

Interpretation of Expression of Will, Reduction of the Amount of Penalty, the Principle of “Nominalism”

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Decision No. 2a/64, of Tbilisi Regional Court on 7 February 2001, upheld by the ruling of the Supreme Court of Georgia N 3k/467-01 of 27 June 2001 concerned the interpretation of expression of will (Civil Code, Article 52), reduction of the amount of penalty (Civil Code, Article 420) and the principle of nominalism (Civil Code, Article 389).

1. The Basic Facts:

The plaintiff lodged a claim before Tbilisi Regional Court demanding the reimbursement of damages from the defendant caused by the non-fulfilment of a contract.

The plaintiff referred to the contract of sale concluded between the parties as the basis of its claim according to which the defendant was to pay in full the value of the supplied goods within thirty calendar days after the supply of goods. The contract provided a penalty in amount of “not more than 0.1%” of the contract value per each day following the expiration of thirty calendar days after the receipt of goods. Furthermore, the plaintiff considered that according to the official note of the National Bank the exchange rate of GEL for USD was 1.335 at the moment of transaction, while at the moment of lodging the appeal it constituted 1.982. This caused additional damages to the plaintiff.

The Court considered it established that pursuant to Article 327 of the Civil Code the contract of sale was concluded between the plaintiff and the defendant and the latter paid part of the value of the supplied goods.

2. The Assessment and the Qualification of the Appellate Court

The Court partially satisfied the claim and considered as established that arrears existed based on the contract of sale, included in the case file and on the affirmation made by the defendant himself

Pursuant to the contract of sale the seller was obliged to transfer the title on the property, all the related documents and to supply goods. Pursuant to Article 477 of the Civil Code the plaintiff duly fulfilled its obligations, proven by the act of acceptance included in a case file. The obligation pursuant to Section 2 of the same Article, according to which the buyer was to pay the agreed price to the seller, was fulfilled defectively, namely according to the submitted evidence, the buyer paid only part of the total value of the supplied goods.

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Consequently, the defendant was to pay the remaining part of the value of goods. The court considered that the existence of arrears was certified by the Act of Comparison drawn up by the parties and the oral acknowledgment of the defendant at the main session of the court.

2.1. Interpretation of Expression of Will

As per the Contract, pursuant to Article 417 of the Civil Code the parties agreed upon additional means of securing a demand by penalty clause in the case of not fulfilling the obligations.

Upon the determination of the amount of penalty disputed by the parties to the contract the court accepted the argumentation of the plaintiff, that under the contract the party breaching the contract was to pay a penalty in amount of 0.1% of the contract value for each day after the expiration of the term provided by the contract (30 calendar days) starting from the receipt of goods.

The court did not accept the assertion of the defendant that the penalty in amount of 0.1% of the contract value was to be paid only for one overdue day. In justifying the above the defendant asserted that the last sentence of the relevant provision of the contract – “not more, than 0.1%” provided for the payment of a penalty for one and not for all overdue days.

Resolving the dispute between the parties the court referred to Article 52 of the Civil Code, providing that “in interpreting the will it should be ascertained as a result of the reasonable deliberation and not only from the literal meaning of its wording”.

The above provision implies the determination of the actual will of the parties, i.e. the establishment whether the party accepting a will was able to understand it in the same sense as expressed by the other party. In assessing this, the court took into account all the circumstances of the case. Both parties belonged to the same business circle and maintained private legal relations with other persons in full compliance with the established customs and traditions as provided by Article 339 of the Civil Code, along with other legal rules. In accordance with the established practice the penalty is generally paid for each overdue day following the origination of a demand.

Based on Article 388 of the Civil Code the court favoured the following expression: “per each overdue day”, as it more corresponded to the essence of the penalty provided by the contract. The purpose of the penalty clause is to make a person in arrears to discharge duly the assumed obligation; otherwise he will be fined until the full payment of the indebtedness.

