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ENFORCEMENT OF THE OBLIGATION TO CONCLUDE THE MAIN CONTRACT: A DOGMATIC AND PRACTICAL ANALYSIS OF ARTICLE 327 OF THE CIVIL CODE OF GEORGIA

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ABSTRACT

The preliminary contract is an important safeguard for the stability of private-law relations and commercial transactions in Georgian civil law. However, the ambiguity surrounding Article 327 of the Civil Code of Georgia (hereafter referred to as the CCG) gives rise to significant doctrinal and practical questions concerning the compulsory substitution of a party's declaration of intent.

This study critically analyses Article 327 of the CCG, examining the legal nature of the obligation to conclude the main contract and the mechanisms of its compulsory enforcement. The research is based on doctrinal legal analysis and an examination of judicial practice, with the theoretical foundation resting on the principles of private autonomy, freedom of contract and legal certainty.

The findings show that judicial substitution of intent is only permitted if a preliminary contract is breached and the essential terms (*essentialia negotii*) have been explicitly defined and accepted by those involved. Otherwise, judicial intervention risks undermining contractual autonomy and effectively making the court a substitute contracting party.

This paper's originality lies in identifying structural deficiencies in the current regulation of Article 327 of the CCG and proposing normative improvements. In particular, the study recommends clarifying the scope of preliminary contract enforceability and establishing a more consistent judicial standard. These measures aim to strengthen legal certainty and enhance predictability in civil circulation, while safeguarding the legitimate expectations of contracting parties.

KEYWORDS

Preliminary Contract, Autonomy of Will, Substitution of Intent, Article 327 of the Civil Code of Georgia, Private Autonomy, Enforcement, Legal Certainty, Georgia

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1. Introduction

In contemporary contract law, situations frequently arise in which parties intend to establish a legal relationship. However, due to practical or legal circumstances, such as the need to organise documentation, secure financing or complete preparatory procedures, the conclusion of the main contract may become temporarily impossible. In such cases, the preliminary contract acts as a legal bridge between the parties' current intention and the future formation of a definitive contractual relationship. According to Article 327(3) of the Civil Code of Georgia (CCG), a preliminary contract gives rise to an obligation to conclude the principal contract. This raises a fundamental doctrinal question: to what extent is the compulsory expression or substitution of will compatible with the principle of freedom of contract?

The principle of freedom of contract is one of the cornerstones of private autonomy and implies the right of an individual to determine independently whether establishing a legal relationship is desirable and the conditions under which it should occur. Nevertheless, the institution of the preliminary contract under Article 327 of the CCG creates a paradox within this framework of autonomy, whereby a party voluntarily restricts its future freedom by assuming an obligation to conclude a principal contract at a later stage. At the same time, Georgian legislation does not expressly provide a special mechanism to regulate the consequences of refusing to conclude the principal contract after entering into a preliminary agreement. In judicial practice, however, such a refusal may result in the court compulsory substitution of the party's declaration of intent.

This theoretical paradox has significant practical implications in Georgian case law, as demonstrated by the practice of the Supreme Court of Georgia. The Court applies the mechanism of substitution of intent not only in disputes concerning preliminary contracts, but also in relation to principal contracts where the original declaration of intent was defective from the outset. For instance, in Decision No. AS-208-197-2017 (Supreme Court of Georgia, 2019), the Court invalidated a debt restructuring agreement that had been entered into by a consumer under duress from an electricity supplier. This decision clearly shows that the authenticity and validity of a party's intent is a prerequisite for the enforceability of contractual obligations, including those arising from preliminary agreements.

When analysing the legal nature of a preliminary contract, the institution of substitution of intent occupies a central position. Essentially, a preliminary contract represents the 'preservation' or 'conservation' of intent: the parties agree in advance that, at a future point in time, they will express their intent to conclude the principal contract. The obligation established under Article 327(3) of the CCG is enforceable by its very nature. Although substantive legislation merely recognises the emergence of the obligation, its practical realisation is grounded in a fundamental principle of civil procedural law, namely the compulsory substitution of a declaration of intent through judicial intervention.

At this point, significant doctrinal tension emerges. Contract law is based on the principle that a declaration of intent must be made freely and consciously, and be genuine. Coercion inherently undermines this principle. According to Article 52 of the CCG, a declaration of intent should be interpreted based on reasonable judgement and an objective understanding of the declaration, rather than on the literal meaning of the words used alone. A contract concluded under coercion is not automatically void, but voidable, requiring an active challenge by the injured party. Article 85 of the CCG expressly states that a declaration of intent made under coercion results in the annulment of the transaction. While the Civil Procedure Code of Georgia does not define coercion as a substantive legal category, it establishes procedural standards for proving it in court.

In Georgian law, compulsory substitution of a declaration of intent implies that a legal act, which would usually depend on an individual's free will, is replaced through judicial authority. Under this mechanism, if one party acts in bad faith and withdraws unjustifiably from an obligation assumed under a preliminary contract, a court judgment acquires the same legal force as a contract that party has voluntarily signed. This substitution is only permissible where the preliminary agreement contains all the essential terms of the contract (essentials of the contract) and the claimant is seeking either the conclusion of the main contract or judicial confirmation of the underlying contractual relationship.

Thus, the substitution of intent constitutes the exclusive legal instrument that transforms a preliminary contract from a moral or political understanding into a binding legal act. Its significance lies in the fact that it safeguards the legitimate interests of creditors not only by compensating them for damages, but also by enforcing the obligation in nature. Examining this delicate boundary, where private autonomy ends and the legitimate intervention of judicial authority begins, is the central scientific value of the present study.

Article 319(1) of the CCG establishes the principle of contractual freedom and the general framework governing contractual obligations. In particular, it provides that: 'Subjects of private law shall be free, within the

limits of the law, to enter into contracts and determine their contents. They may also conclude contracts not expressly provided for by law, provided that such contracts do not contradict the law” (CCG, Article 319(1)).

