important factors is the correct distribution of the burden of stating the facts and the burden of proving the facts between the disputing parties. The Chamber of Cassation pointed out that according to the first part of Article 134 of the CCG, documents, business, and personal letters containing information about the circumstances important to the case are written evidence. The Court highlighted the surety agreement placed in the case file, all five pages of which are signed by the guarantors, the subject of the agreement is clearly defined, as well as the requirement secured by the surety and the guarantor's liability (solidarity surety). Hence, the plaintiff's claim that there is no reason to invalidate the disputable clauses of the suretyship agreement as unusual standard terms of the suretyship agreement under Article 344 of the Civil Code was shared.[59]

[59] Decision No. ას-372-2023 of October 6, 2023 of the Supreme Court of Georgia (In Georgian).

V. Legal Consequences of Unusual Provisions of the Standard Terms

Where an unusual and unexpected standard term is not made a constituent part of the contract, the following legal consequence arises: the contract is considered concluded without this condition.[60] The regulatory vacuum caused by not including an unusual standard condition in the contract should be filled by the dispositional norms of the law. The rest of the agreement remains in force.[61]

The standard condition left outside the contract is replaced by the dispositional norms of the law. The negative control of the inclusion of the condition in the contract (Article 344 of the CCG) and the control of the content (Articles 346-348 of the Civil Code) aim to protect the contracting party from the unilateral determination of the content of the contract by the offeror. According to the unilaterally formulated term, only the offeror is responsible for the performance of the contract. They carry the risk that the condition formulated by them will not be able to withstand the scrutiny of the judge (as per Articles 344, 346-348 of the CCG), and the offeror should not be exempted from this risk. The offeror cannot go beyond the framework of the settlement of interests proposed by the legislator. However, on the other hand, the judge is not the "architect of the contract" who, under the pretext of the "unusuality" of the standard clause, should give it a new look that is in line with the requirements of the law. In this way, it is not allowed to reduce the validity of an unusual condition, i.e. to reduce the impermissible content of the condition to an acceptable level and keep it in this form.[62]

In one of the cases, the Chamber of Cassation made an important interpretation regarding the unusual provisions of the standard terms in the insurance contract, in particular, in the case at hand, it is not proven that information about the disputed provision of the contract and its legal consequences was available and/or explained to the counterparty. In the absence of such an assertion, the provisions of the general insurance policy, which establishes the no-fault liability of the defendant insurer, are unusual standard terms of the contract since, on its basis, the liability of the insured is expanded in the sense that the insurance company is equipped with the authority to demand reimbursement of the amount paid by it in favor of the beneficiary, against the third (culpable) person as per the subrogation rule (Article 832 of the Civil Code) without submitting a request, to be satisfied directly from the insured person regardless of their guilt, which is unexpected for the insured person, therefore, according to Article 344 of the CCG, this condition cannot be considered as a constituent part of the contract, which means that there is no factual composition giving rise to no-fault liability based on the contract. [63]

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60 BGH, NJW 2001, S. 292; BGH, NJW, 2000, S. 1110; BGH, NJW, 1998, 2284;

61 *Chanturia L.,* Chanturia/Zoidze/Ninidze/Khetsuriani/Shengelia (ed.) Commentary on the Civil Code of Georgia, Book Three, Article 344, Tbilisi, 2001, 192 (In Georgian).

62 *Rusiashvili G., Aladashvili A.,* Commentary on the Civil Code of Georgia, Book III, Chanturia (ed.), 2019, Article 344, Field 31 (In Georgian).

63 Decision No. ას-812-2022 of October 5, 2022, of the Civil Affairs Chamber of the Supreme Court of Georgia (In Georgian).

VI. Conclusion

Standard terms are predominantly used by those involved in civil relations, who enter into many contractual relations with contractors on a daily basis and, therefore, use predefined contractual terms to facilitate this relationship. Standard contract terms are one common example of intervention with the nature of freedom of contract.

With regards to the determination of terms by one of the parties to a contract for the other, it is relevant to take into account the provisions of Article 325 of the CCG as if the terms of the contract must be determined by the party, it is assumed that they must be determined based on fairness. Hence, to check the validity of the standard terms, it is necessary to evaluate them with the criterion of fairness. Article 325 of the Civil Code prohibits dishonest and unfair contracting and establishes the rule of fair contractual relations as a whole.

The reservations in civil law should be used as the primary regulator of a contract with a standard condition concluded by electronic means, within which the rights of the other party to the contract will be completely protected. The standard terms of the electronic contract are not regulated by separate provisions in Georgian legislation, and the rules for the standard terms of the CCG are applied.

When talking about the control of the content of the standard terms of the contract, we should touch upon three main characteristic issues: a) its purpose, b) the competition of norms with respect to other legal institutions of the CCG, and c) the correlation between freedom of content and control of content.

In the case of standard terms, the intervention is aimed at limiting the content of multiple-use contracts. Therefore, the realization of the freedom of contract in the same dose, as it is possible in other cases, does not take place under standard terms. Defining the standard terms of a contract has a great practical purpose. It establishes the scope of freedom of action of parties. Its purpose is to entail contractual terms based on the principle of good faith and autonomy of will in standard contracts.

According to the provisions of Article 344 of the CCG, a mechanism is created to protect the offeror's counterparty from unusual and unexpected terms – the so-called prerequisite for negative inclusion – the condition must not be unusual, otherwise it shall not become a part of the contract. It appears as one of the expressions of the principle of clarity operating in the law of standard terms. This rule applies equally to the standard terms imposed on both the consumer and the entrepreneur as an entrepreneur does not have an optional obligation to read the standard terms in full or to negotiate in this regard.

Checking the circumstances, whether the standard term is present at all (Article 342 of the Civil Code) and, in case of confirmation, whether it becomes a constituent part of the contract (Article 343 of the CCG), systematically precedes checking the provisions of Article 344 of the CCG. According to Article 344 of the CCG, control is a “negative control of inclusion in the contract” and, therefore, a correction of the result under which the condition would have been valid “in itself” had it not been unusual.

Determining what constitutes an unusual standard contract term requires a comparison with the “usual” regulation, which raises the question of whose perspective should be used to determine what

constitutes a "usual" rule. When determining the content of the expression of will, it is not the offeror's but the receiver's point of view that is decisive. Those provisions of the standard terms and conditions that suddenly impose additional obligations on the other party to the contract or substantially change the agreed performance and the party to the contract could not take them into account are considered unusual.

In the event that an unusual and unexpected standard term is not made a constituent part of the contract, the following legal consequence arises: the contract is deemed concluded without this condition. The regulatory vacuum caused by not including an unusual standard term in the contract should be filled by the dispositional norms of the law. The rest of the agreement remains in effect.

The standard term left outside the contract is replaced by the dispositional norms of the law. The negative control of the inclusion of the term in the contract (Article 344 of the CCG) and the control of the content (Articles 346-348 of the CCG) aim to protect the contracting party from the unilateral determination of the content of the contract by the offeror. According to the unilaterally formulated condition, only the offeror is responsible for the performance of the contract. He carries the risk that the condition formulated by him will not be able to withstand the scrutiny of the judge (as per Articles 344, 346-348 of the CCG), and the offeror should not be exempted from this risk.

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