ESJ Humanities

The Accessory Nature of the Penalty and the Peculiarities of Payment

Ekaterine Nandoshvili, PhD Student
Grigol Robakidze University, Tbilisi, Georgia

Doi:10.19044/esj.2021.v17n33p93

Submitted: 29 May 2021
Accepted: 02 August 2021
Published: 30 September 2021

Cite As:
Nandoshvili E. (2021). *The Accessory Nature of the Penalty and the Peculiarities of Payment*. European Scientific Journal, ESJ, 17 (33), 93.
https://doi.org/10.19044/esj.2021.v17n33p93

Abstract

This paper focuses on analyzing the accessory nature of the penalty, the peculiarities of its payment, and the legislative provisions regulating the penalty. It also presents their shortcomings and criticizes the wrong opinions in the legal literature on the concept and types of the penalty. The penalty is considered as the institutions with only accessory nature. Reduction of the penalty requires the debtor's counterclaim, without which the court is deprived of the possibility of reducing the penalty. The provision of Article 417 of the Civil Code is considered a serious legislative gap by the paper. The novelty is the provisions of the paper and the necessity of introducing norms on legal penalties in the Civil Code is substantiated, without which the case law may become a factor of unjustified violation of the rights of the participants of the private relations. There is also substantiated provision, which refutes the validity of the opinion of the authors who exclude the initiative of the court in the issue of reduction of the penalty. The aim of this paper is to analyze certain aspects of the regulation of penalties, which, together with the theoretical aspects, have practical significance that will provide better understanding of a number of issues as well as the correct qualification of the rights and obligations arising from the payment of penalties. Logical and systematic analysis of norms, as well as comparative-legal methods, are used to achieve the above-mentioned goal. Using these methods, it is possible to determine the progressiveness of Georgian law norms and to identify existing gaps in them. This further provides a better understanding of their content so as to develop suggestions and recommendations to improve the norms and practices.

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

Problems are analyzed on the examples of Georgian and German civil law. In terms of types and concepts of penalties, common characteristics and shortcomings between Georgian and German models were revealed. The efficiency of the Georgian model was also examined in terms of establishing the penalties. The study revealed that the Civil Code of Georgia determines the type of contractual penalty and allows its reduction. Based on this, a wrong conclusion has been made in science and practice about the existence of only one type of penalty in Georgian law. The circumstance that private law legislation does not consist solely of the Civil Code was not taken into account. The paper examines the applicable legislation of Georgia, which sometimes does not even use the term "penalty", but actually provides for a legal penalty in various provisions. It is inevitably necessary to reflect the norms in detail in order to regulate the payment of legal penalties in the Civil Code of Georgia.

Keywords: Penalty, reduction, accessory, obligation, security

1. Introduction

The norms regulating penalties are reflected in the Civil Code of Georgia, which speaks of additional means of securing demand. Existing legislation on penalties is influenced by German law. Obviously, there are some differences between the German and Georgian arrangements, but the main essence is common. By introducing a contractual penalty, the legislature has given priority to the principle of the will and private autonomy of the parties. The principle "pacta sunt servanda" is applied in private law and the contract must be fulfilled. On the other hand, fulfillment of the contract depends significantly not only on the will of the party but also on the means of security. In addition, the collateral must not exceed the damage caused by the non-fulfillment of the obligation. The mechanism of a fair balancing of the interests of the debtor and the creditor must be found by the court in a situation where the security measure bears a heavy burden on the debtor. The institution of the penalty which contains the assessment categories gives the court the discretion to assess the non-compliance of the penalty. More so, there are consequences if the contract is breached. Therefore, a fair balance is ensured between the weak and the strong parties. The penalty is also a means of securing the obligation.

The concept of security is not provided by law. It is not an unambiguous technical legal term, but an expression belonging to the legal language. This indicates the means of achieving a specific goal (Kvinikadze, 2016, p.86).

Article 417 of the Civil Code (hereinafter referred to as abbreviation "CC") of Georgia has a significant meaning under non-fulfillment of obligations. This issue should be interpreted in the systemic connection with

Article 316 of the CC, according to which the fulfillment of the obligation may be manifested in refraining from acting as well. According to Article 339 of the German Civil Code, if the fulfillment of an obligation is to refrain from acting, the penalty is subject to payment in case of acting that is contrary to such obligation (Kropholler, 2014, p.240).