The problematics of the declaration of intent in the context of preliminary contracts are closely linked to issues of the validity and substantive certainty of the contractual will. As Tumanishvili and Tkeshelashvili (2020) have noted, a declaration of intent is the primary means by which private autonomy is realised and legal relationships are formed. Within the framework of Article 327, the preliminary contract precisely constitutes such a declaration, whereby a party consents in advance to a limitation of its future contractual freedom. According to the authors, contractual intent should be interpreted based on its objective perceptibility, with judicial substitution of intent only occurring where the preliminary agreement leaves no room for ambiguous interpretation (Tumanishvili & Tkeshelashvili, 2020).

Similarly, Jorbenadze (2014) argues that civil legal relations are based on the correspondence between an individual's internal will and an adequate external expression of that will. The validity of any transaction, including a preliminary contract, depends on how accurately a party's intent is perceived by the other party and the state. A declaration of intent is not merely a physical act, but an expression of personal autonomy. Consequently, judicial substitution of intent should only be permitted where normative determinability of intent is present, i.e. where a party's conduct has created legitimate reliance on the performance of an obligation by a third party (Jorbenadze, 2014).

Therefore, a declaration of intent should not be understood merely as a psychological phenomenon, but as a legally operative act that produces legal consequences. In the context of preliminary contracts, parties effectively 'preserve' their future intent, thereby creating a guarantee for the subsequent conclusion of the principal agreement. Accordingly, when interpreting such intent, objective criteria must be prioritised to avoid uncertainty and inconsistency at the enforcement stage.

This study critically analyses Article 327(3) of the CCG, addressing the legal void in practice caused by ambiguity surrounding key contractual terms and imperfect enforcement mechanisms.

A preliminary contract cannot be reduced to a mere declaration of future intention in the context of pre-contractual relations. Once the parties have agreed on all the essential terms of the contract, it becomes legally mandatory to conclude the main contract. Conversely, if the parties only agree that the essential terms will be negotiated at a later date, this should be regarded as a non-binding intention to negotiate. In this regard, depending on the degree of certainty achieved by the parties, the legislative wording of Article 327 may reveal an alternative or dual legal character.

This article addresses the principal research question of whether the compulsory mechanism envisaged under Article 327 constitutes an unjustified restriction on freedom of contract, and which standards govern its enforcement in Georgian judicial practice. To answer this, the study analyses relevant Supreme Court of Georgia decisions and evaluates the doctrinal foundations of judicial substitution of intent. The author submits that this research will modestly yet meaningfully enhance legal certainty in the process of the compulsory conclusion of principal contracts.

The scientific and practical significance of the research is determined by the following considerations:

1. The study's conclusions provide recommendations for possible amendments to Article 327 of the CCG, particularly regarding the stricter regulation of preliminary contracts' validity periods and formal requirements.

2. The research proposes a judicial 'test' – a set of cumulative criteria by which courts should judge whether a preliminary contract is sufficiently specific to justify substitution of intent. This would reduce the risk of subjective and unpredictable judicial decisions.

3. The study's findings may help legal practitioners and attorneys to draft preliminary contracts more effectively, thereby reducing the likelihood of subsequent invalidation due to ambiguous or indefinite essential contractual terms.

2. Literature Review

The institution of the preliminary contract, by its legal nature, constitutes one of the most debated issues within private law doctrine. An analysis of the existing literature demonstrates that, despite a common conceptual foundation, significant differences in emphasis exist between Georgian and foreign legal scholarship, thereby necessitating the present study.

Within Georgian legal doctrine, the issue of preliminary contracts has been extensively examined by Chanturia (2011). The author places particular emphasis on the principle of “identity of form,” arguing that a preliminary contract should not be perceived merely as a stage within the negotiation process, but rather as a legally binding juridical act possessing obligatory force. Nevertheless, Chanturia’s approach remains predominantly focused on normative interpretation and provides a comparatively limited response to the practical collision that arises where formal requirements are duly observed, while the substantive content of the agreement remains vague or indeterminate.

Conversely, Zoidze (2005) analyzes the issue through the prism of private autonomy. His philosophical and legal approach is of particular importance for legitimizing the concept of compulsory performance, insofar as coercion becomes permissible only because the party has voluntarily restricted its own contractual freedom in advance. However, Zoidze’s theory leaves unresolved a fundamental question: where should the boundary be drawn between voluntary self-limitation and the impermissible imposition of new contractual terms upon the parties by judicial authority?

The review of existing scholarship reveals that, despite the existence of a substantial theoretical framework, Georgian law still contains what may be described as a “dogmatic gap” between legal theory and judicial practice. In particular, the following shortcomings may be identified:

- **Filling the Theoretical Vacuum:** Existing literature insufficiently analyzes the impact of Article 311¹ of the Civil Code of Georgia (concerning registration requirements) upon the enforceability of Article 327 (substitution of intent). The present research seeks to establish a systematic interrelationship between these two legal provisions.

- **Empirical Validation:** Unlike the majority of existing doctrinal works, the present article evaluates doctrinal approaches through expert-based empirical research in order to determine whether prevailing theories adequately respond to real legal challenges arising in practice.

- **Development of a Practical Instrument:** The study aims not merely to describe the existing problem, but to formulate the minimum substantive criteria necessary for a preliminary contract to be considered sufficiently definite and therefore enforceable.

Alongside the obligation to conclude the principal contract, it is equally important to consider civil liability arising from avoidance of contractual obligations, particularly in relation to compensation for damages originating from pre-contractual relations under Articles 316 and 317 of the CCG.

