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Can Georgia Become a Regional Center for Resolving International Commercial Disputes?

1. Introduction

Over the last couple of decades, commercial arbitration gained wide popularity among the business community and international legal practitioners. A number of arbitral institutions have been established in different jurisdictions. These institutions are dealing with dozens of cases and a huge amount of money every day. Administering commercial dispute resolution has become a profitable business not only for the institutions but also for the countries hosting the resolution of disputes. Consequently, these countries are trying to become hubs for resolving international commercial disputes. The present article will analyze whether Georgia has the potential to become a regional center for administering international commercial disputes.

It is safe to say that a natural way to resolve international commercial disputes is arbitration instead of litigation in domestic courts. According to

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the Queen Mary 2015 survey, 90 percent of the respondents indicated that arbitration is their preferred dispute resolution method.[1] The reasons why companies and legal practitioners opt for this avenue are flexibility and predictability, especially the worldwide enforceability of awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), and reluctance of parties to go to domestic courts, which might be biased or lacking expertise in specific commercial fields.

The past couple of years show that resolution of international commercial disputes is shifting from Europe to Asia.[2] The stakeholders are actively resorting to the Singapore International Arbitration Center (SIAC) and the China International Economic and Trade Arbitration Commission (CIETAC), which are rather inexpensive and of comparable quality, than the International Chamber of Commerce (ICC) in Paris and the London Court of International Arbitration (LCIA) in London.[3] Rise of arbitration in Asia was caused by several factors, including the emergence of China as an international trade giant. The crucial reforms were implemented at three different levels: strengthening of an arbitration-friendly judicial system; transformation of legislation reflecting modern international practice; and establishment of arbitration institutions capable of handling international commercial disputes.[4]

The question, which this paper intends to answer, is whether Georgia is capable of becoming a regional center for resolving international commercial disputes and offer an alternative arbitration-friendly forum to excessively expensive Europe or emerging Asia. This question is more legitimate especially after Georgia and the EU signed the Association Agreement and removed trade barriers to the very lucrative EU market of over 500 million people.[5] More international trade means more international disputes. While the As-

1 Queen Mary 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 2.

2 C. Bao, "International Arbitration in Asia on the Rise: Cause & Effect", *The Arbitration Brief*, volume 4, issue 1, 2014, p. 31

3 Queen Mary Survey, p.2

4 Bao, p. 34

5 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part was signed on June 27, 2014.

sociation Agreement does not impose any obligation on Georgia regarding commercial arbitration, Georgia can implement the changes in the legislation to become a regional center for resolving commercial disputes. In order to answer the question, this paper is divided in the following order: firstly, it reviews the changes that can be carried in the judiciary; secondly, it discusses the amendments that can be made to the Law of Georgia on Arbitration, and continues to review arbitral institutions in Georgia that are capable of administering resolution of international commercial disputes; and finally, it provides the concluding remarks.

2. Changes in the Judiciary

Even though commercial parties prefer to resolve their disputes through arbitration, they still need a strong, specialized and independent court system. Commercial arbitration cannot be fully functional without "positive intrusion" from domestic courts. To name a few, parties practically always need to have the recourse from an arbitral award through the set aside procedure in the supervisory jurisdiction or opposition to enforce the awards in any secondary jurisdictions.[6] Furthermore, the operation of *ad hoc* arbitration greatly depends on domestic courts, especially in the arbitrators' appointment procedures.[7] Thus, it is important to have pro-arbitration courts that are independent from state influence, especially in the cases where a dispute is related to the state or state-owned companies, as well as specialized in international commercial arbitration. This paper submits three proposed reforms in the judiciary, which can strengthen the courts' approach to arbitration, viz., the creation of specialized courts for international commercial arbitration; conducting court proceedings in the English language; and the possibility for qualified foreign lawyers to practice in these specialized courts.

6 M. Ball, "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration", *Arbitration International*, volume 22, no.1, 2006, p. 74.

7 *Ibid*.

2.1. Creation of a Specialized Arbitration Court

At the end of 2016, the Ministry of Justice of Georgia launched an ambitious project in the judiciary, which aims at creating a special commercial court.[8] Although the exact details of the project, such as the scope of its jurisdiction, are unknown at this moment, the idea should be welcomed, as it will solve disputes in an expedited and specialized manner. Similar commercial courts have been successfully functioning in London, Singapore and New York.[9]

In addition to the creation of a special commercial court, this paper suggests that establishing a specialized court handling international commercial arbitration would be a strong incentive to the parties to select Georgia as a seat of arbitration. The number of specialized arbitration courts in different jurisdictions is growing. On December 3, 2013, the Miami International Commercial Arbitration Court was created, which caused a rapid increase in demand for Miami as a seat of arbitration.[10] The judges in this court were selected due to their experience in international commercial arbitration and their academic background in the relevant field.[11] The scope of the jurisdiction of this court is related to the determination of existence and validity of an arbitration agreement, granting interim reliefs and appointment of arbitrators.[12] Since the creation of the specialized arbitration court, the number of parties who selected Miami as a seat of arbitration is growing, especially from Latin America.[13] Specialized arbitration courts can also be found in Australia (the state of Victoria) and India (Bombay).[14]

8 Official report is available at the following link: http://www.justice.gov.ge/News/Detail?newsId=5307

9 M. Hwang, "Commercial courts and international arbitrators – competitors or partners?", *Arbitration International*, volume 31, no. 2, 2015, p. 196.