This paper utilizes the systematic and comparative method to analyze the effectiveness of the norms regulating penalties that define the concept, form the penalties, and possibly reduce the penalties by a court. It is necessary to also determine the practical and theoretical significance of the accessory nature of the penalty. However, achieving the set goal is impossible without practice. The purpose of the analysis of practice and legislative provisions is to identify gaps in both norms and practice and to develop proposals for the improvement of each of them. By doing this, the provisions regulating the penalties are accepted from German law. The aim of the study is to determine the similarities and differences between the Georgian and German models, which makes it possible to see the advantages of each of these models.

During the writing of the abstract, both Georgian and German legal literature was selected as the study material. The conclusions and recommendations developed in the paper are of practical and theoretical importance since they will help to form unified approaches.

2. The Concept and Purpose of the Penalty

The legal definition of a penalty is given in Article 417 of the Civil Code of Georgia. It is a misconception that a penalty as a specific manifestation of private autonomy can only be determined by the agreement of the parties (Chanturia, 2012, p.237). Therefore, it should be noted from the outset that the Codex definition of a penalty is imperfect. This is because, according to Article 417 of the Civil Code, a penalty is a sum of money payable which is agreed by the parties to a debtor for non-fulfillment or improper fulfillment of the obligation. On the other hand, payment of the penalty may be determined not only by agreement between the parties but also by the Law. Although it is expected that the debtor pays the penalty to the creditor, it would still be desirable to specify in the law that the debtor does not simply pay the penalty but pays it to the creditor.

According to the generally admitted opinion, the penalty is an additional means of securing an obligation. Securing the obligation through the penalty implies that the obligation to pay indulges the debtor to duly fulfill the obligation. In case of non-fulfillment or improper fulfillment of the obligation by the debtor, the penalty loses the securing nature and the obligation to pay becomes a means of protecting the interests of the affected creditor.

Collateral rights and penalties arising from the fulfillment of the obligation are of an accessory nature. However, the demand of the penalty combines both accessory and non-accessory demand signs. The accessory nature of the right means that it cannot arise unless a principal obligation has arisen. Also, it cannot exist if there is no basic obligation and it will be terminated if the basic obligation is terminated (Schöbi, 1990, p.10-25).

The penalty is the most commonly used means of securing the performance of an obligation. This is explained by the fact that, unlike the determination of the amount of damage to be reimbursed, the penalty is not difficult to calculate. More so, its payment does not require establishing a causal relationship between the debtor's illegal action and the damage incurred by the creditor. This conclusion is based on the analysis of Articles 401 and 417 of the Civil Code.

The basic reason for the purpose of the penalty is to ensure regulatory obligations. However, the penalty may also secure the protective obligations (for example, the obligation of the guarantor is seen in the first part of Article 891 of the CC, while the obligation of the insured to the insurer for the reimbursement of the insurance sum is seen in the first part of Article 799 of the CC).

The purpose of the penalty is also to encourage the debtor to fulfill the obligation, in anticipation of an unfavorable prospect, and at the same time to determine in advance the amount of damage caused by non-fulfillment (Chitashvili, 2020, p.19).

According to the analogy with the rules on penalties, the parties can use them in order to ensure the performance of relative obligations. However, the major issue is about duties and not obligations.

This duty is not of an obligatory nature. This is because, on its basis, there is no transfer of property from one person to another between the participants of the civil turnover, which is the main sign of the obligation. Therefore, this is not an action to be taken under an obligatory right. It refers to the obligation to conclude a contract for the performance of a preliminary contract (Article 327, Part 3 of the CC). Under the law, a preliminary contract may give rise to an obligation to enter a future contract. Therefore, it is incorrect to use the word "obligation" in the wording of this norm. The Civil Code of Georgia does not also provide for the obligation to conclude a contract or contracting as a result of non-fulfillment of this obligation.[1]

3. Types of Penalties

The penalty is accrued through various means. Among these means, a distinction is made between the interest and fine. Although there is no direct

[1] Compare to Article 319 of the CC.

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

record of this in Article 417 of the CC, the signs are characterized in the legal literature. This makes it easier to distinguish an interest and a fine.

The fine is imposed/charged once, while the interest is imposed for a certain period of time (By hours, days, months, etc.) (Akhvlediani, 1999, p.78-79). A typical basis for charging the interest is the overdue payment of a basic obligation. The fine is imposed in case of other types of violations. An example of this is the Labor Code of Georgia according to Article 31, Part 3, which states that "The employer is obliged to pay the employee 0.07 percent of the delayed amount for each day of any delay in payment or settlement."