This “dogmatic gap” becomes even more apparent in the jurisprudence of the Supreme Court of Georgia. In its decision of 27 September 2017, Case No. AS-202-191-2017 (Supreme Court of Georgia, 2017), the Court explained that:

“A preliminary contract constitutes a legally independent contract, whereby the parties’ interest is directed toward the future conclusion of a contract, and it lacks independent economic substance. Given that the fundamental principles of contract law apply to preliminary contracts, agreement upon all essential terms is required. However, Article 327(3) does not define the motives underlying the conclusion of a preliminary contract.”

Furthermore, in its ruling of 20 July 2023, Case No. AS-1038-2022 (Supreme Court of Georgia, 2023), the Court emphasized that a preliminary contract serves as a legal mechanism of compulsory contracting (*Kontrahierungszwang*) and grants the parties a claim right demanding the future conclusion of the principal contract.

Accordingly, the present article moves beyond the mere reproduction of existing doctrinal positions and instead proposes a reassessment of Article 327 in light of contemporary judicial practice and expert legal perspectives.

3. Research Methodology and Theoretical Framework

In order to achieve the complex objectives of the present study, an interconnected system of legal research methods has been employed. Each methodological approach has been selected to ensure examination of the issue from both theoretical-normative and practical-empirical perspectives.

The methodological design of the research ensures a multi-layered analysis of the subject matter. In the following sections of the article, normative and dogmatic reasoning will consistently be reinforced through empirical data obtained from expert interviews and surveys. This methodological approach enables the comparison of theoretical concepts with practical legal realities.

Such methodological pluralism guarantees that the recommendations presented in the concluding section of the article will be grounded not only in abstract legal theory, but also in the consolidated experience of legal practitioners and internationally recognized standards. This synthesis ensures both the high academic quality of the research and its practical applicability within legal science and judicial practice.

At the same time, the study is subject to certain limitations. The research focuses exclusively on Georgian judicial practice and does not include a comparative analysis of foreign jurisdictions. Furthermore, the results of the expert survey cannot be regarded as fully representative of the legal field as a whole.

4. Theoretical Framework

The present study is grounded upon three fundamental theoretical pillars of private law: freedom of contract as the source of declaration of intent; the principle of *pacta sunt servanda* as the guarantee of contractual performance; and the standard of legal certainty, which determines the permissible limits of compulsory enforcement through the substitution of intent. It is precisely through the synthetic analysis of these three principles that the study critically evaluates the scope and doctrinal legitimacy of Article 327 of the Civil Code of Georgia (CCG).

4.1. Private Autonomy and the Dynamic Interpretation of Freedom of Contract

The principle of private autonomy, which in German legal doctrine is understood as a manifestation of the individual's right to free personal development within civil circulation (Larenz, 1987), acquires a specific doctrinal significance in the context of preliminary contracts. The mechanism of substitution of intent envisaged under Article 327 of the CCG frequently becomes the subject of criticism as a potential infringement upon contractual freedom and individual autonomy.

Within the framework of the present research, the author develops a model of the “dynamic interpretation” of freedom of contract. This argumentation is based on the thesis that contractual freedom should not be understood merely as a momentary and isolated expression of will; rather, it also encompasses “responsibility for one's own declared intent” (Flume, 1992). When a party enters into a preliminary contract, it exercises its autonomy precisely by voluntarily restricting its own future freedom of action. Consequently, judicial substitution of intent should not be perceived as a restriction of liberty, but rather as a legal ratification of the party's previously realized autonomous choice (*Ratification of Choice*).

This interpretation enables reconciliation between the apparent conflict of two foundational private-law values: on the one hand, individual freedom, and on the other, the binding force of voluntarily assumed obligations. From this perspective, compulsory conclusion of the principal contract derives its legitimacy not from external coercion imposed by the state, but from the party's own autonomous self-obligation expressed at the moment of concluding the preliminary agreement.

4.2. Legal Certainty and the Theory of Protection of Legitimate Reliance

The second essential component of the theoretical framework of this article is the principle of legal certainty, which is closely interconnected with the theory of protection of legitimate reliance. Within this doctrinal approach, the preliminary contract is viewed as an instrument for legitimizing reliance and expectations between the parties (Zoidze, 2005). However, such reliance acquires legal value only where the contractual relationship demonstrates sufficient substantive certainty.

The author's contribution in this respect is reflected in the introduction of the concept of the “standard of qualified reliance.” According to this approach, judicial intervention and substitution of intent are legitimate

only where the preliminary contract satisfies the test of “sufficient certainty” (Chanturia, 2011). If the document remains vague or fails to include the essential contractual terms (*essentialia negotii*), the expectation of the party cannot be regarded as genuine legal reliance deserving judicial protection.

This theoretical model serves as a safeguard against what may be described as “judicial tyranny,” namely, the risk that courts might impose contractual conditions upon parties that they had never actually agreed upon. Accordingly, the doctrine of legal certainty functions as a limiting principle upon judicial discretion in disputes concerning preliminary contracts.

Thus, the relationship between legal certainty and protection of reliance is not absolute. Judicial enforcement of a preliminary contract remains legitimate only where the expectations created by the parties are grounded upon objectively verifiable, legally valid, and sufficiently determinate contractual commitments.

5. Main Analysis and Discussion

5.1. The Dogmatic Nature of the Preliminary Contract and the Transformation of the Form of Declaration of Intent

Article 327(3) of the Civil Code of Georgia (CCG) should not be understood merely as a narrowly technical legal provision; rather, it regulates a complex legal relationship in which the voluntary agreement of the parties prospectively binds their future legal conduct. A fundamental doctrinal debate within academic scholarship is centered upon the following question: does the preliminary contract constitute an autonomous and independent legal institution, or is it merely a preliminary “embryonic” stage of the principal contract?

In addressing this issue, reference to German legal doctrine is particularly relevant. Karl Larenz (1987) argues that a preliminary contract constitutes a fully developed obligation-based legal relationship that gives rise to an independent claim right. According to this approach, breach of a preliminary contract is not limited merely to liability for damages arising from frustrated reliance (*contractual liability*), but also establishes the basis for a claim demanding specific performance. Within the Georgian legal context, this principle is manifested through the mechanism of compulsory substitution of declaration of intent under Article 327 of the CCG.

