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Irakli Adeishvili[*]

Protection of Foreign Investment According to the Case Law of the European Court of Human Rights

In current economic reality states compete with one another in attracting foreign investments. In this regard, it is crucial to identify all those legal mechanisms that allow foreign investors to protect their investments from the arbitrariness of the host state. In this vein, the article examines mechanisms of dispute resolution under the investment agreements executed by Georgia and, whenever judiciary or administrative system of the host country is chosen for resolving such disputes, additionally explores the options of the European Court of Human Rights to restore the violated rights of the foreign investors.

***Key words**: foreign investment, investment disputes, Georgian investment agreements, residence of a legal person, the European Court of Human Rights, the case law of the European Court of Human Rights, property right.*

1. Introduction

In the modern world, when development of the states vastly depends on investments and specifically on foreign investments, there evolves a crucial issue of investment protection in the host states. Although, almost all states, including well-developed ones, have relevant legislation and bilateral investment agreements, the international community has developed number of multilateral international treaties[1] that aim to protect investments. Nevertheless, the participants of investment disputes still address the European Court of Human Rights. Therefore, in this article we will examine specific cases of the European Court of Human Rights considered from the perspective of foreign investment, will try to elaborate an answer to the questions – when do foreign investors have the right to apply to the European Court of Human Rights and what benefits or detriments does this mechanism have in comparison to such effective dispute resolution mechanism as international arbitration.

2. Foreign Investor as a Subject of Investment-Legal Relations

Foreign investors are either individuals (natural persons) or companies (legal persons). However, in the majority of cases, investor is a commercial legal entity. The investor's nationality determines from which treaties it may benefit[2]. For natural persons, investment agreements generally base nationality exclusively on the law of the state of claimed nationality[3]. Some investment

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1 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); the Energy Charter Treaty (1994); the North American Free Trade Agreement (1992), etc.

2 *Dolzer R., Schreuer C.,* Principles of International Investment Law, Oxford University Press, 2006, 46.

3 *OECD*, International Investment Law: Understanding Concepts and Tracking Innovations, 2018, 8, <https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> [14.09.2021].

agreements also introduce alternative criteria, such as a requirement of residency or domicile[4]. According to the "Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment", dated 18 October 2001, Article 1.1."a", a natural person is a person "having the nationality of a Contracting Party in accordance with its applicable law"[5].

In case of commercial legal entities, the most commonly used criteria are incorporation or the main seat of the business (*siege social*)[6]: "According to the international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration of effective seat may also be taken into consideration"[7]. It is noteworthy, that this approach is shared in Georgian legal literature[8].

In some cases an entity that does not comply with the above mentioned requirements, can be considered an investing legal person, when it is controlled directly or indirectly by the nationals of one contracting party, or by legal persons having their head office in the territory of one contracting party and constituted or otherwise duly organized in accordance with the legislation of that contractor party[9].

With respect of foreign investment, all the following can be considered as such: movable or immovable property, shares, claim, know-how, intellectual property and etc. Generally, a more detailed list is given in specific agreements – bilateral or multilateral agreements. For instance, under the agreement executed between the Kingdom of Sweden and Georgia: "investment" means any kind of property that is directly or indirectly owned or controlled by the investor of one contracting party on the territory of the other contracting party, provided the investment was made in accordance with the laws and regulations of the latter contracting party, and include in particular, but not exclusively:

a) movable and immovable property, as well as any other property right, such as lease, mortgage, lien, pledge, usufruct and similar rights;

b) company or entity, or shares, stocks or any other form of equity participation in a company;

c) claims to money or any performance having an economic value;

d) intellectual property rights, technical processes, trade names, know-how, goodwill and other similar rights;

e) entrepreneurial concessions conferred by law, administrative decisions or agreements, including concessions for exploration, cultivation, extraction and exploitation of natural resources"[10].

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4 *OECD*, International Investment Law: Understanding Concepts and Tracking Innovations, 2018, 8, <https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> [14.09.2021].

5 "Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment", adopted: 18/10/2001, entrance into force: 01/03/2004.

6 *Dolzer R., Schreuer C.,* Principles of International Investment Law, Oxford University Press, 2006, 49.

7 Autopista v. Venezuela, Decision on Jurisdiction, [2001], (ICSID Reports 419, para. 107), cited in: *Dolzer R., Schreuer C.*, Principles of International Investment Law, Oxford University Press, 2006, 49.

8 *Ioseliani Al.,* Conflict of Contract Law, Tbilisi, 2011, 157-158 (in Georgian); *Gabisonia Z.,* Georgian Private International Law, Tbilisi, 2011, 138-156 (in Georgian).

9 "Agreement Between the Government of the Italian Republic and the Government of the Georgia on the Promotion and Reciprocal Protection of Investment", adopted: 15/05/1997, entrance into force: 26/07/1999.

10 "Agreement between the Government of the Kingdom of Sweden and the Government of Georgia on the Promotion and Reciprocal Protection of Investment", adopted: 30/08/2008, entrance into force: 01/04/2009.

However, according to the “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, Article 1.1.“h”, “commercial transactions designed exclusively for the sale of goods or services and credits to finance commercial transactions with a duration of less than three years, other credits with a duration of less than three years, as well as credits granted to the State or to a State enterprise are not considered an investment”[11].

Therefore, we can conclude that, although the states can define the meaning of the term “investment” themselves, the concept of such terms is similar, as the content of the investment agreements is vastly derived from the standard investment treaties. However, it is undisputable that investment includes numerous components.

3. Bodies Resolving Disputes with Foreign Investors

Both, bilateral investment agreements, and multilateral treaties regulating investments, envisage different ways for settling and resolving disputes arising from the foreign investment. As a rule, bilateral investment treaties provide several alternatives (will be discussed in details later in this article) for the dispute participant to choose (*The Fork in the Road* provision). According to this principle “the investor must choose between the litigation of its claims in the host state’s domestic courts or through international arbitration and that the choice, once it has been made, is final”[12]. For instance, as is stated in the “Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal protection of investment” (signed on 29 August, 2009) Article 8[13], “If any dispute between an investor and of the contracting party cannot be thus settled within the period of six months of the date when the written request for the settlement has been submitted, the investor shall be entitled to submit the case, at his choice, for settlement to:

a) the competent court and administrative tribunal of the Contracting Party which is the party to the dispute; or

b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, in the event both Contracting Parties shall have become a party to this Convention; or

c) an arbitrator or international ad hoc arbitral tribunal establishment under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules”.

Other bilateral investment treaties executed by Georgia also provide similar provisions for dispute settlement with additional reservations or without it. For instance, the “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment” in addition to all

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11 “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment, adopted: 18/10/2001, entrance into force: 01/03/2004.

12 *Dolzer R., Schreuer C.*, Principles of International Investment Law, Oxford University Press, 2006, 216.

13 “Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal protection of investment”, adopted: 29/08/2009, entrance into force:13/03/2011.

three above-mentioned measures, also provides one more – forth option, namely, the International Chamber of Commerce, where a dispute is resolved by a sole arbitrator, or an ad hoc tribunal under its rules of arbitration[14]. While the "Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran" (dated 26 September 1995) Article 11, provides for only one way of resolving disputes – an arbitral tribunal of three members. The arbitration shall be conducted according to UNCITRAL Rules[15].

4. Admissibility Criteria for Disputes Originated from Foreign Investment by the European Court of Human Rights

Applying to international arbitration in case of disputes related to foreign investment by parties is an established practice, however, this does not exclude a foreign investor when starting litigation, in other words when making a choice under the *Fork in the Road Principle*, to choose host state's domestic judiciary or administrative bodies for resolving a dispute. In such cases, disputes are settled by the procedural and material norms of the respective country, taking into consideration the obligations set out in the international treaties of that country. Therefore, if the host state is also a member of Council of Europe, the investment dispute, provided it meets the required legal preconditions, may also be resolved by the European Court of Human Rights. Even more so, the European Court of Human Rights has a practice of resolving (clearly, taking into consideration the principle of subsidiarity) a number of disputes that at a glance were investment disputes.

4.1. Admissibility of a Foreign Investor's Application (Complaint) During Parallel Proceedings

Before moving to the consideraton on merits of the disputes by the European Court of Human Rights, it needs to be noted, that decision on admisibililty by the European Court of Human Rights is no less important than consideration on the merits of the case. In case an investor decided to choose host state's domestic courts and has exhausted all domestic remedies provided by the spesific jurisdiction, investor's application (complaint) will be examined according to the standard admissibility criteria of the European Court of Human Rights.

Nevertheless, as case-law shows, there are cases, when investor opts for parallel proceedings both in international arbitration and in the European Court of Human Rights[16], i.e. investor initiates litigation both in international arbitartion and in the host state, the violations of principles of fair trial by the courts of the latter caused appling to the European Court of Human Rights. Thus, it is crucial to

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14 "Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment", adopted: 18/10/2001, entrance into force: 01/03/2004.

15 "Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran", adopted: 26/09/1995, entrance into force: 22/06/2005.

16 *Kriebaum U.,* Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in: *Dupuy P. M., Francioni F., Peterssmann E. U. (eds.),* Human Rights in International Law and Arbitration, Oxford University Press, 2009, 219.

establish cases for which parallel litigation is possible and which the European Court of Human Rights considers to be admissible or inadmissible.

The European Court of Human Rights gave a very important explanation regarding parallel proceedings carried out in the international arbitral tribunal in the case *OAO Neftyanaya Kompaniya Yukos v. Russia*. After the case was found to be admissible by the European Court of Human Rights, the Government claimed that prior to such admission the applicant company's majority shareholders (all of them were legal persons), which jointly owned over 60% of shares in the applicant company, brought arbitration proceedings against the Russian Federation for the alleged breaches of the Energy Charter Treaty in the Permanent Court of Arbitration in the Hague[17].

The European Court of Human Rights reviewed positions of the applicant company and of the Government and concluded, that these litigations were not identical. Namely, the Court stated that arbitration proceedings initiated by two shareholders registered in Cyprus and one shareholder registered in the Isle of Man against the Russian Federation before the Permanent Court of Arbitration in the Hague among other things, referred to the same events and proceedings as those complained of by the applicant company in the application before the Court, but also alleged numerous violations of their rights as investors under the Energy Charter Treaty[18]. Some of the company's minority shareholders had also initiated similar proceedings under bilateral investment treaties. The Court noted, however, that despite certain similarities in the subject-matters of the Court case and of the arbitration proceedings, the claimants in those arbitration proceedings were the applicant company's shareholders acting as investors, and not the applicant company itself, which at that moment in time was still an independent legal entity[19]. The Court considered to be an essential argument that the Court case has been introduced and maintained by the applicant company in its own name and although the above-mentioned shareholders could arguably be seen as having been affected by the events leading to the applicant company's liquidation, they have never taken part, either directly or indirectly, in the Strasbourg proceedings[20]. Relying on all these circumstances, the Court concluded that the parties in the above-mentioned arbitration proceedings and in the present case were different and therefore the two matters were not "substantially the same" within the meaning of Article 35 paragraph 2 (b) of the Convention[21]. Consequently, the application (claim) was found to be admissible, the merits of the case were examined and the respondent was ruled to pay an unprecedented sum in the amount of more than 1.8 billion Euros in favor of the shareholders [22] (especially considering that the Russian Federation managed to liquidate and remove the applicant company from the register of legal persons during the dispute settlement period).

Admissibility of the application in regard to arbitral dispute was also discussed in the case *Le Bridge Corporation Ltd. S.R.L. against the Republic of Moldova*. The court of Moldova annulled the decision announcing the winner of the tender for the right to build and run duty free shops (after some

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17 OAO Neftyanaya Kompaniya Yukos v. Russia, [2011], ECHR, (HUDOC), § 517.
18 Ibid, § 524.
19 Ibid.
20 Ibid, § 525.
21 Ibid, § 525-526.
22 OAO Neftyanaya Kompaniya Yukos v. Russia, Just Satisfaction, [2014], ECHR, (HUDOC), § 38.

of the shops were built and made operational) and announced the rival company to be the winner. As a result, the sole shareholder, a natural person who was a French national, of the former winner company introduced an action before the International Centre for Settlement of Investment Disputes (ICSID) on the basis of the bilateral agreement between the Governments of the Republic of Moldova and France concerning protection of investment[23]. The arbitral tribunal established the breach of provisions of the France-Moldova Agreement as a result of the applicant company's impossibility to open and operate a fifth duty free shop at Chișinău airport and the Government of the Republic of Moldova was ordered to pay compensation in an amount of 2 187 487 Euros[24].

Following this *Le Bridge* addressed the European Court of Human Rights under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention indicating that proceedings were unfair and resulted in loss of the property.

After examining in details the application submitted to the ICSID by the company's 100% shareholder, it became clear to the Court that the applicant's complaint under the Convention was the same in substance. Indeed, the essence of the argument in both sets of international proceedings was that the civil proceedings before the domestic courts were unfair[25].

The European Court of Human Rights recalled the case of *OAO Neftyanaya Kompaniya Yukos* and its own judgment and clarified that these cases could not be considered similar, as the *Yukos* case involved numerous shareholders who did not coordinate their actions and were not aware of the actions of the applicant company, and only a part of whom applied to arbitration tribunals, while in case with *Le Bridge*, the only shareholder was directly involved in the Strasbourg proceedings and also in the capacity of the CEO signed the application form when introducing the case with the Court[26]. In such circumstances and given that in the proceedings before the ICSID the 100% shareholder claimed that *Le Bridge* could not be dissociated from him as investor and in its submissions to the European Court the applicant company did not dissociate itself from its sole founder, the European Court of Human Rights could not but conclude that *Le Bridge's* application was substantially the same as a matter that had already been decided by "another procedure of international investigation or settlement and contained no new information" and was therefore rejected[27].

Following reasoning given in both above mentioned cases regarding admissibility of investment disputes in case of parallel proceeding, it can be concluded that in order for the application derived from investment dispute to be considered admissible, it is of paramount significance that the application is not the same in substance. The application is the same in substance if the following are the same: a) the parties; b) legal norms; c) scope of the claim; d) the type of claim reimbursement.

At the same time, reviewing procedure during parallel proceedings should be so effective as to exclude the jurisdiction of the European Court of Human Rights.

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[23] Le Bridge Corporation Ltd. S.R.L. against the Republic of Moldova, [2018], ECHR, (HUDOC).
[24] Ibid, § 18.
[25] Ibid.
[26] Ibid, § 29.
[27] Ibid, § 31-33.

5. Examination of Merits of the Disputes Related to Foreign Investment by the European Court of Human Rights

Disputes related to foreign investments that are not carried out under parallel proceedings, fall under the general rules of admissibility and are reviewed on merits. In particular, investment (or property or right purchased as a result of investment) is regarded as property under paragraph 1, Article 1 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, consequently, all criteria set forth in the mentioned article and case-law apply to it. Furthermore, case-law of the European Court of Human Rights provides several possibilities for the investor to participate in the disputes related to foreign investment.

5.1. Investor as an Applicant (Author of the Claim)

Clearly, the most common way of participation in a litigation in Strasbourg for an in investor is participation as an applicant (author of the claim) as investor's rights were directly violated. In case Bimer S.A. v. Moldova an applicant was a legal person with shares owned by Moldovan, American and British investors and therefore it qualified as a company owned by foreign investors and thus, benefited from special benefits and guarantees as provided for by the Law of Moldova[28]. According to the Presidential Decree the companies were entitled to operate duty free shops, on this basis the applicant company signed a contract with the Customs Department, at the border between Moldova and Romania, providing for the opening of duty free shops on the territory of the customs. The applicant company also obtained two licences for operating a duty free shop and a duty free bar and started operating them in 1998[29]. Later, as a result of the amendment to the relevan law, the Customs Department ordered the closure of all duty free outlets, however, according to the Law on Foreign Investment, in the event of the adoption of new, less favourable legislation, companies owned by foreign investors were entitled to rely on the old legislation for a period of ten years and the activity of a company owned by foreign investors could be terminated only by a governmental decision or a court order[30].

The Court found no grounds in the present case to call into question that the order deprived the applicant of the right to conduct its business at specified place and interfered with the applicant's property, namely, it controlled applicant's property, moreover, the order was not lawful and was therefore incompatible with the applicant's right to the peaceful enjoyment of its possessions within the meaning of Article 1 of Protocol No. 1 [31].

A similar approach was used by the European Court of Human Rights in 2008 in the case Unistar Ventures Gmbh. V. Moldova. The State-owned airline company was reorganized into a limited liability airline company called Air Moldova S.R.L. The Civil Aviation State Authority retained 51% of the shares of the company, while remaining 49% was transferred to Unistar Ventures

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28 Bimmer S.A. v. Moldova, [2007], ECHR, (HUDOC), § 7.
29 Ibid, § 9-10.
30 Ibid, § 13-18.
31 Ibid, § 58.

Gmbh, that in return was to contribute 2 384 705 USD to the registered capital of the company. This obligation was fulfilled by the Unistar Ventures Gmbh[32].

After the Communist Party of Moldova won the parliamentary elections, economic policy of the State changed and the Civil Aviation State Authority changed the company's CEO by using its 51% of the votes, this was followed by court proceedings, claim and counter claim. In the operative part of the final judgment the Economic Court made the following order: "The parties shall be put in the same position as they had been prior to the conclusion of the contract, following an audit and accounting control to be carried out by the Government, the Ministry of Finance and the Civil Aviation State Authority[33]". Enforcement of the above-mentioned operative part of the judgement was hindered due to its vagueness. The court was addressed to clarify its judgement twice. In the last explanatory ruling the court explained that the parties should recover all the assets and moneys with which they had participated in the company and that any profit obtained by the company during its existence should be divided among them in accordance with the percentage of their participation[34]. Nonetheless, the investor company has not been refunded and it applied to the European Court of Human Rights.

The European Court of Human Rights examined the claim and concluded that the relevant domestic legislation (the Civil Code) afforded the applicant company a right to "*restitutio in integrum*" as a result of the rescission of the contract between the parties and this was also recognized in the judgment of the domestic court. This gave rise to a debt in the applicant company's favor that consisted of the compensation of the initial investment and the return of the profit earned by the company during its existence. The failure by the authorities to enforce a final judgment was considered by the European Court of Human Rights to be a disproportionate interference with the right to peaceful enjoyment of "possessions" and there has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention. As a result, the Court awarded the applicant company a total amount of 6 700 000 Euros for pecuniary damage and 3 000 Euros for non-pecuniary damage[35]. This judgment straightforwardly provides the method applied by the European Court of Human Rights for determining the volume of investment – performed investment plus profit acquired by the investor during its participation period – thus setting a standard for investment compensation.

Examination of the above-mentioned judgments makes us assume that when property in the form of investment or created as a result of investment was not confiscated, the European Court of Human Rights qualified interference of the state not as confiscation but as a control of the right of possession, even though in both cases applicants were not able to continue their initial businesses. All these causes violation of paragraph 2, Article 1 of Protocol No. 1 to the Convention and makes it possible for the investor to be awarded non-pecuniary damage.

5.2. Foreign Investor as a Third Party

Apart from acting as an applicant (claimant) a foreign investor can participate in litigation as a third party. Undoubtedly, such participation increases protection of investor's rights and provides a

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32 Unistar Ventures Gmbh. V. Moldova, [2008], ECHR, (HUDOC), § 8.
33 Ibid, § 6-32.
34 Ibid, § 58.
35 Ibid, § 90, 98.

sense of stability for the investment made by them. In this regard a case of Industrial Financial Consortium Investment Metallurgical Union v. Ukraine, that concerned domestic and foreign investment, is of particular interest. The case originated as the consequences of the decision of the Ukrainian Government to privatize one of the world's largest steel manufacturing companies Kryvorizhstal. The initial buyer – Industrial Financial Consortium Investment Mettalurgical Union was returned 608 million euros paid by it, while the new owner of the 93.02% of Kryvorizhstal's share capital, for the price of 3,9 billion Euros was announced to be Mittal Steel Germany GmbH. Eventually, Mittal Steel Germany GmbH was succeeded by ArcelorMittal Duisburg GmbH, which, according to the documents submitted by that company, made significant investment in Kryvorizhstal[36].

The applicant and the initial buyer of the shares – Industrial Financial Consortium Investment Mettalurgical Union applied to the European Court of Human Rights for acknowledging violation of both Article 1 of Protocol No. 1 to the Convention and paragraph 1, Article 6 of the Convention. The European Court of Human Rights did not consider Article 1 of Protocol 1 to be violated, as the applicant was returned the money it had paid for the shares. However, paragraph 1 of Article 6 was considered to be violated, due to the shortcomings existing in the proceedings of the domestic courts. Most importantly, however, the European Court of Human Right allowed the new owner, a foreign investor company – ArcelorMittal Duisburg Gmbh to participate in the proceedings as a third party, when according to the paragraph 2 of Article 36 of the Convention a company had been granted permission to intervene as a third person by the President of the Section at the time[37].

As can be seen, the foreign investor was allowed to submit his views to the European Court of Human Rights and these views were reflected in the text of the judgment, albeit this circumstance itself did not prevent acknowledgment of violation of paragraph 1, Article 6 due to shortcomings in the domestic proceedings. After all, this judgment is an interesting precedent in terms of demonstrating the rights of the investor by means of involving such investor as a third person in the proceedings.

5.3. Participation of Foreign Investor's State as a Third Party

In practice of the European Court of Human Rights there were cases when states of the foreign investors were involved in the proceedings as third persons. From the prospective of investment protection this circumstance is very important, as an investor knows, that, in case of the respective will, its state may participate in proceedings on investor's side and help to protect its rights. In case of Zlinsat, spol. S.r.o. v. Bulgaria, that originated following an application by Zlínsat, spol. s r.o., a limited liability company incorporated under Czech law, the European Court of Human Rights transmitted a notice of the application to the Czech Government. The latter relied on the right granted to it under paragraph 1, Article 36 of the Convention and submitted its views[38]. As for the case itself, it

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[36] Industrial Financial Consortium Investment Mettalurgical Union v. Ukraine, [2018], ECHR, (HUDOC), § 25.

[37] Ibid, § 5.

[38] Zlinsat, spol. S.r.o. v. Bulgaria, [2006], ECHR, (HUDOC), §4.

is interesting since, unlike previously discussed investment disputes, the foreign investor managed to protect its rights in the domestic courts. Application to such courts was probably caused by absence of bilateral investment agreements – the applicant company entered into a hotel privatization contract with the Sofia Municipal Council in 1997, while the Agreement between the Czech Republic and the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investment was signed in 1999[39]. Nevertheless, the European Court of Human Rights found a violation of property rights and violation of a fair trial – absence of procedural norms limiting the scope of interference of the prosecutor's office in the civil case (suspension of the decision on privatization of the hotel in Sofia and request to prevent obstruction) and absence of protecting norms against such actions was found to be an interference with the peaceful enjoyment of the possessions. At the same time, the violation of the right to a fair trial was established due to the fact that no judicial review was available in respect of the prosecutors' decisions concerning civil cases. Therefore, together with the violation of property rights under Article 1 of the Protocol No. 1 to the Convention, a foreign investor can also claim violation of paragraph 1, Article 6 of the Convention in case procedural violations occurred.

6. Resolving Disputes Originating from Foreign Investment by the European Court of Human Rights – Advantages and Disadvantages

What can presuppose a foreign investor's decision to address domestic courts for dispute settlement and then, in perspective, obtain the right to apply to the European Court of Human Rights instead of choosing international arbitration? In other words, what advantages may the European Court of Human Rights have compared to international arbitration?

We believe several circumstances can be indicated here:

a) We cannot disagree with the opinion shared in the doctrine, that the biggest advantage of the European Court of Human Rights is absence of citizenship (nationality) principle, which is crucial for international investment law. Therefore, an investor, who is a national of the state with no bilateral or multilateral investment agreements, can rely on property protection mechanism under the Convention[40].

b) No court fee is required to be paid by an investor when applying to the European Court of Human Rights;

c) An investor is not required to pay for the services of the arbitrators and the arbitration itself, which in practice is quite expensive. For instance, Arbitration Institute of the Stockholm Chamber of Commerce in its final award dated 25 March 2020 in one of the cases arbitration fee and fees of the arbitrators constituted 381 100 euros[41]. While in another case resolved by the International Centre for

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[39] Agreement between The Czech Republic and The Republic of Bulgaria For the Promotion and Reciprocal Protection of Investment, adopted: 17.03.1999, entrance into force: 30.09.2000.

[40] *Kriebaum U.,* Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in: *Dupuy P. M., Francioni F., Peterssmann E. U. (eds.),* Human Rights in International Law and Arbitration, Oxford University Press, 2009, 229.

[41] Sunreserve Luxco Holdings S.A.R.L. (Luxemburg), Sunreserve Luxco Holdings II S.A.R.L. (Luxemburg), Sunreserve Luxco Holdings III S.A.R.L. (Luxemburg) v. The Italian Republic, §1025, 25.03.2020, <https://www.italaw.com/sites/default/files/case-documents/italaw11475.pdf> [19.10.2021].

Settlement of Investment Disputes, ICSID's administrative fees, fees and expenses of the Tribunal and direct expenses equaled to 1 059 052, 84 USD[42].

d) In some cases parallel proceedings may be permitted;

e) Interference with the business of the company founded through investment or obstacles in using obtained license caused by administrative bodies may result in violations of Article 1 of the Protocol 1 to the Convention or paragraph 1 of Article 6. Furthermore, where an investment protection treaty only provides for jurisdiction in case of expropriation and no expropriation has occurred, the property protection by the European Court of Human Rights may become an option, especially when interference of the state was unlawful[43]. In such cases an unlawful control of property right can become a basis for a claim.

Nevertheless, addressing European Convention on Human Rights may have a number of disadvantages for the investor, for instance:

a) The requirement to exhaust local remedies. Completion of administrative or judiciary procedures may take several years.

b) The European Court of Human Rights is overwhelmed by the cases that often causes backlogs in hearing of the cases for years. For instance, in case of Zlinsat, spol. S.r.o an application was submitted on 14 December 1999, while judgment was adopted on 15 June 2006; in case of Unistar Ventures Gmbh the application was submitted on 7 March 2003, while the judgment was adopted on 9 December 2008; in case of Le Bridge a case was submitted to the court on 27 July 2009, while the judgment was adopted on 19 April, 2018.

c) The possibility to be awarded lesser compensation. For instance, in case OAO Neftyanaya Kompaniya Yukos v. Russia the European court of Human Rights awarded the shareholders of applicant company a total amount of 1,8 billion euros, while international arbitration (the Permanent Court of Arbitration in The Hague) ordered the Russian Federation to pay: 39 971 834 360 USD in favor of Hulley Enterprises Limited (Cyprus) – a legal entity registered in Cyprus shareholder of Yukos;[44] 8 203 032 751 USD[45] in favor of second shareholder Veteran Petroleum Limited (Cyprus); 1 846 000 687 USD[46] in favor of third shareholder Yukos Universal Limited (Isle of Man).

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[42] Antin Infrastructure Services Luxemburg S.a.r.l. and Antin Energia Teromosolar B.V. v. the Kingdom of Spain, § 742, 15.06.2018, <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf> [19.10.2021].

[43] *Kriebaum U.,* Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in: *Dupuy P. M., Francioni F., Peterssmann E. U. (eds.),* Human Rights in International Law and Arbitration, Oxford University Press, 2009, 229.

[44] Hulley Enterprises Limited (Cyprus) v. the Russian Federation, UNCITRAL, PCA Case No. 2005-03/AA226, §1888, 18.07.2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf> [19.10.2021].

[45] Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-05/AA228, §1888, 18.07.2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf> [19.10.2021].

[46] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, §1888, 18.07.2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf> [19.10.2021].

7. Conclusion

To summarize all said above, we can conclude that according to the case-law of the European Court of Human Rights foreign investment is considered as property under Article 1 of Protocol No 1 and the foreign investor has the right in relevant circumstances to address the European Court of Human Rights without hindrance. The European Convention of Human Rights is an effective mechanism that can be used for protection of the foreign investors' rights and despite a number of disadvantages generally caused by the work of the European Court and not related to the peculiarities of these type of disputes, investors use this mechanism and, as showed by the case-law, achieve the restoration of violated rights.

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4. "Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal protection of investment", adopted: 29/08/2009, entrance into force:13/03/2011.
5. "Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran", adopted: 26/09/1995, entrance into force: 22/06/2005.
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15. Le Bridge Corporation Ltd. S.R.L. against the Republic of Moldova, [2018], ECHR, (HUDOC), § 18, 29, 31-33.
16. OAO Neftyanaya Kompaniya Yukos against Russia, [2011], ECHR, (HUDOC), § 517, 524, 525-526.

17. OAO Neftyanaya Kompaniya Yukos against Russia, [2014], ECHR, (HUDOC) § 38.
18. Bimmer S.A. v. Moldova, [2007], ECHR, (HUDOC), § 7, 9, 10, 13-18, 58.
19. Unistar Ventures Gmbh. V. Moldova, [2008], ECHR, (HUDOC), § 6-32, 58, 90, 98.
20. Industrial Financial Consortium Investment Mettalurgical Union v. Ukraine, [2018], ECHR, (HUDOC), § 5, 25.
21. Zlinsat, spol. s.r.o. v. Bulgaria, [2006], ECHR, (HUDOC), § 4.
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23. Antin Infrastructure Services Luxemburg S.a.r.l. and Antin Energia Teromosolar B.V. v. the Kingdom of Spain, §742, 15.06.2018, <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf> [19.10.2021].
24. Hulley Enterprises Limited (Cyprus) v. the Russian Federation, UNCITRAL, PCA Case No. 2005-03/AA226, §1888, 18.07.2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf> [19.10.2021].
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Irina Batiashvili[*]

Article 16 of the Constitution of Georgia in the Continuum of National Legislation and the European Convention

According to the Constitution of Georgia, every person has the right to believe in God, to choose and profess any religion, belief or worldview, to share his views, to live and to act in accordance with them. Man, as a unique being, who is the whole spectrum of his own possibilities, is the subject of the philosophy of existence. In this philosophy, conscience is an existential characteristic of human existence and it is a fundamental moral category.[1]

It is essential that the forms of expression of faith and expression of confession be compatible with the fundamental principles of human dignity and inviolability.

States have a certain degree of margin of flexibility during protection of human rights, which is based on the limitations imposed by international law. Existence of such flexibility will not lead to violations of fundamental rights by the state if the state's discretion, restriction of fundamental rights and the "margin of authority" exercised by it are based on the case law of the European Court of Human Rights.

It is interesting to note that the list of legitimate aims of the restriction in the Constitution of Georgia is much narrower than in the European Convention, to which the Georgian state is a party, and according to which cases are heard and decisions are made by the European Court of Human Rights. The European Convention version is an additional shield for protection this important fundamental right, which if the state fails to overcome, its action will be perceived as a violation of the right. In accordance with this paper it is possible to see importance of vital harmony between the balance of justice of competing interests and international practice.

According to Freedom of Thought, Consience and Religion Article 9 of the European Convention on Human Rights, States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.[2] *Also, in some cases, the state has the right to take preventive measures to protect the fundamental rights of others.*

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[1] *Heidegger M.,* Sein und Zeit, *Tevzadze G. (trans.),* Tbilisi, 2019 (in Georgian).

[2] *Council of Europe, the European Court of Human Rights,* Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

Therefore, in defining fundamental rights and in exercising the restriction of rights by the state, it is best to adhere unequivocally to the standard of the European Convention.

Keywords: *freedoms of belief, religion (confession), and conscience, their limitation purposes, and legitimate forms of intervention.*

1. Introduction

According to the Constitution of Georgia, every person has the right to believe in God, to choose, change and profess any religion, faith or worldview, to share his views, to live and to act in accordance with them. A person can manifest his religion or belief in worship, teaching, preaching, performing rules or rituals, either alone or in community with others and in public or private. This includes the right to be an atheist, also not to profess any religion.

The first paragraph of Article 16 of the Constitution of Georgia distinguishes three important paradigms that differ from each other: faith, religion (confession), conscience.

In 1995, the Constitution of Georgia strengthened the list of fundamental rights and freedoms as a directly applicable law, which restricts the people and the state. The European Convention entered into force in Georgia in 1999, as a result of which the process of harmonization of Georgian legislation and normative documents with the Convention for the Protection of Human Rights and Fundamental Freedoms began.[3] The aim of this process was to avoid a conflict between the Constitution of Georgia and the international agreement.

At present, international agreements of Georgia are an integral part of the state's legislation, which have normative force. Individuals and legal entities are allowed to protect their rights and apply to the European Court of Human Rights under an international treaty such as the European Convention. According to the Organic Law of Georgia on Normative Acts, after the Constitution and the Constitutional Agreement, the international agreements and treaties of Georgia have a higher hierarchical place than other normative acts of Georgia.[4]

The different wording of legitimate aims of the restriction recognized in Article 16 of the Constitution of Georgia from the European Convention may lead to problems of proper understanding and exercising these freedoms. Essential to see importance of vital harmony between the balance of justice of competing interests and international practice.

Notably, that rights and freedoms are two interrelated concepts. According to Georg Jellinek, limiting government power in the field of legislation is manifested not only by the establishment of a legislative procedure, but, first of all, by the recognition of the guaranteed rights of the individual.[5] A basic set of rights has existed in the law of all cultural peoples, and now to a greater extent it subsists over which the power of the legislature is powerless. Human rights are originated from the historical evolution of the people.[6] A number of philosophers include debates about human rights in their

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3 *Demetrashvili A., Gogiashvili G.,* Constitutional Law, Tbilisi, 2016, 97 (in Georgian).

4 *Korkeila K.,* Application of the European Convention on Human Rights in Georgia, Institute of State and Law of the Georgian Academy of Sciences, Tbilisi, 2004, 63 (in Georgian).

5 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, Tbilisi, 2003, 3 (in Georgian).

6 Ibid, 2-4.

philosophical reflections, such as John Locke's Two Treaties of Government, John Sturat Mill's On Liberty and The United States Declaration of Independence by Thomas Jefferson. The notion of fundamental human rights is also linked to the constitutional principle of the rule of law -– the necessary restrictions imposed on the exercise of absolute power by a sovereign or parliament.[7] There are two main theories: the freedom-based theory, which is common in the countries of the common law system, and the continental law-based theory, which is based on rights.[8] Both theories are based on the relationship between the individual and the state, and both endeavor to regulate interference by the state in a person's private life.[9] Basically, theories of freedom require that a person be free from arbitrary interference by the state, while theories of rights are based on the inalienable human rights that the state must respect.[10] Rights, by their very nature, imply that an individual has a moral or legal right to do something. Whereas, the primary provision of freedom implies the absence of coercion or restriction by the state in human choice and action. In general, basic human rights ensure and protect human freedom from unlawful intervention by the state. Rights and freedoms are always indivisible in this regard.[11]

During restrictions of fundamental human rights should be satisfied the requirements of the Constitution. Therefore for the justification of interference with right, the restriction must not only serve to achieve a legitimate aim, but must also be a useful, appropriate, necessary and proportionate in relation to the aims pursued. In defining the principle of proportionality, in the view of the Constitutional Court of Georgia, the principle of proportionality also requires that proportionality be observed in a narrow sense, which implies the need for the state to strike a fair balance in the development of a restrictive measure in such a way that the protected right and the interest in its protection outweigh the interest in the protection of the limited right.[12]

States reserve the right to limit human rights when they consider it inevitable and required. This authority comes from recognizing that rights are not absolute and may be limited to the extent that it depends on state policy, security, morals or health status.[13]

2. Definition of Freedoms of Belief, Religion (Confession) and Conscience

Religious discrimination and intolerance is one of the main causes of international conflict and unrest, a clear example of this is Israeli / Palestinian conflict, as well the fact of creating a threat to

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7 *Smith R.,* Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.),* Tbilisi, 2006, 44 (in Georgian).

8 Ibid, 45.

9 Ibid.

10 Ibid.

11 For example, the right to vote entitles all citizens the right to to vote and the right to take a part in elections (to stand for election). This right automatically gives you the freedom to vote–to choose a candidate and a party at your own discretion.

12 Decision of December 14, 2018 № 3/1/752 on the case: "(NNLE) "Green Alternative" v. Parliament of Georgia" of Constitutional Court of Georgia, II-28.

13 *Smith R.,* Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.),* Tbilisi, 2006, 252 (in Georgian).

security on religious grounds is well seen in the case of the Balkans.[14] According to a UN study, there are two stages in the manifestation of religious intolerance: unfavorable attitude towards people of different religions or beliefs and the practical manifestation of such attitude.[15] On November 25, 1981, the UN General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, on the basis of which it strengthened the idea of respect for freedom of religion and belief.[16] Everyone, without exception, enjoys the rights and freedoms declared in the declaration. Article 6 of the Declaration provides an incomplete list of rights related to freedom of thought, conscience, religion and belief. Some of them can be cited as an example: a) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; b) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; d) to solicit and receive voluntary financial and other contributions from individuals and institutions; e) to write, issue and disseminate relevant publications in these areas; etc.

However, the elimination of discrimination and intolerance does not imply absolute freedom of belief, religion (confession) and conscience. Full and unrestricted exercise of these rights may lead to the violation of other human rights. In the case of Karnel Singh Bhinder v. Canada, the UN Human Rights Committee gave priority not to the protection of religious rights but to the need for safety and health care. According to the fact-based materials of the case, Mr. Karnel Singh Bhinder was employed by the Canadian National Railway Company (CNR) as a maintenance electrician, he wore a turban in his daily life and refused to wear safety headgear (hard hat) during his work. This resulted the termination of his labour contract. The UN Human Rights Committee stated in its decision, that the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the International Covenant on Civil and Political Rights.[17]

Before explaining the phenomenon of faith and conscience in the legal-philosophical context, it should be noted that freedom to manifest (freedom of confession) is common to freedom of belief and conscience, because it is the public declaration of one's faith, conscience and actions taken on this basis. In this context, it is important to focus on the manifestation of religion (confession of religion) and to use the existing official guide to Article 9 of the European Convention for its definition.[18]

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[14] Ibid, 280.

[15] *United Nations*, Economic and Social Council, Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Thirty-Ninth Session, E/CN.4/Sub.2/1987/42, 23/11/1987, 119, Para.15.

[16] *General Assembly*, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Resolution 36/55, 25/11/1981, <https://www.ohchr.org/en/professionalinterest/pages/religionorbelief.aspx> [12.10.2021].

[17] Karnel Singh Bhinder v. Canada, Human Rights Committee, (1989) Thirty-Seventh Session, Communication nos. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986, <http://hrlibrary.umn.edu/undocs/ session37/208-1986.html> [12.10.2021].

[18] *Council of Europe*, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950, <https://www.echr.coe.int/documents/convention_kat.pdf> [12.10.2021].

Freedom of confession, according to logical reasoning, even implies to manifest one religion or another. If a state recognizes this or that belief as an official "religion" and registers it, it will automatically gain protection under Article 9 of the European Convention and the Constitution of Georgia. The right enshrined in Article 9 of the European Convention will lose its meaning and effectiveness if states abuse the discretion of the definition of rights.[19] Explaining / interpreting the concept of religious denomination in a restrictive way deprives other religious minorities of both the opportunity and the possibility to enjoy this freedom. Also there would be a risk of breaching the principle of State secularism by upsetting the balance to be struck between religious and legislative rule-making and by restricting the exercise of the right to freedom of religion.[20]

Religious beliefs are not limited to "basic" religions. However, the probable religion must still be identifiable. In the event that there is an unjustified interference by the State with the applicant's beliefs, which the applicant refers to as a religion, the matter may be settled in court in favor of the applicant. Religion – "It is viewed as a "natural" phenomenon, on the basis of which it would be unjust to discriminate when recognising rights and freedoms".[21]

In limiting the expression of a person's beliefs by the state, a margin of appreciation and fair balance must be maintained since the dimension of religion is one of the most vital elements that determines the identity of believers and their conception of life. The judgment of the European Court of Human Rights in the case of Eweida and Others v. The United Kingdom is an example of a fair balance in how the legitimate aim of the restriction and the right recognized in Article 9 can be compared. In particular: On one side of the scales was Ms. Eweida's desire to express her religious beliefs (Pluralism and diversity are essential for a healthy democratic society. society needs to be tolerant to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others). On the other side of the scales was the employer's wish to project a certain corporate image. European Court of Human Rights considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. Besides, there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. The European Court of Human Rights has therefore concluded that in these circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to

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[19] *Council of Europe, the European Court of Human Rights,* Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

[20] Izzettin Dogan and others v. Turkey, [26/04/2016] ECHR (Grand Chamber), Application no. 62649/10, <https://www.legislationline.org/download/id/6659/file/ECHR_Izzettin%20Dogan%20and%20Others%20v.%20Turkey_2016_en.pdf> [12.10.2021].

[21] *Dickson B.,* The United Nations and Freedom of Religion, International and Comparative law Quarterly, Cambridge University Press, Vol. 44, № 2, 1995, 332.

protect the first applicant's (Eweida) right to manifest her religion, in breach of the positive obligation under Article 9 of European Convention.[22]

In the above context, it is important to analyze the freedoms of belief and conscience.

Belief refers to a person's belief in the truth or falseness of something relied on relevant arguments.[23] It is subjective in its essence. Belief includes both religious and non-religious foundations.[24] Belief also includes a wide range of philosophical views such as pacifism, veganism, etc. The manifestation of faith is in itself linked to freedom of religion.[25] In order for a faith to be protected under a European Convention, it needs to have degree of certainty (solidity), credibility (cogency) and determination of importance. Human has the opportunity to enjoy this freedom both individually and collectively. Freedom of religion also protects the means of practicing religion: liturgy, prayer, processions, church meetings, worships and more. Freedom of belief would be unrealizable, ineffective and dysfunctional if people would not be able to use it fully. The inability to lead a life according to faith in itself deprives essence of recognizing this right. [26]

As for personal belief or ideology, it is more than just an opinion. These are views that attain a certain level of cogency, seriousness, cohesion and importance.[27] They should also have identifiable formal content.

Another right protected by Article 16 of the Constitution of Georgia is freedom of conscience, which can be interpreted as follows: it is the right of a person to make decisions, to live and to act in accordance with his/her conscience. It derives from the human ability to think with moral categories: "Good", "Right", "Bad", "False". Freedom of conscience gives a person the right to have his or her own life credo. The phenomenon of conscience comes from God. Man, as a unique being, who is the whole spectrum of his own possibilities, is the subject of the philosophy of existence.[28] In this philosophy, conscience is an existential characteristic of human existence and it is a fundamental moral category. According to Heidegger, "the call of conscience can never be intended, prepared, or carried out self-consciously (arbitrarily) by us. There is a call against expectation and will. On the other hand the call undoubtedly does not come from anyone else who is in the world with me. The call comes from me and still about me".[29] Some philosophers believe that the formation of the phenomenon of conscience, as well as morality in general, occurs in humans as a result of the

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[22] Eweida and others v. The United Kingdom, [15.01.2013] ECHR (Fourth Section), Applications nos. 48420/ 10, 59842/10, 51671/10, 36516/10, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115881% 22]}> [12.10.2021].

[23] *Kublashvili K.,* Human Rights, Tbilisi, 2003, 138 (in Georgian).

[24] *Tughushi T., Burjanadze G., Mshvenieridze G., Gociridze G., Menabde V.,* Human Rights and Practice of Litigation the Constitutional Court of Georgia, Georgian Young Lawyers Association, Tbilisi, 2013, 184 (in Georgian).

[25] Ibid, 168.

[26] Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia.

[27] Eweida and others v. The United Kingdom, [15.01.2013] ECHR (Fourth Section), Applications nos. 48420/ 10, 59842/10, 51671/10, 36516/10, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115881% 22]}> [12.10.2021].

[28] *Heidegger M.,* Sein und Zeit, *Tevzadze G. (trans.),* Tbilisi, 2019 (in Georgian).

[29] Ibid, 413.

influence of socio-economic factors, for example Karl Marx's book "German Ideology". Among them we can imply that the beginnings of conscience come from the stereotypes, stigmas formed in the society and the ethical dogmas adopted at this or that stage of human development in general. According to materialists and empiricists, conscience is formed as a result of the influence of social factors. As an example, parallels can be drawn with habits and reflexes. For Friedrich Nietzsche, conscience is a chimera caused by human self-suffering (self-punishment) and the influence of social processes.[30] Perhaps that is why moral categories and imperatives have changed throughout history and in different civilizations.

3. Specifics of Restriction of Freedoms Protected by Article 16 of the Constitution of Georgia

States have a certain degree of margin of flexibility during protection of human rights, which is based on the limitations established by international law. Although given words express the level of flexibility: necessary, state security, protection of the rights of others and state of emergency, the state should always respond proportionately and minimize the threat of violation of fundamental rights. By establishing the margin of authority, the European Convention allowed states to become its Contracting Parties and in this way respected the sovereignty of states, observance of morals and national standards in the state.[31]

When discussing freedoms of conscience, religion (confession) and belief, it is necessary to divide them into two dimensions, internal (forum intenum) and external (forum externum). [32]

Internal dimension: what a person thinks in his mind, the inner world of each of us, the faith within us, the unspoken thoughts, and the conscience. The state has no right to restrict the internal dimension and it is subject to absolute protection. This right is not subject to restriction or regulation, as it forms the basis of an individual's identity, autonomy.[33]

It is noteworthy that the state has no right to oblige a priest to give information obtained during confession, or to request the transfer of ecclesiastical mysteries to state. The above example can be considered as an indicator of high protection of the internal dimension.

External dimension: A form of declaration of human religion, for example: When a person preaches, how he/she preaches or what rituals he/she performs in public. In this case, the state may restrict the external dimension in accordance with the Constitution and the standards of the European Convention.[34]

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[30] *Nietzsche F.,* On the Genealogy of Morality, Writings in two volumes, Vol. 2, Publishing House "Thought", Moscow, 1990 (in Russian).

[31] *Smith R.,* Textbook on International Human Rights, Oxford University Press, New York (2005), Georgian Public Defender Library, *Kobiashvili M. (trans.),* Tbilisi, 2006, 252-253 (in Georgian).

[32] *Kublashvili K.,* Human Rights, Tbilisi, 2003, 137 (in Georgian).

[33] Decision of April 8, 2011 № 2/482, 483, 487, 502 on the case: "Citizens' Political Union "Movement for United Georgia", Citizens' Political Union "Georgian Conservative Party", Citizens of Georgia – Zviad Dzidziguri and Kakha Kukava, Young Georgian Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia v. Parliament of Georgia" of Constitutional Court of Georgia, II-4.

[34] Ibid.

Therefore, it is clear that the manifestation of rights protected by Article 16 of the Constitution of Georgia is not subject to absolute protection and in certain situations may be limited by the state. [35] An exhaustive list of these restrictions is provided by the Constitution of Georgia, however, it is advisable to rely on the European Convention and its guidelines for the definition of these restrictions (limitations).

It is essential that the expression of belief (faith) and the form of manifestation of religion be compatible with the fundamental principles of human dignity and inviolability. During manifestation of their faith people should be ready for "remuneration", because they coexist in a society where other people want self-realization, which would be impossible without respect for their rights, dignity and autonomy.[36]

It is interesting to note that the list of legitimate aims of the restriction in the Constitution of Georgia is much narrower than in the European Convention, to which the Georgian state is a party, and according to which cases are heard and decisions are made by the European Court of Human Rights. According to the Constitution of Georgia: "These rights may be restricted only in accordance with law in a democratic society for ensuring necessary public safety, or for protecting health or the rights of others".[37]

According to the European Convention, "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".[38]

Restriction of rights given in Article 16 of the Constitution of Georgia in accordance with the European Convention is possible for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. One of the aim of the restriction under Georgian legislation – "Ensuring the necessary public safety in a democratic society", It is formulated in the European Convention as a necessary condition for the constitutional-legal justification of the restriction of the right (Necessary in a democratic society for the interests of public safety). The European Convention version is an additional shield to protect this important fundamental right, which if the state fails to overcome, its action will be perceived as a violation of the right.

The list of restrictions in the European Convention: public order, health or morals, or for the protection of the rights and freedoms of others is broader than in the Constitution of Georgia. The reality reflected in the continuum of time and the development of mankind, has shown to the legislature to some extent the forms of restrictions that the state needs to function normally.

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[35] *Council of Europe, the European Court of Human Rights,* Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

[36] *Tughushi T., Burjanadze G., Mshvenieridze G., Gociridze G., Menabde V.,* Human Rights and Practice of Litigation the Constitutional Court of Georgia, Georgian Young Lawyers Association, Tbilisi, 2013, 176 (in Georgian).

[37] Article 16, Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995, 786.

[38] *Council of Europe*, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950, Article 9, <https://www.echr.coe.int/documents/convention_kat.pdf> [12.10.2021].

However, it should be noted that the existence of one of these restrictions does not automatically give the effect of justifying the action of the state.

In the presence of the above restriction, in order for a state to justify interference with freedom of religion and not to qualify it as a violation of a right, it is necessary to exist a number of cumulative conditions.

Interference with a fundamental human right by a State (under the European Convention) is admissible (legitimate) if it:

Is prescribed by law, pursued a legitimate aim for the purposes of that provision, is necessary in a democratic society and proportionate in relation to the aim pursued.[39]

Also, in 2004, the Constitutional Court of Georgia established a three-step test of constitutional review of the restriction of fundamental rights by the state.[40]

It is advisable to explain (interpret) the above criteria one by one:

a) *prescribed by law* (In Article 16 of the Constitution of Georgia we find the entry: only in accordance with the law) – Interference should be prescribed by national law, relevant normative act. At the same time, the law should be "adequately accessible", predictable and should be formulated with appropriate precision (not vague) so that people can regulate their actions based on it. The law under which a fundamental right is restricted should be sufficiently foreseeable and should not give the executive power large (boundless) freedom of interpretation and arbitrary action.[41]

b) *A legitimate aim* – Interference is justified only for the protection of public safety and order, health, morals and the rights and freedoms of others. According to Article 9 of the European Convention, "the rights of others" may include the rights of persons whose interests in relation to the protection of safety, health and morals have been violated or a person has been endangered as a result of another person's manifestation of religion or belief. For example, In the case of Handyside v. United Kingdom, concerning a book ban under the UK Obscene Publications Act, European Court of Human Rights notes, that: "…In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[42] In this case, international organisations act only as supervisors.

c) necessary in a democratic society (general principles) – When interfering with the freedom of religion, the state must assess whether the interference is necessary to achieve the legitimate aim pursued and whether the interference measure is proportionate to that aim. The state should balance competing interests, assess the individual rate of necessity for each particular interference, and not

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[39] Metropolitan Church of Bessarabia and Others v. Moldova, [13/12/2001] ECHR, Application no. 45701/99.

[40] Decision of March 11, 2004 № 2/1/241 of Constitutional Court of Georgia.

[41] *Kublashvili K.,* Human Rights, Tbilisi, 2003, 78-79 (in Georgian).

[42] Handyside v United Kingdom, [07/12/1976] ECHR, Application no. 5493/72.

allow intensive, unjustified, and excessive interference with freedom of religion. In priori state should have a vision and try to apply less restrictive measures, which can be concerned as main principle in democratic society. Therefore, it should be clarified whether the restriction established by the disputed norms is wider than it is necessary to achieve a legitimate aim and is there any other less restrictive measure by which it will be possible to achieve the purpose.[43]

d) proportionate in relation to the aim pursued – When analyzing interference in the field of fundamental rights, we consider the principle of proportionality. This means (indicates) that:

1. The interference must serve a legitimate aim – The legitimate purpose of the restrictive measure should be ascertained, because any interference with human rights in the absence of a legitimate aim is arbitrary and therefore the restriction of the right is unconstitutional.[44]

2. The interference should be effective and admissible to achieve the legitimate aim pursued – This condition is met when the purpose can be achieved even theoretically. There should be a rational connection between the restrictive measures stated in the norms and the legitimate aim.[45]

3. The form and intensity of the intervention should be necessary to achieve a legitimate aim – Interference is justified only if there is no relatively soft measures that would give same effective result to achieve the aim. The need to use a minimum restriction measure, will not justify the use of a larger limitation.[46]

4. The intervention should be relevant (proportionate) to the legitimate aim – In determining the compliance (appropriateness) of an intervention, a comparison is made between the interests (rights) limited and protected by the intervention.[47] Therefore, the appreciation of the proportionality of the intervention when comparing limited and protected interests always depends on the individual characteristics of the case.

In determining the legitimacy of a fundamental right restriction and in ascertaining a balance of interests, it is important to conduct a test of proportionality, which includes the appreciation of the criteria of relevance, necessity and proportionality in each particular case.[48]

Can be cited as an example specific areas that may be restricted: improper proselytism (the practice of proselytizing[49]; an active policy of inviting[50]), wearing religious clothing, and more.

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43 Decision of May 1, 2020 № 1/4/693,857 on the case: "NNLE "Media Development Fund" and NNLE "Institute for Development of Freedom of Information" against the Parliament of Georgia" of Constitutional Court of Georgia I Panel, <https://constcourt.ge/ka/judicial-acts?legal=1268> [12.01.2022].

44 Decision of November 5, 2013 № 3/1/531 on the case: "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. Parliament of Georgia" of Constitutional Court of Georgia, II-15.

45 Decision of May 1, 2020 № 1/4/693,857 on the case: "NNLE "Media Development Fund" and NNLE "Institute for Development of Freedom of Information" against the Parliament of Georgia" of Constitutional Court of Georgia I Panel, <https://constcourt.ge/ka/judicial-acts?legal=1268> [12.01.2022].

46 Decision of June 26, 2012 № 3/1/512 on the case: "Danish citizen Heike Kronkvist v. Parliament of Georgia" of Constitutional Court of Georgia, II-60.

47 *Demetrashvili A., Gogiashvili G.,* Constitutional Law, Tbilisi, 2016, 102-103 (in Georgian).

48 Ibid, 103.

49 Proselytism (n.d.), Dictionary of the English Language, 5th ed., American Heritage, 2011, <https://www.thefreedictionary.com/proselytism> [27.01.2022].

50 Proselytism (n.d.), Ologies & Isms, 2008, <https://www.thefreedictionary.com/proselytism> [27.01.2022].

In general, the practice of the European Court of Human Rights in wearing religious clothes until 2014 was absolutely different, for example: Leyla Şahin v. Turkey, Where the European Court shared the applicant's view that wearing an Islamic headscarf was a manifestation of religion.[51] Although in 2014, the European Court of Human Rights holded judgment in favor of France over the removal of the hijab and determined that there has been no violation of Article 9 of the Convention.[52] The decision of the European Court of Human Rights is noteworthy, which should be considered for Georgia as well. Precisely the key point for this particular case was respect for the minimum set of values of an open democratic society (living together), public safety and protection of the rights and freedoms of others. On the basis of these three values the European Court of Human Rights did not consider France's action to be a violation.