Both interests and fines are calculated either in proportion or in lump sums. In addition to fines and interests, the penalty is distinguished based on the following:

1. According to the basis for its determination. This is a contractual (voluntary) and legal (normative) penalty. The contractual penalty is determined by the agreement of the parties, while the legal penalty is determined by a normative act. It is worthy to note that the normative act establishing a penalty can only be a legislative act. The point is that imposing a penalty means imposing legal liability. According to Article 8 of the Law of Georgia on Normative Acts, legal liability can be imposed only on the basis of a legislative act. Article 7 of the same law defines the types of legal acts. Unfortunately, the issue of legal penalties is not properly regulated by the Civil Code of Georgia;
2. According to the payable penalty and damage to be compensated. There are different types of penalties such as the penalty to be counted, the exceptional, and the alternative penalty (Article 419 of the CC, etc.).
3. According to the nature of the debtor's breach of obligation. There are different types of penalties such as penalty for non-fulfillment of the obligation and penalty for improper fulfillment of the obligation (Article 417 of the CC).[2]

Like Georgian law, German law imposes a penalty in monetary form. However, Article 342 of the German Civil Code states that the contracting parties may determine a penalty in a non-monetary form. Accordingly, Articles 339-341 of the German Civil Code apply also.

[2]A comparative-legal discussion of the types of fines is given in the paper- Rolf Knieper, Lado Chanturia, Hans-Joachim Sahramm (Hrsg). Probleme des Vertragsrechts und der Vertragssicherung in den Staaten des Kaukasus und Zentralasiens. Materialien einer internationalen Konferenz an der Universität Bremen vom 10. Und 11 Apriel 2008. BWV. Berlin, 2009, S. 362.

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

The German Civil Code also provides for only a contractual penalty (Vertragsstrafe). This means that it does not provide the possibility of determining a penalty by law.

Unlike the Civil Code of Georgia, the German Civil Code (hereinafter referred to as the abbreviation GCC) does not contain a norm defining the form of agreement on the penalty. According to Article 341 of the GCC, the debtor makes a "promise" to pay a penalty for non-fulfillment or improper fulfillment of the obligation. According to the general rule established by the case law, the agreement on penalties is subject to the same procedure as the form of the contract signing. Thus, both oral and written agreement on the penalty is allowed.

The approach of the Georgian Civil Code to this issue should be considered more progressive. This is because the form of the deal is the factor that determines its authenticity and also facilitates the proof of the existence of an agreement on the penalty. It will be practically impossible to prove the fact of the oral agreement on the penalty, especially in order to establish the existence of a monetary obligation since the Georgian law considers the testimony of witnesses insufficient (Article 624 of the CC). However, the case law also considers some evidence, such as audio record, unconstitutional. Hence, this is treated or regarded as inadmissible evidence.[3] In such circumstances, it is the written form of the penalty that facilitates the proof.

The issue of the ratio of the penalty to the performance of the obligation and the demand for damages refers to Articles 340 and 341 of the GCC. In order to protect the debtor's rights, these articles determine that the creditor may demand from the debtor either payment of a penalty only or performance of the obligation only in a particular case. Also, in the event of a demand for compensation of damages, if the payment is made for improper fulfillment of the obligation, it shall be paid along with the demand of fulfillment of the obligation. The norm of the GCC should be applied in a situation where doubt arises because it is necessary to determine whether the creditor is interested in the actual fulfillment of the obligation by the debtor or whether the partial fulfillment of the obligation and compensation of the unfulfilled part of the obligation in monetary form is sufficient for the creditor.

It should be noted that Articles 340 and 341 of the GCC are not the imperative provisions. The parties have the right to agree that no penalty will be paid in case of non-fulfillment of the contract. However, such a deviation from the provision of law requires an individual/separate agreement.

[3]If, for example, the Supreme Court by the decision of 1 June 2010 on the case of №AS-1154-14-16-09 considered that an audio recording was admissible for determining the private relationship, it established the opposing practice in 2015 (see the Supreme Court's decision of May 4, 2015, on the case №AS-1155-1101-2014).

Therefore, it is not sufficient to formally provide for one of its articles or provisions in the contract.