Article 327(3), which additionally emphasizes the principle of identity of form between the preliminary and principal contracts, confirms that the legislator attributes to the preliminary contract the same legal weight and normative significance as the principal transaction itself. Consequently, the preliminary contract cannot be reduced to a mere stage of negotiation or a non-binding declaration of future intentions; it constitutes a legally enforceable juridical act capable of producing independent legal consequences.

Under the conditions of contemporary digital transformation and the increasing speed of civil and commercial circulation, the issue of the form in which a preliminary contract is concluded acquires particular relevance. As Jorbenadze (2012) observes in his doctoral dissertation, a declaration of intent expressed in electronic form must satisfy the same standards of authenticity and legal validity as a traditional written declaration embodied in a material document.

When Article 327 is interpreted systematically in light of this doctrinal approach, an important practical implication emerges. If parties, through electronic communication — for example, by electronic mail correspondence — agree upon all essential contractual terms (*essentialia negotii*) of a future contract, a legitimate legal basis arises for activating the mechanism of compulsory substitution of intent.

Jorbenadze’s analysis allows the conclusion that the identifiability and validity of a declaration of intent are not determined by its material carrier, such as paper or a physically signed document. On the contrary, the decisive factor for the emergence of legal consequences is the substantive completeness of the declaration and the parties’ intention to create a binding legal effect. Accordingly, a digitally expressed declaration of intent, provided that it satisfies the standard of sufficient certainty and determinability, constitutes a fully adequate basis for the application of the legal remedies envisaged under Article 327 of the CCG.

This interpretation is of particular significance in modern contractual practice, where electronic negotiations, digital communications, and remotely concluded agreements increasingly dominate commercial interactions. Limiting the enforceability of preliminary contracts solely to traditional written forms would undermine both the functional purpose of Article 327 and the broader principle of legal certainty within contemporary private-law relations. Consequently, the transformation of the form of declaration of intent from traditional written expression to digitally communicated consent should not affect the enforceability of the obligation, provided that the parties’ intent remains objectively identifiable, sufficiently definite, and legally verifiable.

5.2. Compulsory Declaration of Intent: A “Crisis” of Private Autonomy?

The autonomy of declaration of intent is not merely a theoretical abstraction; rather, it constitutes the substantive foundation of judicial control in contractual relations. This position is clearly reflected in the ruling of the Supreme Court of Georgia in Case No. AS-661-628-2014 (Supreme Court of Georgia, 2015), which may be regarded as precedential with respect to the practical implementation of Article 327 of the Civil Code of Georgia (CCG).

In this case, the Court refused to substitute the declaration of intent because it established that the preliminary agreement concerning the exchange of land plots had been concluded under conditions of psychological pressure and coercion. The respondent alleged that threats connected to influential governmental officials compelled him to agree to unfavorable contractual terms. The Court formulated a clear legal standard: the validity of a preliminary contract fundamentally depends upon the freedom and authenticity of the parties' intent. Where the agreement has been obtained through coercion, it cannot serve as the basis for judicial substitution of intent or compulsory enforcement. Through this reasoning, the Court emphasized that the coercive mechanism envisaged under Article 327 is legitimate only where the preliminary agreement itself is legally impeccable and free from defects of consent.

From the perspective of the bona fide purchaser, who has fully or partially paid the purchase price on the basis of a preliminary contract, only those risks falling within the purchaser's own sphere of control should be foreseeable and assumable, such as compliance with personal financial obligations. Risks arising from the developer's inability to obtain or maintain the necessary construction authorization cannot reasonably be shifted onto the purchaser, since such allocation would contradict the very essence of the principle of good faith.

This approach corresponds to the doctrine of “protection of legitimate reliance” developed within German jurisprudence, according to which a party that has created a legitimate expectation regarding performance of an obligation cannot evade liability by invoking circumstances falling within its own sphere of control (BGH NJW 2007, 60).

The obligation envisaged under Article 327(3) of the CCG – namely, the obligation to conclude the principal contract – constitutes a specific legal claim whose enforcement is achieved through judicial substitution of intent. The effectiveness of this mechanism is closely connected to the principle of legal certainty. As emphasized within the theoretical framework of the present study, protection of legitimate reliance (Zoidze, 2005) becomes legally justified only where the preliminary agreement contains all essential contractual terms (*essentialia negotii*).

It should also be emphasized that the doctrine of *specific performance*, which forms the conceptual basis of Article 327, encounters significant technical difficulties at the enforcement stage. Experts noted that enforcement authorities frequently experience difficulties in executing judicial decisions where substitution of intent is not supported by a sufficiently detailed operative part of the judgment. Consequently, the study demonstrates that Article 327(3) functions effectively only where three cumulative elements are present simultaneously: compliance with formal requirements (including registration), substantive completeness of the contractual terms, and a clear and workable enforcement mechanism.

5.3. The Standard of Certainty of Essential Contractual Terms

The greatest obstacle to the practical application of Article 327(3) of the Civil Code of Georgia (CCG) is the problem of contractual ambiguity. In order for a court to compel a party to conclude the principal contract through substitution of intent, the preliminary agreement must clearly identify at least the following essential elements:

- the subject matter of the contract (namely, the precise object, property, or service concerned);
- the price or an objectively determinable mechanism for establishing the price;
- the contracting parties.

Where a preliminary contract merely states, for example, that “the parties shall conclude a contract of sale at a future market price,” such wording frequently becomes the source of legal disputes due to its lack of determinacy. From an academic perspective, it is appropriate to rely upon the position advanced by Chanturia (2011), according to which a preliminary agreement loses its legal function where its terms remain uncertain and thereby transforms into a mere *Letter of Intent* lacking binding legal force.