This decision has become an important part of case law regarding the form of expression of faith and its legitimate limitations. It is unfortunate that today such important decisions are made only for countries with politically solid positions.

Freedom of religion and belief implies their manifestation, although there are forms that are unacceptable to a democratic society and subject to restrictions. This can be considered as – inappropriate (improper) proselytism. The proclamation of religion and belief is manifested through the performance of worship, participation in worship, preaching and spreading of religious knowledge (Including an active policy of inviting people to religion or belief), participation in religious meetings and celebrations of religious holidays, performance of religious rites, rituals (Including observance of fasting, confession, communion, participation in worship), religious attire, wearing symbols or jewelry of religious affiliation, having ascetic and isolated lifestyle and in a variety of ways. Freedom of religion and belief is protected by the Constitution of Georgia, regardless of whether it is exercised individually or in collectively, by agreement or on its own initiative, publicly or privately. Freedom of religion is also a right of religious associations. "religious associations" can be interpreted as legal entities whose purpose is to preach their religion, belief or worldview among its members, as well as to spread that preaching.

At this point the individual or organization must strike a balance between the spread of faith and improper proselytism. The spread of religion, the act of converting other people to faith should not turn into inappropriate proselytizing as rough interference with human religious beliefs by unacceptable forms: Through violence, bribery, abuse of trust and lack of human knowledge. In this case, the state has a positive obligation to prohibit such influence on members of a democratic society and to protect their personal space from the rough interference of others.

In accordance with Case-Law Guide on Article 9 of European Convention on human rights, Freedom of Thought and Religion, each that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.[53] Also, in some cases, the state has the right to take preventive measures

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51 Leyla Şahin v. Turkey, [10/11/2005] ECHR, Application no. 44774/98, <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-70956%22]}> [12.01.2021].

52 S.A.S. v. France, [01/07/2014] ECHR, Application no. 43835/11.

53 *Council of Europe, the European Court of Human Rights,* Freedom of Thought, Conscience and Religion Case-Law Guide on Article 9 of European Convention on Human Rights, University of Georgia Publishing

to protect the fundamental rights of others. In the case of Leela Förderkreis e.V. and Others v. Germany It is clear from the position of the European Court that in accordance with the high public interest the state has the right to provide information to the public and to draw their attention to the dangers posed by sects. In this case intervention serves the legitimate purposes of Article 9 Paragraph 2 of the European Convention, in particular the protection of public safety and public order, as well as the rights and freedoms of others. "…Such a power of preventive intervention on the State's part is also consistent with the Contracting Parties' the Contracting Parties' positive obligation under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction".[54]

It should be noted that paragraph 3 of Article 16 of the Constitution of Georgia differs from the record referred to in paragraph 2 of the same article. Paragraph 3 places under absolute protection one specific record and one specific condition: No one shall be persecuted because of his/her belief, religion or conscience, or be coerced into expressing his/her opinion thereon.

If there is obvious persecution and coercion of a person on the basis of conscience and belief by the state, in this case, the action of the state has no constitutional-legal justification and it qualifies as a violation of basic human rights. The state has no legitimate leverage (support) and no grounds to interfere with this right by the forms of restriction. Simply said, paragraph 3 forbids coercing person into expressing his or her own religion and his or her views on conscience, belief. It is also unlawful (proscribed) to persecute a person on the basis of his or her beliefs. There are various forms of "persecution" that clearly show the harassment and violation of human rights. An example is the fact when a person is in person at risk of such attacks or is a member of this vulnerable or endangered group and is therefore in a precarious (dengerous) situation, which is a serious violation of Article 9 of the Convention. In assessing harassment and ill-treatment, the European Court of Human Rights appreciates, according to case law, whether State had reasonable and objective justification of its action.[55] Simply said, there should be no "political persecution" motivated by his/her religious beliefs. The positive obligation of the state is to create a pluralistic environment (society) for people to express their beliefs while respecting the rights of others. This does not always mean the issue of monetary compensation in a positive form.

4. Conclusion

An overview of the above issues presented the scope and characteristics of restrictions on the freedoms of belief, religion (confession) and conscience. When restricting human rights, the state should not violate the principle of proportionality and the aim of the restriction should be to protect the public interest,[56] so as not to despotize private or public interests.[57] In determining the legitimacy of a

House, Tbilisi, 31/08/2019, <https://www.echr.coe.int/Documents/Guide_Art_9_KAT.pdf> [12.10.2021] (in Georgian).

[54] Leela Förderkreis e.V. and Others v. Germany, [06/02/2008] ECHR (Fifth Section), Application no. 58911/00, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-89420%22]}> [12.10.2021].

[55] Gavrilă Baciu v. Romania, [17/9/2013] ECHR (Third Section), Application no. 76146/12.

[56] Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia, Indicated – *Institute for Development of Freedom of Information*, Freedom of Information Guide, 1st ed., Tbilisi, 2012, 7 (in Georgian).

fundamental right restriction and in ascertaining a balance of interests, it is important to conduct a test of proportionality, which includes the appreciation of the criteria of relevance, necessity and proportionality in each particular case. In limiting the expression of a person's beliefs by the state, a margin of appreciation and fair balance must be maintained.

Constitutional norms should be in accordance with international human rights treats/covenants, of which the European Convention on Human Rights is noteworthy.[58]

However, due to the content of freedoms of belief, religion (confession) and conscience, it is impossible and unjustified to exhaustively identify the scope of the protected area (right), as each specific case requires an individual approach and appreciation.[59] Based on the concept of a democratic state, in some cases, when intervention serves to protect the fundamental rights of others, state is obliged to use it.[60] The complexity of the conflict of values is clear, as both sides have the right and the expectation of protection of this right, this sensitive situation can be managed by achieving a fair balance between competing interests and harmonizing these values in the society.[61] in accordance with the high public interest the state has the right to provide information to the public and to draw their attention to the dangers posed by religious organizations. In this case intervention serves the legitimate purposes of Article 9 Paragraph 2 of the European Convention.

Research has shown that in defining restrictions imposed by state on freedom of religion, belief and conscience, it is best to rely on the standards set out in the official case-law guide of Council of Europe and the European Court of Human Rights, in accordance with the European Convention. However, it should be noted that international agreements, including the European Convention, are in the third place in hierarchy of the legislative acts of Georgia, hence Constitution of Georgia takes precedence over international agreements.[62] The fact is that the purpose of the hierarchical ratio of the current normative acts is one: Not only to determine their legal force, but also to make a decision easily during a legal conflict and contradiction of normative acts. However, the discrepancy (difference) between international treaty and national law may raise some question marks and difficulties both in case law and in its theoretical explanation (interpretation). It is a fact that in the event of a alleged violation of fundamental rights the final stage for appealing against decisions made by national courts for citizens of countries that had ratified the European Convention is the European Court of Human Rights. Therefore, it is better to unequivocally adhere to the standard of the European Convention for the definition of fundamental rights and during imposing restrictions on the exercise of freedoms by the state.

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57 *Sajó A.,* Limiting Government: An Introduction to Constitutionalism, Tbilisi, 2003, 248 (in Georgian).

58 Case of Kokkinakis v. Greece, [25/05/1993] ECHR, Application no. 14307/88, References: *Korkelia K., Izoria L., Kublashvili K., Khubua G.,* Comments on the Constitution of Georgia, Basic Human Rights and Freedoms, Tbilisi, 2005, 117 (in Georgian).

59 Decision of December 22, 2011 № 1/1/477 of Constitutional Court of Georgia, II.

60 Ibid.

61 Ibid.

62 *Korkelia K.,* Application of the European Convention on Human Rights in Georgia, Institute of State and Law of the Georgian Academy of Sciences, Tbilisi, 2004, 63 (in Georgian).

States' certain degree of margin of flexibility during shielding of human rights won't cause violations of fundamental rights by the state if the state's discretion, limitation of fundamental rights and the “margin of authority” are based upon the case law of the European Court of Human Rights.

Finally, the prohibition of persecution on the basis of one's belief, religion or conscience and the prohibition of coercing a person to express his or her opinion are subject to absolute protection, however, the factual circumstances surrounding these prohibitions should not be illusory.

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Amendments of Constitution of Georgia in Attempt to Determine and Resolve the Issues Concerning the Status of Autonomous Republics, Separation of Powers and Territorial Arrangement

This article discusses the amendments to the Constitution of Georgia relative to attempts to resolve the issues of territorial arrangement.

The issues falling into the exclusive competence of the supreme state authorities of Georgia and the so-called "residual powers" are analyzed.

Also, the article focuses on the regulations for determining the status of the autonomous republics of Georgia and the separation of powers.

It demonstrates the types of problems that existed in the past and the issues that have been resolved in this regard.

Ultimately, the presented article highlights the expediency of the emergence of the norms clarifying the Constitution on the issues of territorial arrangement.

Keywords: *Constitution, Autonomous Republic, competence, territorial arrangement, legislation.*

1. Introduction

Our country has long been deprived of the opportunity to determine the form of territorial arrangement of its state independently. The state government system that was imposed without considering the centuries-old traditions of the state of Georgia and its historical development raised many complex problems, which could not be solved taking into account the reality existing in the 90s of the 20th century and before that.

In general, the system of state gavernment implies the establishment of a correct and proper state-territorial structure of the state. A state territorial unit is created to ensure a balance between the need for the central government to exercise the state policy and the rights of citizens to express the local interests and, consequently, the development of the country.

One of the main problems of all democratic countries is to ensure a balance between the requirement for the central government to exercise a state policy and the rights of citizens to express local interests. The government of a democratic state, based on its actions, should strive for the unity of the nation, for strengthening the national security, and at the same time, the moral perfection of the individual and inner freedom.

Nowadays, the structure of public administration in Georgia is still in the process of establishment and it is under a strong influence of historical factors and political culture. In this regard, in the process of decentralization and deconcentration of the government, the issues of the state-territorial arrangement of the state, granting of the appropriate status to the territorial units of the state,

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the separation of powers and the full establishment of a proper management system are of fundamental importance, especially when the government of the state cannot exercise its jurisdiction over these territories.

2. Drafting the Constitution of Georgia of 1995

The Parliament of Georgia, elected on October 11, 1992, had to draft and adopt the Constitution of Georgia of 1995.

The work of the State Constitutional Commission – consisting of 118 members and chaired by the then Head of the Government – of drafting the new version of the Constitution of 1921, which was established on February 16, 1993, was reportedly delayed and the draft was not completed and published on time. Since the fall of 1993, independent versions of the constitution drafts had been submitted to the Constitutional Commission by various political organizations and initiative groups. A total of 12 drafts were submitted.

In terms of the forms of the government system, five drafts provided for a mixed system, which was **conventionally close to the "French system**". In these drafts, the president was granted more or less important powers. The system established in the two drafts (National Independence Party, "Voice of the Nation") was close to the presidential republic, as one person had to be both the head of state and the head of government. Two projects (of the Communist Party of Georgia and Z. Okujava's Party) implied the establishment of a Soviet republic. One draft ("Aisi" Bank) discussed the Soviet Republic, in which the presidential election was incorporated. Two projects (of the Republican Party and Al. Shushanashvili's Party) envisaged the **forming of a parliamentary republic**.

According to the six drafts, the presidential election of the Republic by the people was envisaged **in two rounds**; One of the drafts proposed the first round to be the general elections and the second round – the Parliamentary elections; Another draft focused on **the indirect election of the president by the people;** Under this draft, **the president was elected by the parliament.**

This brief overview of the drafts submitted to the Constitutional Commission is an indication of the attitudes and opinions regarding the organization of the central government of Georgia in the first half of the 1990s.

Two drafts of the Constitution were created with the help and direct participation of foreign experts:[1]

A) Developed under the Georgian Republican Party aegis, which envisaged **forming a classical parliamentary republic similar to Italy or Germany;**

B) A draft was drawn up in the Secretariat of the Constitutional Commission**, which was close to the idea of creating a similar type of mixed government in France, which provided for the relatively limited powers of the President.**

These two directions dominated the editorial commission. By the end of 1994, a unified, **agreed-upon draft had been created**, although as a result of additional work on the draft, **the powers**

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[1] *Matsaberidze M.,* Political System of Georgia, Tbilisi, 2019, 233-238 (in Georgian).

of the president expanded and replaced the French-style model of state government with a model similar to that of the United States.[2]

As a result, on May 29, 1995, a draft was submitted to the Constitutional Commission that was **named as The Draft on the Head of the State**. The power of the presidential government dominated at the expense of parliament and local government. At the same time, the president was the head of the executive authority.

From today's perspective, the head of the state, as one of the key elements of the central government system of the state, can be considered as a representative of both the executive and the legislative authorities.

In the process of the discussion on the Constitution occurred in the Parliament, the issue of the powers of the President and **the administrative-territorial arrangement of the country was extremely acute**. At the same time, part of the opposition party was ready to make some compromises on the issue of the presidency, **but any compromises on the issue of state government were ruled out.**

In the process of drafting the Constitution of 1995, various drafts of the Constitution were submitted to the Constitutional Commission by various organizations. 5 of them **declared Georgia as a unitary republic** granting the status of Autonomous Republics to Abkhazia and Adjara. 7 projects envisaged **regional division**, one of which (People's Party) **declared Georgia as the Federal Republic.**[3]

Prior to the drafting of the Constitution of 1995, a draft was submitted on behalf of the Head of the State, according to which Georgia **was to be a federal republic**.[4] Its subjects included**: Abkhazia, Adjara, Tskhinvali self-governing region, and the parties** that were not defined in the draft. The constitutions of Abkhazia and Adjara would be drafted and approved by the supreme representative bodies of Abkhazia and Adjara after being approved by the Parliament of Georgia. The scope of self-government of the Tskhinvali region should have been determined in the Organic Law of the Republic of Georgia On the Region and in the regulations adopted by the authority representing this district.

The approach of the Head of the State, who spoke of federalism as a step we had to take, is typical: “After a throughout and, to tell you the truth, a complex analysis, we came to a conclusion that the entire Georgian territorial integrity should be based on federal principles.” If the issue of Abkhazia did not exist “the idea of federalism might not have even emerged.”

Representatives of the opposition pointed out that the federation itself could not be considered the best form of state government, as for Georgia federalism was an act against the national and state interest. They believed that the idea of statehood of Georgia would be erased as a result of its federal division. Arranging the federal system in Georgia would not neutralize the separatist tendencies, but on the contrary, would create additional problems.[5]

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[2] Constitution of the United States, Article II, Section 1, Published by the united states Senate, in operation since 1789.

[3] *Matsaberidze M.*, Political System of Georgia, Tbilisi, 2019, 233-238 (in Georgian).

[4] Newspaper, Georgian Republic, July 1, 1995 (in Georgian).

[5] Newspaper, Caucasus, May 30, 1995 (in Georgian).

3. Basis of Territorial Arrangement Under the Constitution

The Constitution of Georgia, adopted on August 24, 1995, **left the issue of the territorial arrangement of the country open.**[6] The provisions related to the territorial integrity of Georgia and its arrangement were determined by the very first chapter of the Constitution, namely:

Georgia is **an independent, unified and indivisible state** as confirmed **by the Referendum of 31 March 1991 held in the entire territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the former Autonomous Region of South Ossetia,** and by the **Act of Restoration of State Independence** of Georgia of 9 April 1991. The type of the political system of the state of Georgia is a democratic republic, and the name is "Georgia".

Therefore, **the territory of the state** of Georgia **was determined on 21 December 1991**. The territorial integrity of Georgia and the inviolability of the state border were confirmed by the Constitution and laws of Georgia and recognized by the world community of nations and by international organizations. The alienation of the territory of the state of Georgia was announced as a prohibited act. As for the state, the border could be changed only by a bilateral agreement with a neighboring state.

The state territorial arrangement of Georgia was revised by a constitutional law of Georgia on the basis of the principle of the separation of powers after the complete restoration of the jurisdiction of Georgia over the entire territory of the country.

By providing this entry, the constitutional legislature left the issue of territorial arrangement of the country open. This would grant the government more freedom, and through negotiations with the separatist regimes of Sokhumi and Tskhinvali, the status of these regions within Georgia would be determined later.

The Constitution also addressed the issues **falling into the special competencies of self-government and supreme state authorities**. According to that:

Citizens of Georgia would regulate issues of local importance through representative and executive bodies of local self-government without violating the sovereignty of the state. The rules for establishing local self-government authorities, their powers and relations with state authorities were defined under the Organic Law.

The issues that fell within **the exclusive competence of the supreme state authorities of Georgia** were exhaustively determined. **For example**, legislation on Georgian citizenship, human rights, and freedoms, emigration and immigration, entry into and exit from the country, and the temporary or permanent stay of aliens and stateless persons in Georgia; Status, regime and protection of state borders; Status of territorial waters, airspace, continental shelf and status of an exclusive economic zone, their defense; State defense and security, military forces, military industry, and arms trade, etc.

The issues **falling into the joint competence should have been defined separately.**

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[6] The Constitution of Georgia, The Original Version of the Constitution of Georgia adopted in 1995, 24/08/1995 (in Georgian).

Also, Article 4 of the original version of the 1995 Constitution is noteworthy, according to which, after the creation of appropriate conditions on the entire territory of Georgia and the formation of local self-government authorities**, the Parliament of Georgia would have two chambers: The Council of the Republic and the Senate.**

The Council of the Republic would be composed of members elected by a proportional system, as for the Senate – members elected from Abkhazia, Ajara and other territorial units of Georgia, and five members appointed by the President of Georgia. The membership, powers, and procedures for the election of chambers were determined by the organic law.

Speaking of the Senate, an opinion of G. Gogiashvili's is noteworthy, according to which consent of the upper chamber was mandatory for **the legislative initiative that directly raised the status of territorial units,** he/she would also have the right to veto.[7]

Also, it is important to mention Articles 8, 10, and 11 of the first chapter, according to which the following was defined: the state language of Georgia is Georgian, and **in Abkhazia also – Abkhazian**, **the capital** of Georgia **is Tbilisi**. **The state symbols** of Georgia **are established by organic law**.

In addition to the above, the Articles of the original version of the Constitution of Georgia, which directly addressed the issues of Ajara and Abkhazia, are also important. Namely, Articles 55, 67 and 89 outlined exclusive powers for Ajara and Abkhazia, such as:

Election of each Deputy Chairman of Parliament from the members of the Parliament elected from Abkhazia and Ajara by their own nomination; The Right of legislative initiative for the Supreme Representative Body of Abkhazia and Ajara and the competence of the Constitutional Court of Georgia made a decision **on the compliance of the normative acts of supreme representative bodies of Abkhazia and Ajara under the Organic Law, based on a lawsuit or submission of the Supreme Representative Bodies of Abkhazia and Ajara.**

As the original version of the Constitution shows, with respect to both Ajara and Abkhazia, their status of any kind is not defined, although this approach is changed by the constitutional amendments made on April 20, 2000.[8]

On the surface it seems that the addition and amendments made on 20 April 2000 point out changes only in words, however, these are substantial issues with respect to Ajara and Abkhazia.

It can be said that the mentioned amendments reveal the given circumstances established by the legal norm of Ajara – as a legal entity- namely, the amendments to the Constitution directly indicate that **Ajara is the Autonomous Republic of Georgia, which was not specified in the original version of the Constitution**. However, in this regard, the issue of Abkhazia is still left open.

In addition, Article 3 of the original version of the Constitution, which defined specific issues falling into **the exclusive competence of the supreme state authorities of** Georgia**,** is supplemented

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[7] *Gogiashvili G.,* Comparative Federalism, Tbilisi, 2000, 262 (in Georgian).

[8] On the Amendments and Addtions in the Constitution of Georgia" Constitutional law №260 of Georgia 20/04/2000 (in Georgian).

with Paragraph 3**, according to which the status of the Autonomous Republic of Ajara is defined by the Constitutional Law of Georgia "On the Status of the Autonomous Republic of Ajara."**

According to the amendments to the Constitution of Georgia made on October 10, 2002,[9] a **similar reservation is made in the case of Abkhazia**. In particular, another paragraph is added to Article 3 of the Constitution and reads as follows: "**The status of the Autonomous Republic of Abkhazia is defined by the Constitutional Law of Georgia "On the Status of the Autonomous Republic of Abkhazia."** Relevant changes are made in other entries of the Constitution and, like in Ajara, in the case of Abkhazia, it is indicated that **Abkhazia is the Autonomous Republic** within Georgia.

Among the further amendments to the Constitution should be mentioned the emergence of another paragraph in Article 3 of the Constitution on June 29, 2012. Namely, it was pointed out that **"the status and powers of the city of Lazika are determined by the organic law."[10]**

4. Constitutional Amendments of Georgia in 2017

New amendments to the Constitution of Georgia, including issues related to the territorial arrangement, were introduced on October 13, 2017.[11] In fact, as a result of these changes, the whole

Constitution was completely re-formed, **as well as its first chapter with the title of the relevant articles. In some cases, the drafts were left unchanged. In particular, these changes included the following:**

Georgia is an independent, unified and indivisible state as **confirmed by the Referendum of 31 March 1991 held in the entire territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the former Autonomous Region of South Ossetia,** and **by the Act of Restoration of State Independence of Georgia of 9 April 1991.**

The territory of the state of Georgia was determined on 21 December 1991. The territorial integrity of Georgia and the inviolability of the state border is confirmed by the Constitution and laws of Georgia and **recognized by the world community of nations and by international organizations.** The alienation of the territory of the state of Georgia shall be prohibited. The state border may be changed only by a bilateral agreement with a neighboring state. These entries also existed in previous versions of the Constitution.

Article 2 was titled **State Symbols**. The previous edition of this Article included the inviolability of state borders, territorial arrangement and self-government issues, **however, according to the new 2017 edition, Article 7** was **devoted separately to the Basis of Territorial Arrangement** (including the issues of exclusive governance of supreme state authorities, the status of Autonomous Republics of Ajara and Abkhazia, self-government issues and Anaklia Etc).

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9 On the Amendments and Addtions in the Constitution of Georgia, Constitutional law № 1089 of Georgia 10/10/2002 (in Georgian).

10 On the Amendments and Addtions in the Constitution of Georgia, Constitutional law № 6602 of Georgia 29/06/2012 (in Georgian).

11 On the Amendments and Addtions in the Constitution of Georgia, Constitutional law № 1324 of Georgia 13/10/2017 (in Georgian).

The Article on State Symbols refers to the following: the name of the state of Georgia is "Georgia", the capital of Georgia is Tbilisi. **The state language of Georgia is Georgian, and in the Autonomous Republic of Abkhazia, also Abkhazian.** The state language is protected by the organic law. **The state flag, coat of arms and anthem of Georgia are established by organic law, which shall be revised in accordance with the procedure established for the revision of the Constitution. Here it is demonstrated the rise of the standard of protection of the Georgian language** and giving the norms regulating the status of the state language the same legal force as the organic law. At the same time, the Constitution maintains the legal force of the Abkhazian language.

It is important to pay attention especially to the amendments of Article 7, which, based on the relevant title, determines that **there is a basis of territorial arrangement in the Constitution and** offers certain directions in this way. **For example, Section 4 outlines that the separation of the powers of state authority and self-governing units is based on the principle of subsidiarity.**

The issues **falling into the exclusive powers of the supreme state authorities of Georgia** are being formed in a new way. For example, instead of "emigration and immigration", the legislation addressed **the issues of "migration"** fully; In the legislation of pharmaceuticals, the term "**drug" was replaced by "pharmaceutical legislation"**; Instead of "**military forces"** "**armed forces" was defined;** The term "**aviation"** included – airports and aerodromes, air traffic control and air transport registration; Instead of the "Meteorological Service", the **whole "meteorology"** was outlined, etc.

As it turns out, in the list of issues falling into the exclusive competence, **some issues are only moved** to different paragraphs, however, **there are issues that are new and substantial, unlike the old edition**, such as the legislation on the National Academy of Sciences, courts and prosecutor's offices, money emission, only as legislation on the trade of "national significance". **It is also noteworthy that some of the above terminological corrections have included and combined some of the previous drafts,** such as aviation. In addition, the constitution reflected the previous amendments to various legislation (the term "state security", "armed forces", etc.).

Another important issue needs to be mentioned. Namely, a paragraph was removed from the previously approved version of the Constitution, according to which **the issues falling into the joint competence were defined separately**.

It should also be noted that the constitutional changes no longer specify the status of Ajara and Abkhazia in the constitutional law, but it is just indicated that "**The powers** of the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, **and procedures for exercising such powers** shall be determined by the constitutional laws of Georgia **that are an integral part of the Constitution of Georgia."**

Another essential change that is directly related to the state territorial arrangement is the following:

If the Constitution up until now stated that "The state territorial arrangement of Georgia shall be defined by a constitutional law on the basis of the principle of the separation of powers after the complete restoration of the jurisdiction of Georgia over the entire territory of the country." – the new edition defined the issue differently. Namely, under Article 7, Section 3:

"**The state territorial arrangement** of Georgia **shall be revised** by a constitutional law of Georgia on the basis of the principle of the separation of powers after the complete restoration of the jurisdiction of Georgia over the entire territory of the country."

As for **the issues of local importance, in accordance with Paragraphs 4 and 5 of the same Article**, it is outlined that "The citizens of Georgia **shall regulate affairs of local importance** through local self-government in accordance with the legislation of Georgia. **The separation of the powers of state authority and self-governing units is based on the principle of subsidiarity.** The State ensures that the financial resources of self-governing units correspond with their powers as determined by the organic law. Self-governing units shall be authorised to take decisions, on their own initiative and in compliance with legislation, on all matters that do not fall within the exclusive powers of the State or of the autonomous republics, and which are not excluded from the powers of self-governing units by law. **An exclusive economic zone shall be established in Anaklia** on the basis of the organic law, where a special legal regime shall apply. Other exclusive economic zones with special legal regimes may also be established on the basis of the organic law.

In the given draft introduction of "**the principle of subsidiarity"** is also completely new, as well as **granting** Anaklia **the status of "an exclusive economic zone".** In addition, the new version of the Constitution introduces new grounds for establishing **other exclusive economic zones by the special legal regime under the organic law. In addition to this, entries** on the definition of the status and powers of the city of Lazika by the organic law **have been removed from the previous edition**.

It is noteworthy that even decades ago, hierarchical governance and strict centralization in the world were gradually being replaced by a model of decentralization, which is based on the principle of subsidiarity. Since a strict system of standardization and supervision of results can also have negative consequences, it is important to find some balance here so that the positive effects inherent in the system can be used without endangering local self-government. However, in the circumstances of universal approval of the modern tendencies of decentralization and the principle of subsidiarity, the administrative decisions made by the local authorities and the fields they cover increase significantly. Mandatory supervision is gradually losing its effectiveness; thus, there is the need to subject only the decisions of a special type and content to the supervision arises, otherwise, the supervision system will be overloaded and exercising an effective control will be impossible in a short period of time.[12]

It is true that other amendments were made to the Constitution of Georgia after October 13, 2017, but no substantial changes were made in the first chapter of the Constitution, neither on the issues of territorial arrangement.

The issue that we will discuss is the so-called **"Residual Powers".** It can be said that the Constitution exhaustively lists the issues falling within the exclusive competencies of the supreme state authorities. As for the Autonomous Republics, for example, the fields falling under the special jurisdiction of the Autonomous Republic of Ajara are already defined by the Constitutional Law of

[12] *Kakhidze I.,* Administrative Oversight of Local Government Activities (Comperative Analysis), Tbilisi, 2012, 254-258 (in Georgian).

Georgia "On the Autonomous Republic of Ajara".[13] In addition to the fact that the first Article of this law states that the Autonomous Republic of Ajara is an integral territorial unit of Georgia, Article 2 of the same law lists the exclusive powers that fall under the special jurisdiction of the Autonomous Republic of Ajara exercised independently by the authorities of the Autonomous Republic of Adjara.

Within the framework of special jurisdiction, the Autonomous Republic of Ajara may also establish ministries of specific fields. These fields are economy, agriculture, tourism, health and social security, education, culture, sports and youth policy, environmental protection. The Autonomous Republic of Ajara **may exercise authorities** in these fields which pursuant to the legislation of Georgia does not belong to the exclusive competencies of the state authority or own exclusive powers of the local self-government and exercise of which is not excluded from the powers of the Autonomous Republic of Ajara in accordance with the legislation of Georgia.

The court practice is also interesting in terms of the separation of such powers. By its decision of September 29, 2016, the Constitutional Court of Georgia did not share the standpoint of the Supreme Representative Body of the Autonomous Republic of Ajara that the regulation of **all the issues related to the property of the Autonomous Republic of Ajara fell within the competence of the Management and Administration of the Property and not under the Civil Law.** In this case, the law of the Autonomous Republic of Ajara unilaterally determines the property obligations of third parties in relation to the property of the Autonomous Republic of Ajara, namely, the rules for compensating for the unauthorized use of this property. Resolving such issues goes beyond the competence of the management and administration of the property and **shall be regulated under the civil law, which, according to Article 3 of the Constitution of Georgia, is the issue falling within the competence of supreme state authorities of Georgia only.**

Based on the above, the Constitutional Court concluded that Article 19, Paragraph 3 of the Law of the Autonomous Republic of Ajara "On the Management and Administration of the Property of the Autonomous Republic of Ajara" ("A property user who does not have a document certifying the right to use this property legally and who uses the property for entrepreneurial activity / commercial purposes, is obliged to pay the price of transfer for use to the budget of the Autonomous Republic of Ajara pursuant to a written request of the Ministry of Property of the Autonomous Republic of Adjara) regulates, **on the one hand, issues pertaining to civil law** and, **on the other hand, procedure code**. According to Article 3,

Paragraph 1, Subparagraph "p" of the Constitution of Georgia, these issues fall within the exclusive competence of the supreme state authorities of Georgia, the Parliament of Georgia. Therefore, the issue belonging only to the Jurisdiction of the Parliament of Georgia is resolved by the supreme representative body of the Autonomous Republic of Adjara. At the same time, as mentioned, according to Article 6, Paragraph 3 of the Constitutional Law of Georgia "On the Status of the Autonomous Republic of Ajara", it is inadmissible for the Autonomous Republic of Ajara to even delegate the powers under the special jurisdiction of supreme state bodies of Georgia. Thus, paragraph 3 of Article 19 of the Law of the Autonomous Republic of Ajara on the Management and

[13] The Constitution of the Autonomous Republic of Ajara 20/02/2008 (in Georgian).

Administration of the Property of the Autonomous Republic of Ajara is unconstitutional in relation to sub-paragraph "p" of paragraph 1 of Article 3 of the Constitution of Georgia.[14]

As we analyze the issue of separation of powers, **the process of adopting and amending the Constitution of the Autonomous Republic of Ajara** itself is noteworthy. The first constitution of Ajara was approved on February 20, 2008. The Constitution of the Autonomous Republic was adopted by the Supreme Council of the Autonomous Republic of Ajara with two-thirds of the total membership and entered into force as "On the Approval of the Constitution of the Autonomous Republic of Ajara" **upon the enactment of the Organic Law** of Georgia. Here we are dealing with **a two-stage system**[15] for the adoption of the Constitution, on the one hand at the local level and on the other hand at the central level. The rule for its revision is similar. A similar rule for adopting a basic act by an autonomous union is typical for regional states (Spain[16], Italy[17]). There is no such two-stage regulation system with respect to Abkhazia. Therefore, it becomes interesting how this issue would be regulated if the relevant constitutional law "On the Autonomous Republic of Abkhazia" was adopted.

The Constitution of the Autonomous Republic of Abkhazia[18] is also important in terms of separation of powers. Namely, the Autonomous Republic of Abkhazia, in accordance with the legislation of Georgia, resolves issues within its jurisdiction independently, while **the Autonomous Republic of Abkhazia also exercises powers that do not fall under the exclusive powers of the state government under the law of Georgia** and exercising it is not excluded from the powers of the Autonomous Republic of Abkhazia.

This analysis shows that with these changes, the Constitution is gradually trying to facilitate the resolution of the issue of territorial arrangement. As important challenges such as the separation of powers between the central government and the autonomous republics, the list of issues falling under the special jurisdiction, "residual powers", etc., are an important precondition for laying the foundations for resolving the issue of territorial arrangement. However, the type of arrangement that shall ultimately be determined, must be decided by constitutional changes as well.

It is noteworthy that the constitutional experience of some countries in terms of determining the form of state government. The constitutions of a number of countries directly determine the form of its state government considering its territorial arrangement. For example, according to the very first article of the Constitution of Belgium, Belgium is a federal state composed of communities and regions.[19] The issue of territorial arrangement of the Republic of Brazil is regulated by the Constitution of the Federative Republic of Brazil. Both the title and the first article of the Constitution

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[14] Decision of the Plenum of the Constitutional Court of Georgia 3/4/641 of September 29, 2016 on the case "Constitutional Submission of the Kutaisi Court of Appeal on the constitutionality of Article 19, Paragraph 3 of the Law of the Autonomous Republic of Adjara" (in Georgian).

[15] *Gonashvili V., Kverenchkhiladze G., Kakhiani G., Chighladze N., Eremadze St., Tevdorashvili G.,* Constitutional Law of Georgia, Tbilisi, 2017, 151 (in Georgian).

[16] *Gonashvili V.,* Lawyers for the Rule of Law – "Constitutions of Foreign Countries" – Tbilisi, 2007, part 3, 163 (in Georgian).

[17] Ibid, part 5, 325 (in Georgian).

[18] The Constitution of the Autonomous Republic of Abkhazia, 21/11/2019 (in Georgian).

[19] La Constitution Belge, coordonné du 17 février 1994, Titre Ier, Art. 1er.

state that the form of territorial arrangement of the Republic of Brazil is a federal republic.[20] According to the first part of Article 2 of the Constitution of the Republic of Bulgaria, the Republic of Bulgaria is unified and those autonomous territorial entities are not allowed in it.[21], etc.

When discussing the issue, it is necessary to explain the forms of territorial arrangement. In general, the form of the state government refers to the territorial-organizational features of the internal structure of the state, the mutual dependence between the state as a whole and its constituent parts, between the central government and the local authorities. In this respect, countries are mainly divided into simple (unitarism) and complex (federation, confederation) states.[22]

Federalism is derived from the Latin word: "foedus" and means "pact", "union".[23] Building on the principle of unity ensures the existence of the Federation as a single sovereign state.[24]

A common form of state territorial arrangement is also the unitary regime. The word "unitary" is derived from the Latin word, which means "one". A unitary regime implies a unified legal and political organization of state power throughout the whole country.[25]

The difference between the forms of state government[26] is manifested in the fact that:

- A unitary state consists only of administrative or political-administrative units;
- The units of the federal state are state-like formations, without sovereignty.
- In the case of a confederation, parts of the state retain de facto sovereignty.

The theory of modern (constitutional) law also distinguishes regionalism[27], which, unlike the unitary state, is characterized by a higher degree of decentralization and autonomy of territorial units.

There are a number of cases where the autonomous regions of non-federal states even achieve degrees of federal independence (e.g. Spain, regions with special status in Italy) [28] and some doctrines view a unitary decentralized state as a transitional form between a federal and a unitary state. [29]

In addition to the Confederation, according to some scholars the commonwealth is also considered to be a form of state government. Namely, it is rare, more amorphous than a confederation, but still an organized union of states characterized by somewhat of similar features (economy, law, language, culture, religion, etc.). Commonwealth This is not just a union, but rather a peculiar union of independent states. Commonwealth as a union of states may have a transitional character. It can develop in both the confederation and the federation.[30]

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[20] Constituição da República Federativa do Brasil, Senado Federal, Texto promulgado em 05 de outubro de 1988, Título I, Art. 1º.

[21] Конституция на Република България, Конституция на Република България, приета от Народното събрание на 13 юли 1991 г., Чл. 2. (1).

[22] *Intskirveli G.,* General Theory of State and Law, Tbilisi, 1997, 50-51 (in Georgian).

[23] *Khubua G.,* Federalism as a Normative Principle, Tbilisi, 2000, 14 (in Georgian).

[24] *Rukhadze Z.,* Constitutional Law of Georgia, 1999, 186 (in Georgian).

[25] *Gonashvili V., Kverenchkhiladze G., Kakhiani G., Chighladze N., Eremadze St., Tevdorashvili G.,* Introduction to Constitutional Law, Tbilisi, 2016, 150 (in Georgian).

[26] *Matsaberidze M.,* Political Sysstem of Georgia, Tbilisi, 2019, 299 (in Georgian).

[27] *Demetrashvili A.,* Guidebook for Constitutional Law, Tbilisi, 2005, 124 (in Georgian).

[28] *Pernthaler P.,* Allgemeine Staatslehr und Verfassungslehre, Auft, Wien, 1996, 289.

[29] *Pernthaler P., Kathrin I., Weber K.,* Der Föderalismus im Alpenraum, Wien, 1882, 44.

[30] *Tsnobiladze P.,* Constitutional Law, Tbilisi, 1997, 80-81 (in Georgian).

5. Conclusion

In consideration of the aforementioned, it is clear that in case of the separation of powers of the Autonomous Republics it is mainly exercised **the principle of universality**, according to which the Autonomous Republic of Georgia **exercises other powers in a number of fields** (e.g. in case of Ajara – Economy, Agriculture, Tourism, etc.) except for the issues falling within the exclusive competences, unless that does not fall within the special jurisdiction of the state or the exclusive powers of local self-government, the exercise of which is not excluded from the powers of autonomous republics by the legislation of Georgia.

This means that pursuant to the recent amendments made in the Constitution so-called “residual powers” fell within the powers and competencies of the Autonomous Republics, which is a step towards decentralization. However, there is still the other part of the “residual powers”, which do not fall within the fields mentioned above and do not explicitly belong to the central government either. It can be said that the “residual powers” are divided between the central government and the autonomous republic. One part was handed over by the state to autonomy, while it left the other part to itself.

In general, as known, according to the most common definition of an autonomous republic,[31] an autonomous republic is **a state entity based on political autonomy within a state**, which, although not independent, has its own territory, legislation, governmental authorities, and other attributes of statehood.

Based on the above, it can be concluded that first of all, autonomy is the status for Abkhazia and Ajara, which was established by the constitutional amendments of Georgia, and as for the scope of this autonomy, is already specified directly by the constitutions of autonomous republics, except for the Constitution of Georgia. In other words, the basic status of Abkhazia and Ajara is already defined by Article 7 of the Constitution itself, when it outlines that Ajara and Abkhazia are autonomous republics. This is their status, and the rest is already within the scope of this status. According to this analysis, we can conclude that the constitutional status of the autonomous republics is already well defined and that the existing errors in the constitutional records in this regard have been eliminated.

In addition, it should be noted that the recent constitutional amendments, which were also accompanied by the amendments to the constitutions of the Autonomous Republics, better separated the powers and regulated them between the central government and the Autonomous Republics. For example, not only the issues falling under the special jurisdiction of the supreme state bodies were reviewed and clarified, but the special jurisdictions of the Autonomous Republic were established as well. Moreover, the exclusive powers of the Autonomous Republic are separated from the competencies of **the state** and **local self-government.** Also, the constitution clarifies that **an exclusive economic zone is being established in Anaklia,** where **a special legal regime applies.**

Finally, it can be concluded that when the constitutional amendments speak of the fact that the issue of territorial arrangement is not “determine” as outlined in the old version of the Constitution,

[31] The National Parliamentary Library of Georgia, Encyclopedic Definitions, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=163> [21.12.2021] (in Georgian).

but is “revised”, it indicates that some new constitutional amendments have already tried to resolve the issue of territorial arrangement, however, if this is the case then what type of arrangement is it? Unitary, federal or something else? The Constitution does not outline anything about it, nor do other laws make any reservations about it. Consequently, the following question arises: if the form of territorial arrangement is not defined, then in such case the entry “definition” should have been changed by “revision” or not. The latter may lead to preconditions for constitutional verifications in the future. The ultimate goal of the new constitutional amendments is to resolve the issue of territorial arrangement of our country together with the population of Abkhazia and the Tskhinvali region.

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15. *Matsaberidze M.,* Political System of Georgia, Tbilisi, 2019, 214, 233-238, 299.
16. *Rukhadze Z.,* Constitutional Law of Georgia, 1999, 186.
17. *Tsnobiladze P.,* Constitutional Law, Tbilisi, 1997, 80-81.
18. *Khubua G.,* Federalism as a Normative Principle, Tbilisi, 2000, 14.
19. The National Parliamentary Library of Georgia, Encyclopedic definitions, <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=5&t=163> [21.12.2021].
20. Newspaper, Georgian Republic, July 1, 1995.
21. Newspaper, Caucasus, May 30, 1995.

22. Decision of the Plenum of the Constitutional Court of Georgia 293/4/641 of September 29, 2016 on the case "Constitutional Submission of the Kutaisi Court of Appeal on the constitutionality of Article 19, Paragraph 3 of the Law of the Autonomous Republic of Adjara".
23. Constitution of the United States, Article II, Section 1, Published by the united states Senate, in operation since 1789.
24. La Constitution Belge, coordonné du 17 février 1994, Titre Ier, Art. 1er.
25. Constituição da República Federativa do Brasil, Senado Federal, Texto promulgado em 05 de outubro de 1988, Título I, Art. 1º.
26. *Pernthaler P.*, Allgemeine Staatslehr und Verfassungslehre, Auft, Wien, 1996, 289.
27. *Pernthaler P., Kathrin I., Weber K.,* Der Föderalismus im Alpenraum, Wien,1882, 44.
28. Конституция на Република България, Конституция на Република България, приета от Народното събрание на 13 юли 1991 г., Чл. 2. (1).

Zurab Dzlierishvili*

Termination of Obligation by Deposit

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

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

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

1. Introduction

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

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

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

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

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

4 *Akhvlediani Z.*, Obligation Law, Tbilisi, 1999, 80 (in Georgian).

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

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

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

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

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

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

2. Ground for Deposit

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

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

[8] *Svanadze G., Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 340 (in Georgian).

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

[10] *Zweigrt K., Kötz H.,* Einführung in die Rechtsvergleichung, 3 Auflage, Tübingen, 1996, 497.

[11] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-167-155-2015, May 14, 2015.

[12] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case №AS-75-71-2017, March 31, 2017.

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

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

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

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

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

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

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

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

15 Judgement of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1071-991-2017, March 26, 2018.

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

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

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

Delays in receiving fulfillment should be real. It cannot be based on the debtor's misconceptions.[19]

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

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

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

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

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

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

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

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

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

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

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

25 *Bötttcher L.* in: Ermann BGB Komm, 16. Neu bearbeitete Aufl., 2020, München, §422, Rn.8.

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

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

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

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

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

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

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

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

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

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

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

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[32] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-551-522-2015, August 14, 2015.

[33] *Chechelashvili Z.*, Contract Law, Tbilisi, 2008, 138 (in Georgian).

[34] *Dzlierishvili Z.*, Fulfillment of Obligation, Tbilisi, 2006, 69 (in Georgian).

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

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

[37] *Grüneberg Ch.* in: *Palandt O.,* BGB Komm, 74. Aufl., München 2015, §372, Rn.5.

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

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

3. Deposit Rule

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

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

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

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

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

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

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[39] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1212-1138-2015, June 06, 2015.

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

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

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

[43] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-1069-1028-2016, July 07, 2017.

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

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

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

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

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

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

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

47 UNIDROIT, Principles of International Commercial Contracts, Rom, 1994, Uniform Law Review, 2004.

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

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

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

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

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

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

54 *Eccher R.*, Der Erfüllungsort für Euro-Sulden, Wien, 2001, 1125.

55 *Weiler F.,* Schuldrecht, Allgemeiner Teil, 5. Aufl., Nomos, 2019, 108.

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

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

58 *Dzlierishvili Z*., Fulfillment of Obligations, Tbilisi, 2006, 49 (in Georgian).

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

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

4. Deposit-Related Costs and Their Reimbursement

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

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

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

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

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

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

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

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

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

65 *Burduli I.*, On the Issue of Finance of the Notary Bureau and Remuneration of a Notary, "Journal of Law", № 2, 2011, 36 (in Georgian).

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

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

"In the present case, the Chamber noted that the amount taken back by the debtor from the deposit was on the basis of Article 440, Part 2 and Article 441 of the Civil Code of Georgia, and not on the basis of Article 440, Part 1 of the same Code."[69]

5. Retention Period of the Subject of Performance

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Conclusion

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

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

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

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

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

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

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

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

[72] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia on the case № AS-468-468-2018, March 12, 2020.

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

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

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

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

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

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Natia Chitashvili*

Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy

The article is dedicated to the comparative legal analysis of the material preconditions establishing Institute of impediment of the performance of obligation based on the uniform legal instruments of contract law, study of reformed legal order of mainly Anglo-American and continental law countries. The analysis of legal characteristics qualifying hardship to perform the obligation is done in correlation with the legal nature of the Force Majeure concept, by which the demonstration of essential distinctive marks of these two paradigms are reached with the purpose of determining framework of the collateral legal outcomes and responsibility, as well as scopes of contractual risk. The crucial part of the study also discussed scope of legitimate intervention of the Court and protection of autonomy of the will of parties, methods to be used while exercising judicial control, objective criteria to be considered in accordance with the level of gravity of the fulfillment in the process of adaptation or termination of the contract.

The actuality of the study is particularly increasing for purposes of determining scope of the fulfillment of contractual obligations complicated by the impact of Covid-19 pandemic and for establishing consistent Georgian judicial practice in this sphere.

Key words: *Hardship to perform the obligation, Force Majeure, impossibility of performance, awarding damages, adaptation of the contract, infringement of the obligation, judicial control, amended circumstances of the contract.*

1. Introduction

Pacta sunt servanda[1] is the cardinal[2] principle having foundational significance in all legal orders of the world, which imperatively establishes obligation of fulfillment of the contract terms for

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1 *Surhone L. M., Timpledon M. T., Marseken S. F.,* Pacta Sunt Servanda: Brocard, Civil Law, Contract, Clause, Law, Good Faith, Peremptory Norm, Clausula Rebus Sic Stantibus, Betascript Publishers, 2010; *Houtte H. V.,* Changed Circumstances and Pacta Sunt Servanda: *Gaillard (ed.),* Transnational Rules in International Commercial Arbitration, ICC Publ. Nr. 480, 4, Paris, 1993, <http://tldb. uni-koeln.de/ TLDB.html> [10.10.2021]; *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 576-581; *Sharp M. P.,* Pacta Sunt Servanda, Columbia Law Review, Vol. 41, 1941, <http://heinonline.org/HOL/Page?handle=hein.journals/clr41&div=55&g sent=1& collection=journals> [10.10.2021].

2 *Candelhard R.,* Actual Performance or Compensation for Damages: International Consensus? Anniversary Collection "Sergo Jorbenadze – 70", Tbilisi, 1996, 103 (in Georgian).

ensuring contractual equilibrium, stability of civil circulation and legal certainty.[3] It is considered as transnational principle of private law[4] and milestone of the international trade law.[5]

It is impossible to imagine existence of such a legal system, which does not recognize mutually agreed contractual terms as an individual law acting for parties. The mutual agreement reached lawfully takes place of the law for the parties creating it. For ensuring principle of contract legality out of the principle of non-infringement of the contract there are several exceptions, which are important to be protected as execution of the highest rule of pacta sunt servanda. The contract is legal document which has fundamental purpose to serve countries, nations, civilization, which is considered as vital basis for any society.[6] Fulfillment of the precise contractual obligation must not contradict with this most general aim of contract law, which may cause danger to the private legal value of bona fide implementation of the rights and obligations between participants of civil circulation. In case of dilemma, contradiction between individual contractual interest and function ensuring protective, legal order of civil law, the court is entitled with the power to legitimately interfere into contractual relation.

In contractual relations the emergence of modified terms is a collateral risk of modern civil circulation, in case of which the application of unlimited principle of supremacy of contract results in collapse of principles of contractual equilibrium, fairness, reasonableness, equality and good faith,[7] therefore the principle of *Pacta sunt servanda* exists along with doctrine of *clausula rebus sic standibus*, which provides preservation of binding power in the circumstances of unchanged contract terms.

In the law science it is recognized that modified terms establish two fundamental, basic concepts of force majeure (*vis major* in Roman law) and difficulty to perform (*Hardship*) with the collateral legal outcomes.[8] In particular, hardship to perform entails extreme aggravation of performance of objectively enforceable obligation, which impartially does not exclude possibility of performance and in case of which the first mean of legal protection is adjusting contract to amended

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3 *Puelinckxin A. H.,* Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, 3 Journal of International Arbitration, №2, 1986, 47, <http://tldb.uni-koeln.de/TLDB.html> [10.10.2021].

4 *Goldman B.,* The Applicable Law: General Principles of Law – the Lex Mercatoria: Lew ed., Contemporary Problems in International Arbitration, London, 1986, 125, <http://tldb.uni-koeln.de/TLDB.html> [10.10.2021].

5 *Chengwei L.,* Changed Contract Circumstances, 2nd ed., 2005, <http://www.cisg.law.pace.edu/cisg/biblio/liu5.html> [10.10.2021].

6 *Josserand L.*, Le Contrat Dirige, Recueil Hebdomadaire Dalloz, Paris, 1933, 138, referred in: *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 175.

7 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the Performance of Contract, Mykolas Romeris University, 4 (118), 2009, 198, <https://ojs.mruni.eu/ojs/jurisprudence/article/download/1531/1470> [10.10.2021].

8 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace International Law Review, Vol. 13, Issue 2, 2001, 27, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1214&context=pilr> [10.10.2021]; *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and International Law, in: *Horn N. (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, 16, <http://www.trans-lex.org/create_pdf.php?docid=113700> [10.10.2021].

circumstances. Force majeure is established by the different legal prerequisites, which considers liberation from the performance of obligation as a collateral outcome.[9]

Widening usage of categories of the hardship of performance and force majeure is caused by social-economic changes[10] and globalization or *deglobalization* tendencies of international trade area. Legal categories of hardship and force majeure are enacted after the legal balance defined, determined by the will of parties at the stage of contract stipulation is infringed by unexpected emergence of unpredictable circumstances.[11] Therefore, any legal system provides grounds for excluding liability of debtor with particular features. Force majeure and hardship as ground of temporary or permanent liberation from performing the obligation for the obstacle, which emerged outside the scope of control and risk of debtor, unites and generalizes particularities characteristic to various legal systems, based on which it implies in its concept the necessary systemized catalogue of prerequisites, and therefore, it is considered as **the most general legal principle of contract law**.[12]

The general principle of contract law is used with the meaning of principles of commercial contracts universally recognized on international level. They are considered as an effective mean for interpreting faulted and open norms of national law, as well as terms of the contract and for filling the gap. The abovementioned is clearly confirmed by numerous foreign court decisions.[13]

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9 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, №4, 2007, 483, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

10 *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 174.

11 Ibid.

12 *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, The Netherlands, 2009, 109, With reference: *Magnus U.,* Force Majeure and the CISG, In The International Sale of Goods Revisited, Edited by Sarcevic and Volken, The Hague, 2001, 8; *Kessedjian C.,* Competing Approaches to Force Majeure and Hardship, International Review of Law and Economics, Vol. 25, 2005, 430, <www.cisg.law.pace.edu/cisg/biblio/kessedjian.html> [10.10.2021];
Barry N., Force Majeure and Frustration, American Journal of Comparative Law, Vol. 27, 1979, 231, <http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp27&collection=journals§ion=22&id=245&print=section§ioncount=1&ext=.pdf> [10.10.2021].

13 For instance, UNIDROIT principles of contract was used by International Chamber of Commerce (ICC) for interpreting Dutch law. See Award in ICC Case №8486 (original preserved in German) J.D.I., 1998, 1047-1049, English Translation in Y. B. Com. Arb. 1999, 162-173, UNILEX For English translation see: <http://www.trans-lex.org/create_pdf.php?docid=208486UNILEX> [10.10.2021]; *Berger K. P.,* International Arbitral Practice and the UNIDRUIT Principles of International Commercial Contracts, American Journal of Comparative Law, Vol. 46, 1998, 140, <www.heinonline.org/HOL/Page?handle=hein.journals/amcomp46&id=1&size=2&collection=journals&index=journals/amcomp#150> [10.10.2021]. With regard to using as a mean for interpretation of national law on general contract principles, see: *Mascow D.,* Hardship and Force Majeure, The American Journal of Comparatice Law, Vol. 40, 1992, 657, 665, <http://www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp40&collection=journals§ion=36&id=667&print=section§ioncount=1&ext=.pdf> [10.10.2021]; *Berger C. P.,* International Arbitral Practice and the UNIDRUIT Principles of International Commercial Contracts, The American Journal of Comparative Law, Vol. 46, 1998, 129, 139-140,

Force majeure and hardship of performance apply with different terminological or paradigmatic varieties in legal orders of almost all countries having large legal tradition. Based on the concepts of liability and liberation therefrom, force majeure and hardship were developed as the general contractual principles, which have synthesized in their essence those crucial features and prerequisites, that were considered as major, generalized characteristics for these concepts by the legal systems. Establishment of material legal generalized prerequisites of force majeure and hardship was achieved by unification of the law.[14]

2. Actuality of the Issue for the Judiciary in the View of Global Pandemic

The covid-19 pandemic has been recognized as the darkest period in the existence of mankind, after the second world war.[15] Considering unprecedented negative effect on world economy, national and international, especially long-term contracts,[16] it revived two classical paradigms of the contract law – force majeure and hardship.[17] Both concepts provides such legal regime of performing obligation or excluding performance, which regulates negative outcomes caused by emergence of unpredictable circumstances, especially in the long-term contractual relation.[18] Taking into account its global and unprecedented scales, strict negative impact on international contracts, during the following years or decades Covid-19 will make these two concepts as central issues of judiciary.

In the modern legal area, Covid-19 is considered in the contractual relation as an event causing fracture of economic equilibrium.[19] Therefore numerous countries declared Covid-19 pandemic as force majeure.[20] In February 2020 the Ministry of Economy of France recognized Covid-19 pandemic

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<www.heinonline.org/HOL/PDF?handle=hein.journals/amcomp46&collection=journals§ion=11&id=139&print=section§ioncount=1&ext=.pdf> [10.10.2021].