According to Article 340 of the GCC, if the debtor is obliged to pay a penalty in case of non-fulfillment of the obligation, the creditor has the right to request a penalty payment instead of the contract fulfillment. A request for payment of a penalty for non-fulfillment of an obligation is not applied when the obligation has been improperly fulfilled. In the event that the creditor notifies the debtor that he/she demands the payment of the penalty, a claim for the fulfillment of the obligation to the debtor is excluded.

According to Article 341 of the GCC, the creditor has the right to demand payment of a penalty for improper fulfillment of the obligation (overdue fulfillment, positive breach of contract, dishonest fulfillment). He/she also has the right to request for the fulfillment of the obligation (accumulation). If the creditor accepts the fulfillment, then payment of the penalty can be demanded for. However, this is possible only if the creditor's right to do so in accepting the fulfillment was agreed in advance.

If the creditor is entitled to compensation for damages as a result of non-fulfillment or improper fulfillment of the obligation, then he/she may demand payment of the penalty in the form of a minimum amount of compensation of damages and file a claim at the court for compensation of damages for the amount that exceeds that of the penalty.

If the creditor does not use the penalty and continues to demand payment, he/she can still claim the penalty later (Jamernig, 2009, § 340, Rn. 5).

4. The Accessory Nature of the Penalty

This study also focused on examining the relationship between a penalty and a demand secured by the penalty. In this case, the opinion deserves criticism since the demand for a penalty is an integral part of the demand secured by the penalty. (Civil law 3rd ed. 2006, p. 44-45). The demand for a penalty and the demand secured by the penalty are independent rights. The following circumstances makes it possible to draw the following conclusion:

1. The named rights arise on the basis of different legal facts and, at the same time, these rights do not arise simultaneously (the origin of the basic demand precedes the origin of the right to a penalty); 2. The named rights may belong to different persons (for example, the demand for a penalty may be conceded while the basic demand remains with the original creditor). Thus, the German Civil Code commentary on the case of concession of the demand of the accessory rights does not assign the demand of the penalty to the right of demand (Palandt, 1993, Rn. 455); 3. The named rights may have existed in isolation from each other (the basic demand may be terminated, for

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

example, by fulfillment, while the demand for a penalty may continue to exist). Therefore, it can be concluded that if a change or termination of a basic demand does not result in a change or termination of the demand for penalty claim, the demand for penalty is not an accessory right in the full sense of the word.

This is why the demand for a penalty and the basic demand, when isolated from the demands of each other, may be conceded since both have independent property value. Consequently, in the case of concession of the basic demand, the penalty demand cannot be automatically transferred to the new creditor (cessionary). This means that it remains the property of the cedant.

Since the Civil Code of Georgia provides only for contractual penalties, it is important to identify the basis of the legal facts through which the contractual penalty is imposed. These facts include: a) the contract on the penalty and b) the occurrence of the condition of the right (condicio juris). Such a condition is non-fulfillment or improper fulfillment of the obligation, which is secured based on the penalty by the debtor.

According to its legal nature, the contract on the penalty is a causal contract. This is why its validity depends on the validity of the deal underlying the obligation that is secured by the penalty (Article 153 1 1 of the CC). Given the accessory nature of the penalty, the invalidity of the principal contract to secure the penalty or the debtor's guarantee automatically leads to its invalidity (Gottwald, Peter, 2007, Rn. 6). A contract on the penalty can be concluded after the origin of the basic obligation or before the origin of the basic obligation. An essential condition of such a contract is to determine the amount of the penalty, indicate the main obligation in the contract, and the kind of penalty that will be imposed on the debtor. When determining the interest, the parties must additionally agree on the periodicity of its accrual.

In a situation whereby a contract on the penalty needs to be concluded in advance, the creditor will receive a conditional demand for a penalty, which is considered a future right. The implementation and purchase of this depends on the non-fulfillment or improper fulfillment of the basic obligation (Krasheninnikov, 2005, p. 13,15).

A conditional demand for a penalty is an accessory right to the basic demand. Its accessory nature is manifested in the fact that: a) it cannot arise without a basic demand; b) it changes with the modification in the basic demand; and c) it comes to an end upon termination of the main demand.