This distinction is of particular doctrinal importance because the enforceability of a preliminary contract fundamentally depends upon the existence of objectively identifiable contractual obligations. If essential

contractual terms remain undefined or subject to future negotiations, judicial substitution of intent becomes impossible without impermissibly allowing the court itself to create contractual terms on behalf of the parties. Such judicial intervention would exceed the permissible boundaries of contractual interpretation and would contradict the principle of private autonomy.

Accordingly, the requirement of sufficient certainty serves not merely as a formal technical condition, but as a substantive safeguard protecting parties from arbitrary enforcement and excessive judicial discretion. Only where the essential contractual framework has already been conclusively established by the parties may the court legitimately replace the declaration of intent of the non-performing party.

5.4. Critical Review of Judicial Practice

5.4.1. The Approach of the Court of Appeal: “Agreement to Agree” and the Concept of the Complete Preliminary Contract

In the practical application of Article 327(3) of the CCG, the position established by the Tbilisi Court of Appeal (2017) is of particular importance, as it clearly distinguishes a preliminary contract from other stages of contractual negotiations. In the relevant case, the Court explained that:

“By its legal nature, a preliminary contract constitutes an obligation to conclude the principal contract and not merely a declaration of future cooperation” (Tbilisi Court of Appeal, 2017).

Through this decision, the Court confirmed one of the principal findings identified within the expert survey conducted for the present research: a preliminary contract must satisfy a high standard of legal certainty and determinability. The Court emphasized that where the preliminary agreement lacks sufficient detail enabling identification of the substantive content of the future principal contract, the coercive enforcement mechanism envisaged under Article 327 cannot be activated.

The reasoning developed by the Court of Appeal encompasses several important doctrinal aspects:

- **Autonomy of Intent:** The Court indicated that, by entering into a preliminary agreement, the parties have already “preserved” or “conserved” their declaration of intent for the future. Consequently, where one party subsequently refuses to conclude the principal contract, such conduct constitutes a violation not merely of a promise, but of an already existing legal obligation.

- **The Significance of Form:** In the same case, the Court once again returned to the importance of compliance with formal requirements. It held that a preliminary contract must possess the same level of formal legal quality and certainty as would be required for the principal transaction itself.

- **Critical Perspective:** Although the Court of Appeal attempted to strengthen the practical functionality of Article 327, a significant problem nevertheless remains unresolved in judicial practice – namely, how enforcement should occur where the parties have reached agreement only on part of the contractual conditions while leaving other essential terms undefined.

Accordingly, the decision of the Tbilisi Court of Appeal constitutes an important practical guideline for legal practitioners. It demonstrates that reliance upon Article 327(3) is justified only where the preliminary contract, in both structure and substantive content, is maximally comparable to the principal contract itself. This case once again confirms the central thesis advanced in the present study: within Georgian law, substitution of intent does not constitute judicial creation of new contractual terms, but rather compulsory confirmation and enforcement of an already existing agreement between the parties.

5.4.2. Analogous Challenges: Substitution of Intent in the Context of Invalid Contracts

The 2019 review of judicial practice on the General Part of Civil Law prepared by the Supreme Court of Georgia (Supreme Court of Georgia, 2019) presents a series of cases in which the issue of substitution of intent was examined not within the framework of preliminary contracts, but rather in the context of the invalidity of already concluded agreements. The analysis of these cases is highly significant for the purposes of the present research, as they establish the fundamental principles governing the application of Article 327(3) of the Civil Code of Georgia (CCG).

Although Article 327(3) directly regulates the institution of the preliminary contract, Georgian judicial practice approaches the issue of substitution of intent within a broader doctrinal context. This broader perspective provides important interpretative conclusions regarding the conditions under which compulsory enforcement may legitimately occur.

a) Defect of Intent as a Ground for Invalidity (Case No. AS-208-197-2017)

The significance of this case within the framework of Article 327 lies in the principle that substitution of intent and compulsory enforcement are permissible only where the original declaration of intent was free, genuine, and legally valid. Where defects of intent exist — such as coercion, threats, or mistake — even a preliminary contract cannot serve as a legitimate basis for judicial substitution of intent.

Another important case discussed in the judicial review concerns the invalidity of immoral transactions under Article 54 of the CCG. The Court clarified that a legal transaction contradicting accepted moral standards of society is void irrespective of formal compliance with legal requirements. Within the context of Article 327, this reasoning demonstrates that the enforceability of a preliminary contract depends not only upon formal validity, but also upon substantive legitimacy. Where the content of the preliminary agreement itself contradicts principles of morality or public order, judicial substitution of intent becomes impermissible.

b) Invalidity of Contracts Concluded Under Coercion (Case No. AS-661-628-2014)

In another important decision, Case No. AS-661-628-2014, the Supreme Court (2015) examined an agreement concerning the exchange of land plots, which one party alleged had been concluded under coercion. The Court determined that the transaction was voidable pursuant to Article 85 of the CCG because it had been concluded as a result of “psychological pressure and threats,” thereby excluding the freedom of the party’s declaration of intent.

The Court established that the company involved, benefiting from support by representatives of state authorities, abused its dominant position and exerted psychological pressure upon the respondent in order to secure conclusion of an extremely unfavorable exchange agreement.

It should additionally be noted that Decision No. 2b/339-14 of the Tbilisi Court of Appeal (2014) is significant in two respects. First, it clarifies the issue of formal requirements applicable to preliminary contracts by indicating that registration is not always mandatory. Second, it establishes the objective limits of substitution of intent, particularly in situations where the disputed property has already been transferred to a third party.