14 For instance, CISG, UNIDROIT Principles, PECL.

15 Kristalina Georgieva's Participation in the World Health Organization Press Briefing, 3 April 2020, International Monetary Fund, <https://www.imf.org/en/ News/Articles/2020/04/03/tr040320-transcript-kristalina-georgieva-participation-world-health-organization-press-briefing> [10.10.2021].

16 *Marchioro I.*, European Contracts in the COVID 19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/> [10.10.2021].

17 *Weller M. P. et al,* Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung,Neue Juristische Wochenschrift, 2020, 1022.

18 *Lorfing P. A.,* La Renégociation des Contrats Internationaux (Bruxelles: Bruylant, 2011), 28ff [Accaoui Lorfing "La renégociation des contrats internationaux"]; *Harmathy A.,* "Hardship" in UNIDROIT, ed., Eppur si muove: The Age of Uniform Law – Essays in Honour of Michael Joachim Bonell to Celebrate his 70th birthday, Vol. II, Rome, 2016, 1039.

19 *Weller M.P.* et al, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertrags durchführung (2020) Neue Juristische Wochenschrift, 1021.

20 Chinese firms use obscure legal tactics to stem virus losses", The Economist (22 February 2020), <https://www.economist.com/business/2020/02/22/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses> [10.10.2021]; CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts (10 April 2020), China Council for the Promotion of International Trade, <http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html> [10.10.2021]; *Christie K., Han M., Shmatenko L.,* LNG Contract Adjustments in Difficult Times: The Interplay between Force Majeure,

as force majeure event and established that the respective fines would not have been applied to the cases of delay in contractual relations concerning state procurement.[21] Similar statements have been made in other countries.[22] In May 2020 the government of the United Kingdom has called the contract parties to act fairly and responsibly while performing contractual obligations, especially in disputable relations connected to force majeure and hardship, frustration of purpose of the contract.[23] The "Guideline principles on responsible contractual activity in the process of performing or executing those obligations, which were materially affected by the emergency state of Covid-19", defines that the responsible and fair action entails proportionate and rational activities in the context of performance of the obligation or dispute resolution with relation to enforcement, as well as activities which are oriented on protecting health, public and national interests.[24]

In March 2020 the German Bundestag has adopted the act aiming at reducing negative effects of Covid-19 pandemic for the civil, bankruptcy and criminal law proceedings (so called corona package), which was adopted by the Bundestag on 27 March and it entered into force immediately.[25] According to the mentioned act the requirement to refuse the performance of the contract or its adjustment is still evaluated based on contract limitation clauses (namely prior contractual limitation clauses related to force majeure and hardship) or legislative norms. As a rule, pandemic is considered as force majeure circumstance, however if limitation clauses of the contract do not cover all elements of the existing force majeure situation, then the legislative norms are used for interpreting the limitation clauses of the contract.

The Covid package adopted by Germany underlines the condition that even if there is no special preferential package adopted by the state for the subjects of civil relations and no special regulation introduced with regard to the amended terms in contractual relations and issue of inability to perform,

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Change of Circumstances, Hardship, and Price Review Clauses, 18:3 OGEL, Oil, Gas & Energy Law, 2020, 12, www.ogel.org/ article.asp?key=3889 [10.10.2021]; (CCPIT Certificates, the China National Offshore Oil Corporation (CNOOC) and the China National Petroleum Corp (CNPC).

21 Déclaration de M. Bruno Le Maire, ministre de l'économie et des finances, sur l'impact économique de l'épidémie de COVID 19, à Paris le 28 février 2020 (28 February 2020), <https://www.vie-publique.fr/ discours/273763-bruno-le-maire- 28022020-coronavirus> [10.10.2021]; Mesures d'accompagnement des entreprises impactées par le coronavirus (COVID-19), (28 March 2020), Direction générale de la concurrence, de la consommation et de la répression des fraudes, <https://www.economie.gouv.fr/dgccrf/ mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-COVID-19> [10.10.2021].

22 Iraq's Crisis Cell extends curfew, announces additional measures to contain COVID-19 (22 March 2020), Government of Iraq <https://gds.gov.iq/iraqs-crisis-cell-extends-curfew-announces-additional-measures-to-contain-COVID-19/> [10.10.2021] (the Iraqi government issued a similar declaration, qualifying the period of the COVID-19 crisis a force majeure event for all projects and contracts effective from February 20, 2020); Iraq declares COVID-19 a force majeure for all contracts (1 April 2020), Offshore Technology <https://www.offshore-technology.com/comment/iraq-COVID-19-force-majeure-contracts/> [10.10.2021] (The declaration affected projects worth approximately 291 billion USD).

23 UK Cabinet Office, Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the COVID-19 Emergency (7 May 2020) at para 15 (c), GOV.UK, < [10.10.2021].

24 Ibid.

25 <https://www.klgates.com/COVID-19-German-Act-to-Mitigate-the-Consequences-of-the-Pandemic-03-30-2020> [10.10.2021].

the protective mechanisms for parties is still available and is based on respective normative categories of the German Civil Code (hereinafter – BGB) in the framework of legal regimes of inability to perform and adjust the contract (BGB paragraphs 274 and 313).

The boundary qualifying hardship to perform from the force majeure[26] mainly is displayed by the resource of feasibility with the modified content of performance.[27] In case of hardship the contract may still have resource to be performed in extra term, despite the fundamental, uncontrollable swings, which are faced by contractual relation with amended conditions.[28]

Establishing qualifying boundary for concepts of inability or hardship to perform because of the Covid-19 depends on whether there is an objective, reasonable possibility, even in the modified content, to save contractual relation.[29] In the conditions of Covid-19 it appeared to be more flexible to use the hardship clauses[30] or the standard of protection envisaged by the law regarding, to use the legal regime.[31] The category of absolute inability prescribed under the Roman law, in the view of practical application, was restricted and the purpose to rescue contract on the basis of hardship acquired higher importance.[32]

Both legal mechanisms of hardship and force majeure regulate legal outcomes of modified circumstances, however in certain legal systems the peculiarity of establishment of these categories and frames of their application depend on the scale of exemption from the principle of sanctity of contracts determined by each legal order. Even though Covid-19, in most cases, founds legal category of force majeure, but considering ability to perform the contract, it is possible that the objective possibility for saving contract is still available. Inability to consider in advance the modified conditions and avoid them (inability to decrease or eradicate the event, as well as outcomes), as a common qualifying feature for hardship and force majeure, must be discussed in the view of uniqueness and gravity of Covid-19 crisis. Despite the general forecasts made years ago based on

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26 Tsakiroglou & Co. Ltd. v. Noblee Thörl GmbH [1962] A.C. 93.

27 Pascale Accaoui Lorfing, "L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé" (2018), 5 IBLJ, 450.

28 Tsakiroglou & Co. Ltd. v. Noblee Thörl GmbH [1962] A.C. 9; *Joskow P. L.,* Commercial Impossibility, The Uranium Market and the Westinghouse Case, 6 J. Legal Stud., 1977, 119.

29 *Marc-Philippe Weller et al*, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1022, citied in: *Berger K. P. Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 115.

30 International Chamber of Commerce (ICC) has changed the Force Majeure and a Hardship Clauses adopted in 2003 in March 2020, for adaptation to COVID-19, <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> [10.10.2021].

31 *Marchioro I.,* European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/> [10.10.2021].

32 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, 2008, 39 VUWLR, 724. For comparative analysis of hardship see: *Zweigert K., Kötz H.*, II Introduction to Comparative Law, 1977, 13-14.

medical examinations, such catastrophic scenario, which caused the "world viral crisis",[33] appeared to be unpredictable occasion even for cautious entrepreneurs. If years ago, the legal protection mechanisms of hardship and force majeure were considered as protection mechanisms to be used exclusively, nowadays they will become regular means to be used for the purpose to ensure fair distribution among parties of negative outcomes resulting from impacts of pandemic on the global economy.[34]

3. Scale of Recognition of the Hardship Doctrine in the Continental and Anglo-American Legal Order

In the continental legal systems application of the hardship concept has developed in two directions.[35] According to one approach, the category of hardship emerges in case when fulfillment of the obligation becomes economically distressing [the contractual balance is demolished in the economical aspect][36] by virtue of changed circumstances. In such legal orders, in case of uniform laws, the hardship is also referred as "economic force majeure".[37] According to second, broader approach, for hardship it is necessary to have in place the interference with the basis of the contract or its essential change to the extent in case of which performance of obligation with the primary content is unjustified, unreasonable and contradicting to the principles of contract law.[38] Mostly hardship in an economic, financial event, which causes increase of the cost of performance for one of the parties,[39] but the area of the hardship is not framed only by economic distress in legal orders of second category. The hardship is used as a ground for temporary or permanent, complete or partial exclusion of fulfillment the obligation pursuant to the primary terms.

Jurisdictions of continental law, such as: systems of Germany, France, Greece, Austria, Italy, Poland, Hungary, Portugal, Netherlands, Switzerland, Russia, Argentina, Brazil, Peru, Colombia, Japan and Egypt, have regulated the issue of hardship by normative act, or, at least, have developed in the framework of judiciary.[40]

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[33] *Marc-Philippe Weller et al*, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1022.

[34] *Berger K. P., Daniel Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 130.

[35] *Fontaine M.,* The Evolution of the Rules on Hardship, in *Bortolotti F. Ufot D. (eds.),* Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, par. 12.

[36] For instance, Romania and France.

[37] *Lookofsky J.,* Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's "Competing Approaches to Force Majeure and Hardship, Reproduced from International Review of Law and Economics, Vol. 25, 2005, 438, <www.cisg.law.pace.edu/cisg/biblio/lookofsky.html> [10.10.2021].

[38] German and Georgian model.

[39] *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 176.

[40] *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, Alphen upon Rhine: Kluwer Law International, 2009, 402. ICC Case №16369, 2011, 39 YB Comm Arb 169 (2014), 202.

Continental law countries, and especially German Law represents a system significantly inclined towards friendly adaptation of the contract, which naturally is characteristic to the legal order oriented towards fulfillment of the obligation. In the legal system oriented towards performance, the primacy of fulfillment and therefore the contractual interest is depicted in the primacy of fundamental infringement, and in Georgia in the primacy of obligation to additional performance, which is at the top in the hierarchy of rights to secondary demand,[41] and exit from contract is used as an extreme mechanism of legal protection – *ultima ratio*. The purpose is one – protection of the supremacy of contract, as for the ensuring legal constructions – various.

According to German doctrine, the breach is fundamental when it cannot be corrected in additional period (*nachfrist period*). With relation to the right to reject contract, the primacy of interest in performance is portrayed by the concept of fundamental breach in the Georgian law.[42] The primacy of performance of the obligation results in normative support towards the contract adaptation regime in the continental law countries.

The doctrine of the German law (*interference with the basis of the contract* – wide paradigm of hardship) has influenced on the normative approach towards the issue in Scandinavian countries (Norway, Denmark, Sweden, Finland), as well as in Japan, Greece and Brazil.[43] However, the approaches of legal orders differs in terms of the scale of intervention from the court.[44] Certain legal orders considered termination of the contract (in circumstances of satisfying prerequisites of changed terms) as only legal outcome, excluding the outcome of adaptation. However, such approach contradicts with the essence of existence of the legal category of hardship and the main purpose – to rescue the contract, which is recognized in the theory and practice of the international contract law. The mentioned provides that in case of hardship based on the change in terms, such outcome must be found, which will avoid arbitrary, immature termination of the contract by one of the parties, and termination of the contract by the court may be used as outcome for the claim of adjusting contract as the legal protection mechanism to be applied in extreme case (*ultima ratio*) after establishing objective impossibility of adaptation.[45]

In the common law countries, the doctrines of frustration of contract (English), commercial impracticability (UCC – American) are applicable, however not to such an extent as they are developed in the continental legal systems. The mentioned legislative paradigms are oriented on

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41 *Merryman J. H., Clark D. S., Haley J. O.,* Comparative Law: Historical Development if the Civil Law Tradition in Europe, Latin America, and East Asia, LexisNexis, San Francisco, 2010, 139.

42 *Chitashvili N.,* Concept of Fundamental Breach in Comparative Perspective and its Impact on Georgian Law, Polish-Georgian Law Review, Faculty of Law and Administration University of Warmia and Mazury in Olsztyn Faculty of Law Ivane Javakhishvili Tbilisi State University, No.2' 16, 49-93.

43 *Lando O., Hugh Beale H.,* The Principles of European Contract Law, Combined & Revised, Boston: Kluwer Law International, 1999, 328.

44 *Lorfing P. A.,* Adaptation of Contracts by Arbitrators in: *Bortolotti F., Ufot D. (eds.),* Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, 41, 43 [Accaoui Lorfing, "Adaptation of Contracts by Arbitrators"].

45 Regarding the principle "ut res magis valeat quam pereat" see: Force Majeure TransLex-Principle IV 5.3 and Commentary №2, TransLex Law Research, <www.trans-lex.org/925000> [10.10.2021]; Association of service industry firms v Service industry firm, Award of 27 May 1991, 17 YB Comm Arb 11, 1992, 15.

ensuring the completion of the contract and liberation from the liability to fulfill the obligation and it is not expressed by granting to the judge the power to adapt the contract.[46] One of the numerous dogmatic reasons of the abovementioned is the fact that common law systems have rejected the classical doctrine of amended terms developed by the influence of canon law (*clausula rebus sic standibus*). In the continental law system for transforming contract into individual law for parties, for its legal force, it is necessary to have the will to be self-bound by contract terms. If the purpose, basis for which the parties expressed the will to be bound does not exist anymore, the mentioned justifies excuse of modification/exclusion of performance for legal systems and it gives rise to recognition of concepts of hardship and force majeure.

The approach of English law, which does not acknowledge the power of courts to adjust the contract to modified terms,[47] is criticized in the doctrine in the context of constantly changing commercial reality.[48] American law recognizes application of the doctrine of commercial impracticability in case of the extremely complicated contractual obligations caused by dramatic and unexpected change of terms, however the power of American courts is not wide with regard to exclusion from contractual liability completely or partially.[49]

4. The Doctrine of Interference with the Basis of the Transaction – from the Depths of Judiciary to the Codification by Civil Legislation

In German law on the stage of creating civil legislation (1900) there was a huge contradiction against integration of the principle *clausula rebus sic standibus* with the argument of endangering legal certainty and stability. The will theory known for Canon law appeared to be incompatible with *clausula*[50] theory. Despite the resistance to the adoption of adjustment to modified terms, in the end of 19th century and beginning of the 20th century the controversial discussion on necessity to acknowledge the doctrine was activated among German dogmatists.[51] Before the civil legislation entered into force, German scientist Windscheid stated that "if the Canon law doctrine about modified

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[46] *Marchioro I.,* European Contracts in the COVID-19 age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation/> [10.10.2021].

[47] *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 98-103.

[48] *Rogers A.,* Frustration and Estoppel in: *McKendrick E. (ed.),* Force Majeure and Frustration of Contract, 2ed, London: Lloyd's of London Press, 1995, 245.

[49] *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 103-107.

[50] *Schwarzenberger G.*, A Manual of International Law, 169, 5th ed. 1967; *Verdross A., Simma B.,* Universelles Völkerrecht, 1976, 418-424; *Brownlie I.,* Principles of Public International Law, 2nd ed., 1973, 599.

[51] *Köbler R.,* Die „clausula rebus sic stantibus" als allgemeiner Rechtsgrundsatz, Tübingen: Mohr Siebeck, 1991, 90, Further reference: *Endemann* (1899), *Dernburg* (1899*), Bindewald* (1901) *a Artur Kaufmann* (1907).

terms is thrown away from the door, it will always return from the window."[52] In German law the dramatic hyperinflation after the first world war was considered as the "return from the window" of clausula doctrine, which was followed by the introduction of new currency (*Rentenmark*) for overcoming hyperinflation in 1923. The mentioned reality caused numerous dilemmas for the German court.[53] In 1922, in one of the first cases on adjusting contract to modified terms,[54] the imperial court relied on the doctrine of "interference with the basis of the transaction" (*Wegfall der Geschäftsgrundlage*) developed by Ortmann several years before and on the normative provision of the principle of good faith (BGB par. 242), which in essence comes closer to the substance of the changed circumstances' theory of Canon law. The principle of good faith has justified establishment of the doctrine of changed circumstances in German law, under direct legislative support.[55] Hence, even though *clausula* principle could not enter into German legislation directly ("from the door"), but by force of the principle of good faith ("from the window") it indirectly settled in the judicial law.[56] Therefore, the institute of adjusting contract to changed circumstances is the firstborn of judicial law in German legal system, which emerged from the depth of judiciary and then has been regulated in the legislation.[57]

According to the doctrine of the basis of transaction, any contract is based on grounds agreed by the parties, often not on directly expressed, but on implied terms. These implied terms represent the essence, basis, notion of the contract, on which the agreement between parties is based. If the mentioned basis of transaction is fundamentally interfered, then the contract shall be modified or

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52 *Windscheid B.,* Die Voraussetzung (1892) 78 AcP, 197; *Windscheid B.,* Die Lehre des römischen Rechts von der Voraussetzung (Düsseldorf: Buddeus, 1850).

53 For this issue see: *Rheinstein,* The Struggle between Equity and Stability in the Law of Post-War Germany, 3 U. Pitt. L. Rev. 91-103 (1936/37); *Horn N., Kötz H., Leser H.G.*, German Private and Commercial Law: An Introduction, 1982, 141.

54 Reichsgericht [RG] [Imperial Court], 3 February 1922, 103 RGZ 328 at 332 (Germany).

55 The preference of analogy to law does not secure us from such gaps when the court is obliged to apply analogy of law and regulate relation "in accordance to general principles of law, fairness, good faith and moral requirements" (CCG, Article 5 III), Often the decision made in this basis, despite that it is not limited neither generally nor formally, it takes even more importance than ordinary precedent. This is caused by the circumstances that it does not have exact analogy in the legislation and there is no norm regulating such relations. Therefore, the mentioned ratio descidendi, deriving from its persuasive authority, factually applies and its consideration is done voluntarily by other courts with the principle of cetera parem. After long application (consetudo) this decision changes its initial form and received public recognition (opinion necesitatis), as a fair general rule of conduct, by which it becomes a usual norm. The custom has normative ground of operation (opinion iuris) and pretension to apply. By this way the principle of good faith evolved in the German judicial practice and based on it a lot of norms appeared, which become findings of modern law of obligations. The described process portrays such episode of judicial activity, when area not organized based on the principle of good faith are regulated and legislative gaps are being filled in (function of filling in the law). See *Vashakidze G.,* Good Faith according to the Civil Code of Georgia – Abstraction or Acting Law, Georgian Law Review, 10/2007-1, 44 (in Georgian).

56 *Berger K. P., Daniel Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 122.

57 In the European Law the changed circumstances are mostly determined in the judicial practice, by which the civil code provisions are revived. See: *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J. (eds.),* Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 400 (in Georgian).

terminated. The German doctrine of hardship – interference with the basis of transaction covers mechanisms of adjusting or terminating contract in the Covid-19 scenario as well,[58] when without gault of any of the parties the basis of contract is dispelled.[59]

The fundamental reform of the law of contract in Germany was finalized on 26 November of 2001 by adoption of the law on modernization of contract law,[60] which entered into force on 1st January 2002, after 102 years after adoption of BGB.[61] The reform was caused by requirement of implementation of the EU law and the outcomes of its conceptual improvement was determined by the strive for uniform law. The reform touched upon the hardship, as well as regulation of the concepts of impossibility of performance,[62] deriving from the purpose of legislator – to codify institutes developed by the court independently from code.[63] Therefore, in the paragraph 313 of BGB the firstborn of the German judicial law was portrayed – the doctrine of the interference with the basis of the transaction (Störung der Geschäftsgrundlage).[64]

4.1. Substantive Legal Preconditions for the Interference with the Basis of the Transaction

The concept of the collapse of the basis of transaction prescribed under the new normative provision of BGB (paragraph 313) entails change in the objective grounds of the contract emerged after the conclusion of the agreement, extreme hardship, which results in failure of correlation of contractual obligations, equivalence and contractual balance. The change must be so essential that in case of having considered it in advance, parties would not have concluded the contract, or would have concluded with completely different content.

In the concept of collapse of the basis of transaction three elements may be considered: (1) factual, which provides that the essential conditions considered by the contractors or any of them as the basis of contract are understood, implied from then on, at the stage of conclusion of the contract. If these conditions were not supposed by the parties (or party), the contract would not have been concluded, or it would have been concluded with completely different content. (2) hypothetic element – implied conditions considered as basis of the contract by parties/party would definitely become

[58] *Weller M. P. et al*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift 1017, 1021 (for German law); *Wagner E. et al,* "Auswirkungen von COVID-19 auf Lieferverträge", Betriebs-Berater, 2020, 846.

[59] *Berger K.P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 122.

[60] Gesetz zur Modernisierung des Sculdrechts, Vom 26.11.2001, verkündet in Jahrgang 2001 Nr. 61 vom 29.11.2001, <http://www.rechtliches.de/info_Gesetz_zur_Modernisierung_des_Schuldrechts.html> [10.10.2021].

[61] Regarding the reform see: *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, 2002, 1-5, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html> [10.10.2021].

[62] *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, №4, 2007, 486, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

[63] *Markesinis S. B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 383.

[64] *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 79.

integral part of the contract in case of the respective desire of one of the parties. (3) normative element – second party would have definitely agreed to insert the mentioned conditions into the contract. The normative element is the most important criterion, as far as it creates basis of the contract for both parties.[65] Therefore, when evaluating the basis of the contract the following preconditions must be taken into account: 1. Expectations of one of the parties 2. Were expressed at the stage of conclusion of the contract 3. Expectations were perceived by the second party 4. and the common contractual interest in the relation was based on this expectation.

Hence, the normative provision of German law does not apply only to economic hardship of performance, as it is stipulated in certain legal orders and uniform legal instruments of continental law. The concept of interreference with the basis of transaction is remarkably wide in accordance with the Ortmann doctrine and German judicial practice,[66] as it exceeds the notion of economic force majeure. In addition to the changes of terms emerged after conclusion of the contract, by virtue of which the balance, proportionality collapses between reciprocal rights and obligations of the parties it also entails the occasion when substantial visions of parties, which became the basis for concluding contracts, appeared to be incorrect, i.e. parties were wrong in evaluation, perception of those conditions, which formed the basis of contract (mistake in the basis of transaction).

In the systemic point of view, the doctrine of interference with the basis of transaction often is considered in the frames of the breach of obligation (*Leistungsstörung*). Paragraph 313 of BGB, which is expression of the principle of good faith, was not placed with the paragraph 242 prescribing the principle of good faith, as it was anticipated, but in the book II on the Law of Obligations – in the part of contractual obligations, hence its provisions apply equally to all contractual obligations.

Moreover, paragraph 313 of BGB has strictly assisting significance.[67] First of all, contractual provisions are interpreted, the provisions regulating mistake, hardship, faulty performance and if these mechanisms do not ensure solution of the issue, then the judge may interpret the contract based on the principle of good faith (§§157, 242). Therefore, paragraph 313 of BGB is applied when all the means of legal protection are exhausted.[68]

4.2. Adjustment and Termination of the Contract

After confirmation of existence of the substantial legal preconditions for the interreference with the basis of transaction, the primary and prioritized mean and outcome of legal protection is the

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[65] *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, №4, 2007, 489, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004> [10.10.2021].

[66] *Fontaine M.,* The Evolution of the Rules on Hardship, in: *Bortolotti F., Ufot D. (eds.),* Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, par. 12.

[67] *Hondius E. H., Grigoleit H. Ch.,* Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 55.

[68] *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, Eur. Rev. of Prv. L., Vol. 15, №4, 2007, 490-491, <http://papers.ssrn.com/sol3/papers.cfm? abstract_id= 1154004> [10.10.2021].

adjustment of the contract by the court. BGB provides the possibility to adjust the contract to changed circumstances, if, considering the principle of good faith, it is unreasonable to require from the party to perform obligation in initial, unchanged form. The issue of binding force of the contract must be decided in light of the contractual risk and factual circumstances.[69] In this case the principles of binding force and good faith are confronting one another,[70] which must be determined based on the criterion of reasonableness.

"The area of application of the principle of good faith is mainly caused by occasions, where the requirement formally complies with the acting substantial law, but its enforcement is unfair in certain cases. It is inadmissible that the right deriving from acting law or outcome of its realization is unfair. Consequently, "reservation of the good faith will resist against the execution of requirement deriving from such right, "which in given case has only the form of the right and not the content."[71]

When analyzing the character and gravity of the circumstances obstructing performance, the court may ascertain that it the breach of obligation is based on hardship, and not interference with the basis of transaction. The fundamental reform touched upon the issues of regulating hardship. It may be expressed in the form of absolute, subjective or objective, as well as moral relative and economic impossibility to perform.[72]

Based on the paragraph 275 of BGB it is possible to establish hardship in contracts, which provides delivery of services or goods.[73] For example hardship may be established with absolute term

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69 Paragraph 313 of BGB prescribes:
(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

70 *Hesselink M.,* The Concept of Good Faith in: *Hartkamp A.S., Hesselink M., Hondius E. H., du Perron E., Joustra C., Veldman M. (eds.),* Towards a European Civil Code, 3rd ed., Kluwer Law International, 2004, 471-498; *Ebke W. F., Steinhauter B. M.,* The Doctrine of Good Faith in German Contract Law, in: *Beatson J., Friedman D. (eds.),* Good Faith and Fault in Contract Law, Oxford University Press, 1995, 171-180; *Houh E.,* The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel? Utah L. Rev., Vol. 2005, U. of Cincinnati Public Law Research Paper, №04-12, 2005, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622982##> [10.10.2021].

71 „...im gegebenen Falle also nur die Form, nicht das Wesen des Rechtes hätte". *Dernburg*, Pandekten, Band I, 1: Allgemeiner Theil, 1900, § 138, 320, Referred in: *Kereselidze D.,* Most General Systemic Concepts of Private Law, Tbilisi, 2009, 8 (in Georgian).

72 In details see *Chitashvili N.*, Impact of Changed Circumstances on the Performance of Obligation and Potential Secondary Rights of the Parties, Dissertation, Ivane Javakhishvili Tbilisi State University, 2015, 68-76 (in Georgian).

73 On the exclusion of principle faulty responsibility in financial obligations ("one has to have money") ("Geld hat man zu haben") see BGH, Judgment, February 4, 2015, №VIII ZR 175/14.

(*absolutes Fixgeschäft*) in precise relationship, where delay dispels the contractual interest of performance. The outcome of qualification of hardship may be complete, as well as temporary exclusion from the performance of obligation, i.e. suspending, postponing performance of the obligation (as well as counter/substitute performance[74]) before the eradication of the circumstances causing hardship. In case creditor loses interest in performance during extra term, he/she obtains right to exit the contract.[75] As for the analysis of the right for restitution of damages, even though it is evaluated independently, as a rule in case of unfaulty hardship (force majeure caused by pandemic) (with the reservation that it is not caused by the fault of debtor[76]), it excludes the precondition of fault and therefore, requirement of damages.

Force majeure in German law does not have a normative regulatory support,[77] thus the claim of the party regarding liberation from performance of obligation *("impossibility" – "Unmöglichkeit")* or adjustment *("discontinuation or adjustment of the basis of the transaction"*) must be based on normative prerequisites of paragraphs 275 and 313 of BGB *("Wegfall der Geschäftsgrundlage").* When determining boundary between these two categories, according the fact which concept will exist during the individual analysis of particular dispute (interreference with the basis of transaction or hardship), the respective tools of protection are applied – temporary suspension of performance, temporary or permanent liberation from the fulfillment of obligation, adjustment of contractual obligation to changed circumstances, termination of the contract.

The legal system of Germany is a model essentially oriented on adaptation. If the normative prerequisites of paragraph 313 are fulfilled and there is reasonable alternative of adaptation, party may require from other party adaptation of the contract through court proceedings. The nature of German law inclined towards adjustment of contract remains special load in the context of Covid-19 as well, as deriving from the similar nature of pandemic as of the war, the contractual risk of negative (unfaulty) outcomes coming therefrom, in accordance with the principle of fairness, it is impossible to be imposed only on the one party of the contract.[78] The fact that the voluntary agreement on adaptation of contact cannot be reached between parties, does not hinder the court for implementing the

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[74] BGB 326 (1) If debtor in accordance to paragraph 275 part 3 can refuse to perform, then the right to reciprocal satisfaction is excluded; In case of partial performance paragraph 441, part 3 is applied.

[75] Paragraph 326 (5) If debtor according to paragraph 275 part 3 can refuse performance, then creditor can reject the contract; with regard to exit from the contract paragraph 323 is used, with the condition that determination of term is excessive.

[76] In case of neglecting obligation to notify regarding the prior consideration, avoidance based on anticipatory breach (CCG, 405 IV) etc.

[77] However, German court uses force majeure as general contractual principle and interprets categories of force majeure with generalized signs prescribed in internal legal order. For instance, in the Decision (BGH, Judgment May 16, 2017, №X ZR 142/15), which was related to the adjustment of contract of Air transport, the Federal Court of Justice of Germany ("Bundesgerichtshof" — "BGH") established, that force majeure is the event existing outside the control, which cannot be avoided by special circumspection, that reasonably may be requested by other party, which also is not related to operative area of organization of air tour, as well as area of personal control of passenger."

[78] *Marc-Philippe Weller et al*, Virulente Leistungsstörungen — Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1021.

adaptation.[79] In case of not getting consent on adjustment of the contract from other party, the part applies to the court with the query of adjusting the contract. Thus, the court will decide on terminating the contract if the adjustment of the contract is illegal, impracticable or unreasonable for second party.[80]

According to the compromise reached between the German legal doctrine and judicial law, despite the wide spectrum of application of paragraph 313, it is still exceptional and assisting legal protection mechanisms for parties[81] ensuring contractual equality, public order and the principle of exercising rights in good faith within the framework of civil circulation. Application of the concept of hardship must be still done carefully and within moderate limit, so that the mentioned mechanism does not cause temptation in parties to run away and avoid performance of contractual obligations. Hence, the doctrine of interference with the basis of transaction remain connected to its historic ancestor – the principle of good faith, from which the mentioned normative category has been born.

The doctrine of interference with the basis of transaction may be applied as mean of legal protection in contractual relation only in favor of parties acting in good faith. Use of the doctrine of interference with the basis of transaction remains restricted with the reasonable limits of legal certainty and obligation to fulfill the contractual obligation. Therefore, application of this mechanism for liberation from contractual responsibility must be done with same caution as the function correcting and terminating the principle of good faith in contract law.

5. French Doctrine – *Théorie de l'imprévision*

The historic path of French law from rejection of the doctrine of changed circumstances was ended in 2016 by its codification. Notwithstanding lengthy resistance, in condition of constantly changing civil circulation, the French legal order has come to legislative recognition of the *théorie de l'imprévision* doctrine.

Before 2016 French law completely rejected the *théorie de l'imprévision,* because the Canon law doctrine on changed circumstances could not find place in the Code of Napoleon. In 1876 the Cassation Court of France in the most important decision for French law[82] has strictly criticized *l'imprévision* theory. Based on the binding force of contract (article 1134 of the French Civil Code) the Court rejected the claim of adapting amount of fee defined between parties in 1567 and stated that, despite the high necessity for adaptation, the Court cannot implement adaptation without respective normative provision and in condition of the absence of legislative support.[83]

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[79] BGH, 30 Sept 2011, NJW 2012, 373.

[80] *Christian Grüneberg* in *Palandt*: Bürgerliches Gesetzbuch, 79th ed., Munich: C.H. Beck, 2020, at § 313, par. 42.

[81] *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 124.

[82] Cass civ, 6 Mars 1876, Canal de Craponne [1876] D 1876 I 193 [Craponne].

[83] *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 118.

The mentioned approach for years became the subject of criticism from dogmatists,[84] however the Cassation Court remained on its position. In the view of courts, admissibility of adaptation would have encouraged deviation from the contractual obligation by the parties, and giving discretion of adapting contract to the court would have increased the danger of collapse of legal stability.[85]

With the influence of the mentioned legislative policy and normative reality, parties of the commercial relation ran away from strict judicial or legislative reality by using mechanism of arbitration, as well as by reinforcement of contractual reservations of adaptation and negotiation. Only in 1916 the Court[86] made a precedent of adapting the contracts and admitted adjustment of contract to changed circumstances.[87] The mentioned fact was justified by the public interest of preserving cycle of service in the public sphere, however the court did not give the possibility of adaptation directly to the parties.

In 2016 the legislative reform took place in the French contract law,[88] which changed the conceptual approach developed by the case *Canal de Craponne.*[89] Having analyzed that French law was lagging behind from the major development course of the European law with regard to regulating the issue if changed circumstances,[90] article 1195 reflecting théorie de l'imprévision was added to the French Civil Code: if the changed circumstances, which were impossible to be considered at the stage of concluding contract, extremely complicated the performance of contract for the party who has not taken the contractual risk of appearance of such conditions, then he/she may apply to other party with the query to review the contract, initiate new contractual negotiations. During the negotiation process, the debtor still has obligation to perform the obligation under the agreed terms.

In case of refusal from the second party or failure to successfully conclude negotiation, parties have right to terminate contract by mutual agreement from the determined period and under the agreed terms. Parties have right to jointly apply to the court with the query of adaptation of the contract. In case of failure to agree in the court within a reasonable term, the court may adapt contract terms by the request of one of the parties or terminate the contract from the determined (by the court) period and under determined (by the court) terms.

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[84] *Berger K. P. Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, with further reference.

[85] Ibid, 118.

[86] CE, 30 Mar 1916, Compagnie générale d'éclairage de Bordeaux, [1916], <https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-30-mars-1916-compagnie-generale-d-eclairage-de-bordeaux> [10.10.2021].

[87] The mentioned has given rise to establishment of similar provisions in Egypt, Algeria, Iraq, United Arab Emirates, Sudan. See *Horn N.,* Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn N. (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

[88] Ordonnance of 10 February, 2016.

[89] Craponne case, Cass. D.P. 1876 I. 197.

[90] Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations", Légifrance, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539&categorieLien=id> [10.10.2021].

From the mentioned provisions it is obvious that the French Civil Code defines extreme, unusual hardship of performance as a prerequisite, which differs from the model of German and Dutch law, for which the main thing is the interreference with the basis of transaction.[91] Specific complication of performance exceeds such change of price, that is characteristic and may be reasonable for long-term contractual relations. In this case one party must face extraordinary, unusually strict and unpredictable increase of performance expenses and such extreme decrease of the benefit which he/she expected to receive consequent to the performance of other party (decrease of interest of receiving performance). Therefore, article 1195 does not apply if the debtor took the mentioned risk by direct contractual reservation or entered into the speculative contract bearing high risk.[92] Thus, is the contract party could not take the risk of emergence of Covid-19 by contractual reservation, the latter must be qualified as reservation on hardship and not force majeure, and article 1195 must apply.[93] In France the court fulfills request for adaptation in case when the negotiation between parties conducted in good faith ends without result and one of the parties applies the court with the query to adjust the contract.

The newest approach of France is amazing and innovative,[94] as during decades the authority of administrative court in terms of adaptation of administrative contracts was implemented within a very limited framework. According to new regulation the court is given a wide discretionary power only after the parties are not able to reach consensus on the terms of adjustment through negotiations performed in good faith.

It must be noted that in French law parties have right to exclude application of article 1195 in their contractual relation. In particular, they may reinforce that they will not apply the court with the query to adjust contract to changed circumstances. If the mentioned is considered by the contractual reservation clause, the power of court in terms of adaptation of contract cannot be exercised.[95]

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91 *Fontaine M.,* The Evolution of the Rules on Hardship, in: *Bortolotti F., Ufot D. (eds.)*, Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World, Alphen upon Rhine: Kluwer Law International, 2018, para. 39.

92 *Pascale Accaoui Lorfing*, L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé (2018), 5 IBLJ, 452-453, referred in: *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 119; *Brunner Ch.,* Force Majewe and Hardship Under General Confract Principles: Exemption of Non-Performance in International Arbitration, Kluwcr Law Jnterua-tional, The Hague, 2009, 220; *Treitel G.,* Frustration and Force Majeure, 2nd ed., Sweet & Maxwell, London, 2004, 455; CISG AC Opinion №7 Exemption of Liability for Damages Under Article 79 of the CJSG (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Opinion 3.1 [CISG AC Opinion №7], par.39.

93 *Heinich J.,* L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision, 2020, 614, referred in : *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 119.

94 *Lorfing P. A.,* L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit compare, 2018, 5 IBLJ, 458, referred in: *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 119.

95 *Heinich J.,* L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision, (2020) Recueil Dalloz, 614.

The French[96] model in relation to the issue of hardship was developed under the influence of UNIDROIT principles of International Commercial Contracts (PICC).[97] In UNIDROIT principles the purpose of hardship mechanism is restoration of economic balance of real contract, continuing performance of which, with the initial content, will significantly damage one of the parties.[98] The concept of hardship reinforced by the UNIDROIT principles is connected to existence of the following prerequisites: a) the balance of contract is essentially, fundamentally collapsed because of the increase of performance burden or decrease of contract performance value[99] b) circumstances emerged or became known to the party after conclusion of the contract c) circumstances could not have been considered by the injured party, at the stage of predictable contract conclusion d) circumstance are out of injured party's control e) injured party have not taken the risk of emergence of such circumstances (article 6.2.2).

Hence, French law has combined generalized signs recognized by the uniform legal instrument (PICC) in the substantial composition of *théorie de l'imprévision* doctrine. This partially was due to the fact that uniform law is free from national regulatory barriers of particular countries and is used as source for interpreting or codifying categories prescribed in national legislation.

6. Reform of the Romanian Civil Code (2009) with an Orientation Towards the UNIDROIT Principles of International Commercial Contracts

Before adoption of the new civil code of Romania,[100] the Romanian judicial practice recognized legal mechanism only for the review, evaluation of lease and rent agreements [deriving from its long-term nature], and the *imprévision* doctrine is established by the new Civil Code and is based on Romanian principle *omnis conventio intellegitur rebus sic stantibus* [contract terms are acting in case of unchanged conditions].

According to article 1271 of the Romanian Civil Code, 1. the party is bound by obligation to perform contract even in case when this performance gets extremely complicated due to the increase of performance expenses or decrease of performance value. 2. However, if the performance of contract is complicated due to unusual/exceptional changes of circumstances and performance of the contract with unchanged terms causes collapse of the principle of equity, the court may establish: a) adaptation of the contract, by which the damage or benefit caused by changed circumstances will be equally distributed among parties. b) termination of the contract in the period and under the terms determined

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[96] Also, Dutch model.

[97] ICC Case № 8468, 24 YB Comm Arb 162 (1999) 167.

[98] *Berger K. P., Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 127.

[99] Regarding precondition of strict disbalance of reciprocal performances see *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 175; *Starck B.,* Droit civil. Les Obligations. Paris: Librairies Technique, 1972, 75. The injured maybe one of the parties, or both. See *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, 2008, 39 VUWLR, 715.

[100] New Civil Code of Romania was adopted on 14 July 2009 (287/2009 Official Herald N511), based on which the Civil Code of Romania from 1864 was abolished.

by itself. c) for this to happen it is necessary that the party does not has not taken risk of emergence of such circumstances by direct contractual agreement or reasonably none of the parties may not bear directly or implied the risk of emergence of such circumstances[101] d) the debtor tried to reach the fair and reasonable adaptation by negotiation in good faith and within a reasonable period.

The Romanian Civil Code, alike to French law, has shared the mode of UNIDROIT principles of contract (article 6.2.3.), according to which the most injured party due to changed circumstances is obliged to require in the framework of negotiations adjustment of contract to changed circumstances, which must be performed duly, without delay and with indication to objective grounds for adaptation of the contract. Putting a claim to adapt the contract does not give the right to injured party to exit the contract by itself. In case of disagreement, each party has right to apply to the court, which in case of determining substantial prerequisites for hardship, it suggests two alternative outcomes: it performs adaptation of the contract with the criterion of restoring contractual balance or terminated contract within the period and under terms prescribed by itself.

7. Legal Outcomes of Hardship based on Changed Circumstances

7.1. Adjusting the Contract to Changed Circumstances

Adaptation of the contract, which changes the volume of the performance to be carried out by parties with the vector oriented to restore contractual balance, is the prioritized outcome determined by the legislator during establishment of hardship in relation to termination of the contract.[102] Civil Codes of Italy,[103] France and Netherlands considers adaptation and termination of the contract on parity initials, without giving priority to any of the outcomes.[104] The approaches of German and Greek[105] Civil Codes differ, where adjustment appears to be priority protective mechanism in relation to termination deriving from the existential purpose of hardship – primacy of preservation of the contract (BGB paragraph 313, CC of Greece article 388). In systems oriented on adaptation the primary rule applies regarding what can be preserved from the initial content of the contract, must be preserved in the conditions of adaptation.[106] In Austria (ABGB – Austrian Civil Code) adaptation, as well as the outcome of termination are available, however the latter still is considered as mechanism to be applied in extreme occasion. Despite the primacy of adaptation, the court still treats carefully essential

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[101] *Geamănu R. Gh.,* Hardship Clause in the International Commercial Contracts, Bucharest: Hamangiu, 2007, 23.

[102] *Dumas H. B.,* Les contrats relationnels et la théorie de l'imprévision, Revue internationale de droit économique, №3 (t. XV, 3), 2001, 371, referred in: *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 177.

[103] Articles 1467-1468 of Civil Code of Italy.

[104] *Valk W. L.* in: "Burgerlijk Wetboek", *Krans H. B., Stolker C.J.J.M., , Valk W.L.,* 2017, 3660, referred in: *Marchioro I.,* European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020.

[105] *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to AngloAmerican, German, French and Greek Law, in European Review of Private Law, 2005, II, 142.

[106] *Stathopoulos M.,* Contract Law in Hellas, 1995, par. 265 c.

modification of the contract terms.[107] The possibility of adaptation is determined by the evaluation of lawful balance of parties' interests. Adaptation is impossible when it cannot be mitigated from the perspective of fairness or law.[108]

If at the stage of conclusion of the agreement unpredictable circumstances emerged after conclusion of the contract fundamentally change economical condition of the contract or other circumstances, the principle of binding force of the agreement does not apply anymore and the competent body is entitled, in case of existence of respective contractual reservation, adjust contract to changed circumstances or alternatively, terminate the contract, hence reduce/exclude contractual liability of debtor with the criterion on fairness.[109] Fairness must be conducted with the principle of preserving fair balance with the creditor's interests. By the force of contractual solidarity and principle of due diligence, on the stage of performance of the contract parties are obliged to bring their actions into correspondence with interests of contractors and maximally approximate contractual performance to the conditions and contractual balance envisaged at the stage of conclusion of the contract. By the power of contractual solidarity, parties shall be maximally tolerant with regard to reciprocal interests and needs of contracting parties, which may imply postponing the request of performance, decrease of the debt, etc. When the issue is related to changed circumstances of economic nature, currency exchange rate changed for worse, party shall choose from the mechanisms, prerogatives existing in his/her hands such means, the aim of which will not be sanctioning of the debtor. The doctrine of hardship implies using such legal technique, which in case of changed circumstances will ensure collapsed balance and contractual equality.

In the legal doctrine there are slightly different opinions with regard to the scale of legitimate interference by the judge. Some scholars consider that this must be limited to detailed offer from the creditor, according to diverse opinion, the judge may approve creditor's desire, decrease activity of debtor and interfere actively with the aim to determine quantitative evaluation of decrease.[110] In any case, during impossibility to adapt, claims to exit from/terminate the agreement (in long-term relations) still remain available for injured party.[111] The desire of creditor to review the contract terms,

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[107] *Bollenberger R.* in: *Koziol H., Bydlinski P., Bollenberger R. (eds.),* Kurzkommentar zum ABGB, 2017, para. 901.

[108] *Unberath H.,* BGB § 313, in: BeckOK BGB, *Bamberger H. G., Roth H.,* 2011, par. 33.

[109] *Sitaru D.,* International Commercial Law – Treaty, Bucharest: Acatami, 1996, 77.

[110] Judgment №5922/1991 rendered by the Italian Supreme Court (Corte di Cassazione).

[111] *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, 2008, 39 VUWLR, 724. CISG Articlec 79(5); *Stoll H., Gruber C., in Schlechtriem P., Schwenzer I. (eds.),* Commentary on the UN Convention on the International Safe of Goods, 2 English ed., Oxford University Press, Oxford, 2005, Article 79, par 4.; *Brunner Ch.,* Force Majewe and Hardship Under General Confract Principles: Exemption of Non-Performance in International Arbitration, Kluwcr Law Jnteruational, The Hague, 2009, 366-367; *Honnold J.,* Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations, Kluwer Law and Taxation Publishers, Deventer, Netherlands, 1989, Article 79 par. 435.1; *Magnus U.* in *J von Staudingers* Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Wiener UN-Kauji-echt (CJSG), 15 ed., Sellier, Berlin, 2006, Article 79 par. 55. See also BGB paragraph 313.

must be considered, as for the "termination of the contract remains the core of the disadvantaged party's protection".[112]

Besides, it must be mentioned that precondition for the right to exit from contract (in Georgian law – significant infringement, in other legislations – fundamental infringement), will be in place in most cases of hardship, as complication of the contract implies collapse of the basis of transaction for German, as well as Georgian law.

As for the legal outcomes of hardship,[113] according to numerous legal orders and uniform laws, first of all the vector is directed towards primacy of negotiation between parties. If the negotiation ends without result, the party in entitled to apply to the court with the claim to adapt or terminate the contract. For the purposes of adaptation of the contract the court must take into consideration nature and gravity of hardship. In case of extraordinary circumstances such as pandemic, the court must consider that in case od existence of contractual or implied distribution of force majeure risk in the contract, it is inadmissible to put risk of negative outcomes of pandemic only on one party. In return, negative outcomes of force majeure event and damages must be exchanged.[114] In such case the discretion of the court implies fair distribution of negative outcomes caused by the pandemic among parties.[115]

7.1.1. Limits of Protection of Autonomy of Parties' Will in the Process of Executing Judicial Control

Any interference of the court in the content of contractual relation, may possibly restrict the contract freedom and principle of party autonomy. The issue, whether it is possible to conduct adaptation to changed circumstances against the will of one of the parties and with what extent, is important.[116] Hence, in the process of adaptation of contract to changed circumstances by the court, the principle of party autonomy and necessity to ensure stability of the contract may confront each other.[117]

Principles of good faith, cooperation and flexibility are considered as main grounds for adjustment of the contract to changed circumstances. Adjustment of the contract to changed circumstances by the court implies application of methods of interpretation and filling in gap. Review of contract by the court always entails determination of factual circumstances, as well as aims parties' aims through interpretation, when there is a lacuna in the contract. Therefore, modified contract in

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[112] *Marchioro I.,* European contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020.

[113] UNIDROIT Principles of International Commercial Contracts article 6.2.3.

[114] *Marc-Philippe Weller et al*, Virulente Leistungsstörungen – Auswirkungen der Corona- Krise auf die Vertragsdurchführung (2020) Neue Juristische Wochenschrift, 1021.

[115] UNIDROIT Principles of International Commercial Contracts, 2016, Art 6.2.3, Comment №7.

[116] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 13.

[117] *Faruque A.,* Possible Role of the Arbitration in the Adaptation of Petroleum Contracts by Third Parties, Asian Int'l Arb. J., Vol. 2, 2006, 152, <www.heinonline.org/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22%20Al%20Faruque,%20Abdullah%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search&base=js&all=true> [10.10.2021].

accordance with the changed circumstances must be always expressing the initial contractual balance of the parties.[118] The purpose of the court is that the adapted contract portrays will of parties in new conditions as well.[119] Adjustment of contract by the court, in most cases, causes improvement of the contract terms, if the lawfulness is the guiding principle in the revision process.[120] Adjustment of contract to changed circumstances may be discussed as a type of specific performance, by which the contractual will of parties will be implemented.[121]

Any commercial transaction is based on the balance of reciprocal obligation of parties to the contract.[122] In case of adjusting contract to changed circumstances the quality and outcomes of collapse of the balance of mutual obligations of parties must be evaluated in light of the principle of lawfulness. As far as the principle of lawfulness is the major mechanism for evaluating relations, hence adaptation of the contract does not cause restriction of the principle of freedom of contract, but rather aims at ensuring natural and fair outcomes.[123]

The contract may not be discussed without taking into account surrounding circumstances. Adjusting the contract to significantly changed conditions does not change the will of parties, but in case of changed circumstances it becomes tool for determining the initial intention of parties, their real will. The will of parties at the stage of conclusion of the contract is its performance and adjustment of contract to changed circumstances in the prerequisite for performance of the contract, therefore implementation of the will of parties.

Hence, restoring economic balance of the contract based on the principle of equality is conducted through determination of initial will of parties and their interpretation in light of the changed circumstances.[124]

According to one of the opinions spread in the doctrine of Anglo-American law, the court cannot have right and respective competence to "rewrite the contract"[125] instead of parties.[126] The

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[118] *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 237.

[119] *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol.13, №2, 2005, 111, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

[120] *Kull A.,* Mistake, Frustration, and the Windfall Principle of Contract Remedies, Hastings L. J., Vol. 43, 1991-1992, 38.

[121] *Hillman R. A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, Duke L.J., 1987, 27, referred in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 242.

[122] ICC Arbitration Case №2291, 1976 Lunet 989 (1976).

[123] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 22.

[124] *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol.13, №2, 2005, 111, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

mentioned would have restricted the freedom of contract.[127] However adjusting contract to changed circumstances by the court does not restrict the autonomy of parties, as far as parties cannot have shown their will on such events and regulation of their outcomes, which reasonably could not have been taken into consideration on the stage of conclusion of contract. Therefore, regulation of changed circumstances exceeds the limits of content of the contract and thus, it is possible to trust court, as third objective party.

Consequently, in case of filling in the contract lacuna by the court, the party autonomy is infringed, as in case of lacuna there is no agreement between parties on certain important conditions, which would act in case of changed circumstances. The mentioned may be considered as implied consent of parties and the court adjust the contract to changed circumstances instead of them.[128] As far as parties have not expressed the initial will on the extent of action and responsibility in case of emergence of changed circumstances, the adaptation of contract is made by judge through filling in the gap and interpreting the will of parties in the terms of changed circumstances.

It is a legal axioma that the court cannot have authority to invent essentially new contract terms instead of parties.[129] However, if the body executing justice has not legitimacy to adapt the contract, the will take away motivation from parties to agree through negotiations, before the interference into relation regulated under the law of obligations. The power to adjust the contract is a practical kick for business representatives, to solve the disagreement emerged in a long-term contractual relation through negotiation.[130]

The court may have significant lever to encourage negotiations between parties and agreement about adaptation of the contract. On one of the cases[131] the court has refused to determine the legal protection means when circumstances are changed with the argumentation that parties have better ability to make fair and mutually beneficial decision.[132]

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125 *Gotanda J. Y.,* Renegotiation and Adaptation Clauses in Investment Contracts, Revisited, Villanova University School of Law, Vand. J. Transnat'l L.*,* 36, 2003, 1463, <http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=gotanda> [10.10.2021].

126 *Hillman R. A.,* Principles of Contract Law, 2nd ed., The Concise Hornbook Series, West, 2009, 330.

127 Ibid, 331.

128 *Hillman R. A.,* Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, Duke L. J., 1987, 28, referred in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 242.

129 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 30.

130 Aluminum Co. of American vs. Essex Group, Inc., 449 F. Supp.53 (W.D. Pa.1980).

131 Florida power & Light Company v. Westinghouse Electric Corporation, 517 F. Supp. 440, E.D. Va., 1981, <http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation> [10.10.2021].

132 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 28-29, also, Florida power & Light Company v. Westinghouse Electric Corporation, 517 F. Supp. 440, E.D. Va., 1981, <http://openjurist.org/826/f2d/239/florida-power-light-company-v-westinghouse-electric-corporation> [10.10.2021].

According to the interpretation of the court, in the process of adjusting the contract to changed circumstances the guiding method for the court may be attaining reasons causing damage to the spheres of risk of parties and distributing negative outcomes to contractor with respective proportion.[133]

The distribution of damage with equal proportion to two non-guilty parties may be considered as one of the guiding principles, only in case if differentiation of their responsibility is impossible in accordance with the sphere of risk of different scale.

In the process of adjustment to changed circumstances, when there is discrepancy, collapsed balance in reciprocal performance of parties, it is possible to modify contract price in the legal regime of initial contractual obligation, by which it becomes possible to continue contractual relation with renewed terms and based on decrease of contract price balancing nonequivalent performances of parties.

The court id granted power to prolong term defined for performance, make modification of the contract price and scope of performance. In the process of adjustment of contract, the judge does not have power to draft contract for the second time or change its legal nature and purpose.[134] If the restoration of contractual balance implies change of the essence of contract, then the court must terminate the contract.[135]

The court must distribute to the parties the negative outcomes caused by changed circumstances with the principle that the performance becomes of reasonable gravity for debtor.[136] It is natural that adaptation of the contract does not imply absolute restoration of contractual balance and total liberation of the party by the court from negative outcomes caused by changed circumstances.[137]

The court may prolong the term of performance, increase or decrease the contract price, or the scale of reciprocal performances. Modification of contractual obligation does not entail imposing obligation to the parties with totally new content and different essence.[138] The double-meaning existing in contract does not give title to the court to transform content of the case in the process of finding fairness.[139]

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[133] *Hubbard S. W.,* Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment. Mo. L. Rev., Vol. 47, 1982, 109, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/molr47&id=139> [10.10.2021].

[134] *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

[135] Ibid.

[136] *Brunner Ch.,* Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration. Kluwer Law International: Alphen aan den Rijn, 2009, 499.

[137] UNIDROIT Principles of International Commercial Contracts 6.2.1, European Principles 6:111 (1) and DCFR III 1:110 articles.

[138] *Flambouras D.,* Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108, Pace Law School Institute of International Commercial Law, May, 2002, <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html> [10.10.2021].

[139] *Goldber V. P.,* Framing Contract Law, An Economic Perspective, Harvard University Press, Cambridge, Massachusetts and London, England, 2006, 347.