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

5. Peculiarities of the Payment and Reduction of the Penalty

Non-fulfillment or improper performance of the obligation secured by the penalty in relation to the contract on the penalty is a condicio juris. This happens if the debtor is liable for breaching this obligation (Article 401 of the CC), i.e., if the non-fulfillment was caused by the debtor's fault. In some cases, condicio juris may be found in the debtor's non-faulty action. This is evidenced by the provision of Article 402 of the CC. Nonetheless, in a situation where condicio juris occurs, the contract on the penalty enters into force. This is reflected in the conversion of the creditor's conditional demand into the demand of the penalty.

Unlike the demand for the contractual penalty, a legal penalty demand arises on the basis of only one fact instead of several facts. This implies that it is the non-fulfillment or improper fulfillment of the basic obligation by the debtor. The debtor pays the penalty voluntarily, otherwise, the creditor will apply to the court to enforce the demand for the penalty. The debtor also enjoys the right to a reduction of the penalty. In this regard, the following issues are examined: 1) Whether the court can reduce the penalty on its own initiative in the absence of a debtor's counterclaim; 2) Whether it is possible to reduce the legal penalty; 3) What legal facts should the court take into account when reducing the penalty; and 4) In what way is it possible to reduce the penalty. It is necessary to answer each of these questions consistently. There is an opinion in the Georgian legal literature that the court cannot reduce the penalty on its own initiative (Contract Law, Authors' Group, 2014). This view cannot be shared. The case law proves that the court can reduce the penalty on its own initiative as well. It is a valid opinion and Article 420 of the CC does not indicate specific alternatives. Nevertheless, a certain limit is set within which the decision must be made by a court (Kurdadze & Khunashvili, 2015, p.58). However, reference to only Article 420 of CC is not enough to reduce the penalty (Liklikadze, 2019, p.245). More so, it can be said that Article 420 of CC is one of the most evident examples of interference in the content of the contract (freedom of contract) (Jorbenadze, 2017, p.281).

As for the possibility of reducing the legal penalty, it should be emphasized that the possibility of the reduction applies to both contractual and legal penalties. In this case, the court reduces the penalty at the demand of the debtor or based on his own initiative.

In the event of a reduction, the penalty demand changes. This leads to the payment of the penalty depending on the amount determined by the court.

The disadvantage of the Civil Code of Georgia indicates that it provides a reduction in Article 420, but it does not specify the inconsistent situations for the reduction of the penalty such as the debtor's property situation, damage caused or the amount of unfulfilled or violated obligation (Kapanadze, 2016, p. 115). This means that it does not stipulate the basis of

the legal facts by which the penalty can be reduced. Here it is important to imply the penalty that is clearly inconsistent with the consequences of breaching a basic obligation. These consequences include damage to the creditor's proprietary or non-proprietary rights or his/her legitimate interests. The criterion for non-compliance may be an excessively high interest rate on the penalty, a significant excess of the amount of the penalty on the damage incurred, the duration of the non-fulfillment of the obligation, etc.

Reduction is possible in two ways: 1. to reduce the percentage of the penalty; and 2. to reduce the penalty in the form of a lump sum payable at once (Rustavi City Court decision of 2010 on case №2-652-10).[4] Clearly, the latter is more acceptable to the debtor.

The court has the authority to consider the penalty as inappropriately high and then reduce it. In the event of a dispute, the court is obliged to study this issue (Ioseliani, 2016, p.63).

When reducing the penalty, the court is obliged to determine the real ratio of the requested penalty and the consequences of the debtor's non-fulfillment of the contractual obligation, which is nothing but an expression of the principle of justice (Khunashvili, 2016, p.181).

A penalty is considered counted when the damage is partially reimbursed in the part that is not reimbursed by the penalty. If the penalty to be counted has already been paid by the debtor or a court decision has been made on its payment, then the creditor is no longer entitled to demand the compensation of damages by the penalty in the compensated part. Any penalty shall be considered as the counted penalty unless otherwise provided by law or contract.

A fine penalty will not be counted in the damage report, and this does not reduce the damage. Mentioning the penalty as a fine in the contract does not give grounds to assign it to the fined penalty. A fined penalty is also called a cumulative penalty (Commentary of the Civil Code of Georgia, Collective of Authors, 2001, p.487). In the case of an exclusive penalty, the creditor has the right to demand the payment of the penalty, but not the payment for damages. Such a penalty is used when it is necessary to separate the amount of the debtor's liability. This occurs when the amount of the penalty is so large that it exceeds the expected damage (Chanturia, 2012, p.239).