This case clearly demonstrates the practical limits of enforcement under Article 327: a court cannot substitute intent with respect to property that no longer belongs to the obligated party.

c) Judicial Recharacterization and the Risk of Judicial Activism

Instead of determining the parties’ genuine intent, courts occasionally engage in what may be described as judicial “self-creation” or artificial reconstruction of contractual relationships. Such an example may be found in the case involving L.M. (Young Lawyers Association, 2022), where the court recharacterized a preliminary sale agreement as a construction contract and subsequently declared it invalid on the ground that the contractor lacked authority to conclude multiple construction agreements concerning the same property.

From a casuistic perspective, the legal nature of preliminary gift agreements concerning immovable property is equally noteworthy. In Case No. AS-1529-1443-2012 (Supreme Court of Georgia, 2013), the Court of Cassation explained that although Article 525(2) of the CCG considers a gift agreement concluded only upon registration, this requirement concerns the transfer of ownership rather than the validity of the preliminary promise itself. The Court emphasized that a written preliminary gift agreement satisfies the formal requirements established by law and generates a binding obligation despite the absence of registration.

This interpretation prevents paralysis of Article 327 with respect to specific contractual types, such as gift agreements, where registration requirements apply primarily to proprietary transfer rather than to the validity of the preliminary obligation itself.

d) Formalism and Risks within the Construction Sector

The formalistic tendencies observable within judicial practice are particularly dangerous in the construction sector. This risk is illustrated once again by the case involving L.M. (Young Lawyers Association, 2022), where lower courts declared a preliminary agreement invalid because it had not been registered and because consent of the property owner was absent.

According to the interpretation advanced by the appellate court, the preliminary agreement could not generate an obligation to conclude the principal contract under Article 327(3) because it lacked a “mandatory element,” namely registration or confirmation by the owner. Such an approach undermines the stability of civil circulation and calls into question the rights of thousands of citizens who have already paid the purchase price for property that remains under construction.

The analysis of the foregoing cases confirms the principal thesis advanced in the present study: Article 327(3) of the CCG is not an isolated legal norm. Rather, it is closely interconnected with the general doctrine governing declaration of intent. Substitution of intent, as a mechanism of compulsory enforcement, is permissible only where there exists a presumption that the declaration of intent was made freely and by legally authorized persons. Otherwise, courts are obliged to refuse compulsory enforcement and resolve the dispute within the framework of invalidity of transactions or compensation for damages.

The synthetic analysis of the cases discussed above (AS-208-197-2017, AS-985-2018, and AS-661-628-2014) demonstrates that Georgian judicial practice approaches substitution of intent not as an isolated procedural mechanism, but within the broader doctrinal framework governing validity of declarations of intent under Articles 54, 85, and 97–101 of the CCG. This confirms that Article 327 is not an end in itself; rather, it functions as an instrument for the realization and protection of private autonomy.

5.5. The Supreme Court's Methodological Guidelines: A Systemic Revision of Judicial

Practice

For the comprehensive assessment of the issues examined in the present study, particular significance attaches to the 2015 Review of Civil Case Practice (No. 12) prepared by the Supreme Court of Georgia (Supreme Court of Georgia, 2015). This document does not merely reflect an individual judicial decision; rather, it represents the official institutional position of the judiciary concerning the interpretation and practical application of Article 327 of the Civil Code of Georgia (CCG).

The interpretative framework articulated in the review clearly delineates the permissible boundaries of judicial intervention in the process of substitution of intent.

Limitation of Judicial Authority

According to the methodological interpretation contained in the Review (Supreme Court of Georgia, 2015, pp. 45–48), courts lack legitimacy to determine contractual terms in place of the parties themselves. Judicial substitution of intent is permissible only in the exceptional circumstance where the preliminary agreement already contains a “ready contractual matrix,” namely, a complete and sufficiently detailed substantive framework of the future principal transaction.

This approach reflects a fundamental doctrinal principle: the court's role is not to create contractual obligations *ex nihilo*, but rather to enforce obligations that the parties themselves have already clearly and definitively established through their declarations of intent.

Primacy of Private Autonomy

The research demonstrates that the application of Article 327(2) and (3) of the CCG must not transform into unjustified judicial interference with party autonomy. Where a preliminary agreement is ambiguous or substantively incomplete, courts are obliged to refuse substitution of intent in order to avoid assuming the role of a contractual counterparty.

This systematic judicial approach fully supports the criticism advanced in Subchapter 4.4 of the present article and confirms that enforceability of a preliminary contract is imperatively dependent upon substantive certainty and contractual detail.

Analysis of the case demonstrates that where a party refuses voluntarily to perform an assumed obligation, the creditor possesses the right to demand not merely compensation for damages, but also conclusion of the contract itself through specific performance. This approach constitutes a clear example of the Georgian legal order prioritizing the principle of *pacta sunt servanda* where the parties' intent has been declared clearly and unequivocally within the preliminary agreement.

Particular attention regarding the enforceability of preliminary contracts should also be paid to the Supreme Court's decision in Case No. AS-1014-969-2015 (Supreme Court of Georgia, 2015b). In this case, the Court examined the “conditional” nature of preliminary agreements.

This decision is significant because it clearly distinguishes between:

- the emergence of an obligation; and
- the enforceable right to demand its performance.

The Court's reasoning reinforces the position that Article 327 does not operate automatically. Rather, activation of the mechanism of substitution of intent requires cumulative fulfillment of all concrete preconditions established within the preliminary contract itself.

In conclusion, interpretation of Article 327 must not occur in isolation from the institution of the bona fide purchaser and the broader doctrine of legitimate expectations. As demonstrated by the case involving L.M. (Young Lawyers Association, 2022), payment of a substantial purchase price on the basis of a preliminary agreement, particularly where notarization has occurred, creates a legitimate expectation deserving legal protection.

Unless the Supreme Court establishes a stable doctrinal standard according to which the validity of a preliminary contract does not depend exclusively upon technical registration requirements, the stability of the immovable property market may be substantially undermined. In such circumstances, purchasers would remain vulnerable to opportunistic and bad-faith conduct by developers and other economically dominant parties.