7.1.2. Objective Factors to be Considered in the Process of Adjustment of the Contract

With the purpose of restoring the balance of contract certain objective factors and criteria shall be taken into consideration:

Initial notion of contractual economy, profitability, which was agreed by parties at the stage of concluding contract. During the adaptation of the contract the court must take into consideration initial contractual balance defined by economic parameters, which existed at the stage of conclusion of the contract and it is natural that it should not rely on ideal contractual balance and proportionality. Hence, the initial economic balance is orientational criterion between parties in the process of adaptation of contract. It is hard to provide simple guiding principles for adaptation of contract to the court by the doctrine, but at the stage of concluding contract the initial equilibrium must be preserved with the outcome reached through adaptation of the contract.[140]

Continuing nature of interfering conditions and objective perspective of the performance of adapted contract. The court must take into consideration possibilities and form of the performance of contract with the forecast for certain period in future, during which the impact of outside interfering factors and action on the contractual relation of parties (context of future performance) will continue.

Limits of intervention. The court may change the contract provisions, as well as means of performance, mechanisms and forms, which are necessary for restoration of the balance of parties' rights and obligations.

Analysis of the contractual risk. The attention of the court must be directed to one of the key factors – limits of the admissible for economic and professional activity, normal risk, which is, as a rule, imposed by the legislator on the person obliged to perform – debtor. The issue of direct distribution of contractual risk by agreement becomes subject of evaluation by the court. The risk of emergence of circumstances of certain category may be implicitly be imposed on the party based on the performance content and nature or may be entirely excluded from the area of the risk of party (for instance, from such extraordinary event as pandemic).[141] Hereby it must be mentioned that issue of distribution of the contractual risk must be studied with regard to the limits of unfulfilled obligation.[142] Adaptation mechanism cannot affect already performed part. Attention of the court is directed to the issue of what is the extent to which the obligation is performed (it may be that one party has performed the obligation and the other party not entirely or partially) or enforceable and what may be

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[140] *Norbert H.,* Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

[141] Legislative rule of distribution of the risk is exclueded is the risk of incidence is imposed on one of the parties by the contract. Bulgmian Chamber of Commerce and Jndustryi_ 12 Feb 1998, CISG-online 436; *Katz A.,* Remedies for Breach of Contract under tbe CISG", 25 Jnt'J Rcv L & Econ 378, 2006, 381. *Obcnnan N.G.,* Transfer of Riskfrom Seller for Buyer in International Commercial Contracts: A Comparative Analysis of Risk Allocation under the CISG, UCC and Incoterms, LLM Thesis, Universite de Montreal, 1997, referred in: *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Vol. 39, 2008, 715. see also: *Oberreit W.W.*, Turnkey Contracts and War: Whose Risks?, in: Transnational Law of International Commercial Transactions, *Horn N., Schmitthoff C. (eds.),* 1982, 191.

[142] *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 177.

the scale of the obligation the liberation from the request of performance with unchanged terms what is the scale of the obligation to which it may be related.[143] It is essential that the fundamental purpose and content of the contract must not entirely transform in the context of adaptation of the contract.

Objective possibility of temporary adjustment. When implementing adjustment of the contract, the factor of operation of adapted terms in time must be taken into account. Adjustment must be performed in a way that in case of non-existence of changed circumstances, it still must be performed at the initial stage of conclusion of the contract in accordance with the terms and restrictions envisaged respectively.[144] The mentioned implies the possibility of executing adaptation with the term of changed circumstances (or their outcomes) (temporary adaptation), which leaves to the party the possibility to renew operation of the initial contract after eradication of interfering circumstances (or negative continuing impact of these circumstances).

Priority of adjustment considering the term of contract. In the process of adjustment of the contract it must be considered whether the issue is related to long-term or short-term aggravation of contractual obligation.[145] The risk of emergence of changed circumstances is particularly high in the long-term contractual relations, which results in disbalance of parties' reciprocal rights and obligations.[146] Besides, the future economic interest[147] of preserving contractual connection and the scale of possible negative outcomes must be considered in the long-term contracts.

The limit of average profit characteristic to particular trade sector[148] and the index of its decrease caused by changed circumstances, as an objective, valid indicator of gravity of hardship.

Speculative nature of the transaction – The German court of second instance has not released the vendor from the liability based on article 79 of the Vienna Convention, despite the fact that the price of the subject of contract – the iron Molybdenum imported from china increased by 300%. The Court has explained that the limits of interpretation of the hardship in the trade sector, where operations have speculative nature and bear high risk, must be restricted.[149] The price fluctuation characteristic to the area of trading goods, as a rule, shall not take us to recognition of existence of

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143 *Norbert H.,* Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: book: *Horn (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

144 *Boroi G.,* Civil Law Treaty. General Part. Persons. Bucharest: All Beck, 2001, 156.

145 *Brunner Ch.,* Force Majewe and Hardship under General Confract Principles: Exemption of Non-Performance in International Arbitration (Kluwcr Law Jnteruational, The Hague, 2009, 438-441.

146 Bilateral contracts loaded with reciprocal right and obligations of parties are based on the economic balance of obligations to be performed mutually, which is formed in accordance to parties' will and intention. Hence, the mentioned is considered as subjective contractual balance. See *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, Eur. Rev. Private L., Kluwer Law International, The Netherlands, Vol. 13, №2, 2005, 110, <http://www.heinonline.org/HOL/Print?handle=hein.kluwer/erpl0013&div=13&collection=kluwer&set_as_cursor=0&men_tab=srchresults> [10.10.2021].

147 *Norbert H.,* Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985.

148 *Brunner Ch.,* Force Majewe & Hardship under General Confract Principles: Exemption of Non-Performance in International Arbitration, Kluwcr Law Jnteruational, The Hague, 2009, 438-439.

149 Oberlandesgericht Hamburg, 28 Feb 1997, №167, CISG-online 261.

hardship.[150] According to the commentary of article 6.2.2. of the 1994 edition of the UNIDROIT principles of contract, the change in economic balance with the scale if more than 50% will establish “fundamental change”, however, in the (second) edition of 2004 of the UNIDROIT principles of contract we do not see exact numbers, as far as the issue must be evaluated based on studying particularities of individual case. Despite the mentioned, the legal certainty requires determination of certain index. Based on the approaches and practical solution used by the national legal orders, there is an opinion in the legal doctrine that according to empirical rules, change of 100% is enough for establishing hardship.[151] But it must be mentioned that the limit of 100% change may be justified for national and not international transactions, for international market, where the risk and possibility of change in prices is high in relation to national, internal market systems.[152] For international markets, according to empirical practice, it is recommended to recognize limit of 150-200%. Therefore, in case of using Vienna Convention the courts refrain from recognizing hardship when there are 100% economic changes.[153] Nowadays there are numerous court and arbitration decision, which does not consider 100% price change as sufficient prerequisite for establishing hardship, as far as the change is more-or-less probable for entrepreneurs acting on the trans frontier markets.[154]

Study of prehistory of relation of parties and trading practice. In the process of adjustment the court must evaluate what is fair in the new, changed circumstances, in such a way that none of the parties have to bear negative outcomes caused by changed circumstances (risk) and none of the parties shall receive unjustified advantage on the account of other party using changed circumstances.[155] UNIDROIT Conciliation rules (article 7.2.)[156] imposes on the party and conciliator obligation to use principles of objectivity, fairness and good faith in the process of adjustment, during which parties' rights and obligations, trading practice, circumstances of the dispute and prehistory of business relations must be taken into account.

Initial balance with compromise limits. According to the interpretations of Arbitration tribunals, the compromised outcome of adaptation of the contract, as a rule, cannot ensure for parties a

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150 *Leisinger B.,* Fundamental Breach Considering Non-Confonnity of the Goods, Sellier, Munich, 2007, 119.

151 *Brunner Ch.,* Force Majeure and Hardship Under General Confract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law Jnteruational, The Hague, 2009, 428-435.

152 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 717.

153 ICC Award. 26 Aug 1989, №6281, CISG-online 8; Tribunale di Monza, 14 Jan 1993, CISG-online 540; Joseph Lookovsh.')' “Impediments and Hardship in International Sales: A Corrunentary on Catherine Kessedjian's 'Competing Approaches to Force Majeure and Hardship"' (2005) 25 Jnt'l Rev L & Econ 434, 438, referred in: *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 716.

154 CIETAC, 10 May 1996, №21, CISG-online 1067; Bulgarian Chamber of Commerce and Jndustry, 12 Feb 1998, №11, CISG-online 436; Rechtbank van Koophandel, I!asselt, 23 Feb 1994, №1849, CISG-online 371; Cour d'Appel de Colmar, 12 Jun 2001, CISG-online 694; Cow· de Cassation, 30 Jun 2004, №964, CISG-online 870.

155 No profit no loss principle. See *Schmitthoff C.M.,* Hardship and Intervener Clauses, Journal of Business Law, 1980, 82-91.

156 Resolution №35/52 adpoted by the General Assembly on Devember 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf> [10.10.2021].

better agreement than it existed at the stage of conclusion of contract.[157] Hence, the contract adjusted to changed circumstances must preserve the initial balance, which was established by the agreement of parties at the stage of conclusion of the contract, however the scale of value of performance and contractual benefits cannot be of same size, as it was expected at the stage of conclusion of the contract. In such case the issue is related to proportional, compromised decrease of expectations of parties with the quality by which the changed circumstances caused decrease of the value resource of the transaction. The entitled body implementing adaptation must be cautious during adaptation of the contract and must apply mechanisms justified by general principles of the contract adaptation, such as good faith and equality.[158]

Party autonomy and limits for determination of particular content of lawfulness. When the issue is related to approximation of changed contract prices to market prices or adjustment to the terms caused by change of currency exchange rate, the mentioned can be implemented on the basis of general parameters established by special contract reservations for adaptation, legislation and judicial practice, but when the issue is related to modification of not only quantitative, but qualitative characteristics of the terms, the parties are autonomous in determining contract adaptation terms and limits considering the primacy if freedom of contract.[159] Hence, in case of requirement of adaptation of the contract the maximum expectation is from the party to determine reasonable, fair scope of contract adaptation and objectively substantiated grounds of this requirement. In the process of contract adaptation, the general standard of lawfulness is guiding for the court (rule of fair determination of terms prescribed under article 325 of Civil Code of Georgia (hereinafter – CCG),[160] by application of which the court may rely on the *gap-filling function* of the principle of good faith, however for the prevention of unjustified and unproportionate interreference into the limits of party autonomy the priority are general orientations of adaptation also deriving from the source of party autonomy.[161]

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157 Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v the Government of Qatar, 15 YB Comm Arb 30 (1990); Antonio Crivellaro, “La révision du contrat dans la pratique de l’arbitrage international” (2017) 1 Rev Arb 69.

158 *Berger K. P. Daniel Behn D.,* Force Majeure and Hardship in the Age of Corona: Historical and Comparative Study, McGill Journal of Dispute Resolution, Vol. 6, 2019-2020, 129, with further reference: Government of the State of Kuwait v the American Independent Oil Company (AMINOIL), 9 YB Comm Arb 71 (1984) at par. 24, 59 [AMINOIL]; 293 Mobil Oil Iran, 294 Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v the Government of Qatar, 15 YB Comm Arb 30 (1990) [Wintershall AG v Qatar]; Mobil Oil Iran v Iran, IUSCT Case №150 (1987).

159 *Bockstiegel Kh.,* Hardship, Force Majeure and Special Risks Clauses in International Contracts, 159, in the book: *Horn N. (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance: Studies in Transnational Economic Law, Antwerp: Kluwer Law International, Vol. 3, 1985, 166.

160 According to paragraph 1 of Article 325 of the Georgian Civil Code, if terms of performance of the obligation must be determined by one of the parties or third part, then in case of doubt it is supposed that such determination must be made based on fairness. 2. If the party does not consider the terms fair, or their determination is delayed, the court makes a decision.

161 See also article 6:248 of the Civil Code of Netherlands according to which, contract is followed not only by the legal outcomes agreed by the parties, but also considering the nature of a contract such rights and obligations arise therefrom, which arise by force of law based on reasonableness and principle of fairness. The Civil Code of the Netherlands, *Warendorf H., Thomas R., Curry-Sumner I. (trans.),* Alphen aan den Rijn: Kluwer Law International, 2009.

In terms of practical results, intervention of the court may be materialized in several directions:

1. Quantitative/qualitative[162] increase of decrease of the price of goods and services inserted into the framework of requested adaptation – decrease of scale of obligation, postponing, partial payment, distribution of risk.[163] The court may change the contract terms and determine criteria for price indexation.[164] After confirming existence of substantial legal prerequisites of hardship, debtor is released from the obligation to perform with initial content and scale in the period of interfering circumstances. The mentioned outcome is especially used when interfering circumstances have a continuous nature. Liberation from the obligation to perform with unchanged content is recognized by the German law as well, not only in case of impossibility to perform, but also in case of hardship (paragraph 313 – interreference with the basis of transaction).[165] As for the obligations of collateral accessory nature, modification of guarantees, as a rule, the court does not interfere in their modification, if it directly implied in the scope of requested adaptation.[166]

Regarding the adaptation of the contract we can imagine two possible scenarios. In the sale-purchase agreement the seller offers to buyer delivery of goods if the increased contract price is paid, which is caused by the aggravation of performance of the obligation (hardship). If buyer agrees, the contract is considered as adjusted to changed circumstances agreed based on negotiation. If buyer refuses to pay increased price, and debtor declines and exits from the contract pointing at the hardship, buyer will file a claim for specific performance, or more likely, restitution of damages. Seller may file the counter-petition on the ungrounded refusal of debtor to adjust the contract and request compensation of damages. The substantiation of buyer will be the existence of significant infringement from the side of debtor (refusal to sell the goods), as it was impossible to pay increased contract price. The purpose of evaluation by the court will be determination of whether the requirement to buy goods with the increased price establishes significant infringement for creditor and whether it gives right to refuse substitute performance. The court assesses how reasonable and fair it was to pay increased price by the buyer considering the nature of changed circumstances existing for

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[162] Amsterdam Court of Appeal (Hof Amsterdam 6 May 1982, nr. 314/81), referred in: *Abas P.,* Rebus Sic Stantibus, Deventer: Kluwer, 1989, 202-205; *Hijma J.,* The Role of the Court and of the Parties in Adapting a Contract to Unforeseen Circumstances, Ovid Technologies, Wolters Kluwer Health, 2012, 20, <https://core.ac.uk/reader/43503426> [10.10.2021].

[163] *Kropholler J.,* German Civil Code, Study Comments, *Darjania T., Tchetchelashvili Z. (trans.), Chachanidze E., Darjania T., Totladze L. (eds.),* 13th ed., Tbilisi, 2014, 218 (in Georgian).

[164] *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 177.

[165] *Schwenzer I.* in: *Schlechtriem P., Schwenzer I. (eds.),* Kommentar wm einheitlichen UN Kaufrecht CISG, 5 ed., CH Beck, Munich, 2008, Article 79 par. 4, 53-54; *Magnus U.* in *J von Staudingers* Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Wiener UN-Kauji-echt (CJSG) 15 ed., Sellier, Berlin, 2006, Article 79, 59-60; *Achilles W.A.* Kommentar zum UN-Kaufrechtsübereinlwmmen (CISG), Hermann Luchterhand, Berlin, 2000, Article 79 par. 14. John Honnold Uniform Law for International Sales, 3 ed., Kluwer Law International, The Hague, 1999) Article 79, para 435.5, referred in: *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 720.

[166] *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 177.

the seller. If the court establishes that buyer was obliged, based on the principle of good faith, to take into consideration circumstances interfering performance and pay increased contract price, the decision will be made in favor of seller.

In the second scenario, buyer offers seller to pay increased contract price, but debtor wants to exit the contract. The buyer will file a claim asking for specific performance and/or restitution of damages. The court must evaluate whether hardship continues to exist in case when the buyer offers seller increased contract price – whether this offer was enough for debtor to overcome hardship. If the contract price increased by the buyer annuls the hardship condition (for seller), then the latter is obliged to sell the goods to buyer with offered price. Hence, in this scenario the responsibility must be imposed on seller.[167]

7.2. Termination of Contract by the Court – Alternative to Adjustment Claim, Exceptional and *ultima ratio* Outcome

Termination of the contract, as am extreme outcome established by the court in response to claim for the adjustment of contract to changed circumstances,[168] is the most radical measure of intervention from the court. The mentioned requires substantial reasoning by the court on impossibility to adjust the contract. Introducing the legal outcome of the contract termination in the legal paradigm of hardship approximates hardship to the concept of force majeure, however termination of the contract is considered as sui generis of hardship – original, indigenous characteristic.[169] The outcome of termination of the contract by the court is in place when it is impossible, unattainable to adjust contract by ensuring fair distribution of the negative outcomes of changed circumstances, damage or benefit among parties. The result of termination is justified when adjustment of the contract to changed circumstances causes unfair outcomes to even one of the parties, termination is necessary for minimization of negative outcomes and damage, when the purpose of the performance of contract is reached by adaptation, it dispels or loses social profitability.[170]

For example, the essential term is motivating and determining factor for stipulation of the contract in labor relations. Adaptation may decrease the volume of the work to be performed if the decrease of remuneration is extreme necessity for saving the contract. If the contractual interest dispels for the party, the mentioned establishes impossibility of adjustment and it brings us to the result *ex nunc* (future and without reflexive – *ex ante* results) of contract termination by the court.

When the issue is related to the basis of contract, collapse of contractual interest, the particular contractual interests of parties must be distinguished and in general, the essential purpose and interest of the contract. The interest of the contract covers economic benefit, economic purpose of the contract,

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[167] *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 724.

[168] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 64.

[169] *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 177.

[170] *Pop L., Popa I. Fl., Vidu S. I.,* Civil Law Treaty. Obligations, Vol. II. Contract, Bucharest, Universul Juridic, 2012, 160.

which parties have given to this agreement and which may be established based on the systemic analysis of contract terms, determination of the common spirit. The general interest of the contract is not limited to reciprocal performance of the particular party, but rather its determination requires pragmatic evaluation of the economic benefit of the implied contract at the stage of conclusion. When determining the purpose of contract, the judge takes into consideration interest of parties, separates from it and defines general purpose of the contract, as of whole construction.[171] From the mentioned perspective, the purpose of the contract is the notion of unifying, connecting contractual expectations of parties.[172] The contract is independent legal organism, construction consisting of particular elements, which outside the mutual and covering will, carries indigenous, global logical purpose.[173] In the modern legal sphere the contract is considered as agreement portraying legitimate purposes and interests of parties and not only document regulating rights and obligations of contractors.[174]

In the process of adjustment, the court interprets initial purpose of the contract in light of the good faith. Termination of the contract requires to fairly distribute negative outcomes of termination among both parties. For instance, if only one party is released from obligation of performance (debtor) without determination of compensatory outcome for the creditor, this will result imposition of the risk only to the creditor,[175] which cannot be tolerated by the principle of contractual proportionality. Therefore, in case of termination of the contract the court determines terms of termination in the equal interests of both parties, with the balancing vector.

For the determination of outcome of contract termination, the judge applies interpretation of the contract.[176] While proportional distribution of the outcomes of contract termination among parties, the court has to necessarily evaluate the damage, which may be caused for creditor by release of debtor from the performance of obligation. When terminating the contract, liberation of debtor from performance obligation and responsibility may not always cause entire imposition of negative outcomes of contract termination on the creditor. For instance, by virtue of changed circumstances the essential disbalance may emerge between value of performance to be received by creditor and financial burden of performance necessary for performance by the debtor.[177] In such case, by changed

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171 *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, 149, 2014, 177-178.

172 *Tison R.,* Le principe de l'autonomie de la volonte dans l'ancien droit francais. Paris: Domat, Montchrestien, 1931, 15.

173 *Carbonnier J.,* Flexible droit, 8th ed., Paris: Librairie Générale de Droit et de Jurisprudence, 1995, 312, Referred: *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 178.

174 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 74.

175 Draft European Private Code, 2000, Art. 6:111.

176 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contract, Victoria U. Wellington L. Rev., Vol. 39, 2008, 715.

177 The German Doctrine qualifies the mentioned as "relative" impossibility to perform. See Civil Code of Georgia, Article 275 (2) debtor can refuse to perform obligation, as far as performance requires expenses, which are significantly inconsistent with the interest of creditor toward performance of obligation considering the content of relation and principle of good faith. When determining what reasonable effort may be requested from debtor, debtor's fault in interference in the performance must be taken into account.

circumstances the financial burden for ensuring performance is increase do the debtor, which in certain occasions may cause proportionate increase of the value to be received by the creditor, and this may significantly exceed the value of performance, which was presumed to be received in case of unchanged circumstances, during performance of the obligation by debtor. In such case releasing debtor from obligation to perform and compensate damages may be implemented with the limits, which balances and scales negative outcomes of termination of the contract not considering the initial value of performance and not considering the increased value of performance. Hence, if there is a disbalance between the burden of performance and the value of performance to be received by creditor, the scale of negative outcomes of termination of the contract for the creditor must be evaluated by the initial value of the contract performance (predictable at the stage of conclusion of contract) and not by inappropriately increased financial value of performance interest caused by the change of circumstances. Otherwise the paradigm of hardship would lose the essence of existence.[178] It is inadmissible to tolerate significant financial privilege of one party caused by the change of circumstances, getting reach on the account of other party.[179] In this regard, the balancing interventional power of the court to restore contractual balance is evident.

The study of reciprocal performances of parties or cost relationship between burden of performance and interest to receive performance[180] starts from the moment of emergence of changed circumstances with the orientation towards future performance of the contract, it is inadmissible to review already made performances with reflexive effect. Hence, adaptation of the contract, review of financial-economic obligations of parties is done for ensuring general contractual balance and equality, principles of performing contract terms in good faith.

Using termination of the contract as the extreme measure is justified in case when it is impossible to adjust or adaptation of contract to changed circumstances taking into account reciprocal interests of parties is unfair and unreasonable.[181] 6.2.3 (4) of the UNIDROIT principles of international commercial contracts (2004). 6:111 (3) of the principles of European Contract Law and DCFR (2008) III 1:110 (2) (b) the opposite model is envisaged in the Civil Code of Italy, where injured party has right to claim termination of the contract. Adjustment of the contract is not prescribed in the legislation.[182]

The court has right to terminate the contract with the terms differing from general rules, which acted in general during the exit from the contract. In case of termination of the contract by the court, it determines reasonable time for the termination of the contract, in order not to cause damage to the

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178 See also *Beleiu Gh.,* Theory of Imprevision – Rebus sic Stantibus, in Civil Law II, Law Magazine, Issue 10-11, 2003, 408-409.

179 *Ciongaru E.,* Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice, Procedia – Social and Behavioral Sciences, Vol. 149, 2014, 178.

180 *Horn N.,* Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: *Horn N. (ed.),* Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, at 15 et seq.

181 BGB, paragraph 313 (3).

182 See similarly ICC Hardship Clause, 2003, par. 3.

injured party.[183] If neither adjustment of the contract to changed circumstances, nor the termination of the contract ensures reasonable balancing of best interests of parties, then the court can call upon the parties once again to negotiate or remain in force the contract without modification, with initially agreed terms.

It is crucial that adjustment of the contract to changed circumstances, as well as liberation from the contractual responsibility with the grounds of hardship or impossibility to perform, does not instigate infringement of the principle of freedom of contract.[184]

7.3. Grounds for Obligation of the Parties to Negotiate in Continental, Uniform and Georgian Law

The contract is a tool which requires cooperation and mutual action (duty to cooperate), implementing due diligence obligation for execution of the legitimate expectation of parties. Duty to cooperate as a guiding principle of parties' behavior, considers contractual negotiation as collateral process of emergence of the changed circumstances.[185]

Before using court power to adjust contract to changed circumstances, strengthening obligation to conduct negotiations by the parties in accordance with the principle of good faith[186] with the aim of adaptation of the contract in numerous legal orders, including in the common law system, as well as uniform law[187] and international acts[188] is the response of recognition of the primacy of party autonomy. This obligation operates especially strictly in case of adjustment of contract under national law.[189] In the German judicial practice the approach is recognized that the party has right to claim sending of notification and contractual negotiation.[190] From the German Federal judicial practice it is

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[183] *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 327.

[184] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 11.

[185] *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 238.

[186] *Brunner Ch.,* Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law International, The Hague, 2009, art. 79, par. 24.

[187] UNIDROIT principles of international commercial contracts PICC 6.2.3 (1) Article, Principles of the European Contract Law (PECL) Article 6:111 (2) and DCFR article III-1:110 (3)(d), ICC's Hardship Clause 2003; Also see, *Barcellona M.,* Appunti a proposito di obbligo di rinegoziazione e gestione delle sopravvenienze, in "Europa e diritto privato", 2003, III, 501, referred in: *Marchioro I.,* European Contracts in the COVID-19 Age: A Need for Adaptation and Renegotiation, Regulating for Globalization Trade, Labor and EU Law Perspectives, Wolters Kluwer, 2020, <http://regulatingforglobalization.com/2020/06/29/european-contracts-in-the-COVID-19-age-a-need-for-adaptation-and-renegotiation> [10.10.2021].

[188] Resolution №35/52 adopted by the General Assembly on December 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf> [10.10.2021]; U.N. ECOSOC, Draft Code of conduct for Transnational Corporations, U.N. Doc. E/C.10/1982/6, Annex (1982).

[189] *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 65.

[190] OLG Karlsruhe, DB 1980, 254 (the case relates to long-term contract of providing electricity).

evident that justice gives priority to contractual negotiations conducted based on the principle of party autonomy in long-term contractual relations. Even before the reform of German Law on Obligations, German judicial practice in case of interference with the basis of the contract considered as a first obligation of the party to enter into negotiation based on the principle of good faith in order to adapt the contract.[191]

Despite the fact that the norm establishing obligation to negotiate in case of changed circumstances does not exist in Civil Codes of Netherlands, Italy, Germany and Georgia, this obligation may be interpreted out of article 415 (2) of CCG[192] and article 254 (2) paragraph of the German Civil Code.[193] The obligation to decrease the damage prescribed under the mentioned normative provision by itself implies parties' duty, in case of changed circumstances in the framework of good faith, to try adjustment of the contract to changed circumstances and avoid or decrease continuous, increasing risk of widening scales of negative outcome caused by changed circumstances.[194] Moreover, despite the fact that German, as well as Georgian Law does not categorically prescribe obligation to conduct negotiations, the party is equipped with the power to directly apply to the court with the query to adapt the contract.[195] In the Georgian judicial practice conduct of negotiations by the parties is interpreted as lawful requirement.[196] In one of the cases the Supreme Court the refusal to conduct negotiations based on the principle of good faith, in condition when the second party applied all possibilities in order to convince the claimant in the necessity to

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[191] *Karampatzos A.,* Supervening Hardship as Subdivision of the General Frustration Rule. A Comparative Analysis with Reference to Anglo American, German, French and Greek Law, Eur. Rev. of Prv. L., Vol. 13, 2005, 134, <www.KluwerLawInternational.com> [10.10.2021].

[192] Article 415: 1. If actions of the injured person contributed to the occurrence of damages, then the duty to compensate and the amount of compensation shall depend on which party was more at fault for the damages. 2. This rule shall apply also when the injured person is at fault because of his/her omission to avoid or reduce harm. See also article 77 of Vienna Convention and *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 725.

[193] Paragraph 254 of BGB, Contributory negligence (1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party; (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.

[194] Several representatives of German Doctrine support existence of the principle of mandatory negotiation in German law. *Grüneberg Ch.* In: *Palandt O. and others (eds.),* Bürgerliches Gesetzbuch (67ed, Munich, 2008) § 313 BGB, par.. 41; *Heinrichs H.,* "Vetragsanpassung bei Störung der Geschäftsgrundlage: Eine Skizze der Anspruchslösung des § 313 BGB" in *Stephan Lorenz and others (eds.)* Festschrift für Andreas Heldrich zum 70. Geburtstag (CH Beck, Munich, 2005) 183, 195; *Riesenhuber K.* "Vertragsanpassung wegen Geschäftsgrundlagenstörung – Dogmatik, Gestaltung und Vergleich", 2004 59, Betriebs-Berater, 2697-2698, referred in: *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 722.

[195] *Schlechtriem P.,* The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe", Oxford U Comparative L Forum, 2002, 2.

[196] Judgement of the Supreme Court of Georgia of April 19, 2019 on the case № as-1076-996-2017 (in Georgian).

adjust the contract to the objectively existing circumstances (has objectively substantiated grounds for impossibility to perform and suggested several alternatives of adjustment), interprets as an abuse of power from the side of owner in condition of non-existence of superiority of this right.[197]

The mentioned legislative policy pushes parties to, first of all, conduct adjustment through their own control and participation before delegating this right to the court. However, it must be noted, that the obligation to conduct negotiations is the obligation of act (Obligation de moyens) and not of the result (Obligation de résultat) – obligation to reach the agreement.[198] In the classical face to face negotiation (without facilitation from third party) introducing a party, as a rule, is not oriented on the agreement, if the result of negotiation, agreement with the power of court, hence with the perspective of legal-economic stability, is not firmed. It is rare to expect constructive and cooperative negotiations from parties, mostly in the conditions of no liability for infringing the obligation to negotiate.[199] Moreover, classical negotiation does not have legislative guarantee to protect disuse of confidential information as evidence, because of that business disputes mostly reach agreement not in classical negotiations, but in the facilitative processes equipped with legislative guarantee of confidentiality and enforcement.[200] Moreover, considering the complexity and difficulty of the issue, it is very hard to prove infringement of the obligation to negotiate in contrary to the principle of good faith in conditions of application of the principle of party autonomy.

In the Georgian normative reality the solution may be subjecting the case to compulsory judicial mediation, which serves several reasons: parties, with the expectation that the court will adapt the contract by itself, will try better to define the limits of their will with regard to adaptation through negotiation and reach the enforceable mediational agreement.

In the framework of mediation process, in case of disagreement the parties will have possibility to continue legal proceedings in the court with more precise, studied contractual interests and terms, clarify their claims and define for the court the orientating limits for adaptation (if the case was transferred to mediation before the main hearing in the framework of mandatory mediation). Hereby, the additional advantage of giving case in to mediation must be mentioned: necessity to solve the dispute timely because of the fast increase of monetary obligations due to delay. Besides, in the mediation process parties are entitled to approach the issue in complex manner and widen exchanging resources, distributable good, introduce those resources into the agreement orbit, which are related to the activity outside the dispute. Often parties are connected not only with arguable relation, but also other complex interrelations in the framework of various contacts. The systemic approach towards the issue and widening the area of the agreement will give parties the possibility to agree not only on arguable relation, but use as an alternative of agreement, business resources existing in the framework

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[197] See Judgement of the Supreme Court of Georgia of March 22, 2019 on the case № as-1298-2018 (in Georgian).

[198] *Reimann M., Zimmermann R.,* The Oxford Handbook of Comparative Law, Oxford University Press, USA, 2008, 923.

[199] Even though the responsibility for infringement of obligation to negotiate maybe prescribed by contractual reservations, but the burden of proof in terms of mala fide makes these reservations ineffective.

[200] See for instance, Resolution №35/52 adpoted by the General Assembly on Devember 4, 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf> [10.10.2021].

of other relations and systemically decide not particularly one dispute, but also perspective of preservation of business relations by introducing other substantive resources existing outside the dispute into the negotiations orbit. Therefore, there are often such disputes in the mediation practice, when parties with one court litigation solve disagreements existing in several contractual relations or they try to interest one another with resources available in other relation for deciding particular court case. Herein it must be mentioned that property dispute, which exceeds 20000 GEL cannot be given to mandatory mediation, however the court mediation practice knows occasions when the parties to the disputer being in higher limits that permitted attended the informational meeting of mediation with the recommendation of the judge and they chose mediation based on mutual agreement, after they were explained the essential/procedural benefits in the context of individualization of their dispute. For the future claims on adjusting contract to changed circumstances must be unified in the category of cases subject to mandatory mediation, which will be compatible with the legal orders of various countries and what is important, the mentioned will encourage realization of the principle of party autonomy with great extent in the process of adjustment of the contract.

The interventional role of the court in the framework of contractual liberty and essence of transaction will be determinative in case of not reaching the mediation agreement. Hereby one circumstance must be underlined that in the mediation process party makes decision only based on the analysis of the possible perspective in the court. The party by forecast of the best and the worst alternatives of mediation, determines optimal area of agreement in the mediation process. Therefore, with the purpose to reach agreement in the mandatory mediation the informal participation in good faith will depend significantly on whether court has established practice of adaptation of the contract, which will give the party possibility to analyze, that in case of not reaching voluntary agreement, the adaptation terms will be defined by the court. The mentioned may encourage and stimulate conduct of adaptation in the process of mediation within the framework of party autonomy. In the legal doctrine there is an opinion that opposed to the principle of good faith the failure of negotiation may be considered as a ground for imposing procedural costs.[201] Similarly, in case of refusing participation in the mandatory judicial mediation, the party I fined and it bears the obligation to pay court expenses.[202] Moreover, infringement of the principle of good faith by the party is considered as refusal of participation in the mandatory judicial mediation, when despite appearance at the court, he/she does not provide objective data necessary for reaching agreement, does not have offer and does not react to the equivalent suggestions. Hence, contrary to principle of good faith, formal participation in the process without purpose of the agreement, is not considered as participation in mandatory mediation, based on which mediator may terminate the process on two grounds: 1. The mandatory mediation process has not been conducted, because the second party was not given chance to have possibility to conduct conscientious and result-oriented negotiation. 2. The process of mandatory mediation must

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[201] *Brunner Ch.,* Force Majeure and Hardship Under General Confract Principles: Exemption of Non-Performance in International Arbitration, Kluwer Law Interuational, The Hague, 2009, 483.

[202] Civil Procedure Code of Georgia, article 187^6 (2): 2. In the process of judicial mediation inexcusable absence of party at the meeting appointed by the mediator in accordance with paragraph 1 of article 187^5 of this Code, he/she will be imposed with court expenses entirely, despite the outcome of the case in the Court, and fine of 150 GEL.

finish with the initiative of mediator, as it may be used as measure for procrastination of the negotiation and became a threat for enforcement of the right of accessibility to justice. The mechanisms ensuring operation of the principle of process effectiveness prescribed under the Code of conducts for mediators, exclude the caution of using mediation process for lingering the case. As it was mentioned, in certain legal orders of continental legal system the adaptation of the contract in case of changed circumstances is the prioritized, primarily applicable legal mechanism and form of intervention to be conducted by the court.[203] Adaptation of contract is flexible mechanism, on the one hand to ensure lawful and proportionate outcomes for participants of contractual relations, and on the other hand, the legal stability and principle of enforcement of rights in good faith shall be guaranteed for subjects of civil circulation. The mentioned overall serves to purposes of public order, which by sub elements of social-economic and legal order is reached systemically and therefore, it approves judicial control of the enforcement of private law principles.

8. Hardship in Georgian Law

8.1. The Substantive Legal Composition of the Hardship Established by Changed Circumstances

According to the first sentence of Article 398 I CCG, the adjustment of the contract to the changed circumstances is related to certain legal preconditions[204]: (1) The emergence of a (2) substantial change (3) in the circumstances considered to be the basis of the contract after the conclusion of the contract; (4) inability to anticipate circumstances[205] – unpredictability, unforeseeability; (5) The existence of circumstances beyond the debtor's control, hence the debtor's innocence[206] (6) Extreme aggravation of the obligation[207] (7) Causal connection[208] – complication of

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[203] *Roth G.* in: *Krüger W.(ed.)*, Münchener Kommentar zwn Bürgerlichen Gesetzbuch, 5ed., CH Beck, Munich, 2007, § 313 BGB, par. 93; *Barbara Dauner-Lieb and Wolfgang Dötsch* "Prozessuale Fragen rund um § 313 BGB" [2003] NJ\V921, 925, referred in: *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria U. Wellington L. Rev., Vol. 39, 2008, 723.

[204] On the legal preconditions for the application of Article 398 of CCG, see: Judgment of the Supreme Court of Georgia of June 6, 2010 on the case № AS-7-6-2010 (in Georgian); Judgment of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian); Judgment of the Supreme Court of Georgia of July 4, 2011 on the case № AS-762-818-2011 (in Georgian).

[205] Judgment of the Chamber of Civil Cases of the Supreme Court of Georgia of July 6, 2010 on the case № as7-6-2010 (in Georgian); Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian).

[206] Obstruction or inability to fulfill an obligation is considered a ground for release from liability if it is caused by force majeure circumstances and is not related to the intentional or negligent action of the person. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 10, 2008 on the case № AS-617-842-08 (in Georgian).

[207] According to the Judgement of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of November 25, 2008 on the case № AS-466-707-08 (in Georgian), it is established that the basis for adjusting the contract to the changed circumstances is a sharp, cardinal change in the economic basis of the contract and a significant imbalance of obligations between the parties.

[208] See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of January 9, 2014 on the case № AS-735-697-2013 (in Georgian).

contract performance as a direct result of changed circumstances (8) In the event of prior consideration of the circumstances: (a) the non-conclusion of a contract by the parties (i.e. lack of contractual interest in concluding the contract) or (b) agreement on its different content. [209]

It is important to note that most of the above-mentioned preconditions, both in the various rules of law of the continental system and in Georgian law, are considered not only as a hardship, but also as a founding precondition for force majeure.[210] The difference is that in a hardship the obligation may still have an objective performance resource as opposed to a force majeure.

Based on the legal analysis of the above-mentioned legislative provision (Article 398 I), additional preconditions are revealed necessary for hardship, but not directly formulated in the article. In particular, if the change of circumstances is not estimated for the party at the stage of concluding the contract, there is a precondition of contingency[211], which at the same time implies the uncontrollable nature of the obstacle, its inevitable nature. In particular, if the counterparty did not and could not anticipate a change in circumstances, it would therefore be deprived of the objective ability[212] to avoid, overcome or eliminate its negative consequences even if the necessary precautions[213] and prudence were exercised.[214]

The existence of the above preconditions is considered an obstacle beyond the control of the debtor[215] and, therefore, establishes another additional precondition for the debtor's innocence towards

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[209] *Akhvlediani Z.,* Law of Obligations, Tbilisi, 1999, 57 (in Georgian).

[210] Force majeure, makes it impossible to perform the obligation properly, thus a force majeure situation implies independent from the parties, objectively existing circumstances, which precludes the debtor's fault. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 23, 2009 on the case № AS-30-367-09 (in Georgian).

[211] Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian) – that the circumstances provided for in Article 398 of CCG will not be changed or misrepresented if the aggrieved party has shown negligence or carelessness and at the time of concluding the contract Could have predicted the origin of the obstacle. The party ... was obliged to show prudence and necessary diligence in order to find out the content of the obligations undertaken by it, to examine all the essential circumstances that were necessary to fulfill the obligation imposed on it. A different definition runs counter to the principle of good faith recognized in civil law.

[212] Lack of funds from one of the parties will not be considered as a force majeure event. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of April 18, 2011 on the case № AS-218-204-2011 (in Georgian). Similarly, in the doctrine, subjective insolvency is not considered a ground for exemption from liability (Busch D., Hondius E., The Principles of European Contract Law and Dutch Law: A Commentary (Perspectives on Company Law), Kluwer Law International; 1st ed., August 27, 2002, 341) For it is assumed in the sphere of the debtor's control, and hypothetically there is a possibility of it being influenced by the debtor.

[213] See Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian).

[214] See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 5, 2010 on the case № AS-418-391-2010 (in Georgian).

[215] *Liu Ch.,* Changed Contract Circumstances, 2005, <http://www.cisg.law.pace.pace.edu/cisg/biblio/liu5.html> [10.10.2021]; *Lindström N.,* Changed Circumstances and Hardship in the International Sale of Goods, NJCL, 2006/1, 8, <www.njcl.fi/1_2006/commentary1.pdf> [10.10.2021]; *Southerington T.* In: *Maggi M.,* Review of the Convention on Contracts for the International Sale of Goods (CISG), 2002-2003, Kluwer Law International, Netherlands, 2004, 275-276. On the recognition of independently emerging, outside events as force majeure circumstances. See Also, the Judgement of the Chamber of Civil,

the obstacle.[216] The non-guilt criterion naturally excludes liability for hardship and inability to perform the obligation.

Therefore, in order to be released from liability, it is necessary to exclude the possibility for the parties to anticipate the occurrence of obstacles[217], to avoid them or to overcome[218] / reduce the negative consequences and, at the same time, the existence of an event beyond the debtor's control is essential.[219]

The obligation of the party to reduce the negative effects of the changed circumstances, the expected damage, is also manifested in the obligation to immediately notify the creditor about the circumstances hindering the performance (anticipatory breach), the severity of the disturbing circumstances, the nature and extent of the impact on performance. Although the obligation to notify, unlike the uniform law, is not directly regulated by Georgian law, this obligation may derive from Articles 415 (2), 316 (2). Compliance with the obligation to notify is one of the factors determining the debtor's faultlessness. Articles 8: 108 (3) of European Principles[220], Article 7.1.7 (3) of the UNIDROIT Principles[221] and Article 79 of the Vienna Convention[222] reinforce the obligation for the debtor to notify the creditor within a reasonable time of the obstacle, its quality, duration and possible consequences. It is not necessary to send a message in writing.[223]

Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of February 4, 2010 on the case № AS -1162-1424-09 (in Georgian).

216 See Judgment of the Supreme Court of Georgia of April 19, 2019 on the case № AS-1076-996-2017 (withdrawal from the contract is allowed not only in case of a breach of obligation by the debtor, but also in the presence of the preconditions provided for in Article 398).

217 *Fucci F.R.,* Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American BarAssociation Section of International Law, Spring Meeting, 2006, 17, <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html> [10.10.2021].

218 If the debtor has the opportunity to find an alternative way of performance, then this excludes the release from liability under force majeure circumstances, for the debtor has not fulfilled his obligation to eliminate the negative consequences of force majeure circumstances and has not resorted to alternative enforcement mechanisms. See Judgment of the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia of July 27, 2010 on the case № AS-576-542-2010 (in Georgian).

219 ICC Force Major Clause 2003, ICC Hardship Clause 2003, ICC Publication № 50, 2003, 2, <http://www.trans-lex.org/700700> [10.10.2021].

220 A party who fails to fulfill an obligation must ensure that the notification of the obstruction and the consequences thereof is received by the other party within a reasonable time after the offending party knew or should have known of the origin of the obstruction. The other party has the right to claim damages for any damage suffered as a result of not receiving such notice.

221 The party who fails to fulfill the obligation shall notify the other party of the obstruction and its expected consequences. If a party does not receive the notice within a reasonable time after the infringing party knew or should have known about the obstruction, it shall be liable for the damage suffered by the party as a result of the inadmissibility of the notice.

222 Flambouras DP, The Doctrines of Impossibility of Performance and Clausula Kebus Sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis, Reproduced with permission of 13 Pace International Law Review, 2001, 264, <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html> [10.10.2021].

223 Ibid.

The notice is an expression of a will that requires acceptance by the addressee for its validity and will be considered valid from the moment it arrives to the other party. Consequently, the risk of non-acceptance or delay of the notice is usually borne by the debtor.[224] In case of violation of this obligation, the debtor is liable for damages caused by non-performance of the notice.

In one of the decisions of the Supreme Court of Georgia, submitting a request for adjustment of the contract to the changed circumstances is considered a precondition for exercising the right of adjustment.[225]

The burden of proving the preconditions for the hardship (listed in Article 398 (1)) rests with the debtor.[226]

8.2. Legal Outcomes of Hardship – a Legislative Gap of a Norm and the Necessity of Interpreting It in Existential Connection with the German Analogue

Adjustment of the contract to the changed circumstances in CCG (Article 398) is connected to the identical grounds of the preconditions set forth in paragraph 313 of BGB: *If the circumstances which became the basis for the conclusion of the contract have clearly changed since the conclusion of the contract and the parties would not have entered into this agreement or have entered into other terms with these changes in mind, then the contract may be required to be adjusted to the changed circumstances.* It is also noteworthy that such an obstacle to the performance of the obligation, when the party cannot (i.e. unreasonable) be required to strictly adhere to the irreplaceable contract on the basis of the principles of good faith and fairness, in legal doctrine, it is considered a necessary precondition for the occurrence of a hardship, insofar as the reasonableness of the performance is considered as a criterion for determining the binding force of the contract.[227] It is the will of the legislator to protect the party who suffers disproportionately under the influence of changed circumstances. Execution of the contract on unchanged terms would put the participants of the civil turnover in an unequal position.

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[224] *Lee W.,* Exemptions of Contract Liability Under the 1980 United Nations Convention, 8 Dickinson Journal of International Law,1990, 391, <www.cisg.law.pace.edu/cisg/biblio/lee.html> [10.10.2021]; *Flambouras D. P.,* The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis, Reproduced with permission of 13 Pace International Law Review, 2001, 273, <www.cisg.law.pace.edu/cisg/biblio/flambouras1.html> [10.10.2021].

[225] According to the Court of Cassation, in case of significant excess of the solid cost estimate, the tenant may request the client to adjust the contract to the changed circumstances. If the tenant does not exercise this right and still continues to perform the work, then he loses the right to demand reimbursement from the client. Judgment of the Supreme Court of Georgia of December 30, 2013 on the case № AS-888-834-2012, *referred in* the Judgement of the Supreme Court of Georgia of July 1, 2016, case № AS-397-381-2016 (in Georgian).

[226] *Lando O., Beale H.,* Principles of European Contract Law, part I and II, Kluwer Law International, The Hague/London/Boston, 2000, 383; *Lee W.,* Exemptions of Contract Liability Under the 1980 United Nations Convention, Dickinson Journal of International Law, Vol. 8, 1990, 388, <www.cisg.law.pace.edu/cisg/biblio/lee.html> [10.10.2021].

[227] See German Civil Code – Bürgerliches Gesetzbuch, Federal Ministry of Justice, Juris GmbH, Saarbrücken, 2005) §313 (I).

Despite the fact that Article 398, which is identical to the German norm (par. 313), is part of the substantive preconditions for the application of the doctrine of change of circumstances, is regulated in a contradictory manner compared to its German equivalent (par. 313), which necessitates the interpretation of the Georgian Civil Code norm in relation to its German analogue. First of all, the second sentence of Article 398 (I) causes ambiguity: "If those circumstances ... may be required to adjust the contract to the changed circumstances. Otherwise, in certain circumstances, the party to the contract may not be required to strictly adhere to the irreplaceable contract." Paragraph 313 of BGB in cases where a party may not be required to strictly adhere to an irreplaceable contract, attaches importance to the criteria and grounds for determining the adjustment scope of the contract. In particular, within the meaning of the CCG norm, adjustment should be made when and within the circumstances of an individual case, in particular, the distribution of contractual or statutory risk may not require a party to the contract to comply with the irreplaceable contract.

Accordingly, in the normative body of Article 398, the phrase "otherwise" excludes the result of the adjustment, is a carrier of the contrary admission and not a condition for the adjustment. Therefore, the norm of the Civil Code should be interpreted in the content of GBG paragraph 313: If the circumstances which became the basis for the conclusion of the contract have essentially changed since the conclusion of the contract and the parties would not have entered into this agreement or have entered into other terms with these changes in mind, then the contract may be required to be adjusted to the changed circumstances, to the extent that, under certain circumstances, a party to the contract may not be required to strictly adhere to the irreplaceable contract.

An alternative interpretation of CCG Article 398 (I) is also possible: "Otherwise, the party may not be required to strictly adhere to the irreplaceable contract," may indicate the release of the debtor from the obligation and the termination of the contract when the purpose of the adjustment of the contract is unattainable ("otherwise"). For the purposes of this definition, Article 398 presupposes two consecutive results of the changed circumstances: First of all, the adjustment of the contract, and when this result is unattainable – the termination of the contract by the court, which may mean the release of the debtor from the obligation to perform within a reasonable timeframe ("cannot be required to strictly adhere").

The first sentence of Article 398, Part III of CCG defines the primary obligation of the parties in negotiations for the adjustment of the contract under the changed circumstances: The parties must first try to adjust the contract to the changed circumstances. "The purpose is to support the implementation, to remind the parties that they should not run away from the changed circumstances, but should do everything possible to make the agreement work for them. This will maintain the stability of civil turnover and the agreement will be fulfilled."[228] The mechanism that ensures that the contract is adjusted to the changed circumstances is considered by default as a component of the binding of contract[229], the purpose of which is to implement the principle of the supremacy of the contract.

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[228] *Zoidze B.,* The Reception of European Private Law in Georgia, Tbilisi, 2005, 288-289 (in Georgian).

[229] *Mekki M., Pelese M.K.,* Hardship and Modification (or 'Revision') of the Contract, 2010, 17, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511> [10.10.2021].

A well-founded remark should be made in relation to Article 398, Part III: If it is impossible for the contract to be adjusted to the changed circumstances, ***or the other party does not agree to it***, then the party whose interests have been violated may withdraw from the contract. *Continental and uniform law, as discussed in the paper, imposes the right to refuse / terminate a contract after the adjustment of the contract is objectively unenforceable or unjustified and unreasonable. The 313 (3) paragraph of BGB is imbued with the same spirit: If the contract cannot be adjusted to the changed circumstances or the other party cannot be required to agree to it, then the affected party may withdraw from the contract. In the case of a legal relationship with a long-term obligation, termination of the contract is used instead of rejection of the contract.*

The unreasonable refusal of the creditor to adapt the contract to the changed circumstances should not be taken into account, to the extent that it opposes the debtor's respectable interests, the contract must be maintained and adjusted to the circumstances in order to restore the balance of the contract and the balance of interests – this is the purpose of Article 398 protection, the existential basis of the institute of changed circumstances. Respectable interest becomes the basis for both the transformation and the termination of a binding relationship. The state of interest itself is determined by both the execution process and the circumstances outside it.[230] The creditor naturally has the right to substantiate the impossibility of adjusting the contract to the changed circumstances, taking into account his contractual interest. or to offer the court a more reasonable area of adjustment to the changed circumstances, a version taking into account its legitimate interests. There are preconditions for rejection of the contract when the court considers that the purpose of restoring the balance of the contract – adjustment is impossible and / or unjustifiable to take into account the interests of the creditor of the other party, and the non-performance of the obligation is expressed in a significant violation. The court refuses to adjust the agreement when the adjustment fails to ensure the balanced exercise of the interests of the parties (taking into account the interests of the creditor).

In this case, too, the final decision on the possibility of adjusting the contract is entrusted to the court taking into account the mutual interests of the parties and not only the will of the creditor. This is particularly evident in the aspect that changed circumstances often lead to a disruption of the value balance between the debtor's performance burden and the creditor's performance interest.[231] It is possible that under changed circumstances one party (in this case the aggrieved debtor) will find themselves in a difficult situation with an aggravating burden of performance, and the creditor will be given a chance to receive increased performance value. In the event of such an imbalance between reciprocal obligations, the adjustment of the contract always responds to the interests of the debtor as the aggrieved party, for whom compliance with the original conditions is associated with dire consequences. No less severe consequences may occur with the withdrawal from the contract, which gives rise to an obligation to reimburse performance. In this case, it is better for the creditor to fulfill the contract on unchanged terms, which significantly increases the contractual interest, price and

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[230] *Zoidze B.,* The Reception of European Private Law in Georgia, Tbilisi, 2005, 300 (in Georgian).

[231] See Judgment of the Supreme Court of Georgia of October 24, 2017 on the case № AS-1096-1053-2016 (in Georgian) – changed circumstances complicate the execution to the extent that the request for its execution, no matter how justified, is against the fair (equivalent) exchange of goods inherent in civil turnover and requirements of good faith, which may be due to both increasing the cost of performance and reducing it.

usefulness of the contract. However, even for a creditor, adjusting the contract to the changed circumstances will not have serious economic consequences, as during adjustment the court is guided by the principles of good faith (Articles 8 III, 361 II of CCG) and fairness (Article 325 of CCG).

Whereas the vast majority of the developed legal systems recognize that unjust enrichment and advantage at the expense of one party cannot be allowed, It is intolerable to impose the risk of a changed circumstance (unjustly, beyond control) on only one side (as shown above in the analysis of foreign law) the ability to determine the feasibility of the adjustment should be given primarily to the court. If the adjustment is not possible, the debtor then has the right to withdraw / terminate the contract. In this case, if the issue concerns withdrawal from the contract, reversal of performance (restitution) in the event of withdrawal from the contract should be less severe for the parties than the hypothetical outcome expected from the adjustment of the contract. The advantage of the outcome of the withdrawal from the contract for both parties should be assessed precisely by weighing the consequences of the adjustment of the contract. If there is a relationship that is long-term or the performance reversal is unattainable due to the nature of the performance (for example, an employment, service contract), the right to terminate the contract may be exercised after confirmation of the inability to adjust to the changed circumstances.

That is why, if there is a material legal basis for adjusting to the changed circumstances provided for in Article 398 of CCG (founding preconditions, which is considered in the scope of the court's objective assessment), the unilateral (unjustified, unreasonable) refusal of the other party to adjust is substantially contrary to the essential purpose of the performance complication mechanism. This makes it impossible under changed circumstances, to distribute the negative outcomes fairly between the parties, where in case of impossibility of adjustment, the court has the power to terminate the contract under different conditions. "When terminating a contract, special attention should be paid to the objective of fair distribution of the risk of the changed circumstances by the court (i.e. its consequences), thus restoring contractual justice and the economic order violated in the contractual relationship between the parties. If the adjustment of the contract to the changed circumstances depended on an unreasonable refusal by one of the parties, the institution of adjustment would lose all purpose of its practical application. However, termination of the contract may not be the best means of protecting the interests of the parties when the maintenance of the contract serves the interests of third parties or the public.

9. Conclusion

Contract law is dynamic and ever-changing field according to new developments. At the beginning of the 19th century, it was widely believed that the autonomy of the will of the parties was granted absolute freedom, which could not be limited by the power of the state. It was later recognized that the State was empowered to intervene in the contractual relationship by adjusting it to the changed circumstances in order to ensure the equality of the parties, the vital interests of the public and the fair outcome of the treaty.[232]

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[232] *Syquia E. P.,* The Revision and Adaptation of Contracts in Philippine Law – With a Comparative Look at the Law of other Asian Countries, 1985, 96-97, Book: *Horn N. (ed.),* Adaptation and Renegotiation of

Adjustment of the contract to the changed circumstances in the legal systems is recognized as one of the means of legal protection of the parties, for which the court has wide jurisdiction to decide in accordance with the interests of the contractors. A party may not be liable for a risk for which it has not consented. Therefore, contractual injustice is caused by the fact that neither the debtor deserves suffered losses nor the creditor the benefit, which they generate after the conclusion of the contract.[233] Therefore, the intervention is appropriate in terms of preventing the injustice caused by imposing negative consequences only on the affected party. For in the presence of two equally innocent parties to the origin of the changed circumstances, the imposition of negative consequences on only one party undoubtedly leads to a violation of the principle of justice. Adjusting the contract to the changed circumstances based on the principle of good faith and redistributing the damage to the counterparties[234] significantly protects the interests of those third parties who are dependent on the financial condition of the debtor.[235] Therefore, strict compliance with the terms of the contract may be detrimental not only to the debtor but also to the interests of third parties, and it may lead to a breakdown in the stability of the entire economic system.