The alternative is called a penalty and the creditor is authorized to choose to pay the penalty, to fulfill the contractual obligation, or to compensate the damage (Sekhniashvili, 2019, p.53). However, the enforcement of the creditor's demand for compensation of damages in the form

[4]Review of practice of law on fines (see also Chantladze Madi, Explanation of Expression of Will, Reduction of Fines, Principle of Nominalism, Journal ,, Review of Georgian Law'', №5 / 2002-1, Tbilisi, 2002, pg. 168-174).

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

of a penalty leads to the termination of the demand for the penalty and vice versa. Compared to the penalty to be counted, the alternative penalty is almost not used in practice because it is unfavorable to the creditor. Unlike the alternative penalty, the penalty to be counted enables the creditor to get the compensation for the part of the damage caused to him by demanding the penalty. This can occur without losing the demand for compensation of damages in the part that is not reimbursed by the penalty.

In a situation where an obligation is violated, the creditor is authorized to demand fulfillment of the obligation, compensation for damages, and payment of a penalty. However, it is inadmissible to demand the payment of the penalty and fulfillment of the obligation at the same time. Notwithstanding, it is possible to demand the payment of the penalty and compensation of the damage at the same time (Article 419 of CC). Accordingly, the creditor must choose to demand fulfillment or a penalty. It is also worthy to note that in both cases, the demand for damages is allowed (Meskhishvili, 2014, p.22).

Reimbursement of damages and payment of a penalty for improper fulfillment of a basic obligation shall not terminate this obligation. In contrast, compensation for damages and payment of a penalty for non- fulfillment of a basic obligation results in termination of the basic obligation. This is evidenced by the provision of Article 419 of the CC. In addition, other consequences of the payment of a penalty may be determined by law or contract.

Conclusion

The analysis of the study results revealed important problems. A comparative analysis of German and Georgian law on the regulation of the institution of penalty shows that German law expands the forms of penalty to be imposed on the debtor and provides for the possibility of using its non-monetary form as well, which is unfavorable for the debtor. It is practically impossible for the debtor to request a reduction of the existing non-monetary penalty, which makes the Georgian model more flexible than the German one. This creates a greater opportunity for fair balancing of the rights of the parties.

The advantage of the Georgian model over the German model is also evident in the definition of the form of the penalty since German law bypasses the issue of the form of the penalty, which allows it to be determined verbally. This makes it difficult for the creditor to prove the existence of a penalty agreement. Conversely, Georgian law clearly defines the form of the agreement on the penalty.

The concept of a penalty is limited in the Civil Code of Georgia, and it is reduced to a contractual or voluntarily determined by means of security. As a result, it is advisable to change the wording of Article 417 of the Civil Code

as follows: “The penalty, i.e., the monetary amount, which is determined by Law or agreement between the parties shall be paid by the debtor for non-fulfillment or improper fulfillment of the obligation”. In the category of non-fulfillment of the obligation, the penalty is indicated. It is important to understand this in a systemic connection with Article 316 of the Civil Code. Accordingly, the penalty also ensures restrained action, which is also an obligation.

Considering a fine as a purely accessory right is inadmissible. The penalty demand contains both accessory and non-accessory demand signs.

The parties may also use the penalty in pre-contractual relationships or for the fulfillment of the preliminary contract.

The study proved a common shortcoming of both German and Georgian models. This is because both of them acknowledge the existence of a contractual penalty only. The concept or essence of the penalty is similarly formed in both models. Depending on the basis for determining the penalty, it can be legal or normative and contractual or voluntary. In addition, a normative act determining the penalty may only be a legislative act since a penalty is a form of legal liability. According to Articles 7 and 8 of the Law of Georgia on Normative Acts, the type of legal liability and the basis for imposition may be determined only by a Georgian legislative act.

The agreement of the parties on the penalty is causal in nature since it depends on the validity of the obligation, which is guaranteed by the penalty.

The court may reduce the penalty on its own initiative, even without the motion of the debtor, which is based on the rational definition of Article 420 of the Civil Code. This is also confirmed by the analysis of court practice.