Accordingly, the jurisprudence analyzed above confirms the central thesis of the present study: Article 327 constitutes a narrowly tailored mechanism designed to protect legally recognizable expectations arising from clearly expressed contractual intent, rather than a general judicial license to create or reconstruct contractual relations on behalf of the parties.

5.5.1. The Impact of Article 311¹ on the Validity of Preliminary Contracts

The statutory regulation providing for the possibility of registering a preliminary contract concerning immovable property is often perceived in practice not as an enabling procedural mechanism, but as a mandatory precondition for the validity of the contract itself. Judicial practice (for example, Supreme Court of Georgia Decision No. AS-1002-957-2012) has frequently developed the view that, in the absence of registration, a preliminary contract produces only obligational legal effects between the parties. Accordingly, in the event of breach, the creditor is limited to a claim for damages rather than the right to seek substitution of intent and compulsory conclusion of the principal contract.

From an academic perspective, this approach is subject to criticism for several reasons:

- **Devaluation of Article 327:** If courts refuse substitution of intent solely on the ground of absence of registration, Article 327(3) of the Civil Code of Georgia is effectively deprived of its normative effectiveness. An obligation that cannot be enforced in natura loses its specific contractual character and is reduced to the level of delictual liability.

- **Principle of Formal Equivalence:** Article 327(3) expressly requires that a preliminary contract must comply with the same form prescribed for the principal contract. In the case of immovable property transactions, the principal contract requires written form with authenticated signatures (or notarization). Registration in the public registry, however, is not a form of contract; it constitutes the legal basis for the transfer of ownership rights. Therefore, a duly executed written and authenticated preliminary contract already satisfies the formal requirements, and the absence of registration should not automatically justify refusal of substitution of intent.

In parallel with this critique, it must be acknowledged that the requirement of registration is partly justified by the need to protect third parties, particularly bona fide purchasers. However, this issue can be resolved without denying substitution of intent through the application of rules governing conflict of rights (Article 176 CCG), under which the creditor's protection, in cases where a bona fide third party has already acquired the property, is transformed into a claim for damages rather than specific performance.

This critical approach is further supported by Decision No. 2b/339-14 of the Tbilisi Court of Appeal (2014), where the Court explicitly held that "the Civil Code does not consider registration in the Public Registry as a form of legal transaction" and that the absence of registration does not automatically render a preliminary contract void. The Court further clarified that Article 327(3) requires only compliance with the form prescribed for the principal contract, which, in the case of immovable property sale agreements, is written form under Article 323 of the CCG. Registration is a constitutive requirement for the transfer of ownership, not a condition for the validity of the declaration of intent itself.

Although this decision was rendered by an appellate (and not cassation) court, it reflects an interpretation of Article 327 that is more consistent with the textual structure and legislative purpose of the provision than approaches that treat registration as a mandatory validity requirement. If this interpretative line is adopted, the enforceability of preliminary contracts would depend not on formal registration requirements, but on the substantive completeness and determinacy of the parties' intent.

Where specific enforcement (substitution of intent) becomes objectively impossible due to subsequent alienation of the property, the legal relationship necessarily shifts toward claims for damages. In Case No. AS-1529-1443-2012 (Supreme Court of Georgia, 2013), the claimant sought compensation not merely for incurred expenses but for the market value of the property that could not be acquired due to breach of obligation. The Court accepted the possibility of such a claim and clarified that where a preliminary contract is formally valid (i.e., in written form), its breach gives rise to an obligation to compensate damages. This approach gives Article 327 practical effectiveness: the party is aware that the absence of registration does not automatically exempt the breaching party from liability.

Judicial analysis further demonstrates that misinterpretation of Article 327(3) of the CCG is not uncommon. A pivotal clarification is found in the Supreme Court's decision No. AS-1529-1443-2012 (Supreme Court of Georgia, 2013), where the Court unequivocally stated that no provision of the Civil Code treats registration in the Public Registry as a constitutive form of a legal transaction. The Court held that the forms of legal transactions are limited to oral or written (simple or notarized) form, whereas registration serves

as the basis for the transfer of ownership rights. Accordingly, declaring a preliminary contract void solely due to lack of registration contradicts both the essence of the law and the doctrinal interpretation of Article 327 (Supreme Court of Georgia, 2013).

5.5.2. Expert Perspectives and Practical Contradictions

As demonstrated by the expert survey conducted within the framework of the present research, a segment of practicing legal professionals considers that substitution of intent in the absence of registration may jeopardize the interests of third parties, particularly bona fide purchasers. However, from the author's perspective, this issue should be resolved not through the denial of substitution of intent, but rather through the application of rules governing the conflict of rights between competing claimants.

The judicial approach according to which, "in the absence of registration, the aggrieved party may only claim damages," is difficult to reconcile with the doctrinal framework of *Specific Performance*. According to the prevailing views expressed in the expert survey, such practice creates incentives for bad-faith conduct by sellers, who may deliberately refuse to conclude the principal contract, accept relatively limited damages liability, and subsequently resell the property at a higher price to a third party.

Accordingly, the practice analyzed in Subchapter 5.4.2 reveals a clear doctrinal dissonance within Georgian law between the textual formulation of Article 327 of the Civil Code of Georgia and its judicial interpretation. The judicial tendency to attribute decisive significance to registration weakens the binding force of contractual obligations and leaves parties insufficiently protected in situations where their legitimate expectations were directed toward acquisition of ownership, rather than monetary compensation.

In this regard, the present study identifies three distinct approaches:

- the formalistic approach reflected in Case No. AS-1002-957-2012, which emphasizes registration as a decisive requirement;
- the liberal approach reflected in Case No. 2b/339-14, which rejects registration as a condition for enforceability; and
- the pragmatic expert perspective, which stresses the importance of registration primarily from the standpoint of enforcement efficiency and legal certainty.