Adjustment of the contract to the changed circumstances is a necessary legal protection mechanism in case the agreement is no longer generating social benefits and efficiency.

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[235] *Trakman L. E.,* Winner Take Some: Loss Sharing and Commercial Impracticability, Minn. L. Rev., Vol. 69, 1984, 486, referred in: *Uribe M.,* The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 240.

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Regulation of Internship in Georgian and EU Legislation

The internship contract is among of new legal institutes regulated by the Labour Code of Georgia based on amendments of September 29, 2020.

There are different types of internships, including open-market traineeship. This latest is concluded based on direct relationship between an employer and an intern. Such a model is rarely subject to legal regulation in European countries or is not allowed.

The article reviews the characteristics of an internship; various types of internships are discribed; model of regulation by the Labor Code of Georgia is studied and evaluated; the EU approach and European practice is presented; Controversial questions are initiated for future research and analysis.

Key words: *Internship/traineeship, Labour Code of Georgia, the EU, open-market internship.*

1. Introduction

The labor market requires relevant and profitable professions, qualifications, work skills for the production process. In view of labor market order, the countries are pursuing the education policy that promotes employment and develops in-demand professions. The professional growth, knowledge enhancement and strengthening of practical work skills are also carried out by the private sector, business in the format of joint cooperation with the state or independently. An employer is interested in teaching a person (of both professional and behavioral aspects) under those conditions and organizational arrangements of labor which is established by the employer itself, and then decides to hire that person (of course, based on by mutual consent) who is actually prepared by an employer to be useful in employer's business and manufacturing. Issuing from the above, an internship/traineeship is used in the modern labor market.

On September 29, 2020, amendments were made to the Labor Code of Georgia (hereinafter LCG), on the basis of which the institution of internship was established in the Georgian labor legislation. In fact, the internship was used in practice, although until this period its legal regulation did not exist within the LCG. Thus, Georgian labour law science and studies are lacking the information about the internship contract. So, it is subject of utmost importance to start with deep cognition of the essence of new legal institute.

Issuing from the abovementioned, the article aims to study the legal nature of the internship, to assess the validity and purpose of its normative establishment in private labor relations. To this end, the article discusses the characteristics of internship, types of internship, EU approaches and recommendations, compliance of Georgian legislative policy with the European practice.

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2. The Legal Nature and Signs of Internship

Internship or traineeship is an important transition period and a bridge from education/training to employment, especially in high-income countries. Recently, there has been a tendency to increase the use of an internship, as it plays a positive role both in the production process and in the professional development. At the same time, there are dangers and risks of using internships in order to replace an employment and to make a labour cheap.[1]

The modern labor market is characterized by segmentation – formal and informal, primary and secondary. There are companies in the labor market that offer stable and long-term employment. One of the assets of such companies are to develop labour skills and knowledge of employees. But, at the same time, there are enterprises that are focused on short-term labor relations and hiring of unskilled workers. Thus the segmentation changes the practice and consequences when using internship relationships (it is either positive or negative).[2]

An internship is a combination of teaching and work, in other words – learning through practice. It is especially used with students/youth. It is integrated into university programs, according to which students are placed/distributed in various businesses to reinforce the knowledge and apply theoretical teaching in practice. In Europe, the tripartite relationships are mainly used for internships: employer, intern and educational institutions/universities.[3]

It should be emphasized that the internship is of an age nature. It is mainly aimed at young people to be able to have stable and sustainable employment in the future after completing the teaching/apprenticeship process. In addition to students, internships become essential for any person in a changing industrial or digital world to master new professions or new job skills. Thus, the internship is an opportunity to learn ever. As much as internship is part of the work and teaching of young people, it is becoming more and more subject of interest within the youth policy. Call for a ban on unpaid internship has been noted as one of the tools to strengthen the rights of young people in the European Union.[4] The European Parliament resolution on Youth Guarantees states that unpaid internship is a form of exploitation of young people and a violation of their rights.[5]

Internship is characterized by an unpaid relationship. However, internships are also paid. This is regulated differently within the policies of public services or private companies. It is also worth emphasizing that the internship in this context is separated from the probationary period, which is an employment contract (specific/special), which inevitably means that the work is remunerative.[6]

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1 *Stewart A., Owens R., Hewitt A., Nikoloudakis I.,* The Regulation of Internships: A comparative Study, Employment Working Paper, International Labour Office, ILO, 2018, V, <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_635740.pdf> [20.01.2022].

2 Ibid, 6.

3 <https://www.eurofound.europa.eu/publications/article/2011/strengthened-regulation-of-internships> [20.01.2022].

4 <https://www.euractiv.com/section/politics/news/european-parliament-calls-for-ban-on-unpaid-internships/> [20.01.2022].

5 Resolution on the Youth Guarantee, European Parliament, 08/10/2020. <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0267_EN.html> [20.01.2020].

6 Organic Law of Georgia "Labour Code of Georgia", 17/12/2010, The Legislative Herald of Georgia, 75, 27/12/2010. Article 17.2. (in Georgian).

There are cases when an internship is paid for by an intern. Students pay an impressive amount of money in educational institutions to gain experience in prestigious enterprises and companies with the help/offer of universities/institutes. Young people also pay intermediary/brokerage companies to help to do internships in relevant companies. In addition, interns have additional indirect costs. For example, when they have to refuse paid employment on the grounds that they have to complete a compulsory internship during university studies.[7]

Internship is distinguished from volunteering. The volunte work is also unpaid, but the goal is different. The work here is done for the sake of faith, it is not done for gaining experience and improving future employment opportunities, or the work is performed in order to serve/benefit others.[8]

The internship, by its very nature, does not bind the parties to future legal consequences and does not give rise to an obligation on the part of the employer to conclude an employment contract after the internship is completed, no matter how professional or desirable the intern is (unlike probation period, where the examination of a person with regard to the compatibility with the work is a precondition for concluding an employment contract[9]). Thus, during the internship period, the intern is not under special examination and observation by the employer.

Internship can also be characterized by a large number of contractors/interns. As far as internship is concerned, the development of knowledge and skills in the context of practical work, makes it possible for several interns to train together in a specific work space, in the context of a specific job, under the guidance of a specific person.

3. Regulation Aspects of Internship in Georgian Labour Law

An internship may have negative results and effects.[10] It can be used by the employer to avoid employment and save/reduce costs. In such a case, the **intern may perform a fixed and permanent function of the enterprise/company.** The employer may use such labor multiple times and continuously. **Apparently it seems**, in order to eliminate this negative practice, an internship became the subject of legislative regulation in Georgia. Based on the amendments to the LCG of September 29, 2020, article 18 regulated aspects related to internship. **However, the explanatory note of the organic law/LCG mentions the follow**: "*The draft law regulates hitherto unregulated or incompletely regulated labor issues. In order to ensure the harmonization of national legislation with the legislation of the European Union and international standards, the draft law addresses the following*

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[7] See *Stewart A., Owens R., Hewitt A., Nikoloudakis I.,* The Regulation of Internships: A comparative Study, Employment Working Paper, International Labour Office, ILO, 2018, 23, <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_635740.pdf> [20.01.2022].

[8] Ibid, 15.

[9] Organic Law of Georgia "Labour Code of Georgia", 17/12/2010, The Legislative Herald of Georgia, 75, 27/12/2010. Article 17.1 (in Georgian).

[10] Internship Needs Survey, Report, Friedrich Ebert Foundation, Young Socialists, 2019, <http://library.fes.de/pdf-files/bueros/georgien/16011.pdf> [20.01.2022] (in Georgian).

issues: ... Legal status of the intern "..." The draft law regulates the legal status of the intern and the intern within the scope of the Labor Code."[11]

Explanatory note did not clearly and transparently reflect the grounds for the need to arrange internship and it did not indicate the existing situation in Georgia (neither qualitative nor quantitative research data were attached); besides, it mistakenly indicated that the news related to the internship is due to the approximation with the European Union legislation. The EU legislation does not regulate internship through binding/compulsory legislation. The EU has only a recommendation document.[12] Georgia did not have an obligation in the internship part and such an obligation did not appear in the Association Agreement.[13] As well the explanatory note called the process of approximation with the EU legislation by a wrong term "harmonization" instead of the "approximation".[14] The lack of informative or misleading information on the explanatory note does not/cannot clarify the purpose of the legislator in initiating the norms of internship regulation.

According to the article 18 (1) of the LCG *An intern is a natural person who performs for an employer a particular work, whether paid or not, in order to upgrade his/her qualifications and to gain professional knowledge, skills or practical experience*. This definition emphasizes that the intern performs the job for the employer, although performing such work is combined with the **goal of gaining by an intern the knowledge, skills, experience**. Of course, the latter is also obtained within labor relations, although the primary goal of labor relations is employment. Article 18 (4) establishes the **form of the internship agreement,** in particular, the internship agreement must be concluded in writing. The same article focuses on the **content of the contract**, in particular, the internship contract must describe in detail the work to be performed by the intern.

It was stressed above that internship is not only a using theoretical knowledge in practice, but also a process of teaching and knowledge generation, which implies the employer's obligation to the intern – teach, train, explain, etc. In this regard, article 18 (4) leaves open reference to the scope of the employer's obligations regarding the content of the internship contract. However, this may be due to the fact **(perhaps the legislator thought so)** that the intern needs protection as a weak part whose work should not go beyond the legislative goals and provisions which need to be examined a done work in comparison of internship contractual terms. **This will be one of the subjects of control and evaluation by the labor inspection in the future.**

According to the articles 18 (2) and 18 (3) an employer shall not use an intern's labour in order to avoid entering into an employment agreement; An intern shall not replace an employee; an

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11 Explanatory Note on the Draft-Organic Law of Georgia on Amendments to the Labour Code of Georgia. <https://info.parliament.ge/file/1/BillReviewContent/247835?> [20.01.2022] (in Georgian).

12 See discussion below.

13 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27/06/2014, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02) [20.01.2022].

14 *Kardava E.,* Georgian Labour Law Reform under the European Integration and Assoiation Agreement Obligation, Tbilisi State University, Tbilisi, 2018, 161-173, <https://www.tsu.ge/assets/media/files/48/disertaciebi4/Ekaterine_Kardava.pdf> [20.01.2022] (in Georgian).

employer shall not have the right to hire an intern to replace an employee with whom labour relations were suspended and/or terminated; duration of unpaid internship shall not exceed 6 months, and the duration of paid internship shall not exceed 1 year. A person may do an unpaid internship with the same employer only once.

The aboveposted prohibitive and restrictive provisions in the LCG confirm the reality of the threats or the existence of the practice caused by the internship relationship. Such norms have both a preventive function in order to protect the intern, as well as the function of imposing liability on the employer in case of violation of legal requirements.

The second sentence of article 18 (3) is misleading: "*A person may do an unpaid internship with the same employer only once"*. The LCG imperatively regulates that an internship contract without pay may not be re-entered into, but the issue of the number of paid internship contracts is not subject to direct regulation. There remains a space of freedom which, through wrong practice, may develop and come into conflict with the provision of Article 18 (1) of the LCG (goal of the internship). An internship contract involves the performance of work for the purpose of teaching. Internships should not become a means of bypassing stable, long-term, classic employment contracts. Thus, in order to prevent the abuse of power by the employer, the legislature considered it necessary to legislate the internship in the context of time limitation. The legal provisions governing internship confirm the goal that the institution of internship should not be used indefinitely/unlimited, should not be likened to employment in the name of internship, should not be transformed from a place of acquiring knowledge and raising qualifications into a fixed or permanent function of an enterprise. In view of the above, article 18 (3) of the LCG should be interpreted and applied in practice in accordance with the principle of balance. If there is the case of re-hiring the remunerated Intern, it is important to assess and analyze the specifics of the situation: why did it become necessary to continue and re-play the internship with the same employer (for the additional one year)? Was not it possible the process of acquiring knowledge and raising the qualification be completed? Did the intern replace the employee? Was such an internship a way to bypass the conclusion of an employment contract? etc. In each particular case, this should be the subject of a labor inspection or court assessment.[15]

According to the 18 (5), all the minimum standards of protection provided for by the LCG Law shall apply to agreements concluded with interns except: Chapter VII and Article 48. Chapter VII of the LCG (articles 37-40) regulates pregnancy and childbirth leave, childcare leave, adoption leave, additional child care leave. Article 48 regulates the aspects of prior notice of termination and compensation for termination. At the discretion of the legislator, the standard of protection set forth in these articles does not apply to interns. However, a ban on the dissemination of other LCG provisions on the internship, has not been established. At the will of the legislator, the other standards set out in other articles of the LCG apply to interns. Such an approach could be problematic and obviously, is it necessary to test and evaluate in order to settle the good legal practice: A) Should the standard of protection of annual paid leave, annual unpaid leave and paid leave for to harmful and hazardous work

[15] *Kardava E.,* Labour Law Bulletin № 3, Friedrich Ebert Stiftung, Association "European Time", July, 2021, 3-4 (in Georgian).

effect to an intern?[16] B) How or in what part of the leaves mentioned in the above paragraph should be extended to unpaid internships and paid internships? C) Is it possible to terminate the internship contract at any time? If so, under what conditions and on what grounds? D) Is the internship period included in the total length of service?

According to the articles 18(6) and 18(7), it is established the scope of regulation: *The norms of this article shall apply unless otherwise determined by special law... This article shall not apply to public institutions, including legal entities under public law. So,* Some aspects of specific internships are regulated by other normative acts of Georgia, which won't be regulated by the LCG. For example, according to Article 10 (1.c) of the Law of Georgia on Lawyers, a lawyer is required to undergo a mandatory professional internship and the details of such internship are regulated by the this law. [17] Internship issues at the public service are regulated in a unified manner by a resolution of the Government of Georgia. [18] Also, the orders of various ministers regarding the rules of internship have been approved. The Law of Georgia on Employment Promotion considers the internship institute in the context of eliminating of unemployment and obliges the state to take care of it. Here, *an intern is a natural person who is temporarily sent to the relevant internship for a period of not more than 6 months in order to develop professional skills and practical skills*.[19]

4. General European Practice of Regulation of Internship

Internship arrangements are different in EU member states and the regulatory framework set up different types of internships. Many countries do not have clear and transparent aspects towards the open-market traineeships, which sometimes make it difficult to separate internship from ordinary labor.[20]

Internship issues in the EU are regulated by the recommendation of the Council of the European Union on Framework for Traineeships[21]. According to this recommendation, internship (traineeship) is for a limited time, paid or unpaid, which include a teaching and training component in order for the intern to gain practical and professional experience to improve employability and facilitate the transition to regular employment. The EU recommendation is not binding for member states. Thus, at the national level, some European countries have a legal definition of internship in law, some do not. In any case, in countries where there are regulatory norms, there is a strong link between education /

16 Organic Law of Georgia "Labour Code of Georgia", 17/12/2010, The Legislative Herald of Georgia, 75, 27/12/2010, Article 31 (in Georgian).

17 Law of Georgia on Advoctes, 20/06/2011 (in Georgian).

18 Resolution of the Government of Georgia № 410, on the Approval of the State Program on the Terms of the Internship at the Public Service, 18/06/2014 (in Georgian).

19 Law of Georgia on Facilitation of Employment, 14/07/2020 (in Georgian).

20 Traineeships under the Youth Guarantee, Experience from the ground, European Commission, 2018, 2, <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8163&furtherPubs=yes> [20.01.2022].

21 Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships, (2014/C 88/01), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0327(01)&from=EN> [20.01.2022].

training and work, both internship interests – work and training – are interrelated and discussed in a single context.[22]

There are 4 main types of internships in Europe: Internship within the educational curriculum; Internship as a mandatory part of professional training; Internship as part of Active Labor Market Policies (ALMPs); Open-market internship.

The first type of internship is carried out under the auspices of educational programs and with the help of educational institutions. The second refers to the internship of an employee who has to undergo training in order to develop and progress. ALPMs Internships in EU Member States are included in the field of public service employment services. The aim is to promote the development of the labor market and to train unemployed youth. For the purposes of the LCG, the object of interest is an open-market internship. The latter is organized directly by the employers and is based on the contract between the parties. These types of internships deserve the most criticism, because they are either not regulated or are poorly regulated by national labor laws, resulting in free employment, replacement of staff with internships, inadequate training, non-compliance with social security norms, etc. On the other hand, open-market internships are less used in Europe and big companies.[23]

According to a report from the European Commission, only four countries (Belgium, Lithuania, Poland and Romania) have set an internship limit of up to 6 months, while in most countries the duration is not regulated or the law allows for an extension of more than 6 months. [24] There are countries where open-market internships are not allowed. According to an ILO report, in France, where an internship is based on a direct agreement between the employer and the intern, it is prohibited. Internships are allowed here only under a tripartite agreement involving an educational institution. The same approach is used in Brazil and Argentina.[25]

The recommendation of the council of the EU has been criticized by trade unions and youth organizations. In their view, the recommendation fails to provide concrete mechanisms that would actually eliminate the unfavorable practices in some EU countries.[26]

5. Conclusion

The article revealed the positive role of internships in the professional advancement and promotion of interns, as well as the possible negative consequences of internships in the segmented labor market.

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22 Traineeships under the Youth Guarantee, Experience from the ground, European Commission, 3, <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8163&furtherPubs=yes> [20.01.2022].

23 Ibid, 4.

24 Commission Staff Working Document Applying the Quality Framework for Traineeships, Strasbourg, 4/10/2016, 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0324&from=EN> [20.01.2022].

25 See *Stewart A., Owens R., Hewitt A., Nikoloudakis I.,* The Regulation of Internships: A comparative Study, Employment Working Paper, International Labour Office, ILO, 2018, 45, <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_635740.pdf> [20.01.2022].

26 Fraudulent Contracting of Work: Abusing Traineeship Status, (Austria, Finland, Spain and UK), Eurofound, 2017, 2, <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1717en5_1.pdf> [20.01.2022].

The internship has strong signs that distinguish it from labor relations, probationary period, volunteering. A special feature are a) learning / training and practical performance of work together; b) Internship is a tool for training young people and their future employment.

There are several types of internships, namely: A) internships within educational curricula and with the help of educational institutions; B) Compulsory internship for already employed persons (under company policy); C) internships aimed at increasing employment opportunities and combating unemployment, administered by the state; D) Open-market internship, which arises on the basis of a direct agreement between the employer and the employee. Exactly, the **latter is regulated by the Labor Code of Georgia. Internships within educational programs are widespread in Europe. The open market internship model is almost unregulated in European countries. Only a few states have mere regulatory norms in labor laws. At the same time there are countries that completely ban the use of this type of internship.**

The European Parliament and the Council of the EU adopted non-binding documents related to internship, noting the risks of internships for young people. The European Parliament has considered unpaid internships as a form of exploitation and a violation of the rights of young people.

LCG regulatory norms are new, the practice of their use has not yet been tested. At the same time, there are unanswered questions such as in what dose, in what part and how the general norms of the LCG (except for Chapter VII and Article 48) apply to the internship contract, whether paid internships are allowed continuously and repeatedly, and so on.

The establishment of an internship institute in Georgian Labow law, law is not required by the Association Agreement, nor does the EU regulate the issue under normative secondary legislation. However, a decision has been made at the national level and from now on, in order to establish a fair internship practice in Georgia, the Labor Inspection Service will have an important function and role to check the proper application of the norms of the LCG.

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3. Law of Georgia on Lawyers 20/06/2011 (in Georgian).
4. Law of Georgia on Facilitation of Employment, 14/07/2020, (in Georgian).
5. Resolution of the Government of Georgia № 410, on the Approval of the State Program on the Terms of the Internship at the Public Service, 18/06/2014 (in Georgian).
6. Explanatory Note on Draft Organic Law of Georgia on Amendments to the Labour Code of Georgia. <https://info.parliament.ge/file/1/BillReviewContent/247835?> [20.01.2022].
7. Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships, (2014/C 88/01), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0327(01)&from=EN> [20.01.2022].
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9. Commission Staff Working Document Applying the Quality Framework for Traineeships, Strasbourg, 4/10/2016, 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0324&from=EN> [20.01.2022].
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11. Fraudulent Contracting of Work: Abusing Traineeship Status, (Austria, Finland, Spain and UK), Eurofound, 2017, 2, <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1717en5_1.pdf> [20.01.2022].
12. *Kardava E.,* Labour Law Bulletin № 3, Friedrich Ebert Stiftung, Association "European Time", July, 2021, 3-4 (in Georgian).
13. *Kardava E.,* Georgian Labour Law Reform under the European Integration and Assoiation Agreement Obligation, Tbilisi State University, Tbilisi, 2018, 161-173, <https://www.tsu.ge/assets/media/files/48/disertaciebi4/Ekaterine_Kardava.pdf> [20.01.2022] (in Georgian).
14. *Stewart A., Owens R.,, Hewitt A., Nikoloudakis I.,* The Regulation of Internships: A comparative Study, Employment Working paper, International Labour Office, ILO, 2018, v, 6, 15, 23, 45, <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_635740.pdf> [20.01.2022].
15. Traineeships under the Youth Guarantee, Experience from the ground, European Commission, 2018, 2-3, <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8163&furtherPubs=yes> [20.01.2022].
16. <https://www.eurofound.europa.eu/publications/article/2011/strengthened-regulation-of-internships> [20.01.2022].
17. <https://www.euractiv.com/section/politics/news/european-parliament-calls-for-ban-on-unpaid-internships/> [20.01.2022].

Nazi Varazashvili*

Choice of Workplace as a Guaranteed Right of an Employee in the Post-COVID World

Due to the COVID-19 pandemic, humanity has been forced to reduce the instances of leaving one's home. This has caused a number of employees to commence fulfilling their employment obligations via distance work, a development that, many feel, has been a positive for them. At the same time, a position has emerged, that the chance for the employees to work from home has not, in fact, adversely impacted the employers in a significant way. In light of this, the discussion that has begun heating up is whether it would be beneficial to keep such a status-quo even after the pandemic has subsided.

The present article discusses exactly such a possibility. It considers ensuring a guaranteed right for the employee to work from home (or any different locale of their choice). With such a change in place, it may indeed become possible to retain a rare positive aspect of the pandemic and to make a step in the right direction, in the pursuit of better regulation for employment relationships.

The primary subject studied by the article at hand is that of regulating distance work, as well as the associated matters thereto, such as employee rights and contract autonomy.

Key Words*: Employment Law, Pandemic, Distance Work, Workplace.*

1. Introduction

The pandemic caused by the spread of COVID-19 has plunged the modern world into a deep crisis.[1] A number of states and organizations have undertaken significant steps in order to remedy the situation and restore the status-quo that existed pre-pandemic.[2;3] However, an especially resilient line of thought related to this idea is that the pandemic and those issued unearthed by it may, in fact, present an opportunity of going beyond merely fixing things and can serve as a springboard to creating a better world.[4];[5] It is this fact that has necessitated the need to evaluate employment relationships and to critically analyze the current, modern models thereof.

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1 *Michie J., Sheehan M.,* Building Back Better?, International Review of Applied Economics, Vol. 35(2), 2021, 111-116.

2 *Liu K.,* COVID-19 and the Chinese Economy: Impacts, Policy Responses and Implications International Review of Applied Economics, № 35(2), 2021, 308-330.

3 *Pinna A. M., Lodi L.,* Trade and Global Value Chains at the Time of Covid-19, The International Spectator – Italian Journal of International Affairs, № 56(1), 2021, 92-110.

4 *Michie J., Sheehan M.,* Building back better? International Review of Applied Economics, № 35(2), 2021, 111-116.

5 *Beland D., Marier P.,* COVID-19 and Long-Term Care Policy for Older People in Canada, Journal of Aging & Social Policy, № 32(4), 2020, 358-364.

When attempting to utilize a crisis in order to usher in systemic reform, the most realistic approach is to improve the field which had, pre-crisis, already had significant problems[6] and which, at the same time, was impacted by the crisis in a major way.[7] Considering such criteria, of the legal fields, possibly the primary candidate for a change for the better should be employment law.

That the extant practices prevalent in the field of employment law are far from optimal is quite an accepted opinion in academic literature.[8];[9] A number of respected articles even focus on the opinion that huge structural changes are both necessary and inevitable.[10];[11] As for the impact of the pandemic, it has been quite widely accepted, that COVID-19 has revealed tremendous weaknesses currently plaguing the field, quite possibly illustrating the greatest amount of such existing issues even in comparison with all other legal fields.[12]

As a result of the above, there is a distinct chance to positively impact employment law via using the effect the pandemic has had on the world. In order to come out better from the unfortunate event at hand, there is the need of significant improvement.[13] I turn, to achieve this, it is imperative that the law evolves so that it fits best with the post-pandemic world. So, if the changes are aimed at improving the field beyond restoring the pre-COVID status-quo, in turn ensuring that employment law is in line with the needs and the challenges of the modern reality, such amendments will be considered a positive event and a step in the right direction.

At the same time with the aforesaid, in order for any reform to have a chance of success, there is a need to identify the precise matters, which may be improved upon. In line with this, a good manner of identifying exactly such an issue is to analyze the impact of COVID-19. The latter can lead us to a reveal, namely the fact, that possibly the most important positive change enforced by the pandemic has been the chance for a number of employees to work from home.[14] This would have been impossible in

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[6] *Miele M. G., Sales E.,* The Financial Crisis and Regulation Reform, Journal of Banking Regulation, № 12(4), 2011, 277-307.

[7] *Thornton J.,* Post-crisis Financial Reform: Where Do We Stand?, Journal of Financial Regulation and Compliance, № 12(4), 2011, 277-307.

[8] *Shah H.,* Transition to Labor Law Reform: State-Level Initiatives & Informal Sector Labor Relations, Indian Journal of Industrial Relations, № 50(1), 2014, 33-50.

[9] *Kardava E.,* Development of Employment Law during the Euro-Integration Processes, Journal of Law, № 1, 2016, 33-50 (in Georgian).

[10] *Santos A.,* Labor Flexibility, Legal Reform and Economic Development, Virginia Journal of International Law, № 50(1), 2009, 43-106.

[11] *Kardava E.,* Employment Relationships between People, Journal of Law, № 2, 2013, 130-145 (in Georgian).

[12] *Soto-Acosta P.,* COVID-19 Pandemic: Shifting Digital Transformation to a High-Speed Gear, Information Systems Management, № 37(4), 2020, 260-266.

[13] *Baldwin C., Boothroyd I., Ross H.,* Convergence and Divergence: Environmental Implications of a Most Unusual Year, Australasian Journal of Environmental Management, № 27(4), 2020, 345-350.

[14] *Lord P.,* Changing World, Changing Work, Contemporary Social Science – Journal of the Academy of Social Sciences, № 15(4), 2020, 407-415.

the past[15], however, with the technological leaps in place, millions of people are granted the chance to remain indoors, in safety, and still continue to fully and completely fulfill their employment obligations.[16]

It should be noted, that even prior to the pandemic, there have been a number of attempts at changing the reality related to office work.[17] Issues such as having the time spent getting to the office count as work hours[18] and the general need to reduce the length of the work week[19] are quite popular in academic literature. However, such changes have always been strongly opposed by the major employers and those representing their interests.[20]

Hence, it will be correct to say, that the work in an office environment, that has for so long been the norm, is quite problematic for a number of employees, while the pandemic has strongly highlighted both the need for changes thereto, as well as the fact that it is not necessary in order to retain a number of employment relationships that previously depended upon it. Additionally, considering the reluctance to voluntarily eschew office surroundings, it is highly unlikely for a large percentage of employers to themselves make a choice of supporting such a development.

In light of the above, the present article shall provide an analysis of whether, once the pandemic is defeated, it will be possible for the world to no longer return to white-collar work being done in offices as opposed to doing so from the comfort of one's home. In this pursuit, a new employment law concept shall be discussed, which shall grant the employee the choice of their workplace and, potentially, will effectively ensure that the rare positive change brought upon by the pandemic is retained.

2. Practical Issues with Office Work Pre-Pandemic

A major challenge for the legal field in the twenty-first century is the need to reform the rules and regulations governing employment law.[21] A persistent problem that still remains is the exploitation of workers by their employers[22] and in order for this to be fixed, structural changes are

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15 *Hantrais L., Allin P., Kritikos M., Sogomonan M., Anand P. B., Livingstone S., Williams M., Innes M.,* Covid-19 and the Digital Revolution, Contemporary Social Science, № 15(5), 2020, 595-611.

16 *Hite L. M., McDonald K. S.,* Careers after COVID-19: Challenges and Changes, Human Resource Development International, № 23(4), 2020, 427-437.

17 *Travis M. A.,* Telecommuting: The Escher Stairway of Work/Family Conflict, Maine Law Review, № 55(1), 2002, 262-287.

18 *Fleetwood S.,* Why Work-Life Balance Now?, The International Journal of Human Resource Management, № 18(3), 2007, 387-400.

19 *Travis M. A.,* What a Difference a Day Makes, or Does It?, Work/Family Balance and the Four-Day Work Week, Connecticut Law Review, № 42(4), 2010, 1-44.

20 *Miller S. D.,* Revitalizing the FLSA, Hofstra Labor and Employment Law Journal, № 19(1), 2001, 1-124.

21 *Darian-Smith E.,* The Crisis in Legal Education: Embracing Ethnographic Approaches to Law, Transnational Legal Theory, № 7(2), 2016, 1-29.

22 *Livne-Ofer E., Coyle-Shapiro J. A. M., Pearce J.,* Eyes Wide Open: Perceived Exploitation and Its Consequences, Academy of Management Journal, № 62(6), 2019, 1989-2018.

absolutely necessary.[23] An opinion that has been prevalent in the years leading up to the pandemic has been that work hours are distributed in a somewhat less than optimal manner.[24;25]

Those wishing to amend the said situation are generally focused on one of two directions. One the one side, some demand for the definition of work hours to be changed, so that the time needed to get to work is contained within.[26] On the other hand, harsh criticism has been aimed at the five-day work week and many demand it be reduced[27], which is substantiated by the position, that such a regime ensures that the employee will not be an effective worker, and, at the same time, that their work and life balance will be adversely impacted.[28;29]

Besides the problems discussed above, another aspect of criticism levelled against office work is that employees spend an inordinate amount of time doing nothing productive[30], it takes them far too much time to even get to the office[31] and the effectiveness of their work is negatively impacted by them being in the office as well.[32]

The three issues illustrated here may, at first, seem unrelated. However, their analysis clearly shows, that the problem, in all three instances, stems from the same source. The primary subject of the criticism is the fact, that employees are forced to be at their workplace and to spend a lot of time getting there, when, quite possibly, this is not necessary at all.

When analyzing the criticisms, at is indeed quite easy to see, that the aforesaid is the primary target for them.[33;34] The employee’s interests are harmed, because they are required to be present at an

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23 *Rodriguez J. K., Johnstone S., Procter S.,* Regulation of Work and Employment: Advances, Tensions and Future Directions in Research in International and Comparative HRM, The International Journal of Human Resource Management, № 28(21), 2017, 2957-2982.

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25 *Tucker P. T.,* Working Time, Health and Safety: A Research Synthesis Paper, Conditions of Work and employment Series, № 31, 2012, 1-68.

26 *Alexander C. S., Prasad A.,* Bottom-Up Workplace Law Enforcement: An Empirical Analysis, Indiana Law Journal, № 89, 2014, 1069-1131.

27 *Travis M. A.,* What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week, Connecticut Law Review, № 42(4), 2010, 1-44.

28 *Staines G. L., Pleck J.,* Non-Standard Work Schedules and Family Life, Journal of Applied Psychology, № 69(3), 1984, 515-523.

29 *Fleetwood S.,* Why Work-Life Balance Now?, The International Journal of Human Resource Management, № 18(3), 2007, 387-400.

30 *Cranwell-Ward J., Abbey A.,* Organizational Stress, Palgrave McMillan Publishing, New York, USA, 2005, 47-93.

31 *Hynes M.,* Mobility Matters: Technology, Telework, and the (Un)sustainable Consumption of Distance, National University of Ireland Publishing: Galway, Ireland, 2013, 11-30.

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33 *Cranwell-Ward J., Abbey A.,* Organizational Stress, Palgrave McMillan Publishing, New York, USA, 2005, 47-93.

34 *Travis M. A.,* What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week. Connecticut Law Review, № 42(4), 2010, 1-44.

office, to spend time, energy and money getting there[35], despite the fact that, for a number of cases, this is entirely not needed in order for them to fully do their job.[36;37]

As a result, if a way is found, which would remedy the situation discussed above by freeing the employee from the obligation to pointlessly sit in an office, this would fix a number of issues and be instrumental in mending the rules that are most often criticized in academic literature. While attempts have previously been made at fixing the very same issue, they were, most often, targeted at treating the symptom and not the underlying issue. It is exactly doing the former, when the initiative of reducing the work week to four days is floated. The same can be said with counting the travel times in the work hours. As for the real problem, which is the time unnecessarily spent in offices, academic literature had previously failed to be concerned with it.

This status-quo was changed in 2020, when the pandemic caused by the spread of COVID-19 forced the world to fundamentally rethink employment relations.[38] As a result, this great crisis can be viewed as a potential way out for the problem of office work discussed herein.

3. The Practical Changes Caused by the Pandemic and Their Results

The ramifications of the COVID-19 pandemic are quite diverse[39], and, considering the fact that the crisis is still ongoing, rather difficult to evaluate as well.[40] However, one major change imposed upon the society immediately after its commencement was the need for a lot of people to not leave their homes.[41] This so called "lockdown" especially affected the relationships regulated by employment law.[42]

In the 21st century, distance work has become more and more attractive, as it allows for the employee to fulfill their obligation in full from the site of their choosing.[43] In spite of this, however, the huge majority of employment relationships included the need for the employee to be present at the

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35 *Hynes M.,* Mobility Matters: Technology, Telework, and the (Un)sustainable Consumption of Distance, National University of Ireland Publishing: Galway, Ireland, 2013, 11-30.

36 *Travis M. A.,* What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week, Connecticut Law Review, № 42(4), 2010, 1-44.

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41 *Kamal M. M.,* The triple-edged sword of COVID-19: Understanding the Use of Digital Technologies and the Impact of Productive, Disruptive, and Destructive Nature of the Pandemic. Information Systems Management, № 37(4), 2020, 310-317.

42 *Lord P.,* Changing World, Changing Work, Contemporary Social Science – Journal of the Academy of Social Sciences, № 15(4), 2020, 407-415.

43 *Danielsson C. B., Bodin L.,* Office Type in Relation to Health, Well-Being, and Job Satisfaction Among Employees, Environment and Behavior, № 40(5), 2008, 636-668.

location of the employer's choice.[44] Even when discounting such jobs where it is impossible to work from a distance (such as positions in retail or restaurants, as well as the medical field, etc.), in practice, prior to the pandemic, most of the so called "white collar" jobs involved going to the office and working from there.[45] The spread of COVID-19 and the ensuing crisis have made retaining the status-quo unchanged impossible. Due to the threat of the virus, in a number of countries, a lockdown was instituted, which, in turn, outlawed or severely limited office work.[46] As for those nations, where no such prohibitions were put in place, certain employers still chose to limit the risk by allowing their employees to work from home.[47] Surveys of the employees that have been conducted after the lockdown began universally show, that people who are allowed to work from home are far happier than they were when they had to commute to work.[48;49] They point out, that even when doing the same amount of work, the amount of free time available to them has significantly increased.[50] Moreover, a significant positive effect on the mental health of the employees who work from home has been observed as well.[51] A major purpose of employment law is the protection of the employees' interests[52], therefore, since there is a change, that considerably alters the situation for the benefit thereof, it is quite necessary that such progress is not wasted and the positive steps undertaken are retained for the future as well.

At the same time, it is important, that the rights of employers are not entirely ignored as well. In this regard, it is important to analyze what adverse effect distance work may have upon the effectiveness of the workers. While there is no final consensus, the rather popular opinion is that the negative impact is minimal.[53;54] Certain surveys even show, that in some cases, if there is enough infrastructure and support, employees may indeed be more effective or, at least, not lose any

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44 *Felstead A., Henseke G.,* Assessing the Growth of Remote Working and its Consequences for Effort, Well-Being and Work-Life Balance, New Technology, Work and Employment, № 32(3), 2017, 195-212.

45 *Ammons S. K., Markham W. T.,* Working at Home: Experiences of Skilled White Collar Workers, Sociological Spectrum, № 24(2), 2010, 191-238.

46 *Soto-Acosta P.,* COVID-19 Pandemic: Shifting Digital Transformation to a High-Speed Gear, Information Systems Management, № 37(4), 2020, 260-266.

47 *Gabryelczyk R.,* Has COVID-19 Accelerated Digital Transformation? Initial Lessons Learned for Public Administrations, Information Systems Management, № 37(4), 2020, 303-309.

48 *Waizenegger L., McKenna B., Cai W., Bendz T.,* An Affordance Perspective of Team Collaboration and Enforced Working from Home during COVID-19, European Journal of Information Systems, № 29(4), 2020, 429-442.

49 *Agostino D., Arnaboldi M., Lema M. D.,* New Development: COVID-19 as an Accelerator of Digital Transformation in Public Service Delivery, Public Money & Management, № 41(1), 2021, 69-72.

50 *Kamal M. M.,* The Triple-Edged Sword of COVID-19: Understanding the Use of Digital Technologies and the Impact of Productive, Disruptive, and Destructive Nature of the Pandemic, Information Systems Management, № 37(4), 2020, 310-317.

51 *Kotera Y., Vione K. C.,* Psychological Impacts of the New Ways of Working (NWW): A Systematic Review, International Journal of Environmental Research and Public Health, № 17, 2020, 1-13.

52 *Gelter M.,* Tilting the Balance between Capital and Labor? The Effects of Regulatory Arbitrage in European Corporate Law on Employees, Fordham International Law Journal, № 33(3), 2009, 792-857.

53 *Hite L. M., McDonald K. S.,* Careers after COVID-19: Challenges and Changes, Human Resource Development International, № 23(4), 2020, 427-437.

54 *Lord P.,* Changing World, Changing Work, Contemporary Social Science – Journal of the Academy of Social Sciences, № 15(4), 2020, 407-415.

effectiveness at all.[55] While there are opposing viewpoints too, there is, as said, no agreement on the matter at hand.[56] Moreover, it also should be noted, that when employees do not need to be at the office, the employers have lower costs as well, such as having to pay lower fees for utilities and, sometimes, even eschewing the need for massive real estate investments in order to have an office at all.[57]As a result, it can be seen, that, on the one hand, distance work has a rather significant positive result on the employees' interests while, at the same time, having no adverse impact on those of the employers, actually somewhat benefiting them too. This, in itself, may be enough to reform the field of employment law in order to ensure that the present circumstances are retained.[58] However, there is one more reason to strive for such an outcome, which makes losing this chance even bigger a lost opportunity, if it does indeed come to pass. The matter in question is the possibility of lowering the risks of discrimination that disabled employees face. While there have undoubtedly have been a number of positive steps taken in the later decades[59], disabled individuals are still significantly discriminated against, part of which deals with access to the workplace.[60] On the one hand, a number of workplaces are yet to be adapted for disabled individuals, making them inaccessible and, therefore, ensuring that the employment chances of those with disabilities are decreased.[61] On the other hand, even if the employer does everything perfectly and fully adapts the workplace, the fact remains, that merely getting to an office is much harder and fraught with danger for a disabled individual than for their coworkers.[62] In light of the above, a popular opinion in academic literature is that distance working conditions may play a very positive role in reducing workplace discrimination against disabled individuals[63]. Considering the fact, that discrimination and the fight against it are hugely important topics for the field of employment law[64], rooting it out should take precedence over almost

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55 *Waizenegger L., McKenna B., Cai W., Bendz T.,* An Affordance Perspective of Team Collaboration and Enforced Working from Home during COVID-19, European Journal of Information Systems, № 29(4), 2020, 429-442.

56 *Hacker J., Brocke J. V., Handali J., Otto M., Schneider J.,* Virtually in This Together – How Web-Conferencing Systems Enabled a New Virtual Togetherness during the COVID-19 Crisis, European Journal of Information Systems, № 29(5), 2020, 563-584.

57 *Fonner K. L., Rollof M. E.,* Why Teleworkers Are More Satisfied with Their Jobs Than Are Office-Based Workers: When Less Contact Is Beneficial, Journal of Applied Communication Research, № 38(4), 2010, 336-361.

58 *Yavson R.,* Strategic Flexibility Analysis of HRD Research and Practice Post COVID-19 Pandemic, Human Resource Development International, № 23(4), 2020, 406-417.

59 *Bonaccio S., Connely C. E., Gellatly I. R., Jetha A., Ginis K. A. M.,* The Participation of People with Disabilities in the Workplace Across the Employment Cycle: Employer Concerns and Research Evidence, Journal of Business and Psychology, № 35, 2020, 135-158.

60 *Kessler L. T.,* Employment Discrimination and the Domino Effect, Florida State University Law Review, № 44, 2017, 261-339.

61 *Butterfield T. M., Ramseur J. H.,* Research and Case Study Findings in the Area of Workplace Accommodations Including Provisions for Assistive Technology: A Literature Review, Technology and Disability, № 16(4), 2004, 201-210.

62 *Swinton K.,* Accommodating Equality in the Unionized Workplace, Osgoode Hall Law Journal, № 33(4), 1995, 703-747.

63 *Schur L. A., Ameri M., Kruse D.,* Telework after COVID: A "Silver Lining" for Workers with Disabilities?, Journal of Occupational Rehabilitation, № 30, 2020, 521-536.

64 *Bagenstos S. R.,* The Future of Disability Law, Yale Law Journal, № 114, 2004, 1-84.

all other.[65] Therefore, any change that has the chance of taking the world in such a direction should, at the very least, merit a serious discussion.

In light of all the above, it can be summarized, that allowing the employees the choice of whether to work from home has a clear positive effect on them, has no real negative impact upon the employers and, at the same time, protects a large number of those involved in the workforce from discrimination. Therefore, considering the fact that the field at hand inarguably needs significant reform, the chance that has inadvertently presented itself needs to be utilized. The new normal brought upon by the pandemic, namely the chance for office workers to continue their careers from the locale of their choosing, needs to be retained. As for the method thereof, the seemingly best option that can be utilized is to allow the workers to be in charge of choosing where they want to work from, essentially taking that prerogative from employers and transferring it to the workers.

4. Choice of Workplace, as a Guaranteed Right of an Employee

In modern employment law, whether it be international practice[66] or Georgian legislation[67], the choice of workplace is something for the parties to agree upon. However, quite often, the choice is effectively left up to the discretion of the employer, who often can make changes thereto unilaterally, without even consulting the employee.[68;69] Considering the clear fact, that employment relationships are inherently unequal and that the employer is almost always far more powerful in the relationship as opposed to the much weaker employee[70] and it can easily be surmised that the choice of workplace is, in effect, left solely to the decision of the employer.

The interests of the employer are, of course, of great importance to the very core of employment law.[71] However, this does not mean that their wishes should always be the decisive factor. If it becomes possible, to change the laws so that they significantly alter the circumstances in a positive direction, it may indeed be a justified choice to take such steps even if the chance of the result thereof is that those creating jobs will have to suffer a loss of certain privileges.[72]

In the event that the extant dynamic is indeed changed and the choice of workplace, as a right, is transferred to the employee, this will go a long way in protecting the positive impact of the pandemic.

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65 *Middlemiss S., Downie M.,* Anglo-American Comparison of Employers' Liability for Discrimination in Employment Based on Weightism, The Equal Rights Review, № 15, 2015, 87-111.

66 *Wilkinson K., Tomlinson J., Gardiner J.,* The Perceived Fairness of Work–Life Balance Policies: A UK Case Study of Solo-Living Managers and Professionals Without Children, Human Resource Management Journal, № 28(2), 2018, 325-339.

67 Article 14.1.D., Organic Law of Georgia Georgian Labor Code, 4113-RS, 17/12/2010.

68 *Bomball P.,* Statutory Norms and Common Law Concepts in the Characterization of Contracts for the Performance of Work, Melbourne University Law Review, № 42(2), 2019, 370-405.

69 Article 20.4.A., Organic Law of Georgia Georgian Labor Code, 4113-RS, 17/12/2010.

70 *Daniel M.,* Protecting Workers' Rights in a Labour Environment Dominated by Nonstandard Work Arrangements and Unfair Labour Practices: An Empirical Study of Nigeria, International Journal of Interdisciplinary Research and Innovations, № 3(1), 2015, 65-83.

71 *Botero J. C., Djankov S., La Porta R., Lopes-de-Silanes F., Shleifer A.,* The Regulation of Labor, The Quarterly Journal of Economics, № 119(4), 2004, 1339-1382.

72 *Miller S. D.,* Revitalizing the FLSA, Hofstra Labor and Employment Law Journal, № 19(1), 2001, 1-124.

Those employees, for whom working from home has been a revelation, will be able to retain this status-quo and continue working from wherever they desire. At the same time, those who would prefer to return to the office will also be able to do so, returning to what was the norm prior to the explosion of the COVID-19 pandemic.

It should be noted, that implementing such a change will not be an easy endeavor. In this regard, it can be described to the fight against sex discrimination. Despite the fact that sex discrimination, both direct and indirect, is essentially prohibited in all major countries[73], the problem still remains. More than that, one of the universal issues of employment law is the disparity between the pay of men and women.[74] Women are paid significantly less, even though the fight against discrimination has been ongoing for a long time[75] and no real solution has been found yet.[76] However, no reputable source of academic literature will even consider the position that since this battle has yet to achieve a final victory, the fight against sex discrimination should stop. This is the approach that needs to be kept in mind regarding the right of the employee to choose their workplace as well. Any sort of discrimination based on where the person chooses to work from must be prohibited.

Together with the above, another factor that needs to be specified is that a number of jobs simply require for them to be done at a specific location.[77] For instance, in the case of those working in the service industry, working from home is essentially impossible.[78] Therefore, in order to avoid the abuse of the right that may be granted to the employees, the employer should, when absolutely necessary, still be allowed the chance to defined the workplace themselves, as to do otherwise would be to make doing the job in question impossible.

In regards to distance work there is no need to create new regulations about work equipment. However, a matter of significance is to define which party shall be responsible for maintaining contact with the other when there is no office work taking place. Currently, this obligation tends to be either equally divided[79], or, especially in regards to having and maintaining a working internet connection[80], which may be necessary to continue fulfilling employment duties, it falls upon the employee.[81]

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73 *Verniers C., Vala J.,* Justifying Gender Discrimination in the Workplace: The Mediating Role of Motherhood Myths, PLOS One Journal, № 13(1), 2018, 1-23.

74 *Rolfsen R.,* College Experiences, the Gender Pay Gap, and Men and Women's Attitudes about Gender Roles in the Workplace, Xavier Journal of Politics, № 6(1), 2015, 46-71.

75 *Ross J.,* Equal Pay and Sex Discrimination Law in the UK and Europe: The Need for Coherence, Journal of Social Welfare and Family Law, № 18(2), 1996, 147-172.

76 *Verniers C., Vala J.,* Justifying Gender Discrimination in the Workplace: The Mediating Role of Motherhood Myths, PLOS One Journal, № 13(1), 2018, 1-23.

77 *Bomball P.,* Statutory Norms and Common Law Concepts in the Characterization of Contracts for the Performance of Work, Melbourne University Law Review, № 42(2), 2019, 370-405.

78 *Danielsson C. B., Bodin L.,* Office Type in Relation to Health, Well-Being, and Job Satisfaction Among Employees. Environment and Behavior, № 40(5), 2008. 636-668.

79 *Michie J., Sheehan M.,* Building Back Better?, International Review of Applied Economics, № 35(2), 2021, 111-116.

80 *Lord P.,* Changing World, Changing Work, Contemporary Social Science – Journal of the Academy of Social Sciences, № 15(4), 2020, 407-415.

81 *Hantrais L., Allin P., Kritikos M., Sogomonan M., Anand P. B., Livingstone S., Williams M., Innes M.,* Covid-19 and the Digital Revolution, Contemporary Social Science, № 15(5), 2020, 595-611.

Considering the fact that the aim of reforming the field is to maintain the positive changes brought about by the pandemic, there is no need to significantly alter the situation discussed. Therefore, it can be stipulated, that in the event that the employee chooses to work from anywhere that is not the office defined by the employer, the said employee should remain responsible for the ongoing contact and clear communication with the employer as well as their coworkers.

In combination with the above, a number of details also need to be discussed in relation with the proposed changes. The idea of the reform discussed herein does indeed have its opponents. Outside of the rather poorly substantiated financial risk issue already considered above, the idea of granting the employee the right to choose their workplace has been opposed by using two main arguments, which shall be evaluated and discussed below.

First of all, there is an opinion that certain employees are unable to concentrate on work at home and, therefore, are much less effective workers, meaning that by allowing them to choose their workplace they themselves, as well as their employer, are bound to suffer.[82;83] This is a rather popular argument to wield when attempting to block the proposed changes, though, considering the reform in the present article, such criticisms do tend to lose their punch.

The aforesaid is delineated by the fact, that instead of all being forced to always work from home, the proposal is to allow the employee the right to choose. If they find that working from their own house is too distracting, they have the freedom to return to the office and refuse the chance to continue distance working. As a result, they would be afforded the exact same situation as they are now, without any reform being in place. Hence, while those who are quite fine working from home will be able to do so, and those who, on the other hand, are unable to concentrate unless they are at the office, will be free to return to their preferred workplace.

Additionally, the proposed change does not in any way intend to amend anything regarding disciplinary proceedings against employees. Therefore, if someone who works from home loses their focus and their work standards slip, the employer has the full right to discipline them, using whatever sanctions may be available, including, if necessary, dismissing them. This too means that if someone cannot effectively work from home, this fact should in no way invalidate the reform proposed herein.

Resultantly, the risk of the employer causing harm to themselves or to their employer by being distracted or otherwise unable to discharge their duties by distance working is negligible. The threats are minimal and, at the same time, the potential problems that may be caused are easily mitigated by readily available measures. Therefore, this argument cannot be considered as impediment to granting employees the right to choose their workplace.

As for the second grounds for criticism, it stems from the fact that when they are at home, employees are able to use their time for their own needs, as opposed to those of their employers and

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[82] *Toniolo-Barrios M., Pitt L.,* Mindfulness and the Challenges of Working from Home in Times of Crisis, Business Horizons, № 64(2), 2021, 189-197.

[83] *Yavson R.,* Strategic Flexibility Analysis of HRD Research and Practice Post COVID-19 Pandemic, Human Resource Development International, № 23(4), 2020, 406-417.

some consider this to be unfair.[84] There are two reasons based on which this line of thinking is to be rejected.

On the one hand, it can be stated, that by guaranteeing the employee the right to choose where they work from, nothing will really change. Quite a lot of research has resulted in findings that even when working in the office, people have free time[85], which they do not use for doing their jobs[86]. The only difference is, that when distance working, they employee is likely to be at their own home and have more freedom in doing what they wish.[87] Therefore, instead of what they prevalently do today, as in wasting this time in entirely unproductive activities[88], the employee will actually get a chance to do something useful for themselves.[89] Moreover, there is also the opinion, that when a person is at home, in comfort, they may have less of a wish to waste time and the employer may actually receive a higher level of productiveness.[90] In light of the above, the result is, that the only real change in this regard that would stem from granting the employee the choice of their own workplace is that their personal interests may be better protected. As for the employer, they are not affected negatively and may, indeed, reap minor benefits as well.

Additionally, according to a rather widespread idea in the academic literature, when an employee is "available" to the employer, even if they are not tasked with anything specific at the moment, this time should still be considered as work hours.[91] Therefore, any argument that by working from home the employees will be allowed too much free time is devoid of all factual grounds.

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[84] *Tabasum S., Kurasheed M. A., Iqbal M. M., Siddiqui I. H.,* The Impact of Telecommuting on Job Performance, Job Satisfaction, Work Life Balance, and Mental Health of Employees in Pakistan in Covid-19: Analyzing the Moderating Effect of Training, International Journal of Management, № 12(1), 2021, 889-928.

[85] *Kamal M. M.,* The Triple-Edged Sword of COVID-19: Understanding the Use of Digital Technologies and the Impact of Productive, Disruptive, and Destructive Nature of the Pandemic, Information Systems Management, № 37(4), 2020, 310-317.

[86] *Tabasum S., Kurasheed M. A., Iqbal M. M., Siddiqui I. H.,* The Impact of Telecommuting on Job Performance, Job Satisfaction, Work Life Balance, and Mental Health of Employees in Pakistan in Covid-19: Analyzing the Moderating Effect of Training, International Journal of Management, № 12(1), 2021, 889-928.

[87] *Kamal M. M.,* The Triple-Edged Sword of COVID-19: Understanding the Use of Digital Technologies and the Impact of Productive, Disruptive, and Destructive Nature of the Pandemic, Information Systems Management, № 37(4), 2020, 310-317.

[88] *Tabasum S., Kurasheed M. A., Iqbal M. M., Siddiqui I. H.,* The Impact of Telecommuting on Job Performance, Job Satisfaction, Work Life Balance, and Mental Health of Employees in Pakistan in Covid-19: Analyzing the Moderating Effect of Training, International Journal of Management, № 12(1), 2021, 889-928.

[89] *Hantrais L., Allin P., Kritikos M., Sogomonan M., Anand P. B., Livingstone S., Williams M., Innes M.,* Covid-19 and the Digital Revolution, Contemporary Social Science, № 15(5), 2020, 595-611.

[90] *Tabasum S., Kurasheed M. A., Iqbal M. M., Siddiqui I. H.,* The Impact of Telecommuting on Job Performance, Job Satisfaction, Work Life Balance, and Mental Health of Employees in Pakistan in Covid-19: Analyzing the Moderating Effect of Training, International Journal of Management, № 12(1), 2021, 889-928.

[91] *Williams J. C., Bornstein S.,* The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias, Hastings Law Journal, № 59, 2008, 1311-1358.

In light of all the above, it can be surmised, that all of the main arguments against guaranteeing the employees' right to choose the workplace is insufficiently substantiated. Therefore, rejecting the reform idea based on them would be both unfair and unwise.