The court gave preference to the statement of the contract “not more, than 0.1%” and would considered it a marginal amount in case of existence of a interest bearing pecuniary obligation.

2.2. Reduction of Unreasonable High Penalty

Taking due account of the circumstances and based on Article 420 of the Civil Code the court considered it expedient to reduce the amount of the penalty. It explained that under the term “unreasonably high penalty” the law means not only the unreasonably high initial percentage amount of the penalty that may incur grounds for its reduction, but unreasonable increase of the penalty during the fulfilment of the obligation. In both cases the court is entitled to reduce the unreasonably high penalty when this is provided for by the interests of the debtor. The court may adopt such a decision not only given the property interests, but with due consideration of all valuable interests, i.e. the court may reasonably reduce the penalty.

The court considers that the grounds for the reduction of unreasonably high penalty were an artificial increase of penalty by the plaintiff. Pursuant to Section 3 of Article 8 of the Civil Code the parties are obliged to exercise their rights faithfully, duly, lawfully, in full compliance with the rules of law and ethics. According to the evidence the plaintiff initially addressed the defendant in writing demanding the repayment of arrears upon the expiration of the term provided by the contract and again only after two years.

Pursuant to the contract the plaintiff could have addressed the defendant for payment of arrears any time within a period of three years after the origination of a demand, but acting according to the above mentioned principle of fairness, the former could have addressed the defendant after several months as well so as not to allow the amount of the penalty to increase during two years.

2.3. The Principle of Nominalism

The court considered that the reference of the plaintiff to the indemnification of damages with due consideration of inflation, based on Article 389 of the Civil Code, was groundless, because the above Article says that in the case of increase or decrease of the currency exchange rate or the change of the currency, the debtor is liable to pay in accordance with the rate existing at the moment of origination of the obligation. In the case of the change of currency, exchange relations should be based on the rate that existed at the moment of the change of the currency.

Based on the above quoted provision of the law the increase or decrease of the currency unit itself means money reform. This is a state legislative act implemented to reinforce the monetary system, as a result of which the effective system in a state is replaced by another one. In such a case, the devaluated money is withdrawn from circulation and is replaced by a new one; the money unit or the composition of gold in it is changed, as a result of which the format of a money unit, banknote and the national currency exchange rate is established. Currency rate means the value of a money unit of a country expressed by means of the currency of another country.

The establishment of a currency rate is equalised with its quotation. This means the establishment of a stock exchange rate of a foreign currency. Furthermore it should be mentioned that the change of a currency means the change of banknotes.

According to the established practice the so-called “nominal principle” operates during the discharge of financial obligations, i.e. the principle pursuant to which a debt should be nominally covered in the amount according to which the contract was made.

The court considered that recourse to Article 389 of the Civil Code upon the discharge of liabilities is admissible only in the case of denomination, i.e. change of nominal of currency. For instance the rouble was denominated during the Soviet Union when the face value of ten roubles was changed to a face value of one rouble. The change of the currency was the case when the rouble was changed to a coupon and then to the lari.

As regards hyperinflation this means the ultimate growth of the price of goods and of the volume of the circulating currency. The result is a drastic devaluation of the currency unit, balance of payments crisis and the breaking off of nominal economic relations. In such cases the state issues a large amount of money, which exceeds the actual needs of commodity turnover, and this is followed by an extreme devaluation of the currency rate and an increase of the market value of gold. As the lari was not subjected to any similar practice the application of Article 389 of the Civil Code is inadmissible at the moment of discharge of obligations.

The application of the above Article is also inadmissible in the case of the decrease of the currency nominal rate as the same changes are characteristic for every country; The exchange rate of the lari with regard to some foreign currencies could not be assumed as a criterion of the depreciation of lari, as it is a well-known fact that the exchange rate of the lari with regard to foreign currency varies – it depreciates with regard to the currency of some countries but increases with regard to the currencies of other countries.