The author aligns with the approach adopted in Case No. 2b/339-14, as it more closely corresponds to both the textual meaning and the legislative purpose of Article 327. At the same time, the concerns expressed by practitioners regarding practical enforcement difficulties are acknowledged as a relevant and necessary dimension of the broader doctrinal debate surrounding the effectiveness of preliminary contractual obligations in Georgian civil law.

6. Research Findings and Their Analysis

The doctrinal analysis conducted within the framework of the present study, the review of judicial practice, and the expert survey have identified several fundamental findings that are critical for the effective implementation of Article 327 of the Civil Code of Georgia (CCG).

6.1. Primacy of Formalization and the Risk of a "Dead Letter" Provision

The study shows that Article 327 CCG only becomes effective and capable of producing enforceable legal consequences when the parties approach the drafting of a preliminary contract with a high level of formality. A direct correlation has been identified between the level of contractual specificity and the enforceability of substitution of intent.

Specifically, if a preliminary contract lacks all essential terms (*essentialia negotii*), Article 327 loses its substantive legal force, effectively reducing it to a "moral agreement", under which judicial substitution of intent becomes practically impossible. This finding confirms that the institution of the preliminary contract within Georgian legal practice requires a higher degree of legal drafting culture than is currently observed.

6.2. Legislative Gap and the Problem of Indeterminate Duration

One of the study's key findings is a legislative deficiency relating to the absence of a maximum time limit for preliminary contracts to remain valid. The current wording of Article 327 establishes no temporal framework for the preparatory phase, creating risks for the stability and predictability of civil circulation.

The expert survey revealed that this indeterminacy often results in a 'permanent state of legal tension', whereby the obligor remains indefinitely bound to the expectation of eventually concluding the main contract. The study concludes that this legislative vacuum requires normative intervention to prevent the abuse of rights and ensure legal certainty in contractual relations.

6.3. Deficiencies in the Enforcement Mechanism of Substitution of Intent

The research also identified a structural discrepancy between substantive law and procedural enforcement mechanisms. While Article 327 establishes an obligation to conclude the principal contract, practical enforcement at the execution stage often encounters technical obstacles.

Specifically, the study found that a court decision ordering substitution of intent does not always provide a robust legal basis for the automatic registration of ownership rights in the Public Registry, particularly when the preliminary contract lacks clear and precise identification of the transaction's subject matter.

Accordingly, the findings suggest that the preliminary contract institution in Georgia is still in its developmental stage. Its effectiveness depends not only on legislative refinement, but also on the establishment of a unified, strict and predictable judicial standard for substitution of intent — one that balances the principle of contractual freedom with the protection of legitimate expectations and legal certainty appropriately.

7. Conclusion and Recommendations

This study shows that Article 327 of the Civil Code of Georgia (CCG) is one of the most important guarantees of stability in civil transactions. However, the effectiveness of this guarantee depends on the quality and precision with which preliminary contracts are drafted. Based on the doctrinal analysis conducted, the following conclusions can be drawn:

Firstly, a preliminary contract should not be considered a mere 'moral promise' or an intermediate stage of negotiations. Rather, it establishes a legally binding relationship that gives rise to an enforceable claim, namely the obligation to express and implement contractual intent. The study confirms that judicial substitution of intent does not infringe private autonomy; rather, it is a legal mechanism that protects and enforces a previously expressed and binding declaration of intent.

Secondly, the research identified the issue of the so-called 'deficit of determinacy'. Analysis of judicial practice and expert responses shows that Article 327 is rendered ineffective where the preliminary contract lacks the essential terms of the main agreement (*essentialia negotii*). Substitution of intent as an exceptional remedy (*ultima ratio*) is only permissible where the parties' intention is clear enough that the court does not need to 'construct' new contractual terms on their behalf — a practice that would contradict fundamental principles of private law.

In order to avoid unjustified infringement of the rights of bona fide purchasers, courts should prioritise the parties' genuine intent (e.g. the intention to sell and purchase) over formalistic contractual classification.

To address the deficiencies identified during the research process, the following legislative and practical reforms are proposed:

1. Legislative level

It is advisable to amend Article 327 of the Georgian Civil Code by introducing a clarification that establishes a maximum reasonable duration for preliminary contracts. To ensure legal certainty, the legislator should stipulate that, in the absence of an agreed term between the parties, the right to demand the conclusion of the main contract expires one year after the preliminary agreement is concluded. This would protect parties from perpetual legal uncertainty and strengthen the principle of legal predictability in civil transactions.

2. For legal practitioners and attorneys

When drafting preliminary contracts, it is recommended that structured 'automatic performance' clauses are used. In particular, contracts should include provisions under which specified conditions (e.g. registration of property rights in the Public Registry) automatically trigger the formation or conclusion of the principal contract. Additionally, including a strong penalty clause for refusal to conclude the principal contract is advisable, as this serves a preventive function and reduces the likelihood of litigation.

3. judiciary

When adjudicating claims for substitution of intent, courts should apply a combination of formal review and substantive assessment. It is crucial to evaluate whether there have been any material changes in circumstances between the conclusion of the preliminary contract and the initiation of proceedings. Where objective changes in circumstances (e.g. force majeure or economic collapse) make it disproportionately difficult for one party to fulfil their obligations, the court should prioritise fairness and resolve the dispute by awarding damages rather than by compulsory substitution of intent.

This recommendation to introduce a substantive review standard is based on the Supreme Court of Georgia's existing case law, particularly Case No. AS-208-197-2017 (Supreme Court of Georgia, 2019). In this case, the Court moved beyond a mere formal review of the existence of a contractual text to assess the genuineness of the parties' intent, as well as issues of coercion and authority.

Lower courts should adopt a similar interpretative approach when applying Article 327, to prevent the compulsory enforcement mechanism from being exploited by a party whose initial expression of intent was influenced by bad faith or an absence of proper authorisation.

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