Finally, it should be noted, that before the pandemic ends, there is a major opportunity to ensure that the steps undertaken in the direction of allowing employees to work from home are retained. If this is not done, there is a significant risk, that once the crisis caused by the spread of COVID-19 is over, all will return to the status-quo that existed prior to the pandemic, meaning that the resources that are currently available for distance working may no longer be at hand and, as a result, the chances of the reform discussed within this paper would greatly diminish. This means that the timeframe to do what is necessary for the protection of the employees' rights is rather short and the chance afforded to the future of employment law cannot be squandered, otherwise, there may not be another such opportunity in the near future.

5. Choice of Workplace and Contract Autonomy

Employment law is mostly considered to be part of private law.[92] This field includes the concept of contract autonomy (also referred to as party autonomy)[93], which, in essence, means that the parties to any agreement are free to regulate their own relationship in accordance with the rules that they impose upon themselves, basically, doing as they wish.[94]

Contract autonomy is an important aspect of all civil law relationships.[95] It should not be interfered upon and the parties to an agreement should not be denied their freedom to self-regulate unless there is a legitimate purpose behind such an action.[96] A dominant position in academic literature related to this question is that, for an interference to be justified, first of all, it needs to be protecting an interest of significant value[97] and, at the same time, the interference should be of proportional value.[98] In order for the proposed reform to be justified, the said standard must be satisfied as well.

Firstly, as to the issue of an interest of significant value. A major such component is the rights of the employees. Considering the fact that protecting the latter is considered to be the paramount aim

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92 *Pipia A.,* Regulating Risk of Negative Outcomes during the Process of Contract Fulfillment – Approach to the Economic Analysis of Law, Journal of Law, № 2, 2018, 85-118 (in Georgian).

93 *Jorbenadze S.,* The Concept of the Freedom of Contract, Journal of Law, № 1, 2014, 262-288 (in Georgian).

94 *Johns F.,* Performing Party Autonomy, Law and Contemporary Problems, № 71, 2008, 243-271.

95 *Nishitani Y.,* Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia, Japanese Yearbook of International Law, № 59, 2011, 300-344.

96 *Eller K. H.,* Comparative Genealogies of "Contract and Society", German Law Journal, № 21(7), 2020, 1393-1410.

97 *Pertegas M., Marshall B. A.,* Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts, Brooklyn Journal of International Law, № 39(3), 2014, 975-1005.

98 *Schwartz A., Scott R. E.,* Contract Theory and the Limits of Contract Law, The Yale Law Journal, № 113, 2003, 541-619.

of employment law, it can most definitely be considered as of value[99], and something that clearly should be protected. Moreover, this action will be a step in preserving the healthy balance of employment market, by ensuring that the rare positive impact that the pandemic has had on the world economy is retained, thereby changing the world for the better.

As for the proportionality of the interference, considering all that has been discussed above, it has been demonstrated, that the negative impact of the reform upon the employers are either nonexistent or negligible. Therefore, even if the change will no longer allow for parties' freedom, as a result thereof there will be one party that benefits and the other that does not suffer at all. Therefore, there is no real violation and the interference most definitely does not outstep its bounds.

Finally, it needs to be noted, that both the proposed amendment as well as the interference in contract autonomy is quite recommended, as, according to the surveys of employers, they fully intend to return to the office regime.[100] This will ensure that the employees' interests will, in a way, suffer, when, as can be clearly seen, their rights are not particularly difficult to protect. Therefore, in order to preserve a healthy employment market and combat the negative ramifications of the COVID-10 pandemic, it is of utmost importance that the reform proposed by the article at hand is put into effect.

6. Conclusion

Protecting the employees is a paramount aim of employment law. In order to achieve such a goal, the greatest crisis of modernity needs to be utilized and the positive ramifications thereof must be retained. This is why the right of the employee to choose their own workplace must be guaranteed, which would be a step taken in the right direction.

Such a change has a definite and major positive effect on a large number of employees, while not affecting others, while having no significant negative impact whatsoever upon the employers. At the same time, this change also offers other opportunities, such as protecting a large number of those involved in the workforce, namely individuals with disabilities, from discrimination.

The COVID-19 pandemic has caused the greatest challenge facing the modern world. In order for it to be surmounted, all measures need to be taken to ensure that not only is the reality of the past rebuilt, but the resultant environment in which humanity is to proceed must be built back better. The world needs to be stronger than before, and a part of such a change can be the mechanism of ensuring that each employee has a guaranteed right to choose their own workplace.

The present article has illustrated the need to protect the interests of the employees as much as possible. Additionally, the position that granting them the right to choose their own workplace bears little to no risk, whilst promising a number of significant boons has also been explored.

Considering the fact that employee protection is one of the primary purposes of employment law, the said purpose will have been neglected in the event that the concept defined above is not considered. While, of course, the drafting and enactment of regulations is a complex process, with its

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[99] *Daniel M.,* Protecting Workers' Rights in a Labour Environment Dominated by Nonstandard Work Arrangements and Unfair Labour Practices: An Empirical Study of Nigeria, International Journal of Interdisciplinary Research and Innovations, № 3(1), 2015, 65-83.

[100] *Miller S. D.,* Revitalizing the FLSA, Hofstra Labor and Employment Law Journal, № 19(1), 2001, 1-124.

exact details as well as the practical outcomes being impossible to predict, but the essay at hand has shown the soundness of the underlying principle. Workplace choice, as a guaranteed right of the employee, is a valid notion, the study and exploration of which is a necessary stepping stone in the development of both the Georgian and international employment law.

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13. *Cranwell-Ward J., Abbey A.,* Organizational Stress, Palgrave McMillan Publishing, New York, USA, 2005, 47-93.
14. *Daniel M.,* Protecting Workers' Rights in a Labour Environment Dominated by Nonstandard Work Arrangements and Unfair Labour Practices: An Empirical Study of Nigeria, International Journal of Interdisciplinary Research and Innovations, № 3(1), 2015, 65-83.
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Miranda Matcharadze*

Modern Tendencies for Persons Performing Work Through Digital Platform to Qualify as Employees

Determining legal status of persons performing work through digital platform is the challenge of modern employment law, as far as it is very important to develop a uniform approach towards this issue because of the specific character of this type of work. The tendency of widening the concept of employee in scientific literature and judicial practice is observed, the aim of which is to provide minimal social guarantees to persons.

Key Words: *Digital Labour platform, Application, Employment relationship, Economically dependent self-employee, Control through algorithm, Organization of working process.*

1. Introduction

The issue of qualifying person as an employee is crucial for an individual to be provided with legal and social guarantees conferred by the law. In modern circumstances, especially with the influence of digital technologies, the standard classifiers defining the concept of employee are increasingly losing their grounds. While evaluating essence of labor relations, courts mostly put an accent on real circumstances of subordination, in order to exclude "camouflaged" labor relations. According to the ILO[1] N198[2] Recommendation (herein after Recommendation), the framework of labor relations must be reviewed periodically, in order to be adequate. The issue of review and adaptation of national policy also responds to processual approach, which is the irreversible process of evolution. Necessity of regular review derives not only from the purpose of protecting persons, but also from the interests of entire society.[3]

Necessity of review of the standard classifiers is mostly evident with regard to labor relations performed through usage of modern internet technologies, where nonexistence of fixed working hours or working place, untraditional methods of implementation of control by the employer, and other numerous factors create illusion of absence of labor relations,[4] because of which often persons of certain category, even if their activity if labor relation, are left without legal and social guarantees.

The purpose of the article is to evaluate criteria for qualifying persons left outside legal protection (in this particular case persons employed through online platform) to qualify as employees,

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[1] ILO-International Labour Organization.

[2] R198 – Employment Relationship Recommendation, 2006 (No. 198).

[3] A fictitious self-employment may disrupt the financial stability of the social security system. Companies, which use fictitious self-employed persons do not pay installments of social maintenance aimed for the budget, therefore comparing to competitors who use legal employees, they are in better condition.

[4] As a rule, companies consider platform as connecting circle between courier and customer. *Hartmann-Cortés K.,* How did a Food Delivery Platform's Judgement Transform Freedom of Association into a second- class right? Comparative Labour Law and Policy Journal, 2021, 3.

outlined from the analysis of legislations and judicial practice of various countries in order to improve legal condition of vulnerable groups.

2. Employment Through Digital Labour Platform

In the modern world performance of work through digital labour platform (herein after – platform) in especially topical.[5] Noncompliance with labour standards and minor tax responsibilities give to platforms considerably big advantage comparing to competitors.[6] It is possible to use the term "platform work" as a common term in general, with regard to types of online work.[7] The digital online platforms are considered here, which comprise platforms connected to network that are functioning in the geographically distanced area ("crowdwork") and where people are gathering throughout the world, as well as applications based on location (apps), which unite people in specific geographic area.

There is also content-wise difference between these two notions. The first one is that the service is performed "online" (micro projects, informative access, business consultations) and second, providing service through application, but "offline" (transport, delivery service, housekeeping service, cosmetic service). While the first category (crowdworkers) mostly perform administrative (office) work and this entails global or regional market, the workers of applications based on location are involved in physical work and their usage is targeted to local conditions. In both cases the information technologies and internet are important, in order to provide demand and supply of service in maximally short time, as far as the remuneration of such workers happens momentarily, by principle pay-as-you-go.[8]

3. Criteria for Considering Persons Working Through Digital Platform as Employees

The number of criteria necessary for classifying work performed through digital platform increases day by day.[9] Their essence is also different and the reason is in volumetric character of the

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5 Platform work.

6 Unregulated activity of digital platforms creates danger of disappearance of such companies, which perform activities in line with labor standards and by following tax legislation fully. See *Rodríguez-Piňero Royo M.,* Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 452.

7 OECD (Organisation for Economic Co-operation and Development) considers under the notion of platform works the deals and web-pages performed through application, which through the specific algorithm connects customers and clients with persons, who performs certain type of work in exchange to payment.

8 There is no difference whether person applies online platform for earning extra money, or it is the only source of his/her income, the labor standard must be same in both occasions. See *De Stefano V.,* A manifesto to reform the Gig Economy, Institute for Labor Law, 2019, <http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/> [02.10.2021].

9 In 2007 the new term was established in the legislation of Spain: so-called "economically dependent self-employee", in short "TRADE". Here the category is considered, which receives 75% of income from one person. This legal construction was introduced as a mechanism for protection of economically tormented workers, however, it resulted not in real improvement of persons' condition, but legalization of fictitious employment. That was an offer of intermediate model between employee and independent contractor.

multifactorial test. Besides the traditional control test, which was inadequate in this case, courts had to outline other elements as well, such as for instance acting by using other's brand, influence of algorithm and rating of clients, etc., which is subject to interpretation.[10] The wide scale discretion in terms of evaluating various factual circumstances is added to the mentioned, which brings courts to different legal outcome even within the common framework of legal system.

For instance, the Unemployment Insurance Appeal Board in the state of New-York has ruled repeatedly that the Uber taxi drivers are employees, however, it considered that couriers of Postmates does not fall within the category of employees.[11] The appellate court of the New-York State has ruled that the Postmate conducted non accidental control of personnel, but rather the control of couriers was enough for considering them employed. Moreover, the court has decided that it is important to evaluate control of different degree and it derives from the characteristics of the work.[12]

In the judicial practice of national courts four different factors may be outlined for determining labour relations, which essentially responds to ILO labour relations Recommendation (2006, Nº198).[13] These factors are: 1) flexibility of working hours; 2) control over technologies; 3) usage of tools and other resources of the provider of work; 4) possibility of replacement.[14] It is possible that all four factors are used cumulatively and are altogether evaluated by the court. This does not mean that other factors, such as universal principle of primacy of facts, is worthless.[15] This principle is logical prerequisite of study of all other indicators. When while using this principle, the discussion takes place regarding the classification of labour raletion, the court of some countries directly indicated the ILO N198 Recommendation as a theoretic framework.[16] In USA using the ABC test for determining

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Rodríguez-Piňero Royo M., Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 448.

[10] Ibid, 454.

[11] Legal argumentation is that the Uber controls working tools and working methodology of driver, such as classification of Uber transport (UberX and UberXL); Uber requires from drivers to have cars technically fit condition, clean and all sanitary requirements must be protected; Uber prohibits presence of other person in the car during the ride, rather than passenger; Uber defines 15 second time limit to accept the ride; It determines what type of details and when should be exchanged during the communication between driver and passengers; It gives recommendation to wait at the destination point minimum 10 minutes; It provides river with GPS navigation system. Unimployment Insurance Appeal Board, New York, 2019, № 603938. <https://uiappeals.ny.gov/system/files/documents/2019/09/603938-appeal-decision.pdf> [11.10.2021].

[12] For classification as labor relation it is essential that the control of making important business decisions must be in employer's hands. State of New York, Court of Appeals, 2020, № 13. *Commissioner of Labor v. Postmates Inc,* <https://www.nycourts.gov/ctapps/Decisions/2020/Mar20/13opn20-Decision.pdf> [07.09.2021].

[13] According to the article 13 of the Recommendation, one of the indicators of existence of labour relations is performance of work for only one employee, which aims to define economic dependence on the employee. See *Matcharadze M.,* Expediency of the Review of the Concept of Employee Considering the Technological Progress, Journal of Law, № 2, 2020, 57 (in Georgian).

[14] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 30.

[15] Principle of primacy of facts – is the standard of International Labour Law and is widely used by national courts. The principle indicates how important is the analysis of terms of the contract and factual circumstances of the case.

[16] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 31.

existence of labour relation is one of the effective methods, especially when the burden of proof is transferred to employer, who is obliged to prove that there is not a labour relation.[17] One of the potential outcomes is abolishment of statuses of employer and independent contractor, and consequently all categories of workers must be protected. In USA some statuses already resemble this idea.[18]

3.1. Flexibility of the Work Schedule

The possibility of persons employed through digital platform to individually determine their working schedule, as they do not have an obligation to be in the system at fixed hours of the day or week, is defined as "flexibility of work schedule". This criterion is mostly used by national Courts as an argument to dissociate employee from independent contractor.[19] For instance, it happened in Brazil when both Courts (Superior Tribunal de justica and Tribunal Superior do Trabalho) ruled that flexible work schedule of Uber drivers does not give possibility to consider them as employees.[20] Besides, the Labour Tribunal in Turin did not consider food delivery couriers as employees because of the flexible work schedule. Similar argument – absence of fixed working hours was in substantiation of the Labour Tribunal of Milan.[21] However, flexibility of work schedule has not created compelling obstacle in some jurisdictions. The evident example is France. Where the Appellate Court of Paris has rules with regard to Deliveroo in 2017 that there is no labour relation in place when working days, hours is a choice of person, whether to work hourly or daily, personally decide when to rest and for how long.[22] The same court in January 2019 has not excluded freedom of choosing working hours with regard to Uber from the scope of labour relation, considering the fact that when drivers connect to the application, they connect to the activity organized by the company, which gives them directions, controls their performance and implements disciplinary powers over the employees.[23] Along with organization of working process, when assessing labour relation it is necessary to take into consideration length of relation and its continuing nature.[24] In March 2020 the Cassation Court has

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17 *Bellomo S., Ferraro F. (eds.),* Modern Forms of Work, A European Comparative Study, Roma, 2020, 35.

18 *Bales R., Mikhelidze A.,* Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States, Modern Law Journal, V.I, Book I, 2019, 11 (in Georgian).

19 In the paragraph 13 of the ILO Recommendation № 198 it is noted that the work is performed in hours specially determined for that or on the specifically determined or agreed location or the accessibility of employee is required – are the probable admissible indicators for existence of labour relation.

20 Drivers are not in depending relation with the Uber company, as far as they provide service on randomness principle, without any preliminarily defined hours, they do not receive fixed salary, which does not create characteristics of labour relation, *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.

21 Ibid.

22 It must be noted that in 2016 by the El Khomri Act the French legislator gave collective rights to platform workers approximately with the same amount as persons employed under the labour contract. See *Daugareilh I.,* The Legal Status of Platform Workers in France, Comparative Labour Law and Policy Journal, 41(2), 2020, 412.

23 *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.

24 *Bellomo S., Ferraro F. (eds.),* Modern Forms of Work, A European Comparative Study, Roma, 2020, 23.

approved the decision of the Appellate Court of Paris from January 2019, which was related to consideration of Uber drivers as employees.[25]

In Spain platforms categorically are against conclusion of employment contracts.[26] The Spanish Court has studied issue of flexible work schedule profoundly and has concluded that the schedule is not an obstacle for qualifying relation as labour relation. Moreover, in case of Glovo couriers, during performance of an order, choice of time is limited.[27] According to the Court decision, necessity of points' system which is used by application and which is based on the rating of customers, is revealed when there is a need for service in peak hours. If couriers cannot work during peak hours, their rating points decrease, and this refrains them from having access to orders in conditions of maximal demand from customers.[28] Therefore, possibility to choose time for performing delivery existing theoretically is sharply different from the real freedom.[29] Based on the Court decision, Glovo courriers are also employed in the conditions when they do not have fixed work schedule, preliminarily defined rules when to take work leave, etc. It is important that Court underlined the fact that Glovo controls work schedule of employees, which is expressed in variable remuneration and imposing rating and evaluation system.[30] If an employee desires to be paid more, he/she must work during high demand, which is possible only resulting from evaluation.[31]

Netherlands suggests other example for illustrating the fact that flexible work schedule is not inconsistent with labour relation. In July 2018 the Court of Amsterdam has rules that Deliveroo couriers are self-employed because of their flexible work schedule. In the view of the Court, the fact that top couriers have advantage with regard to certain part of time, does not limit less successful couriers to reserve the order, which they may perform after successful couriers. According to the Court, this occasion does not fulfill the element of subordination prescribed in the Civil Code of Netherlands. In July 2019 other Court of First Instance in Amsterdam shared this decision.[32] According to its substantiation, Deliveroo factually restricts right of couriers to choose working time. Courriers are bound by labour contract, despite the fact that they exercise high degree of freedom. The

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[25] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.

[26] The most acceptable format of cooperation for platforms is to classify persons as economically independent self-employees. In their view, this is the most flexible form, which is admissible for both sides. *Rodríguez-Piňero Royo M.,* Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 461.

[27] In Georgia, Glovo has concluded service contracts with couriers as individual entrepreneurs and manages relations allegedly on equal basis. The tariffs are decreased unilaterally without giving any prior information to couriers.

[28] The role of digital labour platforms in transforming the world of work, World Employment and Social Outlook, International Labour Office, Geneva, 2021, 177, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771749.pdf > [23.09.2021].

[29] *Rodríguez-Piňero Royo M.,* Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 470.

[30] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 33.

[31] Ibid.

[32] Ibid.

degree of dependence on Deliveroo is highly significant, rather than the independence of couriers.[33] In the decision of February 2021 the Appellate Court has rules that only circumstance which indicates to self-employment of couriers may be their freedom to organize work.[34] However, in the view of the Court this flexibility is not inconsistent with labour relations between Deliveroo and its couriers. The argument of Deliveroo, that self-employment is strengthened by the possibility of couriers to connect to application by their own desire and work, anytime, has not changed the position of the Court.[35]

Some countries remain devoted to the opinion that the essential term of labour contract is existence of mutual obligation. The principle of mutual obligation is specifically followed by the United Kingdom. With regard to Uber (*Uber BV and others v. Aslam and others,* 19 February 2021) by the decision of the Supreme Court of the United Kingdom,[36] freedom of Uber drivers whether to work or not work at all, does not oblige them to be in the labour relation with the person they work for. In Germany the Munich Land Court underlined the condition that the framework agreement, rules and terms of platform (application), which does not create obligation to perform work, may not be considered as labour contract.[37] This degree of independence with regard to the working time is absolutely unusual for labour relations. This decision was overruled by Federal Labour Court, which considered the abovementioned relation as labour relation. With regard to the flexible schedule of courier, it has noted that even though the courier has choice to agree or not to work, in combination with other elements such as detailed instructions, this became ground for the court to qualify relation as labour one.[38] Similar platform in France, Clic and Walk, was also considered as employer.[39]

3.2. Control Through Technologies

Control of the performed work by the employer is the main characteristic of labour relation.[40] The options of platform to implement control over its workers through technologies such as: algorithms, evaluation systems and geolocation tools, is an important element in numerous Court decisions considering such type of work as labour contract.[41]

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33 *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 33.

34 Ibid.

35 It must be noted that in Netherlands persons have possibility to conclude collective contracts even in case of service contracts, which is controversial with regard to CJEU practice, which does not give this right to others than employees. See *Gundt N.,* The Netherlands: Trying to Solve 21st Century Challenges by Using 20st Century Concepts, Comparative Labour Law and Policy Journal, 41(2), 2020, 481.

36 Uber BV and others v. Aslam and others, Uk, The Supreme Court of UK, 2021, <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> [10.10.2021].

37 *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 34.

38 Ibid.

39 In this case the important argument was the existence of instructions for couriers and oversight in line with these instructions, Cour d'appel de Douai du, 2020, Nº19/00137, *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 34.

40 In the civil law jurisdiction, it corresponds to the element of subordination.

41 In the Republic of Korea the Ministry of Employment and Labour in 2019 considered food delivery service company "Yogiyo" couriers as persons employed under the labour contract, *De Stefano V., Durri I.,*

In the case *Asociacion Profesional Elite Taxi v. Uber Systems Spain SL*[42] in 2017 the Court of Justice of the European Union (CJEU) has made explanation with regard to the application of national transport regulations, that Uber taxi service is transportation service by using digital technologies. The decision also discusses the control element implemented by the company with relation to drivers. The company implements control over selected drivers in the process of service provision, when they perform particular order.[43] The company not only determines maximum amount of price through its application, but also ensures issuance of bonuses. The application also has function of rating – to give advantage to drivers having better results and expel drivers having improper evaluation.[44]

The control exercised by the company, which es depicted in the financial motivation based on the evaluation of passengers, gives possibility for better management of drivers, rather than direct control of employer over employees based on formal commands in case of similar orders.[45] The control exercised from the side of clients makes platform workers "hyper dependent employees" in comparison to traditional employees.[46] By introducing rating system platform gives a managerial evaluation function to client, which in case of companies alike Uber, where there are fixed tariffs and standardized service, the reputational system is used for excluding nonprofessionals from the application.[47]

However, there are reasons why it is impossible to consider Uber as employer in accordance to national law. The taxi companies, for instance in Brussels, have sued Uber that it must be prohibited because of violation of transport legislation. While deliberating on this case the Court assessed drivers as self-employed persons. Moreover, it made distinction between Deliveroo couriers, who were considered as employees.[48] When comparing these two subjects, the Court noted that Uber drivers have transport license in comparison to Deliveroo couriers. Besides, while in case of couriers, geolocation probably only serves to the aim that client may see where is the order, for taxi drivers – geolocation is necessary for functioning. Not only taxi driver is relocated but also is the client, therefore may we say or not that Uber exercises control over the client as well? The above-mentioned

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Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.

[42] Asociacion Profesional Elite Taxi v. Uber Systems Spain SL, (CJEU), 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0434#t-ECR_62015CJ0434_EN_01-E0001> [10.10.2021].

[43] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.

[44] When the work is performed online, reputation and positive rating obtains a huge significance. See *Moore P. V.,* The Mirror for (Artificial) Intelligence: In Whose Reflection? Comparative Labor Law & Policy Journal, 41(1), 2019, 64.

[45] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.

[46] *Rodríguez-Piňero Royo M.,* Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 470.

[47] *Berg J.,* Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 83.

[48] The Administrative Commission of Belgium conferred status of employees to the Deliveroo's couriers, see *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.

is needed only for mutual connection to the application. In this decision the argument of the court is that if passengers are not controlled hierarchically, then the drivers also may not be subject to control hierarchically.[49]

In New Zealand, in the case *Arachchige v. Raiser New Zeland Ltd&Uber BV* (December 2020) the Oakland Labour Court has ruled that Uber driver is an independent contractor.[50] Along with other arguments the Court has established that work of drivers is not managed and neither controlled by the company, the only thing is that drivers use Uber brand. In addition, the court has noted that this decision was based on mostly interpretation of significant facts.[51]

The Cassation Court of France also underlined the component of geolocation, when it overruled the decision of the Appellate Court with regard to "Take it Easy" platform. By reasoning of the Cassation Court, when the company uses platform and application for connection with the customer, it is interested in and sees the location in real time in order to find out how many kilometers are there to reach the customer, hence considering all these, its possibility to use sanctions towards driver does not leave this relation only in the framework of legal construction of independent contractor.[52] All the more, when there are three elements of subordination in place (giving instruction, control and sanctioning), which unconditionally gives to relation a nature of labour contract.[53] In the more later case the Cassation Court of France approved Uber's control considering the determination of price, taking order and surveillance function over the route through algorithm.[54] Various platforms uses financial sanctions towards persons for improper performance of work, which is characteristic to labour relations.[55] The Supreme Tribunal of Madrid (2019) has noted that with the geolocation system Glovo exercises effective and continuous control over the activity of courier.[56] The reward system dependent on the evaluation of customer is the undisputable proof of labour contract.

In Canada, according to the recent practice, the Ontario Labour Relations Board[57] has noted that with regard to such platforms as Foodora, technologies represent additional mechanism of control in

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[49] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

[50] Arachchige v.Raiser New Zeland Ltd&Uber BV, Auckland Employment Court, 2020, <https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2020-NZEmpC-230-Arachchige-v-Rasier-NZ-Ltd-and-UBER-BV-Judgment.pdf> [13.10.2021].

[51] Ibid.

[52] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

[53] *Bellomo S., Ferraro F. (ed.),* Modern Forms of Work, A European Comparative Study, Roma, 2020, 99.

[54] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

[55] *Berg J.,* Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 84.

[56] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

[57] Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.llnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

the hands of employer. Using GPS[58] is extra mechanism for control. Technological algorithm,[59] GPS, automatic notifications, communication with short textual messages – all these gives possibility to Foodora to control working process with the minimum involvement of human.[60] In the other case in Pennsylvania[61] (USA) the Appellate Court judges were not certain about whether Uber drivers were not subject to control in accordance with the standards of fair labour.[62] They outlined the fact that Uber restricts access to application to drivers who have low rating and reduces their work in following hours.[63] Regarding the dispute which was related to exercise right to unemployment insurance by the driver, the New-York City Supreme Court established that there was an essential evidence of exercising control over the driver by Uber, which created precondition for presence of labour relations.[64] Uber controls route through navigation, by means of rating system, if there is improper performance, it reduces the amount of payment for the driver. Uber observes location of car, behavior of the driver, and gives him motivation to create positive environment during travel through award system based on rating.[65] In the United Kingdom, the Supreme Court granted status of Limb (b type) employee to Uber drivers based on the argument that the rating is used by the Uber only as internal mechanisms for managing performance and as a ground for terminating relations, when the feedback of customer shows that the driver does not comply with standards defined by Uber – which is a classical form of subordination characteristic to labour relations.[66]

3.3. Tools and Other Resources

For determining status of employee, article 13 of the Recommendation takes into consideration supply of the person to whom it offers work with tools, working material, technique. Whether a person carries the logo or uniform of the employer is one of the indicators, which is considered by many

[58] Global Positioning System.

[59] Usage of algorithm is followed automatic decision making, without participation of individual, which deprives person from the possibility to decide the issue my means of negotiation and communication. The lack of transparency in this process is also problematic, *Berg J.,* Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 80.

[60] Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.llnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

[61] Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC., United States District Court for the Eastern District of Pennsylvania, 2018, <https://www.isdc.ch/media/1591/14-razak-v-uber.pdf> [30.09.2021].

[62] Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC., United States Court Of Appeals for the Third Circuit, 2020, <https://law.justia.com/cases/federal/appellate-courts/ca3/18-1944/18-1944-2020-11-05.html> [01.10.2021].

[63] Ibid.

[64] Colin Lawry v. Uber Technologies, INC, State of New York Supreme court, 2020, <https://decisions.courts.state.ny.us/ad3/Decisions/2020/530395.pdf> [14.09.2021].

[65] Ibid.

[66] Uber BV and others v. Aslam and others, United kingdom, The Supreme Court of UK, 2021, <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> [10.10.2021].

courts. In Chile the Court did not consider Uber as employer of drivers because they did not use special uniform. The same approach took place in Australia as well, where the Fair Work Commission decided that as far as worker does not have right to portray the name, logo or colors of company or affiliated with the company on the transportation mean, it hinders the possibility to qualify this relation as labour relation.[67] Moreover, it must be taken into consideration that the worker must have his/her own car, smart phone and access to navigation, in order to use Partner application. Similar approach is in the USA as well. From the sic factors qualifying labour relation (so-called "Donovan factors") according to US Fair Labour Standard one of them is the persons investment in tools and equipment necessary for performing work. This factor strengthens arguments in favor of independent contractor. Uber drivers when they purchase their own vehicles, they make important capital investment.[68]

In the case *Joshua Klooger v. Foodora Australia Pty Ltd* the Fair Work Commission of Australia has noted that claimant did not have any substantial investment (installment) in the form of major item, which he/she definitely needed for performing courier work.[69] Other courts compare the significance of worker's investment when buying own tools with the technological investment of the company. The Ontario Labour Relations Board defines that necessary tools for providing service may be ensured by the courier, as well as by the company, however the application must be underlined, which represents most important part for providing service and is owned and controlled by Foodora.[70] The Court in Madrid has evaluated the ownership of tools and noted that it is important to compare essential technological instruments which are in ownership of the defendant (digital platform and application) and relatively less important (courier's smart phone and motorcycle). The essential in the delivery service for the courier is digital platform and less important – courier's smartphone or motorcycle.[71] Similar decision was made by the Supreme Court of the United Kingdom in case of Uber.[72]

3.4. Obligation to Perform Work Personally

The recommendation outlines the obligation to perform work personally among labor relations' identifying elements. Traditionally for the labour contract personality of employee is essential figure. This issue receives special significance when it relates to performing work through platform. Some

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[67] Mr Michail Kaseris v. Rasier Pacific V.O.F. (U2017/9452), Fair Work Commission, 2017, <https://pdf coffee.com/mr-michail-kaseris-v-rasier-pacific-vof--pdf-free.html> [03.10.2021].

[68] The opinion of US Department of Labor is the same. They use similar platforms, in order to find job quickly, but the dependence on application is minimal, as far as they can use other network or other competitor application. See *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 38.

[69] Joshua Klooger v. Foodora Australia Pty Ltd, Fair Work Commission, 2018, №FWC6836, <https://www. fwc.gov.au/documents/decisionssigned/html/2018fwc6836.htm> [10.09.2021].

[70] Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.llnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

[71] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

[72] Uber BV and others v. Aslam and others, United kingdom, The Supreme Court of UK, 2021, <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> [10.10.2021].

platforms give possibility to their workers to be substituted by other persons. Those rules and terms which regulate relations between worker and platform, in some occasions regulate the circumstances in case of which they may be substituted with other persons. Whether liability insurance towards third persons is applied to substitute person as well. The obligation of personal performance became arguable topic in Brazil as well. The Brazilian judge decided that Uber drivers are not employed, as far as they may be substituted by others.[73] In the United Kingdom the Central Arbitration Committee has noted that Deliveroo couriers really have right to be substituted. As a result, they are not considered as employees in accordance with the Trade Union and Labor relations (Consolidation) Act or Employment Rights Act (1996).[74] Therefore they are excluded from the majority of employment rights, minimal wage, working hours and antidiscrimination protection is related to so-called Limb (b) status of employee, which is hybrid status between employee and independent contractor. The Supreme Court has shared the decision of the Central Arbitration Committee.[75] The London Central Employment Tribunal has decided the dispute in favor of employees. The argument was that workers do not really have right to substitute in practice.[76] This balance between theoretical right to substitute and practice may be found in other countries as well, for example in Spain. The Supreme Court considered term of substitution as a term introduced with the purpose to cover labour contract.[77] Study of existence of similar substitution in other cases was conducted based on the principle of primacy of facts.

4. Conclusion

As a result of analysis of the work of digital platforms the following necessities were outlined: First of all, it is necessary to determine on the legislative level legal status of persons performing activity through digital platforms. Decision of problem is possible by conclusion of collective agreement, as it was done in France.[78] Particularly with this tool the obtaining of minimum guarantees of protection happen for this category of persons.

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[73] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

[74] IWGB v. RooFoods Limited T/A Deliveroo, 39, UK CENTRAL ARBITRATION COMMITTEE, 2017, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf> [23.09.2021].

[75] *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

[76] *Dewhurst v. Citysprint UK Ltd.*, The Central London Employment Tribunal, 2017, <https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I8a926728d7e211e698dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=5ed654bc-6dcb-4947-9112-711982f21728&ppcid=3eac205b77ea4d959e0ee73c08f0541a&contextData=(sc.Default)&comp=pluk> [12.10.2021].

[77] The fact that the substitution of complainants with other persons has never occurred makes the court think that this term is more deceptive and written with the aim to hide existence of labor contract, rather than collateral of the service. *De Stefano V., Durri I., Stylogiannis, C., Wouters M.,* Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

[78] Awarding possibility to conclude collective contract to self-employed persons gives possibility to start negotiations with the platform in equal conditions, See *Daugareilh I.,* The Legal Status of Platform Workers in France, Comparative Labour Law and Policy Journal, 41(2), 2020, 415.

It is critically important for all employees, regardless the content of contractual regulation, to have minimum rights and guarantees. ILO Global Commission on the Future of Work[79] has underlined existence following universal labour guarantees for all employees: freedom of association and participation in collective contracts, adequate salary,[80] limited working hours, secure and healthy working environment.[81]

Usage of algorithms must have limits and technological systems must be used restrictively, balanced and only with the extent necessary for performance of work.

It is necessary for persons performing work through digital platforms, deriving from specifics of their functions (courier, taxi driver) to ensure adequate insurance package on the expense of the offeror of work.

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[79] Global Commission on the Future of Work.

[80] For instance, in Austria there is no legislation regarding the minimal wage. The most important legitimate mean for regulating this issue is collective agreement. The collective agreement regulates 98% of labour relations. However, for concluding collective contract they must have status of employees. See *Löschnigg G.,* Platform Work in Austria, Comparative Labour Law&Policy Journal, 41(2), 2020, 401-402.

[81] "…New ways must be found to afford adequate protection to all workers, and that all workers regardless of their contractual arrangement or employment status, must equally enjoy adequate labour protection to ensure humane working conditions for everyone." *Berg J.,* Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 88.

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The Principle of Competitive Neutrality: Theory and Practice

The principle of competitive neutrality is an important concept for states when they choose to act as business owners. Its contents can be summarized as follows: When state bodies own commercial legal entities, the latter should not possess any advantage in relation to those competitors that happen to be private businesses.

The bigger a role the state undertakes in regard to business, the more important observing the principle of competitive neutrality becomes. Therefore, a number of passive and active steps have been stipulated, which need to be utilized in practice to ensure that the said principle is observed. Hence, the state must make certain that such steps are indeed undertaken.

Considering the fact that, in Georgia, the governing bodies are actively involved in the field of commerce, it is important, that the needed actions are taken, and the principle of competitive neutrality is made reality. In light of this, the present essay discussed the very essence of the said principle, as well as those steps necessary for its implementation and compares them with the extant reality of Georgia.

***Key Words**: Competitive Neutrality, State Owned Enterprises, State Business.*

1. Introduction

The participation of the governing bodies in business activities has become an inseparable part of modern commerce[1]. State owned enterprises play a significant role in international business[2] and have a major impact on the development of the world economy[3]. Their actions can, in a big way, determine the success or failure of the relevant commercial sector[4]. Therefore, it is of utmost importance to have an appropriate legislative "frame", within which the state owned enterprise is to be contained[5].

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1 *Grossi G., Papenfuss U., Tremblay M.,* Corporate Governance and Accountability of State-Owned Enterprises Relevance for Science and Society and Interdisciplinary Research Perspectives. International Journal of Public Sector Management, № 28(4), 2015, 274-285.

2 *Milhaupt C. J., Pargendler M.,* Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform. Cornell International Law Journal, № 50(3), 2017, 473-542.

3 *Kirkbride J., Letza S., Smallman C.,* Minority Shareholders and Corporate Governance: Reflections on the Derivative Action in the UK, the USA and in China. International Journal of Law and Management, № 51(4), 2009, 206-219.

4 *Shirley M.,* Bureaucrats in Business: The Roles of Privatization versus Corporatization in State-Owned Enterprise Reform, World Development Journal, № 27(1), 1999, 115-136.

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One of the fields in which the activities of state owned enterprises are a major topic of study is competition law[6]. The purpose of the latter is to ensure the existence of a competitive environment, in which obtaining and, especially, abusing a dominant position would be impossible[7]. However, this often conflicts with the interests of public entities[8], especially, if such an entity chooses to actively participate in business[9].

In practice, it is difficult to determine when the steps undertaken by the state as part of its commercial activities are appropriate and when, instead, they cause harm to the national economy[10]. The principle of competitive neutrality has been envisaged for such a purpose, to help define the good and the bad[11]. In accordance with it, the state owned enterprise should possess no competitive advantages when juxtaposing it with private companies, with no comparative benefits stemming from the fact that the former is owned by public government[12].

The principle of competitive neutrality has enjoyed significant popularity ever since the start of the 21st century[13]. With time, it is becoming increasingly unacceptable to have certain sectors be monopolized by the state[14] and the support of healthy competition is becoming more and more important[15]. Therefore, it is of great significance to realize the considerable positive impact that the implementation of the principle of competitive neutrality can have upon the free market.

For this very purpose, the present article will, first of all, study the theoretical groundwork of the principle of competitive neutrality. Afterwards, it will analyze the steps needed to implement the principle at hand. Finally, it will evaluate whether the current reality within Georgia is in line with the demands of competitive neutrality.

As a result of the writing of the present essay, the main aspects necessary for defining the main ideas of competitive neutrality shall be clarified. This will show the necessity of their practical

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6 *Matsushita M., Lim C.,* Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules, World Trade Review, № 19(3), 2020, 402-423.

7 *Mosca M.,* On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition, European Journal of the History of Economic Thought, № 15(2), 2008, 317-353.

8 *Fletcher G. S.,* Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation, Duke Law Journal, № 68, 2018, 479-554.

9 *Talus K.,* Long-Term Natural Gas Contracts and Antitrust Law in the European Union and the United States, The Journal of World Energy Law & Business, № 4(3), 2011, 260-315.

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enactment, both on an international level as well as in Georgia. This, in turn, will create the theoretical basis necessary for the eventual legislative regulation of such an important principle as that of competitive neutrality.

2. The Theoretical Basis of the Principle of Competitive Neutrality

A dominant position within the modern academic literature is that for both the internal, national economy[16], as well as the international counterpart thereof, competition is always good[17][18]. Therefore, it is of utmost importance to undertake steps that are capable of ensuring that a healthy, competitive environment for the economic reality is ensured[19]. At the same time, when the state makes a decision on becoming a participant of commercial activities, naturally, it is within its interest to be successful in such a pursuit[20]. A commercial entity, within its capacity, utilizes all instruments available to it in order to achieve success[21]. The state is not immune to having such an impulse either[22] which can lead to the latter using the natural advantages it possesses, that stem from the very nature thereof[23]. This may include disparate actions, such as writing laws that are in line not with the market demands but with the needs of the state owned enterprises[24], or using state bodies in a way that is contradictory to their public law purpose[25], or using state funds for illicit means[26], etc.

The principle of competitive neutrality focuses on avoiding such activities[27]. Its purpose is to ensure the existence of a level playing field, for both private businesses and the state owned

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16 *Fletcher G. S.,* Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation, Duke Law Journal, № 68, 2018, 479-554.

17 *Mosca M.,* On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition, European Journal of the History of Economic Thought, № 15(2), 2008, 317-353.

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23 *Cuniberti G.,* The International Market for Contracts: The Most Attractive Contract Laws, Northwestern Journal of International Law & Business, № 34(3), 2014, 455-517.

24 *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, Leiden Journal of International Law, № 33(2), 2019, 1-32.

25 *Goldeng E., Grunfeld L. A., Benito G.,* The Performance Differential between Private and State-Owned Enterprises: The Roles of Ownership, Management and Market Structure, Journal of Management Studies, № 45(7), 2008, 1244-1273.

26 *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements. Leiden Journal of International Law, № 33(2), 2019, 1-32.

27 *Zwalf S.,* Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.

enterprises[28], in order to rule out the companies owned by the governing bodies having an unsustainably large advantage[29] which, as a direct result, may even lead to the relevant economic sector being controlled by a monopoly[30].

This is paramount, since it is a well agreed-upon fact that monopolies are always a negative development for the economy[31]. Moreover, when there is a state owned monopoly in place, it becomes doubly harder to ever dislodge it, unless the state itself consents to such a change[32]. As a result, the situation that is in place means that the state is "successful" in its entrepreneurial activities, because it has no competition and, most likely, can have no competitors either[33]. This significantly increases the chance for the state bodies to forget their public law obligations and put an unhealthy amount of emphasis on the success of their own enterprises[34]. Such an action should be considered to be a major threat not just to the economy, but to the very legal system itself[35].

Something to be emphasized is, that even when there is no monopoly, the state can still cause significant harm by participating in a business and granting major advantages to the government-owned companies. This harms the relevant field in a big way[36]. The competing private entities are "bullied", with their economic interests being injured[37]. On the other hand, such actions also lead to the decrease in the trust the government enjoys, which is problematic for a host of reasons and goes beyond the economic problems that state owned enterprises are sometimes associated with[38].

In light of the above, the theoretical basis of the principle of competitive neutrality can be defined as follows: If the state participates in economic activities, the enterprises owned by it should have no advantages over their competitors. This is necessary to ensure the existence of a competitive environment, to support the organic development of the economy and to avoid creating a monopoly.

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28 *Valkama P., Virtanen M.,* Competitive Neutrality and Distortion of Competition: A Conceptual View, World Competition Journal, № 32(3), 2009, 393-407.

29 *Healey D.,* Competitive Neutrality, and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific, Revista de Defesa da Concorrência, № 7(1), 2019, 51-68.

30 *Zwalf S.,* Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.

31 *Kim M.,* Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, Harvard International Law Journal, № 58(1), 2017, 225-272.

32 *Room R.,* The Evolution of Alcohol Monopolies and Their Relevance for Public Health, Contemporary Drug Problems, № 20, 1993, 169-187.

33 *Sakyi K. A.,* Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), Advances in Social Sciences Research Journal, № 6(4), 2019, 148-167.

34 *Kim M.,* Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, Harvard International Law Journal, № 58(1), 2017, 225-272.

35 *Room R.,* The Evolution of Alcohol Monopolies and Their Relevance for Public Health, Contemporary Drug Problems, № 20, 1993, 169-187.

36 *Fox E., Healey D.,* When the State Harms Competition: The Role for Competition Law, Antitrust Law Journal, № 79(3), 2014, 769-820.

37 *Gallagher M.,* Reform and Openness: Why China's Economic Reforms Have Delayed Democracy, World Politics Journal, № 54, 2002, 338-372.

38 *Fox E., Healey D.,* When the State Harms Competition: The Role for Competition Law, Antitrust Law Journal, № 79(3), 2014, 769-820.

3. The Principle of Competitive Neutrality in Practice

The primary problem currently associated with the principle of competitive neutrality is the fact that there is a certain ambiguity regarding the methods which can be utilized to implement its provisions[39]. There is no unified approach in regards to what instruments and mechanisms should be utilized in order to realize the said principle[40]. Hence, the present paragraph will summarize the most often used steps.

The principle of competitive neutrality can be summarized as follows: State owned enterprises should have no advantage just because they are owned by the state[41]. This can be ensured by undertaking certain passive or active measures[42].

The passive measures in question, in practice, consist of the state refusing to undertake certain actions[43]. This, mostly, means that the representatives of public governance must refuse to utilize their power in order to draft and enact laws and other administrative documents, as well to otherwise work in such a way that their actions are aimed at supporting state owned enterprises. In effect, all actions that support businesses owned by the public bodies, be they legal or otherwise, must be cut out[44].

As it has been discussed above, in accordance with the principle of competitive neutrality, the state may not enact administrative acts (which includes all types and subtypes, starting from the most basic individual acts to legislation), the purpose or the effect of which is the support for state-owned enterprises[45]. This means that the governing bodies may not take any steps which are focused on the commercial success of their own businesses, unless such actions would be taken regardless of the existence of state owned enterprises[46]. In practice, such actions are divided into three categories. They are as follows:

A) Legislative changes aimed at creating a beneficial environment for the state owned enterprises – In such a case the state may choose to adopt specific pieces of appropriate legislation[47]. The effect of such an activity may sometimes be minimal, but, in other cases, it can fundamentally

[39] *Valkama P., Virtanen M.,* Competitive Neutrality and Distortion of Competition: A Conceptual View, World Competition Journal, № 32(3), 2009, 393-407.

[40] *Zwalf S.,* Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.

[41] *Huang K., Liu Z., Tian G.,* Promote Competitive Neutrality to Facilitate China's Economic Development: Outlook, Policy Simulations, and Reform Implementation: A Summary of the Annual SUFE Macroeconomic Report (2019–2020), Frontiers of Economics in China, № 15(1), 2020, 1-24.

[42] *Krafve L. J.,* To Design Free Choice and Competitive Neutrality: The Construction of a Market in Primary Health Care, Scandinavian Journal of Public Administration, № 15(4), 2012, 45-66.

[43] *Sadiq K., Richardson C.,* Tax Concessions for Charities: Competitive Neutrality, the Tax Base and "Public Goods" Choice, Australian Tax Forum: a Journal of Taxation Policy, Law and Reform, № 25(4), 2010, 401-416.

[44] *Healey D., Smith R. L.,* Competitive Neutrality in Australia: Opportunity for Policy Development, Competition & Consumer Law Journal, № 25, 2018, 223-248.

[45] *Pan L.,* Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees, Cambridge Journal of China Studies, № 14(4), 2019, 16-30.

[46] *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, Leiden Journal of International Law, № 33(2), 2019, 1-32.

[47] *Kwan C. H.,* China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved, Public Policy Review, № 16(3), 2020, 1-26.

alter the commercial reality[48]. In any case, by taking such steps, the state ensures that the company within its control is in a more advantageous position than the private business[49]. The worst type of interference is the state creating a monopoly by way of a focused law, meaning that the legislative act stipulates that the state owned enterprise is the sole entity allowed to participate in the certain field, with all others being legally excluded[50]. This does not mean, however, that the less drastic actions (such as, for instance, freeing the state owned companies from the payment of taxes[51]) are not harmful, as their implementation can have a hugely adverse impact on the competitive environment and, indirectly, on the national economy at large[52].

B) Enacting administrative acts to ensure support for state owned enterprises – In such cases, the state or one or more of its bodies, attempt, via a variety of administrative actions, to confer benefits to their own companies[53]. This may involve the transfer of property to a state owned enterprise[54], provision of services thereto free of charge[55] or other beneficial actions. In any event, in such a case, the beneficiary is granted a considerable advantage in relation to those others working in the same sector, which, in itself, rules out the possibility of the principle of competitive neutrality becoming reality[56].

C) Unofficial steps aimed at granting a competitive advantage – Such events involve the state using its power to support the business below it[57]. This may be legal, but unethical. Though, sometimes, such actions possess an illegal nature[58]. Sometimes, they may even involve criminal activities[59]. Therefore, even if actions of this type are relatively less impactful upon the economic equilibrium, as opposed to, for example, a monopoly enshrined in law[60], it can be argued, that a harmful law is better than the representatives of the state acting in an illegal and corrupt manner.

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[48] *Ramaiah A. K.,* The Competition Neutrality in Malaysia: Challenges and Policy Options, Journal of International Business, Economics and Entrepreneurship, № 3(2), 2018, 45-54.

[49] *Pan L.,* Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees, Cambridge Journal of China Studies, № 14(4), 2019, 16-30.

[50] *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements. Leiden Journal of International Law, № 33(2), 2019, 1-32.

[51] *Graetz M. J., Warren A. C.,* Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility, The Yale Law Journal, № 121, 2012, 1118-1167.

[52] *Sakyi K. A.,* Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), Advances in Social Sciences Research Journal, № 6(4), 2019, 148-167.

[53] *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, Leiden Journal of International Law, № 33(2), 2019, 1-32.

[54] *Modou D., Yun L. H.,* An Empirical Investigation of Causal Relationship of Chinese FDI to African Economies, International Journal of Academic Research in Business and Social Sciences, № 7(3), 2017, 199-207.

[55] *Mason R., Knoll M. S.,* What Is Tax Discrimination? The Yale Law Journal, № 121, 2012, 1014-1116.

[56] *Kwan C. H.,* China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved, Public Policy Review, № 16(3), 2020, 1-26.

[57] *Argy F.,* National Competition Policy: Some Issues. Agenda, № 9(1), 2002, 33-46.

[58] *Waldron J.,* Is the Rule of Law an Essentially Contested Concept (In Florida)? Law and Philosophy, № 21(2), 2002, 137-164.

[59] *Lopes Júnior E. P., Camara S. F., Rocha L. G., Brasil A.,* Influence of Corruption on State-Owned Enterprise Expenditures, Brazilian Journal of Public Administration, № 52(4), 2018, 695-711.

[60] *Dutta N., Sobel R.,* Does Corruption Ever Help Entrepreneurship? Small Business Economics, № 47(1), 2016, 179-199.

Whichever of the actions discussed above is present, in order for competitive neutrality to be enacted, all of them need to be avoided. If this is indeed achieved, then it can be said that the passive measures have been successfully implemented.

As for the active measures, they are relatively difficult to classify[61]. In essence, they are considered to be the actions needed to be actively undertaken in order to ensure that the principle of competitive neutrality is in effect in the relevant economic field[62]. In practice, this means creating a legislative framework that ensures a twofold result:

D) Reducing the overlap between the state and the commercial entity – The creation of such legislation is necessary, so that the state owned enterprise has no access to certain advantages that the private entities possess[63]. Therefore, it is recommended to enact such legislative regulations, which would rule out "higher up" politicians being involved, as well as make sure that the intellectual capital of the public sector is not supporting a private sector player[64].

E) Proactive support for competition – The state must always strive to strengthen competition in all economic sectors[65]. This is especially important in those sectors where the state owned enterprises are involved[66]. Considering the fact, that by doing business, the public bodies effectively harm those private interests already tied up in the relevant sector, it is doubly important for the state to act in such a case. It must strive to ensure that competitive neutrality is in place, and such a result can only be achieved if the independent businesses are supported and allowed to flourish[67].

In the end, in order for the principle of competitive neutrality to be put in place, the state and its bodies must enact both passive and active measures. Only in this case will it be possible for the activities of the state owned enterprises not to have negative ramifications on the economic sector and those private businesses working within it.

4. Georgia and the Principle of Competitive Neutrality

State owned enterprises play a significant role in the national economy of Georgia. The public sector controls such companies, as JSC Partnership Fund (The state investment fund[68]), Georgian Post

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61 *Pan L.,* Construction of Public Enterprises with a Comprehensive Model in China: Principles, Foundations and Guarantees. Cambridge Journal of China Studies, № 14(4), 2019, 16-30.

62 *Sadiq K., Richardson C.,* Tax Concessions for Charities: Competitive Neutrality, the Tax Base and "Public Goods" Choice, Australian Tax Forum: a Journal of Taxation Policy, Law and Reform, № 25(4), 2010, 401-416.

63 *Healey D., Smith R. L.,* Competitive Neutrality in Australia: Opportunity for Policy Development, Competition & Consumer Law Journal, № 25, 2018, 223-248.

64 *Zwalf S.,* Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.

65 *Kim M.,* Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements, Harvard International Law Journal, № 58(1), 2017, 225-272.

66 *Fox E., Healey D.,* When the State Harms Competition: The Role for Competition Law, Antitrust Law Journal, № 79(3), 2014, 769-820.

67 *Zwalf S.,* Competitive Neutrality in Public-Private Partnership Evaluations: A Non-Neutral Interpretation in Comparative Perspective, Asia Pacific Journal of Public Administration, № 39(4), 2017, 225-237.

68 About Us, JSC "Partnership Fund", <https://www.fund.ge/who-we-are> [05.01.2022] (in Georgian).

Ltd (The primary postal operator of Georgia[69]), United Airports of Georgia LLC (The company that owns all of the country's international airports[70]), etc. Additionally, JSC Partnership Fund itself is the sole owner of such major commercial players as JSC Georgian Oil and Gas Corporation (A major business in the field of oil and gas), JSC Georgian Railway (The main rail operator of Georgia), Academician Nikoloz Kipshidze Central University Clinic Ltd (One of the biggest medical clinics of Georgia[71]), etc.[72]

Considering the major part these companies play in the beneficial development of the Georgian Economy and since they sometimes even tend to act as monopolies in the relevant sectors, it is even more important to ensure the enactment of the principle of competitive neutrality. Therefore, the present essay shall analyze, whether the aforesaid active and passive measures are indeed implemented or whether the needs of the economy, in line with principle in question, are neglected.

Legislative Acts – Research has revealed no Georgian legislative acts, which directly confer the right to act as a monopoly in the relevant sector to any state owned enterprise. At the same time, there are still a number of legislative pieces that convey advantages to such entities. For instance, JSC Georgian Oil and Gas Corporation has been granted the status of the national oil company[73], which is its exclusive privilege and entails a number of rights and obligations for the said company[74]. Moreover, a number of state owned enterprises have been granted special rules, enacted by way of government ordinances, which frees them from certain legal obligations and procedures, making it easier for them to do business[75][76][77]. The latter fact has, in the past, become a topic of discussion in a dispute in front of the Constitutional Court of Georgia. The court reviewed a case in 2019, which was focused on the said special rules as pertaining to Georgian Post Ltd. The court stated, that while the company was indeed privileged, since as a result of this the postal service was ensured for the entirety of the country, such privileged status was indeed constitutional[78]. However, it did not consider whether such a status-quo would be harmful for competition and the national economy at large.

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69 About Us, "Georgian Post" Ltd, <https://www.gpost.ge/?site-lang=ka&site-path=company/about/> [05.01.2022] (in Georgian).

70 About Us, "United Airports of Georgia" LLC, <http://airports.ge/index.php/ka/about-us/goals-and-objectives> [05.01.2022] (in Georgian).

71 About Us, Academician Nikoloz Kipshidze Central University Clinic, <http://respublikuri.ge/%e1%83%a9%e1%83%95%e1%83%94%e1%83%9c-%e1%83%a8%e1%83%94%e1%83%a1%e1%83%90%e1%83%ae%e1%83%94%e1%83%91/>> [05.01.2022] (in Georgian).