References:

1. Akhvlediani, Z. (1999). Obligatory Law, Publishing House "Samartali", Tbilisi.
2. BGB (2019)**.** German Civil Code, Second amended edition, Tbilisi.
3. Chanturia, L. (2012). Credit Security Law, Publishing House „Samartali“, Tbilisi.
4. Chantladze, M. (2002). Definition of Expression of Will, Reduction of Penalty, Principle of Nominalism, magazine „Review of Georgian Law“, №5/2002-1, Tbilisi.
5. Chitashvili, N. (2020). The Function, Securing the Contractual Interest for Penalty and Demand for Damage Compensation, Journal „Comparative Law“ №2, Tbilisi.
6. Civil Code of Georgia (1997). Legislative Herald №786, Tbilisi.
7. Commentary on the Civil Code of Georgia (2001). Group of Authors, Book Three, Author of Commentary on Article 417 B. Zoidze, Tbilisi.

8. Commentary on the Civil Code of Georgia (2018). Group of Authors, Book Two, Tbilisi.
9. Commentary on the Civil Code of Georgia (2019). Group of Authors, Book Three, Tbilisi.
10. Contract Law (2014). Authors Group, USAID Edition, Publishing House „Meridiani", Tbilisi.
11. Gottwald, P. (2007). Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band. Schuldrecht, Allgemeiner teiel, Auflage, München.
12. Jauernig **(**2009). BGB, Bürgerliches Gesetzbuch Kommentar, 13 Auflage, Verlag C.H.Beck, München.
13. Jorbenadze, S. (2017). Freedom of Contract in Civil Law, Tbilisi.
14. Ioseliani, N. (2016). Inconsistently High Contractual Penalties and the Role of the Court in Protecting Civil Interests, Magazine „Samartali" №1, Tbilisi.
15. Kapanadze, S. (2016). Theoretical and Practical Aspects of Penalty Reduction, „Student Law Journal", Tbilisi.
16. Khunashvili, N. (2016). Principle of good faith in contract law, Publishing House „Bona Causa", Tbilisi.
17. Knieper, R., Chanturia, L., Sahramm Hans-Joachin (Hrsg) (2009). Probleme des Vertragsrechts und der Vertragssicherung in den Staaten des Kaukasus und Zentralasiens. Materialien einer internationalen Konferenz an der Universität Bremen vom 10. Und 11 Apriel 2008, BWV. Berlin.
18. Kropholler, J. (2014). German Civil Code - Study Commentary, the 13th revised edition, Tbilisi.
19. Kurdadze, SH. & Khunashvili, N. (2015). Civil Procedural Law of Georgia, Publishing House „Meridiani", Tbilisi.
20. Kvinikadze, K. (2016). Reduction of penalty by the court as a „judge's intervention" into the principle of contractual freedom, Journal "Justice and Law" 2nd edition №50, Tbilisi.
21. Labor Code of Georgia (2010). Legislative Herald №4113-RS, Tbilisi.
22. Liklikadze, T. (2019). The Role of the Court in Determining the Amount of Penalty in Relation to the Purpose of Providing the Public Order, Review of Private Law №2, Publishing House Meridiani, Tbilisi.
23. Meskhishvili, K. (2014). Penalty (Theoretical Aspects, Judicial Practice), 3rd Edition „Review of Georgian Business Law", Tbilisi.
24. Meskhishvili, K. (2020). Relevant Issues in Private Law (Theory and Judicial Practice), Volume 1, Tbilisi.
25. Organic Law of Georgia On Normative Acts (2009). Legislative Herald №1876, Tbilisi.

 ISSN: 1857-7881 (Print) e - ISSN 1857-7431

26. Palandt, O. (1993). Bürgerliches Gesetzbuch, bearbeitet von Bassenge, Diederichsen, Edenhofer, Heinrichs, Heldrich, Putzo, Thomas, 52 neubearbeitete Auflage. C.H. Beck Verlagbuchhandlung, München.
27. Schöbi, Ch. (1990). Die Akzessorietät der Nebenrechte von Forderugen unter besonderer Berücksichtigung des Rechtsinstituts der Verjährung, Zürich.
28. Sekhniashvili, I. (2019). Scope of compensation of penalties in Georgian Judicial Practice, Group of Authors, Publishing House „Sulkhan-Saba Orbeliani University“, Tbilisi.
29. Civil law (2006). Ed. E. A. Sukhanova. 3rd ed. T. 3, Moscow.
30. Krasheninnikov, E.A. (2005). The legal status of the parties to a delayed transaction during a state of suspension. Essays on commercial law. Issue 12. Yaroslavl.