72 Consolidated Audited Financial Report of JSC "Partnership Fund", 2019, <https://fund.ge/upload/media/PF_Consolidated_FS2019GEO.pdf> [05.01.2022] (in Georgian).

73 Ordinance № 299 of November 25, 2013 of the Georgian Government on Granting the Status of the State Oil Company to JSC "Georgian Oil and Gas Corporation".

74 Article 9, Georgian Law on Oil and Gas, LHG, 13(20), 16/04/1999.

75 Ordinance № 506 of November 30, 2017 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC "Georgian Oil and Gas Corporation".

76 Ordinance № 587 of September 18, 2020 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC "United Airports of Georgia".

77 Ordinance № 411 of August 16, 2021 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by "Georgian Post" Ltd.

78 Decision of April 18, 2019 case № 1/1/655 of Georgian Constitutional Court, 33-59.

In light of the above, at can indeed be said, that the passive measure in question is not in place in Georgia. There are a number of extant legislative acts, which privilege the state owned enterprises, which, in turn, comes in conflict with the principle of competitive neutrality.

Administrative Acts – In practice, Georgian state owned enterprises are bestowed their property by the government free of charge, with no additional obligations coming in tow, which means they are granted a significant advantage as opposed to their competitors, as the latter are forced to undertake a number of duties in order to accrue capital, ensuring further needs and ramifications in the future[79]. At the same time, the state owned enterprises need do no such things, being granted property and capital by way of administrative acts. As a result, the fact remains that even in such regard, there are issues regarding the implementation of the principle of competitive neutrality.

Practical Support – Naturally, there are a number of methods to ensure the success of state owned enterprises, which are effectively impossible to find out information about. However, the fact remains, that the representatives of the state, including those at the very top, often undertake steps which are aimed at exactly that very purpose[80][81]. Hence, it can indeed be said that the principle discussed within this document is not in place in this regard as well.

Contact Minimization – There are very few steps that can be considered to have been undertaken by the Georgian government that can be construed as being aimed at proactively ensuring that the contact between the state and its companies are minimized. For instance, one of the primary governing bodies of JSC Partnership Fund is the Supervisory Board[82]. The head of this board is the Prime Minister of Georgia, with other ministers being a part thereof as well[83]. As for a number of other state owned enterprises, the company is governed by the director, who is directly or indirectly appointed by public governing bodies[84][85].

Hence, it is clear, that the link between the state and its businesses is indeed still in place. In order for the principle of competitive neutrality to be observed, this needs to change and the role of the government as pertaining to running its companies needs to be reduced much further.

Support for Competition – When analyzing the laws of Georgia, there is no trend of proactive support for competition in the fields within which the state owned enterprises are active. Moreover, the Georgian National Competition Agency, the primary entity tasked with ensuring the rule of

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[79] *Borlini L. S.,* When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements, Leiden Journal of International Law, № 33(2), 2019, 1-32.

[80] The Georgian Prime Minister meets with the President of the Paris Airports Union., February 19, 2020, <http://gov.ge/index.php?lang_id=-&sec_id=541&info_id=75207> [05.01.2022] (in Georgian).

[81] At the Prime Minister's assignment, the procedure for the corporatization and reform of the railway shall be drafted, February 4, 2021, <https://1tv.ge/news/premier-ministris-davalebit-rkinigzis-korporatizaciisa-da-reformirebis-dghis-wesrigi-shemushavdeba/> [05.01.2022] (in Georgian).

[82] Article 4, Ordinance № 230 of June 2, 2011 of the Georgian Government on affirming the Bylaws of JSC Partnership Fund and forming its Capital.

[83] Ibid, Article 5.

[84] Article 5, Order № 93 of May 13, 2013 of the Minister of Energy of Georgia on affirming the bylaws of LEPL "Oil and Gas State Agency".

[85] Article 9, Order № 1-3/815 of September 4, 2012 of the Chairman of LEPL "Company Governance Agency" on Affirming the Bylaws of "United of Airports of Georgia" LLC.

competition law in the country[86], essentially refuses to investigate companies under the public bodies. It has never found any evidence of a breach of competition law by a state owned enterprise. Which, if the international practice in the relevant field is examined, is quite unlikely and should be considered a significant anomaly[87].

Therefore, it can be said that the state most certainly does not strive to actively support competition in the sectors which are relevant to the activities of its own businesses. Therefore, just as with the previous measures, the steps needed in order to ensure competitive neutrality are not being taken.

In light of all the above, it is evident, that neither the passive nor the active measures are put in place by the Georgian state. Appropriate actions need to be taken as soon as possible, as the extant reality is incompatible with the principle of competitive neutrality. Such a status-quo, by itself, will most assuredly lead to a misdevelopment of the national economy and significantly harm the commercial sector.

5. Conclusion

The principle of competitive neutrality is one of the keys that can unlock the economic success of the nation. Its implementation would, on the one hand, be beneficial to the appropriate development of state owned enterprises and, at the same time, be a major positive change for their competitors, the private businesses, which, in sum, would have a productive impact upon the whole commercial field.

In order for the principle of competitive neutrality to become reality, both passive and active measures are needed to be undertaken. Unfortunately, in the case of Georgia, such measures are not in place to the extent needed. This, in turn, means that competition is stifled and the national economy suffers significantly. Considering the fact that the share of the state owned enterprises in the gross domestic product is quite considerable, this fact should be considered a major problem.

As a result, remedying the extant situation should become a priority for the state. Only if competitive neutrality is put into practice, it will become possible for the free market and the state-owned enterprises to successfully cohabitate, which would, in turn, be a significant step on the road to economic success.

As it has been discussed above, the principle of competitive neutrality has great importance for the development of the national economy. There are a number of ways in which its provisions can be implemented, however, this remains not to be the case in Georgia. The economy of the country cannot afford to ignore such an important instrument for its development, so it is of paramount importance that the legislative framework is amended so that the principle of competitive neutrality is enshrined therein. As a result, in such an event, this highly valuable concept shall be permitted to play its role in enhancing the everyday life of Georgia.

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[86] About Us, Georgian National Competition Agency, <https://competition.ge/about-us/what-we-do> [05.01.2022] (in Georgian).

[87] *Sakyi K. A.,* Public Corporation Monopolies – Case Study of Sale of Electricity Company of Ghana (ECG), Advances in Social Sciences Research Journal, № 6(4), 2019, 148-167.

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4. Ordinance № 299 of November 25, 2013 of the Georgian Government on Granting the Status of the State Oil Company to JSC "Georgian Oil and Gas Corporation".
5. Ordinance № 411 of August 16, 2021 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by "Georgian Post" Ltd.
6. Ordinance № 506 of November 30, 2017 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC "Georgian Oil and Gas Corporation".
7. Ordinance № 587 of September 18, 2020 of the Georgian Government on Enacting the Special Rules for Purchasing of Goods and Services by JSC "United Airports of Georgia".
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9. *Albers M.,* Achieving Competitive Neutrality Step-By-Step, World Competition Journal, № 41(4), 2018, 495-512.
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49. Georgian National Competition Agency, <https://competition.ge/about-us/what-we-do> [05.01.2022].
50. JSC “Partnership Fund”, <https://www.fund.ge/who-we-are> [05.01.2022].
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52. Academician Nikoloz Kipshidze Central University Clinic, <http://respublikuri.ge/%e1% 83%a9%e1%83%95%e1%83%94%e1%83%9c-%e1%83%a8%e1%83%94%e1%83%a1%e1%83%90%e1%83%ae%e1%83%94%e1%83%91/> [05.01.2022].
53. “Georgian Post” Ltd, <https://www.gpost.ge/?site-lang=ka&site-path=company/about/> [05.01.2022].
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Mariam Chilachava[*]

Specific Private-Legal Aspects of the Blockchain System Functioning

In the 21st century, humanity is facing a fourth – technological revolution, characterized by an amazing pace and scale of development of digital technology. The cause of this revolution is blockchain technology, one of the most relevant, discussed and promising systems today, which is also becoming the basis of the new digital economy.

The goal of the work is to introduce the essence and structure of the blockchain technology to readers, to analyze the blockchain system in the private-legal context, to discuss private-legal endogenous and exogenous problems reasoned by DLT implemented transactions, to contradict the autonomy of the blockchain system with national legislation, to offer legislative alternative for legal regulation of the blockchain system, to define the necessity for symbiotic coexistence of technologies and the Law and to offer the ways for finding the compromises needed for such coexistence.

Keywords: *Blockchain, Distributed Ledger Technologies, endogenous problems, bona fide purchaser, cryptography, private key, irreversibility of transactions, property, public key, hash.*

1. Introduction

Given the current trend, the need to understand cryptocurrency as an object of civil law is on the agenda. This means protecting the property right over it and preventing unauthorized disposal by the illegal owner. Therefore, the existence of such a legal mechanism, which prohibits the unauthorized owner from entering into a new transaction, which in turn will prevent irreparable damage to the real owner. In addition, the question of the typological attribution of crypto-assets to types of legal entities is a significant one- whether it is movable or immovable property? What is the legal regime for the emergence of property rights and, therefore, protection? The article considers the problem of unauthorized use of a blockchain personal key by an unlawful owner and its legal consequences.

The goal and objective of the paper is to provide necessary information on blockchain technologies to readers and to give in-depth presentation of legal problems related to them, to offer compromises necessary for coexistence of information technologies and the Law and solutions to problems to be solved by all means, along with providing information about existing practices and standards.

Considering the goals of the article, have been used the logical and systemic analysis research and comparative law methods. As result of using those methods, has been created an essential representation of approaches and regulations in relation to blockchain technologies in different countries. Have been discussed private-legal problems reasoned by blockchain technology transactions

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and have been offered solutions to those problems through integration of Private Law into the blockchain technology.

2. Blockchain as the Distributed Ledger Technology (DLT). Essence, Structure and Brief Review of Its Development

Although blockchain is a new word in science, the idea of the Distributed Ledger Technologies (DLT[1]), which blockchain is based on, is not a novelty.

First research on DLT was published in 1976, in the scientific article *The Directions in Cryptography[2],* however, its realization was believed to be too complicated and unsecure for quite a long time.

At the end of the 20th century, namely in 1991, was published the first work authored by *Stewart Haber* and *Scott Sornetta*[3], describing the chain of blocks produced through cryptographically protected calculations. Main goal of *Haber* and *Sornetta* was to create such a system that would unite several documents in one block.[4] In the system, documents were hashed (transformation of input data into cryptographic data by using mathematical algorithms), for getting unified unique hash.[5]

In 2008, in social network was published the article, which was later recognized as a scientific article. As an author of the article[6] was named *Satoshi Nakamoto*. It was after the publication of the article under the nickname of *Satoshi Nakamoto* when raising awareness on blockchain and blockchain-based bitcoin (during later period on other cryptocurrencies) started.

Blockchain is a permanently growing list of records, which forms the chain of blocks through unity of predefined rules of transaction records, in which, each of such transactions may be movement of money, different goods or secure data.[7]

Blockchain is protected cryptographically, meaning that each block consists of hash-figures, which means sign, time figure and transaction data connected to the previous block.[8] It is actually impossible to change information existing in a blockchain. Any specific person does not manage database. Every user of the network has a copy of the whole database. Old blocks are saved eternally,

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1 Distributed Ledger Technologies.

2 *Kekelia V., Kotrikadze G.,* Methods and Models of Symmetrical System of Blockchain, Book I, Tbilisi, 2016, 4 (in Georgian).

3 *Bayer D., Haber S., Stornetta W. S.,* How to TIme-Stamp a Digital Document, Journal of Cryptology, № 3, 1991, 99–111.

4 *Bayer D., Haber S., Stornetta W. S.,* Improving the Efficiency and Reliability of Digital Time-Stamping, New York, 1992, 329–334.

5 Ibid.

6 *Nakamoto S.,* Bitcoin: A Peer-to-Peer Electronic Cash System, Decentralized Business Review, October, 2008, 1-9.

7 *Kotrikadze K., Kipshidze D.,* Blockchain Technologies, as Self-Organized Systems, Tbilisi, 2019, 1 (in Georgian).

8 *Lansiti M., Lakhani K. R.,* The Truth About Blockchain, Harvard Business Review, Januar-February, 2017, 1, citation: "The technology at the heart of bitcoin and other virtual currencies, blockchain is an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way."

while new blocks are added to the ledger making it impossible to manipulate through forging documents, transactions and other data. Therefore, falsification of one record will result in the falsification of the whole chain.

Hence, blockchain is an independent "open ledger of transactions implemented between two parties",[9] which is completely decentralized and secure.

Blockchain is a self-organized system, featuring two parameters: first – any type of change made in any block results in cancellation of validity of following blocks. This means that change of transactions record log is in fact impossible. The system recovers its by means of systems of other members of a network, while undesired changes are cancelled automatically.[10]

Second, no less important parameter is that rules in blockchain are backed mathematically – it is not necessary to engage any central managing body in order to find out if your transaction is wrong or not at any moment of time.[11]

Structurally blockchain consists of two elements. First – hash and second – previous hash. Hash is the "fingerprint" of data or information. Hash consists of special cryptographic algorithms and is a hexadecimal number. It is possible to hash any word of sentence. Hashes can be calculated by means of any online-calculator.[12] In other words, block hash is a fingerprint, making each block unique. In order for information block to be created, along with individual hash, it is necessary to have certain data and time-stamp. It is noteworthy that along with the first hash, each new block consists of both, its own and previous block fingerprint. First block and hash are called genesis[13], consisting of probability-set algorithm, which is impossible to be calculated. Sequence of hashes forms the blockchain (chain of blocks). If we change anything inside the block, the aforementioned will result in the change of the whole hash (the change will be shown), which will cause invalidity of all following blocks. First block is the special block, as it does not have the previous valid hash, (previous block does not exist).

As I have already mentioned, each user has the complete copy of a blockchain database, while as of today, the size of the database is 200 gigabytes.[14] When a new block is created, it depends on the system user, if the new block will be approved or not. Approval needs majority of votes – 51%. Therefore, any previous hash creates the chain of blocks, ensuring that the system is secure and protected.

Blockchain is a platform on which cryptocurrencies, smart contracts, NFT[15], etc., are created. Thus, the subject of research is the need for a legal regulation of blockchain, as it is a platform for creating cryptocurrencies and circulating autonomous currencies, a means of concluding and executing

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9 *Siraj R.,* What Is a Decentralized Application, USA, 2016, 1-2.

10 *Kotrikadze K., Kipshidze D.,* Blockchain Technologies, as Self-Organized Systems, Tbilisi, 2019, 2 (in Georgian).

11 Ibid.

12 *Nakamoto S.,* Bitcoin: A Peer-to-Peer Electronic Cash System, Decentralized Business Review, October, 2008, 2.

13 <https://www.investopedia.com/terms/g/genesis-block.asp> [04.02.2022].

14 <https://www.statista.com/statistics/647523/worldwide-bitcoin-blockchain-size/> [26.12.2021].

15 <https://www.bbc.com/news/technology-56371912> [04.02.2022].

smart contracts, and NFT as the basis for unique digital property turnover, resulting in both property rights and the need to create and regulate other legal norms.

3. Necessity for Existence of the Blockchain Legal Regulation

Distributed Ledger Technology (DLT) is an alternative to legal regulation. DLT was created for eliminating negative sides of banking system.[16] Main goal of *Satoshi Nakamoto* was to simplify transactions by means of that system, in which transactions would be of decentralized nature and their conducting would be possible without third persons.[17]

There are several contradictory ideas about the blockchain. DLT supporters claim that autonomous cryptocurrency is the guarantee for protection of human rights from government interference.[18] This is because the DLT will make government lose monopoly on issuing money and decrease its role. *Laurence Lessig*[19] believes that – the code is law. *Lessig* is one of those scholars who put code and technology over the Law and claim that the blockchain technology does not need any regulation, as it is ideal. *Lessig's* opinion can be counted right only in endogenous part, but not in relation to the exogenous problem, which remains outside of this ideal system.

Indeed, if we follow *Laurence Lessig's* opinion, we will see how technology replaces the Law, as far as it is possible to conduct thousands of secure transactions without participation of any third persons. Transaction process is fully free from any type of regulation. Transaction is made directly by the person who wants to do it, by using his own private key. This transaction is after checked and approved by other participants of the system. For the cause it not necessary to involve a lawyer, Notary, bank or depositary. This is not implemented based on any special contract or other legal document. All this is replaced by one code. Right by this one code the Law is simplified or even replaced.

The above approach can be used directly in blockchain transactions, but not in the case of blockchain technology product NFT, which technically can be thought of as a digitally exclusive sample owned by the creator – author and acquirer – owner.[20]

However, the above mentioned does not exclude existence of legal regulation. The system may be unique and absolutely perfect from inside, but it is not protected from (external) exogenous problems. Hence, it absolutely logical and expected that in the nearest future will appear the new field of Law – *lex cryptographica*.[21]

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[16] *Nakamoto N.,* Bitcoin: A Peer-to-Peer Electronic Cash System, Decentralized Business Review, October, 2008, 1-3.

[17] Ibid.

[18] Comp. *Levy S.,* Crypto: How the Code Rebels Beat the Government Saving Privacy in the Digital Age, USA, 2001, 78-79.

[19] Comp. *Lessig L.*, Code Is Law, USA, 2000, 4-6; See also, *Lessig L.*, Code: Version 2.0, USA, 2006, 1-8.

[20] <https://www.bbc.com/news/technology-56371912> [04.02.2022].

[21] *Wright A., De Filippi P.,* Decentralized Blockchain Technology and the Rise of Lex Cryptographia, USA, 2015, 48.

4. Private-Legal Problems Caused by DLT-Conducted Transactions

As it is often said, receiver of transaction becomes owner of a bitcoin.[22] Terms – owner, holder, property and others are also used in relation to cryptocurrency[23], as long as cryptocurrency is a legal benefit. Therefore, the DLT connection with property is clearly apparent. But, despite all that, it is still obscure to what extent cryptocurrency, including Bitcoin, is able to position itself as property.[24] This is a problematic, however often ignored issue. As I have already noted, in the nearest future, the new field of Law – *lex cryptographica* – is to become an essential, demanded and usable field of Law.

Considering that the world is divided into states and every state has its own legal system, it is logical that property rights are individually regulated in each of them at the national legislative level.[25] In the first place it is necessary to look at property law from the collusive legal angle and only after that to use it in virtual and real world.

There is an opinion that search for relevant Private Law is an anathema.[26] As far as, fully independently from the Law the DLT ensures any type of transaction in shortest period of time, with maximum guarantee of security, which cannot be guaranteed by any lawyer of legal system in general. Still, this relates to endogenous issues, not exogenous. Therefore, let us discuss problems arising during endogenous and exogenous transactions.

4.1. Endogenous and Exogenous Problems of Transaction

Endogenous problem is the one appearing inside the system,[27] or a technical problem that can appear or happen by participation of oracle[28]. For example, executor of transaction may make a mistake, type figure 1 instead of 10, or the system may shut off due to electricity failure for several minutes, and transaction may be late.

It is enough to use the correct code for successful and efficient transaction. One transaction takes exactly the time that is needed for the system to confirm relevance of the private key with the public key[29]. However, the technology is unable to consider the way of obtaining that key, which may

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22 *Meiklejohn S.,* A Fistful of Bitcoins: Characterizing Payments Among Men with No Names, IMC'13 – Proceedings of the 13th Conference on Internet Measurement, USA, 2013, 127. Also, see, *Tu K.,* Perfecting Bitcoin, USA, 2017, 505, 548.

23 *Abramowicz M.,* Cryptocurrency-Based Law, USA, 2016, 414; Also, *Bayern S.,* Dynamic Common Law and Technological Change: The Classification of Bitcoin, USA, 2014, 22, 29.

24 *Cutts T.*, Bitcoin Ownership and its Impact on Fungibility, USA, 2015, 23; Also, *Low K., Teo E.,* Legal Risks of Owning Cryptocurrencies, Handbook of Blockchain, Digital Finance and Inclusion, USA, 2018, 47.

25 *Rose C. M.*, Possession as the Origin of Property, USA, 1985, 84-85.

26 *Bayer D., Haber S., Stornetta W. S.,* Improving the Efficiency and Reliability of Digital Time-Stamping, USA, 1992, 325.

27 *De Filippi P., Mcmullen G.,* Governance of Blockchain Systems: Governance of and by Distributed Infrastructure, USA, 2018, 16.

28 This will be discussed in following chapters.

29 <https://www.gemini.com/cryptopedia/public-private-keys-cryptography#section-what-is-public-key cryptography> [04.02.2022].

not be legal and may be connected to scam and etc. This is not the task of algorithms or technology; therefore, it is one of exogenous problems.

Exogenous problem is the one not resulting from the blockchain platform. Its source comes externally, but affects those persons who own the cryptocurrency.[30]

Among exogenous problems is obtaining a private key through scam, distortion of facts, falsification, deception and other means.[31] All these ways of executing transaction are illegal by means of Law, but it is acceptable for the blockchain technology. Therefore, the contract (i.e. transaction) is not considered effective legally, when it is about such circumstances. For example, person X illegally obtained a private key from another person's computer and illegally transferred bitcoin to his account. The way of obtaining the key is legally unacceptable, although, the efficiency/executability of transaction is present.

Situation is the same when it is about Inheritance Law and Institute of Succession. In all the legal systems, property of a deceased goes to successors.[32] This is done automatically. It is possible for such handover to consider in case of giving cryptocurrency that a deceased owned,[33] as far as it is the legal benefit.

Another type of exogenous problem is bankruptcy. Often, bankruptcy manager is in the role of debtor and manages all assents in order to satisfy creditors.[34] This also considers virtual assets, such as Bitcoin too, as it can be certain part of debtor's property. Despite any kind of description, it is apparent that crypto-assets are ordinary property, which must be protected just as any other property or property right.

After a fact of death takes place, according to the Inheritance Law, property of deceased is handed over to successor. This considers any property of a deceased, including cryptocurrency. This is executed not depending on whether or not a successor is aware of the private key, crypto-assets still go into his property, which means that technically successor may not be owning/holding a private key, but based on Law successor becomes legal owner of such crypto-assets.

The Law is unable to put blockchain into restraints is the hypothetic inheritance. Let us imagine that person X passed away, left the Will with his private key, which is kept in his office work computer. X's co-worker has access to that computer. According to Inheritance Law, all the assets go to X's successor.[35] Including the private key kept in X's office computer. However, X's co-worker, having access to that computer, is able to make blockchain transactions by using this private key,

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30 *De Filippi P., McMullen G*, Governance of Blockchain Systems: Governance of and by Distributed Infrastructure, USA, 2018, 44.

31 *Miranda C.,* How to Avoid a Bitcoin Blackmail Scam, USA, 2018, 8.

32 *De Waal M. J.,* Law of Succession, in Introduction to the Law of South Africa, USA 2004, 169; Also, *Dyson H.,* French Property and Inheritance Law: Principles and Practice, USA, 2003, 313.

33 *Anitei A. C.,* Digital Inheritance: Problems, Cases and Solutions, International Conference Education and Creativity for a Knowledge-Based Society, 2017, 32; Also, see, *Cahn N.,* Probate Law Meets the Digital Age, USA, 2014, 67.

34 *Campbell B. H.,* A Treatise on the Law and Practice of Bankruptcy: The Act of Congress of 1998 and Its Amendments, 3rd ed., Kansas City, 1922, 4.

35 *McGovern Jr. W., Kurtz S., English D. M.,* Wills, Trusts and Estates, Including Taxation and Future Interests, USA, 2010, 57.

which means that he obtains factual ownership of Bitcoin. Neither the legal successor nor the Will Executor will be able to manage the deceased's crypto-assets if they will not have the private key. Blockchain cannot be responsible for that or control the process, as the blockchain records neither deaths nor other factors, which stay outside of its algorithm functioning.

In order for this system to be perfect, it is in the first place necessary to globally recognize cryptocurrency as property, object of right to property and second – a mechanism must be developed that will restrict unauthorized holder to execute new transactions, i.e. to use private key. Therefore, not depending on what kind of problem we are dealing with, be it endogenous or exogenous, it in the first place considers property of a person and any kind of violations must be regulated based on the Law.

5. Legal Problems of Relevance with Legislation

It is enough to adapt the DLT to Private Law in order to solve all the above discussed problems. At first glance, this means that all transactions will be checked according to local national legislation, which will in return increase the gap between technologies and the Law.

5.1. Blockchain Autonomy VS. National Legislation

First complication existing between the DLT and the Law is the autonomy of DLT, as it always functions independently from any law and the legal system in general. Aside from that, there is the threat of legal restraint of the blockchain and putting it into some frames. For illustrating the aforementioned let us analyze the following case: a person, who illegally obtained another person's private key, made transaction and created another, new private key produced from that key.[36] Legally, such transaction must be annulled, as the property was taken away from the true owner of the Bitcoin without their awareness, through misappropriating their private key. But, when a private key is used and transaction is confirmed, technically a new key is created, the owner of which becomes another – third person. This third persons now appears as a new, honest owner, who has the right to use the key as desired.[37] This can legally be compared to an honest purchaser, who did and could not know about the true case.

It is technically impossible to interfere with the actions of a person illegally misappropriating a private key, as every new transaction creates a new private key, which is available to those persons who received the aforementioned transactions and it is also impossible to find that key too, as it can be located in any part of the world. This private key is able to create a new private key and this exceeds the legal process and becomes of irreversible character.

DLT – is a perfect mechanism, which has digital image and is seen on screen. Very beneficial and efficient is transferring crypto-assets through blockchain, when it happens by using private and public keys, although, there still is the risk of hacker misappropriation, as result of which an

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[36] *Garrison J.,* 2 Men Arrested in Elaborate Plot to Steal $550K in Cryptocurrency by Hacking Social Media Accounts, USA Today, 2019, <https://www.usatoday.com/story/news/nation/2019/11/15/massachusetts-men-arrested-plot-steal-cryptocurrency-bitcoin-social-media-threats/4201763002/> [24.12.2021].

[37] *Agrawal H.,* How Long Does It Take to Transfer Bitcoins and Why?, Coinsutra, 2019, <https://coinsutra.com/bitcoin-transfer-time/> [25.12.2021].

unauthorized person gains the right to manage Bitcoin, while the person having real right to those assets faces loss. In order for the DLT to become fully compatible with the Law, it must be substantively studied and even changed, as the result cannot be achieved superficially.

5.2. Irreversibility of Transactions as the Characteristic Feature of the Blockchain

Opposition of the Law and technologies can be avoided if we suspend the distribution of the illegally obtained block. For example, at the time of illegal obtaining of a private key, the case must not be based on claiming that it is a property "of that one" and requesting it back from an illegal owner, but on recognizing the produced chain as illegal and annulling it, meaning recreating the initial situation.

Same mechanism must be used if an unauthorized person takes over bitcoin; for example: not a successor after decease of property owner. It seems that the blockchain itself must be changed for the cause, not to lose justice in such a context. However, this cannot be achieved as a bitcoin, as already programmed and systemically launched mechanism is impossible to be changed to transformed.[38] As I have noted several times, blockchain-bitcoin technology is programmed the way that the information already reflected in the chain (of an executed transaction) cannot be erased or changed. This is the result of its irreversible nature. Hence, any transaction is added to the DLT and passed over to next block owner in a unified way. The basis for the guarantee of the blockchain itself is right its unchangeability and irreversibility.

Still, it is possible to modify or reorganize any system, but the question is how justified it is to make such modification. Quite often, such actions bring more losses than benefits. Let us recall the years 2013 and 2016. In 2013 Bitcoin reorganization[39] took place, which considered adding of smart-contacts and in 2016, forceful reorganization of Ethereum was done, reasoned by large volume of crypto-assets misappropriated by hackers, pointing to weakness of the program.[40] In both cases, new version of blockchain was developed. Reorganization did not cause such serious loss in case of Bitcoin as in case of Ethereum. Ethereum was divided into two generations: Ethereum (One) and Ethereum Classic. Hacked ledger in fact "passed away" and all those faced losses who had purchased the first generation of Ethereum.[41]

This means, any reorganization, modification, be it forceful or voluntary, has negative impact on public confidence, while the value of cryptocurrencies directly depends on public trust and demand.

5.3. Legislative Alternative in the Context of Legal Collision

As it said, Private Law has as many expressions as there are number of different countries. In order to give legal evaluation to symbiotic coexistence of technologies and the Law and functioning of

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[38] *Wright A., De Filippi P.,* Decentralized Blockchain Technology and the Rise of Lex Cryptographia, USA, 2015, 37.

[39] *Buterin V.,* Bitcoin Network Shaken by Blockchain Fork, USA, 2013, 7.

[40] *Gomez E.,* The Ethereum Hard Fork & Ethereum Classic, USA 2016, 11.

[41] *Low L., Teo E.,* Legal Risks of Owning Cryptocurrencies, USA, 2018, 19.

blockchain system it needs to be identified if any country's legislation regulates the aforementioned and if yes, which country it is and how they do it. This falls under the authority of the Private International Law regulation sphere.[42] Collision Law is based on affiliation of facts and relations to the country's law, which the tightest contacts are identified with.[43] Such methodology is a great challenge to the DLT. Blockchain is a global and transnational mechanism not affiliated with any country. Blockchain transactions are made by using private and public keys, without identification of location of parties. In order to use the Private International Law, it is necessary to define location of contract parties or to specify location of action, while this is inadmissible in blockchain, as it is against the general principles of the blockchain technology. Information reflected in blockchain is kept in different computers worldwide. Any person can take part in such permissionless system, as Bitcoin. Approval of transaction is done by confirmation from all the participants throughout the world. Therefore, it would be right to say that the permissionless system is fully decentralized and it not tied to any country. Another challenge that complicates solution of aforementioned problem is the non-uniform approach to blockchain-bitcoin.

It is quite difficult, but still possible to connect the blockchain and the Law, as far as any transaction is made by two parties.[44] Furthermore when it is possible to classify cryptocurrency as property, as it has value. Therefore, it is the case to be discussed by property right and the law.

Contractual qualification – takes us to autonomy of parties in which parties will be able to agree on anything.[45] Based on that, parties will have the right to use the Law, which mostly complies with transaction made by them. In such cases, DLT regulation is defined in each specific case, by individual legislation; but, the aforementioned may be incompatible with the blockchain technology itself. This is because other participants will not know about the Law that the parties have chosen, while the validity of transaction depends on the confirmation from those participants. This means that this is technically impossible to do. Thus, it would be advisable to create one unified law or new field/direction of law, which would regulate the DLT and relations and actions connected to it. Meanwhile, the latter contradicts with the Bitcoin ideology. Usage of one law is admissible only for permissioned systems, which are managed by one of several persons, but fully contradicts with the permissionless system, which is accessible and functional worldwide, without any type of supervision. Anonymity principle, which the blockchain technology stands on will be breached, if it will be publicized which countries a transaction is made between in order to define relevant law. The latter is necessary for the Private International Law as it is based on the territoriality principle.

If we look at cryptocurrency and transactions as property and their owners and those with the right for property, then we will get *Lex Rei Sitae*, when an object of property is defined and it an item. Information on blockchain and cryptocurrency based on it is not material item, which exists only as records in ledger, without possibility to detect location. Bitcoin does not have any factual address and geographical home; although, it is also possible to change the *Lex Rei Sitae Rule*. For example, many

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42 *Fawcett J., Carruthers K., Cheshire N. F.,* Private International Law, USA, 2008, 19.

43 *Fawcett J. C., Cheshire N. F.*, Private International Law, USA, 2008, 85.

44 *Wright A., De Filippi P.,* Decentralized Blockchain Technology and the Rise of Lex Cryptographia, USA, 2015, 184.

45 *Weintraub J.,* Functional Developments in Choice of Law for Contracts, Germany, 1984, 239, 271.

countries use PRIMA rule in relation to intangible securities, which indicates usage of legislation of the country, in which an intermediary is.[46] The aforementioned would be possible to be used if there was an intermediary party in a transaction, but the permissionless system involves only two parties and there is no intermediary institute. Therefore, the PRIMA rule is absolutely incompatible with the blockchain. DLT is possible to be used for transferring property assets, be it immovable or movable property – by means of tokenization. These assets require individual approach.

Eventually, none of the collision law regulated cases are relevant to DLT. This problem needs comprehensive and in-depth study and development of new approaches, which will bring technologies and the Law closer together. One of the solutions is modernization of property law or recognition of Bitcoin as property worldwide. Still, in both cases, it is necessary to thing and understand globally, for one not to contradict with the principles of another.

6. Private Law Integration with the DLT

6.1. Coexistence of Technology and the Law – Search from Compromises

When speaking about the coexistence of the blockchain and of the Private Law, three aspects discussed in previous chapters must by all means be considered: DLT autonomy, irreversibility of transactions and blockchain independence from any country – or its decentralized nature. It is necessary to create such a mechanism that will define the number and quality of transaction, but that will not be controlled by national legislation of any country. The new Law must be acceptable to all the countries and must not contradict with the international legislations of states. The given offer satisfied all the above discussed criteria, although, it may be criticized both by lawyers and technologies. In order to avoid such criticism, let us discuss where this offer comes from and what its advantages are.

It must be said in the first place that blockchain is an innovation related to the future that will be useful and beneficial for both a country and people. If we presume that there will be no scam and illegal actions in the blockchain functioning, it is a fact that as a technology, it will function ideally even without laws.[47] If lawyers will attempt to make changes to its functioning, it will be damaged as a mechanism. Even selection of regulating law may have negative impact, as the aforementioned contradicts with DLT autonomy and anonymity principles, along with the decentralized character of the blockchain.

It is noteworthy that the law must not interfere with the blockchain functioning. After the development of the law, the technology must continue functioning as usual; conduct transactions the same way, by protecting autonomy and anonymity and by using private and public keys. The main power of a private key owner is that he has the latter. The law and legal system should not take this power away in general from the legal owner. Every new transaction creates new private key and this

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[46] Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary Art, 05/06/2006.

[47] Please see Bitcoin circulation statistics, <https://www.statista.com/statistics/730806/daily-number-of-bitcoin-transactions/> [26.12.2021].

process is irreversible. The Law is unable to stop the process that is called irreversibility of creation of new keys[48] and should not even have claims for it. Irreversibility of transactions is the fact that needs to be recognized and accepted by the legal society. Otherwise, the desired result will not be achieved. This case looks like the following: for example, a person who knows a card pin-code is withdrawing cash from an ATM, but he does not have a permission to withdraw the money. ATM thinks that an authorized person is withdrawing cash, as there is a correct pin-code entered – as result money is given. Let us discuss a second case – the case of honest owner (purchaser). If a thief is selling an item, this item becomes property of an honest purchaser and previous owner cannot claim it back. The situation is the same here – the right to get back this key exists until the latter executes a new transaction.[49]

The Law must not fully control the blockchain; it must regulate the part that relates to the illegal misappropriation of the key.

6.2. Modification of Transaction Irreversibility

Blockchain transactions are almost irreversible – which means they are final.[50] Although it is impossible to erase or annul an already created block, the Law is able to change the value of sequence. For example, although it is impossible to erase already existing, it is possible to get back that transaction. Such an obligation may be imposed on a party, when the second one did not execute its share of obligation, i.e. recreation of initial situation. Although, from technical viewpoint, the initial situation cannot be recreated, as a transactor does not return the old key, but is forced to create the new one, receiver of which will be the old owner. Such a solution can be offered to parties by a defined law or a new field of law. However, there is one circumstance – execution of transaction depends on the will of receiver. He must use his own private key to give back cryptocurrency, while there is no guarantee that he will do so.[51] Although, it is possible to conduct forcing action, recognized by the Law. Such a forcing action may be court verdict, sanction or anther document having legal force.[52] Of course, these legal means are not as efficient as erasing transaction technically, but in this case, there is no other way of using.

Therefore, transaction concept must be transformed the way to adapt to property law, based on liabilities. In this case, it will not be needed to change the Law or legal system itself. Analysis of transactions in relation to property right has several positive aspects. For example: after identification of aforementioned it will not be necessary to check validity of all transactions. DLT works without failures, while the Law regulates external violators as result of which we will get an ideal mechanism.

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[48] *De Filippi P., Wright A.,* Blockchain and the Law, Harvard University Press, USA, 2018, 24.

[49] Miller v. Race, [1758], 1Ch 1151-1155.

[50] *Nakamoto S.,* Bitcoin: A Peer-to-Peer Electronic Cash System, Decentralized Business Review, October, 2008, 1, 8.

[51] *Raskin M. I.,* Realm of the Coin: Bitcoin and Civil Procedure, Fordham Journal of Corporate & Financial Law, Vol. 20, Issue 4, 2015, 969, 975.

[52] Ibid.

Still, this cannot be regulated just by the Private Law, as scam for instance is not subject of study of Private Law.

Bitcoin transaction is not a contract, but this action is an implementation of an abstract contract. The aforementioned looks like a Purchase and Sale Agreement. Similar to the international Private Law, here it is also possible to use location of parties or execution location for determining the applicable law. Alternatively, based on – *lex loci delicti*, which is recognized by majority of States in their legislation.

7. Conclusion

Joshua Fairfield claims that it is necessary to bring technology and Law closer together, in order to not only achieve efficient functioning of the system, but also to maximally protect user rights, which will, in return, result in the formation of new direction in Law.[53] To solidify this point of view, according to other scholars, in relevant fields of Law must until now have been introduced such notions as: "Bitcoin – new type of property"[54], "crypto-robbery", "crypto-scam" and etc.[55] Following in the footsteps of modern trends, the irreversible process of convergence of technology and law is remarkable. For the legal interest and protection of any user using the block chain system, its legal regulation is inevitable. Based on the analysis presented in the paper, it can be said that the protection of the person using the block chain system is carried out in the same way as in the case of traditional property ownership. This creates the need to understand cryptocurrency as an object of law, to present it as property, and as an object of property rights. It is true that Bitcoin does not have an actual address or geographical location, but based on the reasoning and examples discussed in the study, it can be concluded that cryptocurrency is a protected legal good. In addition, the information on the block chain and the cryptocurrency based on it is immaterialized, which exists only in the form of records in the registry. Thus, the increasing development of technology shows that the field of private law protection is not limited to traditional property; it goes beyond the boundaries of this tradition.

Although the blockchain is of autonomous nature, DLT still needs legal regulation. Therefore, if we wish to achieve a unified and completely secure and protected mechanism, symbiotic coexistence of technologies and the Law is necessary. Both sides must make compromise for the cause, as result of which will be created a new direction of law – *lex cryptographica* – which will discuss all the aforementioned problematic issues and not only those.

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[54] Ibid.

[55] *Zaytoun H.,* Cyber Pickpockets: Blockchain, Cryptocurrency, and the Law of Theft, USA, 2019, 395, 401.

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Elguja Tavberidze*

Legislative Regulations and Practical-Legal Aspects of Arrest of a Person Without a Court Ruling

This article looks at the one of the problematic and topical issues of the criminal process. The presumption of liberty belongs to the category of fundamental human rights, which is recognized and protected by applicable national and international law. Interference with fundamental rights in criminal proceedings is justified only in exceptional circumstances. Arrest, detention is the most serious measure of coercion permitted by both domestic and international criminal procedure law and international human rights instruments.

The article is based on the analysis of doctrine and investigative/judicial practice. It describes and discusses the main aspects of modern unlawful arrest and the current challenges.

The purpose of the study is to identify gaps in legislative and investigative/judicial practice related to the arrest of a person without the court's permission and to determine the measures to be taken to ensure their resolution.

Keywords: *Arrest, Unlawful Arrest, Lawful Arrest, Judge's Ruling, Urgent Necessity, Factual and Formal Grounds for Arrest.*

1. Introduction

Coercive measures in criminal procedure are measures in legal doctrine, that ensure the proper performance of duties by the participants in the proceedings and the prevention of obstruction of the rendering of justice at the stages of investigation[1], prosecution and / or trial.[2]

So, Arrest is a legal measure of coercion in criminal procedure, which implies short-term (maximum period – 72 hours) restriction of a person's liberty. on the basis of a probable cause of committing an alleged offence for the purpose of preventing obstruction of the proper administration of justice.

The current criminal procedural legislation establishes two rules for arresting a person: 1) Ordinary rule – by a court ruling; And 2) Based on the urgent necessity without the permission of the court.

Arrest as a coercive measure in criminal procedure has an "ultima ratio" character.[3] It can be used only in extreme cases when the constitutional and lawful purposes cannot be achieved through other means.

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1 Records of June 26, 2015 № 646 of Constitutional Court of Georgia.

2 Decision of 18 April 2016, case № 2/1/631 "Citizens of Georgia Temur Janashia and Giorgi Alasania v. Parliament of Georgia" of the Constitutional Court of Georgia, II-20.

3 *Papiashvili L. (ed.),* rivate Part of Criminal Procedure Code of Georgia, Tbilisi, 2017, 213 (in Georgian).

An essential prerequisite for a coercive measure in criminal procedure – lawful arrest – is the existence of probable cause, that a person has committed a crime for which the law provides imprisonment.[4]

A probable cause is a binding standard of proof, whose legislative definition is provided for by article 11(11) of the Criminal Procedure Code. According to this definition, a totality of facts or information that, together with the totality of circumstances of a criminal case in question, would satisfy an objective person to conclude that a person has allegedly committed a crime.

During the arrest with or without a court ruling, there must be a probable cause that at least one of these dangers is available, in particular: the person will flee or will not appear before a court, destroys information important for a case, or will commit a new crime.

Therefore, it is clear that with the standard of probable cause it is necessary to establish the commission of an act that contains elements of crimes provided for by Criminal Code of Georgia.[5]

Arrest of a person without a court ruling, also called lawful arrest, is carried out in the case of urgent necessity on the basis of an instantaneous, abrupt necessity.[6] Urgency indicates a lack of time, when it is impossible to obtain a judge's permission to restrict the right, and requires immediate action.[7] However, it should also be noted that arbitrary arrest is largely related to urgent necessity.[8]

Accordingly, all necessary measures must be taken at the level of both legislative and investigative practice in order for the state to prevent unjustified arrest and groundless restriction of the rights of individuals.[9]

In view of all the above, the arrest of a person without a court ruling serves to promote the proper administration of justice. The existence of this measure is an important legal lever for the prosecution to prevent the accused from hiding, destroying evidence, and/or committing a new crime in the future. Taking into account these circumstances, it is necessary to identify problems at the legislative level, as well as in practice, to find ways to solve them, to refine national legislation and to legally use unlawful arrest in practice.

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4 *Papiashvili L.,* The Legal Basis for the Use of Arrest and Detention in the Criminal Process, Constitutional and International Mechanisms for the Protection of Human Rights, *Korkelia K. (Ed.),* Tbilisi, 2010, 176 (in Georgian).

5 Lukanov v. Bulgaria, [1996], ECtHR, 21915/93; Steel and others v the United Kingdom, [1998] ECtHR, 23/09/1998, 67/1997/851/1058.

6 Decision of 11 April 2013 № 1/2/503,513 "Citizens of Georgia Levan Izoria and David-Mikheil Shubladze v. Parliament of Georgia" of the Constitutional Court of Georgia, II-13.

7 Decision of 26 December 2007 № 1/3/407 "Georgian Young Lawyers Association and Citizen of Georgia – Ekaterine Lomtatidze v. Parliament of Georgia" of the Constitutional Court of Georgia, II-26.

8 *United Nations,* Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 161.

9 *Myer E., Hancock B., Cowder N. (eds.)*, Handbook for Human Rights Prosecutors, Tbilisi, 2008, 68 (in Georgian).

2. Factual Grounds for the Arrest in the Case of Urgent Necessity

A more common case in investigative practice is the arrest of a person without a court ruling, in the state of urgent necessity. Similar to a lawful arrest, during the arrest of a person without the permission of a court requires both factual (evidentiary) and formal (procedural) grounds, there must be evidential standard of probable cause for both grounds cumulatively. The absence of one of these prerequisite prevents the possibility of using the arrest and makes it illegal.[10] Factual ground for arrest in the case of urgent necessity is provided for by part 3 of article 171 of the Criminal Procedure Code, In particular, the first sentence of that part says that a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime. Accordingly, the body conducting the investigation had to have collected the sum of evidence that is sufficient to establish probable cause that the crime was committed by the person arrested without a court ruling. At the same time, unlawful arrest, different from sanctioned detention, does not require that this particular crime be punishable by imprisonment. Based on the above, the factual ground is established by the sum of evidence that proves the guilt of the person according to the standard of probable cause. Accordingly, the evidence listed in the decree on indictment and also other sum of evidence available in the case files, which may not be mentioned, in particular, in the decree, but exist in the criminal case and directly or indirectly indicate the guilt of the person. However, it should also be noted that all the basic, direct / indirect evidence that proves a commission of an incriminated act by the person against whom this act is incriminated, in most cases, directly specified in the decree on indictment.[11]

In one of the judge's rulings of the Tbilisi City Court we read: " According to the facts and information referred to in the decree on indictment (a record of inspection of a crime scene, records of interrogation of witnesses, a record of interrogation of victim , records of interrogation of accused , a record of arrest and a personal search and other materials available in the case files) and according to the criminal case materials , there are sufficient factual grounds and probable cause ... "[12] According to another ruling, "The Court clarifies that ... the factual ground relates to the issue of evidence and with the standard of probable cause should evaluate the totality of facts or information that, together with the totality of circumstances of a criminal case in question, would satisfy an objective person to conclude that the accused has allegedly committed a crime."[13] Existence of "reasonable suspicion" implies the existence of facts and information which would satisfy an objective person to conclude that a person has committed a crime, although what may be considered 'reasonable' depends on all the circumstances of the case."[14]

Unlawful arrest should not be perceived in such a way that judicial control over the arrest of a person is not carried out at this time. The court shall check the lawfulness of the arrest at the first

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[10] *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 503 (in Georgian).

[11] Brogan v. the United Kingdom, [1988] ECtHR, 11209/84; 11234/84; 11266/84; 11386/85; Murray v. the United Kingdom, [1996], ECtHR, 25/01/1996, 41/1994/488/570.

[12] Ruling of November 9, 2013 case №10a/5899 of Tbilisi City Court.

[13] Ruling of October 21, 2016 case № 10d/4666 of Tbilisi City Court.

[14] Fox, Campbell and Hartley v. the United Kingdom, [1990], ECtHR, 12244/86, 12245/86, 12383/86.

proceeding before the court, and if it considers that there was no factual or formal ground for the arrest, it considers such arrest to be unlawful. It is the duty of the judge to make at least a few sentences concerning the lawfulness of the arrest in his ruling about the first proceeding before the court and applying a measure of restraint. According to the ruling of the Tbilisi City Court of January 30, 2017, “The fact of allowing substantial procedural violation during the arrest of I.B. bringing charges against him, also during carrying out other procedural actions , which would have led to the refusal to apply the measure of restraint, is not confirmed by the case materials."[15] Consequently, if the no existence of the factual or formal grounds for arrest are not confirmed by the materials provided by the prosecution, even in such cases, the judge will make at least a few suggestions on the matter and declare that there was no substantial procedural violation during the arrest. And if the court finds that during arresting a particular person the case materials (combination of facts or information) in a criminal case against that person is not sufficient to establish a factual ground with probable cause, the judge will recognize the arrest unlawful and release the arrested immediately.

2.1. Formal Grounds for the Arrest in the Case of Urgent Necessity

For the arrest of a person in the case of urgent necessity, it is necessary to have a factual (evidential) grounds along with the formal (procedural) ground, otherwise arrest of the person is inadmissible.[16] The degree of reasonableness of the arrest is much higher in the case of urgent necessity than in the case of a lawful arrest, because the arrest of a person is not preceded by the court's awareness of the act committed or to be committed and by the court's permission to arrest. In the case of a unlawful arrest, a police officer, an investigator or other person authorized to arrest shall make a decision based on personal experience and professional skills, after which the judge shall check the lawfulness of this decision at the first proceeding before the court. A person may be arrested without a court ruling if: the person has been caught in action while or immediately after committing a crime (in flagrante delicto); the person has been seen at the crime scene, and a criminal prosecution is immediately initiated to arrest him/her; a clear trace of crime has been found on or with the person or on his/her clothes; the person has fled after committing a crime, but he/she is identified by an eyewitness; the person may flee; the person is wanted; this possibility is provided for by the Law of Georgia on International Cooperation in Criminal Matters. At the same time, we must also remember part 3 of Article 171 of the Criminal Procedure Code, which is considered cumulatively in connection with the second part of the Article 171, according to which there must be any of the following circumstances (formal alternative ground) in addition to the factual grounds for arrest : the risk of the person fleeing or not appearing before a court, destroying information important to the case, or committing a new crime.

It is noteworthy that both the office of the General Prosecutor of Georgia (its structural units) and the common courts find it more difficult to convince a formal ground with an admissible standard than a factual ground. This is due to the fact that this requires specific, actual, objective factual

[15] Ruling of January 30, 2017 case № 10d/163 of Tbilisi City Court.
[16] Ruling of December 28, 2016 case № 10d/5660 of Tbilisi City Court.

circumstances, which, in addition to the crime already committed, indicate the existence of other above-mentioned normative risks. As already mentioned, arrest of a person without a court ruling is possible only in case of urgent necessity, when there is physically no other alternative present in the existing legal space. The Criminal Procedure Code of Georgia exhaustively lists seven specific grounds when the person may be unlawful arrest. Also, a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime and the risk that he/she may flee, not appear before the court, destroy information that is important to the case, or commit a new crime cannot be prevented by an alternative measure that is proportional to the circumstances of the alleged crime and to personal characteristics of the accused.[17]

Due to the importance of the issue, we will discuss each ground independently to be able to thoroughly identify problems at both the theoretical and practical levels and find appropriate ways to solve them.

2.1.1. Arrest of a Person While or Immediately After Committing a Crime

During the arrest of a person on this ground, it is necessary that there is no long interval between the unlawful act committed and the arrest. The person has been caught in action while or immediately after committing a crime is a case when a person, who has allegedly committed a crime, completes unlawful act and an arresting person is/goes to the crime scene immediately, which does not take a long time between the offender committing the crime and his/her attempt to leave the crime scene.[18] The person has been caught in action while committing a crime is a case when the arresting officer catching, arresting an alleged offender while committing a crime, when the crime has not yet been completed or has instantly been completed and the accused is in the view of the arresting person, i.e. the arresting person also has the first touch of the visual perception of the criminal act.[19]

Arrest of a person immediately after committing a crime implies that the person does not hide from the view of the arresting person after committing the crime. Moreover, it does not matter if the person is arrested at the crime scene after the crime has been completed or away from the crime scene. The main thing is that the crime committed by the arrested person is directly seen by the arresting person and before his arrest he does not objectively hide from the view of the arresting person.[20]

It is interesting to consider one of the examples from the investigative / judicial practice when there are cases of arresting a person on this ground. The record of an arrest and personal search of the accused dated April 6, 2017, provides Article 171(2)(a) of the Criminal Procedure Code "the person has been caught in action while or immediately after committing a crime " as one of the formal (procedural) grounds for arrest in the case of urgent necessity.[21] According to the materials of the mentioned case, on April 6, 2017, the accused, together with another person, used a screwdriver to try

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17 See. Article 171 (3), Criminal Procedure Code, LHG, 31, 03/11/2009.

18 Decision of November 11, 2016 case № 1c/1722-16 of Tbilisi Court of Appeals.

19 Ibid.

20 *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 505-506 (in Georgian).

21 Criminal case № 001060417001, Record of Arrest and Personal Search of the Accused of April 6, 2017.

to secretly taking money from the Paybox for its unlawful appropriation, when mentioned persons were arrested by police officers under Article 19, 177 (3)(a) of the Criminal Code of Georgia, which implies attempted theft committed with a preliminary agreement by a group. The arrest of the mentioned persons was carried out on the ground of urgent necessity and, as mentioned, the record of an arrest and personal provides Article 171(2)(a) of the Criminal Procedure Code as one of the formal (procedural) grounds for arrest. The Tbilisi City Court, by its ruling of April 7, 2017,[22] while discussing the issue of a measure of restraint of accused, considered the arrest of the mentioned persons on the ground of urgent necessity to be lawful. Indeed, it is clear that in the criminal case referred to above, there were both formal and factual grounds for unlawful arrest.

However, it is interesting to consider another example from the investigative / judicial practice that concerns similar factual circumstances. The record of an arrest and personal search of the accused dated December 21, 2014, provides Article 171(2)(c) of the Criminal Procedure Code "a clear trace of crime has been found on or with the person or on his/her clothes".[23] as one of the formal (procedural) grounds for arrest in the case of urgent necessity. Moreover, it is established from the case materials, that person (B. K.) was arrested at the time when he was trying to secretly taking money from the paybox by using a hook. As a result of the personal search of the mentioned person it is true that the above-mentioned hook was seized, which the accused needed to commit a crime, but, it is clear that he was caught in action while committing a crime, so in the record of an arrest and personal search with Article 171(2)(c) of the Criminal Procedure Code had to be also mentioned subparagraph "a" of the second part of the above-mentioned article. Notwithstanding the above, according to the judge's ruling[24] the fact of allowing substantial procedural violation during the arrest of B. K. bringing charges against him, also during carrying out other procedural actions, is not confirmed by the case materials, so it is why the arrest of the mentioned person in the case of urgent necessity was considered lawful.

It is noteworthy that while working on the labor, up to a hundred judges' rulings on the first proceeding before the court and the applying measure of restraint were examined, from the analysis of which it is possible to make a conclusion that the court does not make a detailed discussion on the legality of the arrest and is limited to a few words whether there was a fact of procedural violation during the arrest of the person or not. We consider it appropriate for judges to discuss in more depth the issue of the legality of arrest, even with regard to the grounds for the arrest, whether the grounds provided in the record of arrest or/and personal search are relevant to the factual circumstances of the criminal case.[25] This will properly develop investigative directions in the context of the arrest and establish correct / uniform investigative / judicial practice. With regard to Article 171 (2)(a) of the Criminal Procedure Code, it should also be noted that it simultaneously considers both the completed crime and the attempted cases and their differentiation in the record of an arrest is not essential. An indication of the time at which the arrest was made specifically in action while or immediately after

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[22] Ruling of April 7, 2017 case № 10a/1686 of Tbilisi City Court.

[23] Criminal case № 001211214001, Record of Arrest and Personal Search of the Accused of December 21, 2014.

[24] Ruling of 23 December 2014, case № 10a/7319 of Tbilisi City Court.

[25] *Bokhashvili B., Mshvenieradze G., Kandashvili I.,* Procedural Rights of Suspects in Georgia, Tbilisi, 2016, 16 (in Georgian).

committing a crime, a practical purpose may be acquired later, during the interrogation of the arresting persons, in the descriptive section, in the context of compliance of the testimonies and persuasiveness.[26] It should also be noted that the possibility of the arrest a person on the grounds under consideration is also provided for by Belgian law, where the arrest is regulated at the legislative level in law on "Pre-Trial Detention", which was passed in the 1990. Under Belgian law, an important ground for detaining a person is to catch him/her in action while committing a crime. In such a case, the police officer is authorized to apply a measure of procedural coercion against the person – in the form of arrest. At the same time, in the presence of a similar situation, a person can be arrested by a private person. In any other case, the prosecutor is a person who can make decisions about the arrest of a person.[27] Finally, with regard to the procedural law of Georgia, it should be noted that the grounds under consideration in this subsection are the only formal grounds on which even a person with immunity may be arrested. This possibility is provided for by Article 173 of the Criminal Procedure Code of Georgia, although it provides for an exception, in particular, even on this ground may not be arrested the President of Georgia, persons enjoying diplomatic immunity and their family members.

2.1.2. Arrest of a Person at the Crime Scene

A person may be arrested without a court ruling if the person has been seen at the crime scene, and a criminal prosecution is immediately initiated to arrest him/her; this means that the person did not hide from the view of the eyewitness / hot pursuit subjects. If a person has at least temporarily disappeared from the view of the arresting person and reappeared later, then his/her arrest must be carried out on other grounds.[28]

It should also be noted that the mentioned ground are very similar to the grounds for arrest discussed above, but the difference between them is that, unlike the abovementioned, the person is not arrested at the crime scene, but is pursued and arrested away from the crime scene. At the same time, during the arrest of a person on this ground, it becomes much easier to substantiate the risk of hiding , even when discussing a measure of restraint, because it is indisputable that if a person tried to abscond immediately after committing a crime, Even at a later stage of the proceedings, there will be a priori danger of his/her absconding. Indeed, according to the judge's ruling: "Although the expected severe sentence is one of the relevant factors in reasoning the risk of absconding, the court does not consider the risk of absconding to be reasoned just by referring to a severe sentence. It should be taken into consideration that the accused tried to abscond from the crime scene and it was possible to arrest him only after the police chased him".[29]

It should be noted that this ground of the arrest significantly expands the circle of alleged arrested persons. Being at the crime scene a priori does not mean being directly came into contact with

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[26] Department of Human Rights and Investigation Quality Monitoring, Recommendation on Drafting a Record of Arrest, Tbilisi, 2020, 4 (in Georgian).

[27] *Vingart K. (ed.),* Criminal Procedure Systems of EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 40 (in Georgian).

[28] *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 506 (in Georgian).

[29] Ruling of April 7, 2017 case № 10a/1686 of Tbilisi City Court in the.

the crime. Taking into account the principle of foreseeability of the rule of law, it would be desirable for the legislator to specify better the mentioned ground, which would allow us to conclude in what specific cases it is possible, in case of urgent necessity, to arrest a person on the above-mentioned ground, in order not to be groundless interfere with human rights in the field protected by the Constitution and international legal acts. It should also be noted that the grounds under review in practice are usually used in combination with other grounds for the arrest. Mostly It is used in cumulation with Article 171 (1)(a) of the Criminal Procedure Code.[30] Consequently, these two grounds are quite close to each other in practical terms as well.

It is also interesting to pay attention to the words "criminal prosecution shall be carried out immediately" on the grounds under consideration. As it is known from the current procedural legislation, the subject of criminal prosecution is the prosecutor. On the mentioned ground, it is clear that the prosecutor is not meant, but mostly the person who performs the duty of maintaining public order. In addition, under criminal procedure law, a criminal prosecution shall be initiated upon the arrest of a person or upon the recognition of a person as the accused.[31]

From the normative content of the grounds under consideration, it may be concluded that a person may be prosecuted even before he/she is arrested / recognized as the accused. Therefore, the question naturally arises: can a criminal prosecution be initiated before the actual arrest of the alleged offender?[32] This question should be answered in the negative form for the simple reason that the current procedural legislation directly and imperatively regulates the cases of initiation of criminal proceedings. Consequently, there will be no prosecution until the arrest of a person or the recognition of a person as the accused.[33] Accordingly, the current edition of the criminal procedure legislation needs to be refined in this regard. There is no doubt that the term "criminal prosecution" is misused in Article 171 (2)(2)(b) of the Criminal Procedure Code, which makes it more complicated to understand of the main point of criminal prosecution and leads to terminological confusion. It is advisable to formulate this sub-paragraph as follows: "The person has been seen at the crime scene and a hot pursuit is being carried out to arrest him/her."[34]

2.1.3. Arrest of a Person in the Existence of a Clear Trace of Crime

If a clear trace of crime has been found on or with the person or on his/her clothes, in such case, the current procedural legislation provides for the possibility of arresting the mentioned person without a judge's ruling. According to the verbal explanation of the law, we can conclude that the trace of the crime must be clear and it must be found on or with the person or on his/her clothes. Otherwise, if an expert examination is required to prove the existence of trace, this does not create the possibility of arresting the person on this ground and in case of confirmation of the trace, the arrest of the person should be carried out based on a court ruling. However, clear traces include cases when a person, on

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30 Criminal Case № 001060417001, Record of Arrest and Personal Search of the Accused of April 6, 2017.

31 See. Article 167 (1), Criminal Procedure Code.

32 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 92 (in Georgian).

33 Ibid.

34 Ibid.

whose clothes / with whom / or on whose body the mentioned trace will be found, cannot explain the origin of the mentioned trace and cannot indicate some reasonable / logical explanation.[35] In addition, the ground under consideration determines the location of the traces. In particular, the body of the person, the clothes of the person, a space or object in the immediate vicinity or in the possession of a person. Consequently, traces can be found both on the outside of the body and in the form of traces left in the body. For example, under the nails of the violater are samples of person's hair and skin, or a drug is found in the body of the person who transports it through the body. In the latter case, we will face another ground for the arrest: "the person has been caught in action while committing a crime". An example of a clear trace of a crime on a person's clothes may be a case when law enforcer (a person authorized to arrest) heard a loud scream from a residential building and a person with a bloody T-shirt ran out of the mentioned building. In such a case, the arrest of a person on the ground under consideration should be considered lawful. And, as it comes to the existence of a clear trace of crime on with the person, this may occur when it turns out a firearm or a narcotic substance in the bag on his back, the legal origin of which the person cannot prove. It is a common case in investigative practice when an investigative action is initially carried out – a personal search, on the ground of which a decision may be made to arrest a person in the case of urgent necessity. For example, on August 4, 2016, in city Tbilisi, the person took out the woman's mobile phone and then silently fled from the crime scene. The woman informed the law enforcers about the fact on the same day and also provided information about the individual and generic characteristics of the mobile phone. A few hours after the message, a person was found, who was personally searched on the basis of urgent necessity, as a result of which the above-mentioned mobile phone was seized.[36] After the mentioned, the unsanctioned arrest of the mentioned person took place immediately on the ground under consideration.[37]

2.1.4. Identification as a Ground for Arrest

It should be noted that a person could be arrested without a court ruling even if the person has fled after committing a crime, but he/she is identified by an eyewitness. First of all, it should be noted that the identification referred to on the abovementioned ground is legally very different from the identification provided for by Article 131 of the Criminal Procedure Code. The latter is an investigative action, the procedure of which is regulated in detail in the mentioned article. But, as it comes to the identification of an alleged offender by an eyewitness, it is necessary for the person to first commit a crime, after which he/she must flee and after that he/she must be identified by an eyewitness, which will be the ground for arrest a person without a judge's ruling. The criminal procedure code provides two additional preconditions for the arrest of a person on this ground: 1) the person who committed a crime must flee from the crime scene; 2) he/she is identified later by an eyewitness.[38]

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35 *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 509 (in Georgian).

36 Criminal Case № 001040816006, Record of Personal Search of August 4, 2016.

37 Criminal Case № 001040816006, Record of Arrest of the Accused of August 4, 2016.

38 *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 508 (in Georgian).

It should also be noted that the previous code of the current Procedure Code formulated the mentioned rule differently. The 1998 Criminal Procedure Code of Georgia allowed for the arrest of a person if eyewitnesses, including victims, directly identified the person as the person who committed a crime.[39] The new Procedure Code did not share the rule of the previous legislation, as the above-mentioned provision unreasonably extended the procedural grounds for arrest, as the victim may not have been an eyewitness at all: For example, the person took out the woman's mobile phone and then silently fled from the crime scene, as it was the case in the previous reasoning example. The new Code of Procedure focuses directly on eyewitnesses to the crime, including the victim. An eyewitness is considered to be a person when he / she has directly witnessed the fact of committing a crime – in whole or in part – any part of committing a crime.[40]

Indeed, according to the part of the report on the arrest and personal search of the accused dated July 1, 2016, "Under what circumstances did the arrest take place?", "after receiving a message with the participation of the victim eyewitness L. J., the area around the crime scene was inspected by car and L. J. pointed at a young boy walking on the street and said that this boy had demanded him a mobile phone under the threat of using a knife".[41] The judge considered it lawful to arrest a person on such grounds and pointed out, that "the fact of substantial violations of the law during the arrest of the accused is not established by the case materials, including the record of arrest".[42]

It should be noted that in practice, it is not uncommon to arrest a person in the case of urgent necessity on the ground of identification by an eyewitness. As a rule, the identification of a person by an eyewitness is carried out during the above-mentioned investigative action – identification, after which the mentioned person is arrested on the grounds of urgent necessity. However, it is possible and in the above example it has been shown that also in practice there are cases when the investigative action – identification, does not precede the arrest of the person on the grounds under consideration, but the identification by the eyewitness is carried out orally or through other relations with law enforcers. Identification by an eyewitness can be related to several situations: 1) The eyewitness does not know the person committing a crime / does not know his / her identity but directly refers to him / her as the person committing a crime – this is practically equal to identification; 2) The eyewitness knows the identity of the person committing a crime and names him/her. This can happen not only in action while or immediately after committing a crime, but also later in relationship with law enforcement body (for example, in the record of interrogation of witness, in notification, etc.).[43]

In practice, both cases had first Division of Tbilisi Gldani-Nadzaladevi police department's office. Robbery took place in both criminal cases. In particular, on July 5, 2016, the offender cut a golden necklace from the throat of the woman and fled from the crime scene. The mentioned woman did not know the person who committed a crime, but was able to remember the personality traits. In

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[39] Article 172, Part 1, Subparagraph "b", Criminal Procedure Code of Georgia, Parliamentary Gazette, 13-14, 20/02/1998.

[40] *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 506 (in Georgian).

[41] Criminal Case № 001010716009, Record of Arrest and Personal Search of the Accused of July 1, 2016.

[42] Ruling of July 4, 2016 case № 10a/3229 of Tbilisi City Court.

[43] *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 508 (in Georgian).

the framework of the mentioned case, on July 13, 2016, an investigative action – identification was carried out, during which the person who committed a crime was identified by the woman and this person was arrested by the law enforcers on the grounds under consideration. After that, on July 14, 2016, first proceeding before the court was held, where the judge considered it lawful to arrest the person on the above-mentioned grounds of urgent necessity and imposed the person sentence of imprisonment as a measure of restraint.[44]

Except for the above-mentioned case, on April 24, 2014, the person who committed crime of robbery was arrested again, one of the formal grounds for his arrest is provided for by Article 171, Part 2, Subparagraph "d" of the Criminal Code of Georgia. The arrest was not preceded by an investigative action – identification, but person, whose mobile phone was stolen, knew the person who committed a crime and she notified to law enforcers about this as a witness in the record of interrogation. According to the decision of the Tbilisi City Court of April 26, 2014, the arrest was declared legal.[45]

Based on all the above, the grounds mentioned in the sub-section under consideration are one of the important legal levers in the investigative practice of Georgia.

2.1.5. Arrest of a Person in the Existence of a Risk of Fleeing

One of the hypothetical and, therefore, most difficult to prove grounds for unlawful arrest is the existence of a risk of fleeing. According to the current Criminal Procedure Code, a person may be arrested if the person may flee. This should not be construed in such a way that the arrest of any person is considered possible only in the light of the private views of the persons carrying out the arrest, but rather that there are specific circumstances which reasonably indicate the real possibility of the person fleeing. In these circumstances, the personal and character features[46] of the person should be taken into account, such as when a person runs away, does not obey the lawful request of a law enforcer, or the person is obviously preparing to flee, and so on. The existence of such a ground for arrest increases the risk of arrogation from an appropriate law enforcement body. That is why, during the arrest of a person on the grounds of fleeing, we must face not only subjective but also objective circumstances that actually indicate a person's subjective desire to flee from justice.[47]

The risk of a person fleeing may also be indicated by objectively existing circumstances of fleeing in the absence of his / her subjective desire. For example, when a person does not have a permanent place of residence. Accordingly, each such circumstance should not become a ground for interfering with a person's right of liberty. In such a case, there may be some difficulties in establishing a person's place of residence and later securing his or her appearance in court, but this difficulty does not constitute a legitimate aim for a short-term restriction of a person's liberty, even if there is no evidence of his or her hiding from law enforcement.[48]

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44 Ruling of July 14, 2016 case № 10a/3393 of Tbilisi City Court.

45 Ruling of April 26, 2014 case № 10a/2848 of Tbilisi City Court.

46 Letellier v. France, [1991], ECtHR, 12369/86; Matznetter v. Austria, [1969], ECtHR, 2178/64.

47 *Khaindrava N., Bokhashvili B., Khidasheli T.,* Analysis of Human Rights Law Related to Pre-Trial Detention, Tbilisi, 2010, 47 (in Georgian).

48 *Papiashvili L. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 510 (in Georgian).

After studying the investigative practice, we came to the conclusion that in most cases, if there are any other grounds for arrest, the investigator or a person authorized to arrest, still indicate the ground – "person may flee" with the mentioned ground in the record of arrest, it seems that this makes the justification firmer for the arrest of a person in case of urgent necessity. This has its logical explanation, for example, when a person is caught in action while or immediately after committing a crime, it is objectively possible for that person to want to flee. Accordingly, in such a case, if in the record of arrest is indicated Article 171(2)(e) with the Article 171(2) (a) of the Criminal Code, it should not be a problem.

As mentioned, law enforcers must be very careful during the arrest a person in the case of urgent necessity only in relation to arresting a person on this ground, as the mentioned ground really and objectively needs to be proved by facts and only the subjective will of the arresting person is not enough. It is interesting to consider one of the criminal cases from the recent past. In the record of arrest dated April 8, 2015,[49] states the only reason for the arrest – "the person may flee" and in the column "Under what circumstances is the arrest carried out" read: "After he (the accused) appeared in the first division of the Gldani-Nadzaladevi department and said that he had inflicted multiple wounds with a cold weapon in the abdomen of G.O. a few minutes ago."

Regardless of the category of the crime and the nature of the act committed, the substantiation of the existence of a risk of fleeing requires existence of specific, actual circumstances. The fact that a person voluntarily declares himself to the investigative body immediately and confesses to the act committed, indicates not only the risk of hiding, but also the opposite, which is evidenced by the judge's ruling in the same case. "As it comes to the risk of absconding, it is true that the accusation against the accused is punishable only by imprisonment and this is a relevant factor in assessing the risk of absconding, but the fact that the accused confessed to the police should be taken into account, which proves that he does not avoid possible responsibility".[50] Accordingly, the judge himself closed out the risk of absconding in the present case, however, he considered the arrest of the person lawful,[51] which we considered illogical and inconsistent with the legal argumentation. It should also be noted that in practice there was a case when the arrest of a person with urgent necessity in his / her apartment on the grounds only "the person may flee" was considered lawful by the court. The mentioned person was denounced in the robbery on the branch of JSC "Liberty Bank", during which he opened fire on the police officers, inflicted health damage on one of them, after which he fled from the crime scene. Initially, the person could not be identified, but as a result of investigation the identity of the person was established, after which he was arrested in his apartment. According to the ruling of the Tbilisi City Court of October 1, 2016, the mentioned arrest was declared lawful, and imposed the accused sentence of imprisonment as a measure of restraint.[52] It is inadvisable to arrest a person on the grounds of risk of fleeing in the case of urgent necessity[53] when the alleged accused pleads guilty in the law

[49] Criminal case № 001080415001, Record of Arrest of April 8, 2015.
[50] Ruling of April 9, 2015 case № 10a-1621-15 of Tbilisi City Court.
[51] Ibid.
[52] Ruling of October 1, 2016 case № 10a/4432-16 of Tbilisi City Court.
[53] Ruling of June 26, 2013 of Batumy City Court, <https://court.ge/courts/baTumis_saqalaqo_sasamarTlo/?page=25&id=695> [29.05.2021].

enforcement body, he is aware of the investigation initiated against him, is interrogated as a witness, appears in the investigative bodies to participate in various investigative actions upon summons and by his actions does not obstruct the investigation[54], also, in other cases, he voluntarily declares himself to the investigative body and confesses to the crime committed.[55] The following criminal case is interesting to illustrate this point: a judge of the Criminal Cases Panel of the Tbilisi City Court recognized as unlawful with his ruling dated on February 9, 2015, to arrest a person on the grounds of "the person may flee" in the case of urgent necessity due to the following circumstances: "According to the report of arrest of R.I., the arrest of the accused was based on the assumption that he was fled, but the presented materials show that the theft took place on December 23, 2014, moreover, on February 7, 2015, accused appeared in the investigative bodies upon summons, was interrogated as a witness, confessed to the charges against him, after which he was arrested as a defendant. The mentioned record also states that the arrest took place in a calm environment, there was no coercion, the prosecution has no specific information about his possible fleeing, this excludes the need for the arrest without a judge's ruling on the grounds of fleeing in the case of urgent necessity".[56]

In the present case, the court found that the requirement of Article 171 of the Criminal Procedure Code had been substantially violated, as there was no urgent necessity for the arrest. As a result, the accused was immediately released from the courtroom, but the bail was used as a measure of restraint against the accused. This emphasizes the fact that a recognition arrest as unlawful does not automatically mean a refusal to use a measure of restraint, as these two procedural institutions have been considered independently and need to be substantiated separately. It should be noted that, in general, the grounds under consideration are regulated in the Criminal Procedure Code of a number of European countries, including Italian law, where an arresting person is entitled to arrest a person on grounds of risk of fleeing without the permission of a court in case of urgent necessity.[57]

In view of all the above, the arrest of a person only on the ground when "a person may flee" is associated with a number of procedural and factual difficulties and allows for a wide range of considerations by law enforcement, which may substantially restrict the right of liberty. Therefore, it is advisable to prevent / regulate the mentioned risk at the normative level and to further specify the mentioned ground, so that there will be no unjustified restriction of the rights of individuals and the rule of law will be enforced.

2.1.6. Arrest of a Wanted Person

According to Article 33 (6)(N) of the Criminal Procedure Code of Georgia, a prosecutor may issue a decree on the conduct of search for the accused (convicted person). Consequently, the search may be announced for both an accused and convicted person. After the issuance of a decree on the

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54 Ruling of June 26, 2013 of Batumy City Court, <https://court.ge/courts/baTumis_saqalaqo_sasamarTlo/?page=25&id=696> [29.05.2021].

55 *Natsvlishvili A.,* Human Rights During Arrest and the Situation in Georgia, Analysis of Legislation and Practice, Tbilisi, 2017, 13-14 (in Georgian).

56 Ruling of February 09, 2015 № 10a/536 of Tbilisi City Court.

57 *Tsikarishvili K. (Trans.),* Criminal Procedure Systems of EU Countries, Tbilisi, 2002, 260 (in Georgian).

conduct of search, if a law enforcer finds a person against whom the above-mentioned decree has been issued, he or she has the right to arrest the person without a court ruling. The reason for issuing a search decree may be a non-appearance of a person in an investigative body or in court. Also, if the accused is in fleeing and does not attend a hearing on the merits and he/she is sentenced to imprisonment in in his/her absence, the search for the convicted person will be announced in such a case. On this basis, in practice, it is a more common case when a particular person commits a crime and then flees from the investigation not appears in the investigative body or in the court. In such a case, if the sum of evidence is obtained as a result of the investigation, which is sufficient to establish probable cause that the given crime has been committed by that person, criminal prosecution is initiated against him. According to Article 45 (h) of the Criminal Code, It shall be mandatory for the accused to have a defence lawyer if the accused evades to appear before law enforcement bodies. Accordingly, in such cases the legislation provides for mandatory protection. Indeed, in practice, the person fleeing from the investigation is appointed by the Treasury Attorney, who is assigned by the Legal Aid Service. The above-mentioned lawyer will be handed over a decree on the indictment of the person, also the case materials of the application of a measure of restraint will be handed over before the hearing. After that, first proceeding before the court is held, during which the judge considers the issue of applying a measure of restraint against the accused. If the accused does not appear in court again, the judge will make decision to apply against him/her detention as a measure of restraint, after which the mentioned person will be declared wanted under a decree of the prosecutor, and the decree will be sent to the search service by a letter of appeal.[58]

Indeed, in the investigative practice there are numerous cases of the accused fleeing, which makes it necessary to declare a search for him. Moreover, it is inevitable to apply against mentioned person detention as a measure of restraint. One of the rulings of the Tbilisi City Court we read: “The accused left the territory controlled by Georgia the day after the alleged robbery, which is confirmed by the testimony of the accused's father. All of the above circumstances together, with a high standard of probable cause, confirm the risk of absconding by the accused.[59]

Accordingly, detention was applied against the accused, and the prosecutor issued a search decree. It should be noted that when the mentioned person is arrested, the grounds under consideration must be specified in the grounds for the arrest. However, the term of the searching person is indefinite. According to Article 71 (3) of the Criminal Code of Georgia, The running of the limitation period shall be suspended if the offender absconds during the investigation or trial. In this case, the running of the limitation period shall be resumed from the moment the offender gets arrested or appears with the confession of guilt.

Also, to illustrate, it is interesting to consider one of the criminal cases from the investigative practice. In practice, there was a case when a person for 20 GEL was first prosecuted, and then detention was applied against mentioned person as a measure of restraint, and was declared wanted by the prosecutor, because the accused avoided appearing in the investigative body or in court. According to the factual circumstances of the case, the accused by deception filled with 20 GEL worth of fuel on

[58] Ruling of September 2, 2016 case № 10a/4053-16t of Tbilisi City Court.

[59] Ibid.

the territory of "SOCAR" gas station and left the area without paying any fee. After the prosecutor issued a search decree for the mentioned person, the law enforcers arrested this person a few days ago and, of course, the reason for the arrest of the person in the case of urgent necessity was the fact that this person was wanted.[60] After that, the prosecutor applied to the court to leave detention in force as a measure of restraint, but, the Tbilisi City Court ruled on 22 May 2015 that the measure of restraint against the mentioned person was changed and this person was sentenced to 3,000 GEL bail.[61]

Considering the above example, we conclude that regardless of the category and nature of the crime, if the accused does not appear before the investigative body or the court, it is quite possible to apply detention as a measure of restraint, announce search for him, and then arrest him in the case of urgent necessity on the grounds referred to in that subsection.

2.2. Arrest of a Person within the Possibilities Provided for by the Law of Georgia on "International Cooperation in Criminal Matters"

According to the law adopted on July 20, 2018, Article 171 of the Criminal Procedure Code of Georgia has been amended, in particular, the following words were added to first part "or if the issue of requesting consent from a foreign state in accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters is under consideration", also, a new ground was added for unlawful arrest in the second part, "this possibility is provided for by the Law of Georgia on International Cooperation in Criminal Matters." It should be noted that this law ("On International Cooperation in Criminal Matters") was adopted on July 21, 2010 and entered into force on October 1 of the same year. Consequently, a reasonable question arises as to why this change took place in 2018. The reason for this was the fact that the Law of Georgia on International Cooperation in Criminal Matters was significantly changed on July 20, 2018, which led to the relevant amendments to the Procedure. Amendments to the Law of Georgia on International Cooperation in Criminal Matters have established new regulations. With the mentioned legislative changes, the legislation of Georgia was brought in line with the "Third Additional Protocol to the European Convention on Extradition" and "The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism". According to the first paragraph of Article 30 of the Law of Georgia on International Cooperation in Criminal Matters, if there is a relevant legal ground a person wanted by a foreign law enforcement authorities may be arrested in the territory of Georgia and a measure of restraint may be applied to him if: A motion for extradition of a person has been submitted by a foreign state; a motion for temporary detention for extradition has been submitted by a foreign state; a person is wanted internationally by a foreign law enforcement authorities. Therefore, in case of the arrest of person on any of the above-mentioned grounds, the ground indicated in the sub-section under consideration shall be mentioned in the record of arrest. It should be noted that before the mentioned changes, in case of arrest of a person wanted at the international level, the reason for the arrest was the ground discussed in the previous subsection "the person is wanted", but, after making

[60] Criminal Case № 001090515001, Record of Arrest of the Accused of May 21, 2015.

[61] Ruling of May 22, 2015 case № 10a/2275-15 of Tbilisi City Court.

the mentioned changes, the person will be arrested on the ground specified in the sub-section under consideration. As the Law of Georgia on International Cooperation in Criminal Matters defines the grounds for the arrest of persons wanted by the competent authorities of a foreign state, Article 171, Part 2 of the Criminal Procedure Code of Georgia adds the relevant content, subsection G) which also considers the possibility of arresting a person without a court ruling also the cases provided for by the Law of Georgia on "International Cooperation in Criminal Matters".[62]

Upon the arrest in the territory of Georgia of a person wanted by foreign law enforcement authorities, the relevant prosecutor exercising procedural guidance over the activities of the arresting body shall be notified; the prosecutor shall, within 48 hours, file a motion with the court for the application of restriction measures.[63]

In view of all the above, an arrest should be made on the grounds under consideration when a search for a person is declared internationally.

3. Conclusion

The arrest of a person without a court ruling remains one of the most serious challenges in the Georgian justice system. The present thesis is an attempt to improve both the existing legislative regulation at the normative level and the investigative / judicial practice, in order to promote the steady protection of the rights of individuals and to prevent cases of arbitrary arrest. Achieving this result avoids the responsibility of the state at the international level, including, above all, in the European Court of Human Rights. To do this, it is necessary to strike a balance between state security and the protection of the individual's right to liberty, which is directly related to the exceptional nature of arrest and its *Ultima Ratio* nature.

Indeed, the analysis of investigative and judicial decisions has revealed the heterogeneity of the practice of arresting a person without a court ruling and the importance of their linear development. In addition, it is extremely important to properly apply the law regulating arrest and to interpret the norm from its purpose, in order to ensure that human rights are strictly protected and that groundless unlawful arrest is kept to a minimum. In order to achieve these goals, it is necessary that each of the formal grounds for arrest to be actually based on specific circumstances and that the template justification be rejected at the normative level.

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[62] See, Explanatory Card on the Draft Law of Georgia on Amendments to the "Criminal Procedure Code of Georgia", 2018, <https://info.parliament.ge/file/1/BillReviewContent/181659?> [22.05.2021].

[63] Department of Human Rights Protection and Quality Monitoring of Investigation, Recommendation on the Drafting of Record of Arrest, Tbilisi, 2020, 4 (in Georgian).

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15. *Papiashvili L. (ed.),* Private Part of Criminal Procedure Code of Georgia, Tbilisi, 2017, 213 (in Georgian).
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17. *Vingart K. (ed.),* Criminal Procedure Systems of EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 40 (in Georgian).
18. *United Nations,* Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 161.
19. Brogan v. the United Kingdom, [1988] ECtHR, 11209/84, 11234/84, 11266/84, 11386/85.
20. Fox, Campbell and Hartley v. the United Kingdom, [1990], ECtHR, 12244/86, 12245/86, 12383/86.
21. Lukanov v. Bulgaria, [1996], ECtHR, 21915/93.
22. Letellier v. France, [1991], ECtHR,12369/86.
23. Murray v. the United Kingdom, [1996], ECtHR, 41/1994/488/570.
24. Matznetter v. Austria, [1969], ECtHR, 2178/64.
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29. Criminal Case № 001010716009, Record of Arrest and Personal Search of the Accused of July 1, 2016.
30. Criminal Case № 001090515001, Record of Arrest of the Accused of May 21, 2015.
31. Criminal case № 001080415001, Record of Arrest of April 8, 2015.

32. Criminal case № 001211214001, Record of Arrest and Personal Search of the Accused of December 21, 2014.
33. Decision of November 11, 2016 case № 1c/1722-16 of Tbilisi Court of Appeals.
34. Decision of 18 April 2016, case № 2/1/631 “Citizens of Georgia Temur Janashia and Giorgi Alasania v. Parliament of Georgia” of the Constitutional Court of Georgia.
35. Decision of 11 April 2013 № 1/2/503,513 “Citizens of Georgia Levan Izoria and David-Mikheil Shubladze v. Parliament of Georgia” of the Constitutional Court of Georgia.
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45. Ruling of September 2, 2016 case № 10a/4053-16t of Tbilisi City Court.
46. Ruling of July 14, 2016 case № 10a/3393 of Tbilisi City Court
47. Ruling of July 4, 2016 case № 10a/3229 of Tbilisi City Court.
48. Ruling of April 9, 2015 case № 10a-1621-15 of Tbilisi City Court.
49. Ruling of May 22, 2015 case № 10a/2275-15 of Tbilisi City Court.
50. Ruling of February 09, 2015 № 10a/536 of Tbilisi City Court.
51. Ruling of 23 December 2014, case № 10a/7319 of Tbilisi City Court.
52. Ruling of April 26, 2014 case № 10a/2848 of Tbilisi City Court.
53. Ruling of November 9, 2013 case №10a/5899 of Tbilisi City Court.

Grigol Chkhaidze*

Changing the Classification of a Business Transaction based on Its Form and Substance in Tax Law Relations

Tax law relations are known by their complexity. Generally, tax law-related relations always derive from civil relations, where people participate. Income tax is due when a person is employed, or is self-employed and conducts economic activities. Value Added Tax is due when a taxpayer conducts economic activities and such economic activities are based on different types of contracts. The taxpayer supplies goods or services to the end-users and therefore, is obliged to pay Value Added Tax.

There are many cases when parties conduct a contractual agreement, which does not reflect economic reality. Article 73 (9) of the Georgian Tax Code gives Georgian Tax Authorities the possibility to change the form when the substance does not collide with the form. But the legislation is very general and does not include any indication or legal prerequisites on how this should be done.

This article will serve a purpose to define in which cases tax authorities are allowed to change the form of the business operation, especially when the parties conducted completely different contracts and will evaluate the risks, which might be in presence if the tax authorities will use the norm in a wrong way.

This article will review tax authority's practices and the Georgian Court approach towards the issue.

Key Words: *Tax, Tax System, Directive, Tax Code, CJEU, Substance and form, Georgian Court System.*

1. Introduction

For taxation purposes, it does not matter if the transaction is legal or not.[1] Even though certain business activities might require a special permit and a taxpayer conducts such activity without holding a valid license, for the purpose of the Tax Code, this activity is still taxable, and therefore, taxes will be levied.

Generally, tax law-related relations always derive from civil relations, where people participate. Consequently, the form of contract and the relationship between the parties must be evaluated by the legislation which regulates the very contractual agreement the tax authority studies.

To achieve the main goal that every relationship will be evaluated correctly based on the form and substance, the legislation must be precise, stating all the necessary preconditions.[2] Tax legislation

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[1] *Rogava Z.,* Tax Code Commentaries, Tbilisi, 2012, 479 (in Georgian).

[2] *Gordon R. K., Thuronyi V.*, *T*ax Legislative Process in Tax Law Design and Drafting, *Thuronyi V. (ed.)*, Washington D.C., 1996, 2.

in the process of drafting receives less attention in developing countries, comparing to other, developed countries. For example in the United States of America, any tax legislation and any changes relating to taxes involve big groups which are completed by the people of different professions.[3] The main objective of such groups is that they will evaluate legislation from a different perspective which will guarantee that the law will be effective in practice.[4]

Any operation should be evaluated by its form and substance and it is vital, as it gives the taxpayer a legitimate expectation of how this operation will be taxed based on the legislation requirements. If the tax authorities have a broad possibility to evaluate the operation, which is the case nowadays based on the Georgian Tax Code, it does not give taxpayers the sense of stability and therefore, does not create a safe environment for them to operate in a predictable way. The more precise the legislation is which will grant tax authorities the possibility to change the form and substance of an operation, the more stable tax practice will be for the tax authorities and the Georgian Courts as well. Therefore, the purpose of the paper is to determine the preconditions for the change of the form of a business operation by the authorized administrative body, especially when an existing agreement between the parties carries out a completely different legal essence. Accordingly, the article presents the practical significance of the ability of a tax authority to change the form and content of a business operation as well as its legal grounds, which in turn requires an economic understanding. Additionally, the paper reviews the problematic issues that can be arisen when there is no distinct legal precondition defined by the law.

2. Comparison of the Contractual Relationship and Economic Factors while Examining Taxable Transaction

As *Prof. Zimmer* mentions for evaluating tax law-related relationships, it is necessary to take into consideration all the facts and right interpretation of the law, which regulates this very relationship.[5] To evaluate tax-related relationship correctly, it is of vital importance that the judge or administrative body points out the following facts:

– The Reality of legal relationship;

– Economic reality;[6]

Therefore, while discussing the topic, in the first place should be checked whether the legal relationship is real or not. The judge or administrative body should clarify what type of obligations and rights arise from the legal relationship for parties from the contract. While examining the nature of the legal relationship, it also should be taken into account what type of obligations lies for each party in the contract and what are their rights.

Additionally, the second component, which means checking economic reality takes into consideration all the factors, which is related to the first component – the legal relationship between parties. (For example in a financial lease there might be a clause in the contract which indicates that at

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[3] Ibid.

[4] Ibid.

[5] *Zimmer F.,* Form and Substance in Tax Law – General Report, The Hague, 2002, 16-97.

[6] Ibid, 28.

the termination of the contract the lease becomes the owner of the property, which indicates for economical purposes that the lease fee is part of the property value).[7]

Generally, while checking those two components – the legal relationship between parties and economic reality complies with each other. Sometimes, there is a divergence between those two and there is some vagueness which component should be taken into consideration while evaluating the tax consequences.[8] In such cases, there are some opinions that tax authorities should completely ignore the essence of the contract which was the original agreement between parties, and taxes should be levied based only on economic reality.[9] By following those opinions, it may be concluded that the contractual agreement and legal relationship between parties can be completely disregarded and the only factor which should be taken into consideration is economic reality.

Even though the above-mentioned approach seems reasonable, it has been criticized many times. A different approach suggests that considering only economic factors while evaluating the business operation is against core principles of the law and using it blindly should be strictly prohibited.[10]

For example, some national legislation defines what can be considered as an employment contract and this activity due to other national legislation might not be considered as a labor relationship. Consequently, "income" which is defined by national legislation defines a specific income type, which after being classified as such, might be taxed according to income tax rules. But if a person operates between two countries, in which one defines his/her income as an income derived from labor relations and the other country does not, s/he might be taxed twice which will be against the core principle of double taxation. Therefore, even from the economic point of view for both countries person received an income, it is crucial to analyze legal terms and contract nature for the best possible approach.

As *Prof. De Broe Luc* mentions, analyzing certain transactions only from an economic point of view is abstract and cannot be relied on, as there is always a legal relationship between parties which indicates what was an original agreement between parties and what was their aim while signing the contract.[11]

Additionally, it is very important how the law will be interpreted. To have lawyers and economists on the same page while evaluating and interpreting the law, it is very important that in process of drafting the legislation both professions will be actively included. The law and its

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7 *Li J.*, Economic Substance: Drawing the Line between Legitimate Tax Minimization and Abusive Tax Avoidance, Canadian Tax Journal, Vol. 54, Issue № 1, 2006, 43-44.

8 *Rosenblatt P.*, General Anti-Avoidance Rules for Major Developing Countries, Series on International Taxation, Vol. 49, Kluwer Law International, 2015, 138.

9 *De Broe L.,* International Tax Planning and Prevention of Abuse: a Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies, IBFD Publications, Amsterdam, 2008, 168.

10 *Rosenblatt P., Tron Manuel E.,* Anti-Avoidance Measures of General Nature and Scope – GAAR and Other Rules, IFA Cahiers, Vol. 103A, International Fiscal Association, Rotterdam, 2018, 14.

11 *De Broe L.,* International Tax Planning and Prevention of Abuse: a Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies, IBFD Publications, Amsterdam, 2008, 170.

interpretation are different for lawyers and economists. Consequently, in process of drafting the law, it should be written in a way that will exclude possibilities for it to be read differently.[12]

As the international fiscal association reports in the 2018 edition, evaluating relationships from an economic point of view is not consistent and therefore it gives everyone the possibility to define it differently than it was supposed to be interpreted.[13] In any case, if the form and substance of the contract are changed by the tax authorities, it will be different via countries, because every country has different mechanisms to fight against tax evasion and fraud. The only solution to overcome this challenge is the very tight cooperation of the national courts and tax authorities, as their practice leads a country to have one, uniform tax system.[14]

It is clear, that evaluating business transactions based only on the legal relationship between parties, will not give a clear image, as there are some cases, even when parties agree on certain terms and therefore they define the form of the contract, but it does not reflect the real substance of the contract.

3. Types of Contracts

There are scholarly opinions that changing the form of the contract based on the fact that substance is superior before form when there is a legal relationship between parties is strictly prohibited.[15]

Any relationship is regulated by the specific legislation, therefore tax legislation does not respond to the fact of what the parties intended to be their agreement.[16] The form of the contract is something that reflects legislative requirements and the substance is reflecting what the parties intended to agree upon. Tax authorities can change the qualification of the contract when there is a certain legal prerequisite and it is only allowed when the qualification should be reflecting the existing legislation.

The fact that the nature of the taxes is seen differently by lawyers and economists should also be taken into consideration.[17] For example, for lawyers, Value Added Tax can be described as the tax, which is related to every fact where there is a transaction. An additional term for Value Added Tax to be applicable for lawyers is that the transaction should be conducted by the registered person. It is very clear, that for lawyers for Value Added Tax to be applicable is that that two-term is in the picture.[18] For economists, the main decisive factor is that there is a transaction, supply of goods, or service. As long as

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12 *Gordon R. K., Thuronyi V.*, *T*ax Legislative Process in Tax Law Design and Drafting, *Thuronyi V. (ed.)*, Washington D.C., 1996, 2.

13 *Rosenblatt P*., General Anti-Avoidance Rules for Major Developing Countries, Series on International Taxation, Vol. 49, Kluwer Law International, 2015, 134.

14 Ibid, 12-13. See also: *Li J.*, Economic Substance: Drawing the Line between Legitimate Tax Minimization and Abusive Tax Avoidance, Canadian Tax Journal, Vol. 54, Issue № 1, 2006, 53.

15 *Rogava Z.* Tax Code Commentaries, Tbilisi, 2012, 479 (in Georgian); See also: *Uridia G*., Tax Code Commentaries, Tbilisi, 2011, § 73.9, 486-491 (in Georgian).

16 Ibid, 487.

17 *Sijbren C*., A VAT Primer for Lawyers, Economists, and Accountants, The Vat Reader, Tax Analysts, 2011, 2, <www.taxhistory.org/www/freefiles.nsf/Files/VATReader.pdf/$file/VATReader.pdf> [06.09.2022].

18 Ibid.

there is a transaction, economists consider that the Value Added Tax is applicable.[19] Therefore it is very clear that for economists it is less important to have all the formal requirements in place, while for lawyers it is crucial for deciding whether or not the transaction is taxable.[20] It should also be noted that for example if a person, unregistered is conducting business might still be reliable paying Value Added Tax, if there is a tax inspection and the tax authorities issue a fine, while from the economic point of view, this does not change anything regarding for the taxation purposes. For lawyers, it is the decisive factor and it is the main factor that influences the final decision on the issue.[21]

Taking into consideration all the above-mentioned examples, the conclusion can be derived that any operation from a different perspective can be evaluated differently, and therefore, while tax authorities might use the right to change the substance of the contract and rule it over the form, all the factors have to be taken into consideration.

For example, there is a service contract and the length of the contract is one year, and a person, receiving service pays a fee at the beginning of the month. This contract also has a clause that gives the recipient of the service possibility to cancel the contract, but the clause indicates that if the customer exercises this right, s/he will be fined and the fine will be equal to the amount what s/he had to pay for the whole year for the service. If the customer cancels the contract and pays the fine, from the economic point of view, the operation might be evaluated that the customer still paid the whole amount and the business operator received the equal amount of the money, therefore the amount of fee should be taxed. From the legal point of view, at the moment of the cancelation of the contract, the whole picture of legal relationship changes, and the agreement is no longer binding for the parties, the business operator does not supply service and consequently, the amount paid by the customer is qualified as a fine or compensation amount and not the fee paid for the service, which might indicate that the amount should not be taxed. This clearly shows that the one fixed term in the contract can be seen differently, which indicated the importance of the evaluation of any transaction from different perspectives

Additionally, any term for tax-related transactions might have a different meaning than it is indicated in the other legislation. For example, the term “consumption” which is the main core foundation to define whether the transaction is taxable or not in any other legislation means any type of consumption, while for the Value Added Tax purposes it only means final consumption from the end-user and only in such cases Value Added Tax is applicable.

4. The Practice of Georgian Courts

The conclusion from the above-mentioned examples can be derived that in any business operation, taking into account its complexity and individuality, any term or any substance can be

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19 *Sijbren C.*, A VAT Primer for Lawyers, Economists, and Accountants, The Vat Reader, Tax Analysts, 2011, 2, <www.taxhistory.org/www/freefiles.nsf/Files/VATReader.pdf/$file/VATReader.pdf> [06.09.2022].

20 *Papis-Almansa M.*, Insurance in European VAT on the Current and Preferred Treatment in the Light of the New Zealand and Australian GTS System, Netherlands, 2016, 133.

21 *Henkow O.*, Financial Activities in European VAT, A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities, Netherlands, 2007, 75.

recognized differently.[22] To evaluate business transactions correctly, every factor must be examined which were used in the operation which is disputed. To evaluate all the factors is derived from the General Administrative Code of Georgia. The administrative body is obliged to fully examine all the necessary facts that are important to get the decision.[23] The same approach is repeated by the court practice created by the Supreme Court of Georgia. The decision states that the administrative justice is the core principle and it is one of the most procedural obligations for administrative body to examine and search every single fact related to the case and get the decision only based on those factors.[24] The imperative requirement declared by the General Administrative Code of Georgia serves public governance and legality principles, as any decision product of public governance should be derived from the very well-researched and evaluated facts.[25]

The individual administrative act should be substantiated and it serves a goal to create some frame for administrative bodies and the frames will be directed only by the legislation. Any decision should be based on certain facts which will lead administrative bodies to get the final decision.[26] It is the facts and circumstances which will lead to the legal outcome of the case.[27]

Furthermore, tax authorities, as a litigant in the court hearings, must prove that the administrative act issued by them is legitimate according to the Administrative Procedural Code article 17 (2). The burden of proof indicates the procedural obligation that the administrative body has to prove that they have studied all the necessary facts and all the necessary prerequisites have been fulfilled. The very obligation derives from the fact that the administrative act, if not appealed means that it is legitimate and the decision that they made is based only on legislation.

Article 64 of the Georgian Tax Code indicates that the tax assessment is the administrative act issued by the tax authority and it is legally binding.[28] As the tax assessment is the administrative act, all the obligations imposed by Georgian legislation to issue administrative act is applied to tax assessments too. Therefore, in case changing the taxable transaction form requires having all the facts searched and analyzed before the tax authority does so.

The Georgian court system in general always takes into consideration all the facts, while deciding the disputed case and based on the facts issues a decision.

Tbilisi City court stated that the main aim of article 73 (9)(B) of the Georgian Tax Code is that there is a reasoned assumption that parties of legal relationship chose a certain form of the legal relationship to avoid taxes and in reality, the taxable transaction has different substance.[29] Additionally, the Court stated that parties of legal relationship based on article 319 of Georgian Civil

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[22] *Kesteren H. V.*, Taxable and Non-Taxable Transactions, in: *Lang M., Pistone P., Rust A., Schuch J., Staringer C., Raponi D. (Eds.),* Recent Developments in Value Added Tax,Vienna, 2016, 225.
[23] Art. 96, General Administrative Code of Georgia, LHG, 32(39), 15/07/1999.
[24] Decision of September 23, 2014 case № BS-246-243(K-13) of Supreme Court of Georgia.
[25] Ibid.
[26] Decision of February 18, 2014 case № BS-463-451(K-13) of Supreme Court of Georgia.
[27] Ibid.
[28] Art. 64, Tax Code of Georgia, LHG, 54, 12/10/2010.
[29] Decision of May 13, 2015 case № 3/7152-15 of Tbilisi City Court.

Code can choose any form of the legal relationship of their choice, as long as it is not illegal or against the law.[30]

The Court declared that the tax authorities have the right to change the form of the taxable transaction if in process of tax inspection they find out that the form does not respond to the substance which is indicated in the contract.[31] Additionally, it is of vital importance that the substance of the disputed legal relationship should be a different agreement for the Georgian Tax Code purposes.[32]

The same reasoning has been applied by the Tbilisi Appeal Court in their decision[33], where the Court decided that changing the form and substance of the contract is only allowed if there is a divergence between the form and substance and the main reason for such divergences is avoiding taxes.

In the same case, the Supreme Court of Georgia in its decision[34] made very important notes. The Supreme Court share the ideas of the Tbilisi City Court and Tbilisi Appeal Court and additionally stated that when tax authority decides to change the form of the legal relationship, it should take into consideration the legislation which was applicable at the moment when the legal relationship was formed between parties.[35] In the case, a person gave the government property for free and instead received land which was considered as barter by the tax authority, but the Supreme Court of Georgia stated that by the time the contract was signed, the legislation did not include the exchange of the property and the changes were made later in the legislation, therefore, tax authorities while evaluating transactions should have considered that factor and therefore, should not have changed the form of the contract.[36]

The decision creates a certain framework for the tax authorities while they exercise their discretion, indicating that any transaction should be evaluated not only from the tax legislation perspective but all the related law requirements should be taken into consideration and if certain prerequisites did not exist at the moment when the legal relationship was formed and it was added later, it could not create a strong foundation for changing the form of the contract

Even though the decision gives some clarity on what needs to be done to change the form of the transaction, several questions remain unanswered. What kind of test needs to be fulfilled to change the form of the contract and what requirements should be fulfilled is not clear.

Tbilisi City Court stated that in any case when tax authority uses article 73(9) and changes the form and substance of the contract, the burden of proof lies on the tax authority and they should provide all the facts and proofs which indicates that their activity was legit.[37] Furthermore, the Court stated that the tax authority is obliged to point out all the facts and legislation which gave them the

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30 Art. 319(1), Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.
31 Decision of May 13, 2015 case № 3/7152-15 of Tbilisi City Court.
32 Ibid.
33 Decision of March 16, 2016 case № 3B/2026-15 of Tbilisi Appeal Court.
34 Decision of July 18, 2018 case № BS-854-846(K-16) of Supreme Court of Georgia.
35 Ibid.
36 Ibid.
37 Decision of March 13, 2015 case № 3/2173-14 of Tbilisi City Court.

possibility to change the form of the legal relationship.[38] Such distribution of the burden of proof derives from the Georgian Administrative Procedural Code and article 17(2) which indicates that any administrative body is obliged to prove that the administrative act they issued is legit.[39] In the same case Tbilisi Appeal Court stated that when the facts are sufficient to prove that the legal relationship and contract form is what the parties intended and the substance is in compliance with the form, tax authorities do not have right to change form according to the article 73(9) of the Georgian Tax Code.[40] The Supreme Court of Georgia on the same case declared that the substance must be examined not from the Georgian Tax Code perspective but from the legislation which is originally intended to regulate the legal relationship which was formed between parties and if the substance of the contract responds the requirements stated in the specific legislation tax authorities are not authorized to change the form of the contract.[41]

5. The Practice of Court of Justice of the European Union

Taking economic reality into consideration while examining tax law related relationship when the form of the contract does not respond substance is well-known for Court of Justice of European Union (hereinafter referred to as CJEU) CJEU's decision on a case "Her Majesty's Commissioners of Revenue and Customs v Paul Newey",[42] declares what role does a contract play when deciding how the transaction should be taxed. Legal relationships and contracts generally respond to economic reality but there are some cases when those two elements do not collide.[43] Based on CJEU's practice, in order tax system to be fully functioning, the economic factor plays a decisive role.[44] Based on those arguments, the court decided that if the contractual terms do not respond to economic reality, the contract should be disregarded and the operation should be evaluated from the economic point of view.[45] CJEU points out that when it is clear that the contract has one aim to avoid taxes, economic factors give guidance to tax authorities on how to deal with the transaction. The Court emphasizes the fact that for stability legal relationships and contractual terms must be considered while deciding how the taxes should be levied, but only when it responds to economic reality.[46] The CJEU states that when the contract is used as a mechanism to avoid taxes, it should never be taken into account.[47] According to Court practice, it is very important for economic and law stability that the party has a legitimate

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[38] Ibid.

[39] Art. 17(2), Administrative Procedural Code of Georgia, LHG, 39(46), 06/08/1999.

[40] Decision of April 27, 2016 case № 3B/634-15 of Tbilisi Appeal Court.

[41] Decision of March 14, 2017 case № BS-702-595(2K-16) of Supreme Court of Georgia.

[42] Case C-653/11, *Her Majesty's Commissioners of Revenue and Customs v Paul Newey*, ECR [2013].

[43] Ibid, § 25.

[44] *Radeva Y.*, VAT Implications of Cancellation Charges: New Substance-over-Form Rule?, International VAT Monitor, Vol. 30, № 1, 2019, 14.

[45] Ibid.

[46] Case C-653/11, *Her Majesty's Commissioners of Revenue and Customs v Paul Newey*, ECR [2013], §§ 43-45.

[47] *Kesteren H. V.*, Taxable and Non-Taxable Transactions, in: *Lang M., Pistone P., Rust A., Schuch J., Staringer C., Raponi D. (Eds.),* Recent Developments in Value Added Tax,Vienna, 2016, 221.

expectation of what the outcome might be if they aim to avoid taxes and conduct contracts accordingly.[48] Therefore, when a taxpayer decides to use the legal relationship as a tool to avoid taxes, the future outcomes of such actions should be easily foreseen.[49]

Additionally, it is very important to note that when the above-mentioned principle is being used, the comparison according to the CJEU's practice is what is "normal" and "standard" in everyday life.[50] For the best possible outcome, the contractual terms should be compared to what is "standard" in economic reality and the decision should be derived from those two factors.[51]

Therefore, disregarding contractual terms and using economic factors happens when the contractual terms only intend to avoid taxes.[52]

Additionally, there are no other arguments from CJEU case law on how national courts of the European Union should change or accept the already changed form and substance of the contract.

It is of vital importance that the line is being drawn between what is tax avoidance and what is tax planning to use the best possible tax incentives.[53] Disregarding contractual terms and using economic reality is only justified if the court of tax authorities declare that a contract is being used for avoiding taxes.[54]

If the taxpayer can choose one from several mechanisms which is the best possible tax regime for their business and this choice is not against legislation and the choice is deriving from the legislation itself, this cannot be considered as tax avoidance and it is tax planning. Therefore this can never become the foundation of changing form of the legal relationship.[55]

The CJEU on case "Centros Ltd v Erhvervs- og Selskabsstyrelsen" declared that any member state has the right and obligation to control taxpayers' activities and discover whether or not the taxpayer is avoiding taxes.[56] But in every case, the national court is obliged to learn all the facts and decide whether the activities include tax avoidance purposes and compare it to incentives granted by the European or national legislation. The CJEU additionally stated that if the taxpayer's activity does not display tax avoidance reasons, the court should consider that the taxpayer is doing his/her business normally and the incentives are deriving from the tax planning, which indicates that in that case tax authorities or national courts do not have right to change form or substance of the contract.[57]

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48 *Kesteren H. V.*, Taxable and Non-Taxable Transactions, in: *Lang M.*, *Pistone P., Rust A., Schuch J., Staringer C., Raponi D. (Eds.),* Recent Developments in Value Added Tax,Vienna, 2016, 226.

49 Ibid, 228.

50 *Radeva Y.*, VAT Implications of Cancellation Charges: New Substance-over-Form Rule?, International VAT Monitor, Vol. 30, № 1, 2019, 14.

51 *Kesteren H. V.*, Taxable and Non-Taxable Transactions, in: *Lang M.*, *Pistone P., Rust A., Schuch J., Staringer C., Raponi D. (Eds.),* Recent Developments in Value Added Tax,Vienna, 2016, 231.

52 *Henkow O.*, Financial Activities in European VAT, A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities, Netherlands, 2007, 60.

53 *Doesum A. V., Kesteren H. V., Norden G.-J. V.,* Fundamentals of EU VAT Law, Netherlands, 2016, 123.

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6. Conclusion

Changing the form or substance of the legal relationship is a problematic issue in Georgia and European Union. Taking into consideration that the tax law-related relationships generally are based on the economic reality, it is very hard to draw the line when the tax authorities are allowed to change the form of the contract.[58]

The fact that the burden of proof lies to the tax authorities according to Georgian Court practice should also be taken into consideration, which is the right outcome, as the tax authorities decide that the operation does not respond to its substance and therefore it should be changed. The burden of proof in such cases creates a framework for tax authorities, as they have to prove legal grounds for using such discretion.

For article 73(9) to be correctly implemented by the Georgian Tax authorities, it is crucial that all the factors are taken into consideration and every case is discussed individually, as a general answer to the question when article 73(9) is applicable is hard to get as every case is complex and has a lot of factors which might be decisive as nowadays there are many ways how business operations are conducted.

In doctrine and the practice of Georgian Courts and practice of CJEU indicates, the legal relationship must be examined in the light of the specific legislation which regulates the relationship between parties. Additionally, normal business practices must be learned and compared to the disputed case and after all these factors are thoroughly examined, the conclusions whether the form can be changed or not can be derived. This is the minimum standard that must be fulfilled.

How the future court practice will be developed regarding the issue is still to be seen, as there are many ongoing cases in the Courts of Georgia and there are no final decisions on that cases yet.

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