10 M. Catalina Carmona, "Miami: an International Arbitration Court of its Own", *ARBlog International Arbitration News*, Trends and Cases, 16 December 2013, http: //www.hlarbitrationlaw.com/2013/12/miami-an-international-arbitration-court-of-its-own/ , (accessed 17 February 2017).

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

14 B. Leon, "To Specialize or Not: How Should National Courts Handle International Commercial Arbitration Cases?", *Kluwer Arbitration Blog*, 2 September 2010, http://kluwerarbitrationblog.com/2010/09/02/to-specialize-or-not-how-should-national-courts-handle-international-commercial-arbitration-cases/, (accessed 17 February 2017).

Creation of the specialized arbitration court will boost dispute resolution in Georgia. Parties expect maximum predictability and an arbitration friendly court when they select a seat of arbitration. Having a specialized court and judges in place is critical. At this moment, there are not enough judges in Georgia, who have expertise in this field and the case law on commercial arbitration is scarce. Thus, the specialized arbitration court and appointment of expert judges will greatly contribute to the process. The scope of its jurisdiction can be limited to international disputes only or it can be extended to domestic disputes as well. Typical areas, which will fall within the specialized court's jurisdiction, are enforcement procedure, appointment and challenges of arbitrators and granting of provisional measures.

2.2 Proceedings in the English Language

International commercial transactions and disputes usually involve parties from different countries and different nationalities. The majority of international commercial contracts are executed in English. Additionally, the mainstream language in international commercial arbitration is English. According to the statistics of the Swiss Chambers' Arbitration Institution (SCAI), 67% of the cases were conducted in English in 2014–15.[15] It can be said that today's international business speaks English.[16]

Thus, it is not without merit to say that English language proceedings in the specialized arbitration court will incentivize parties to choose Georgia as the seat of arbitration. Usually, the result of international commercial arbitration is an award consisting of dozens of pages. To challenge the award or to oppose the enforcement of that award, the parties are required to translate all of these documents into the official language and present it to the court. This process involves a considerable amount of time and costs. Proceedings in the English language would greatly ease the process in the specialized court.

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15 Swiss Chambers' Arbitration Institution, Arbitration Statistics 2015, https: //www.swissarbitration.org/files/515/Statistics/Commented%20Statistics%20 2015%20final%2020160810.pdf

16 T. Neeley, "Global Business speaks English", Harvard Business Review, May 2012, https: //hbr.org/2012/05/global-business-speaks-english, (accessed 17 February 2017).

English language court proceedings in non-English speaking countries are not a new phenomenon. The Netherlands is currently in the process of establishing a commercial court, where the proceedings will be conducted in English – both at district and appeal levels.[17] It is said that English became not only a leading language in international transactions, but also for many domestic firms that are either a part of an international chain or doing business with foreign companies.[18] An English language commercial court was established in Dubai, which helps the country to become a center for resolving international commercial disputes in the Middle East.[19] Therefore, appointment of English speaking judges and introduction of English language proceedings in the specialized arbitration court will be a huge advantage for parties and a great incentive to opt for arbitration in Georgia.

2.3 Practice of Qualified Foreign Lawyers

Another way to make Georgia a regional hub for international commercial disputes is to allow qualified foreign lawyers to practice law in the specialized arbitration court, subject to certain limitations that can be prescribed in the relevant legislations. This does not mean that they would be allowed to practice Georgian law. Their scope of practice would be simply limited to certain aspects of international commercial arbitration such as specific enforcement procedures, requesting interim relief and the appointment of arbitrators.

This idea at first glance might seem to be irrational and will probably cause a backlash from lawyers practicing in Georgia, but there can be good reasons behind it. Above all, this possibility will attract international law firms greatly to establish their presence in the Georgian market, which is

17 B. Adriaan de Ruijter, The Netherlands Commercial Court is on its way: The Netherlands as a center for international commercial disputes, *Kennedy Van der Laan*, 21 January 2016, https: //kvdl.com/news/the-netherlands-commercial-court-is-on-its-way/, (accessed 17 February 2017).

18 *Ibid*.

19 Money for old laws, *The Economist Newspaper Limited*, 14 December 2013, http: //www.economist.com/news/business/21591583-new-international-courts-dubai-are-giving-british-legal-firms-boost-money-old-laws, (accessed 17 February 2017).

good for the employment prospects of Georgian lawyers. At this moment, only a couple of international law firms are operating in the Georgian market. In addition, this reform will increase competition between local and international law firms and encourage local firms, which at this moment lack the expertise in the field, to specialize in international commercial arbitration. A similar idea is also implemented at the Singapore International Commercial Court.[20] Georgia needs to make such changes in order to present itself as a lucrative market for the leading arbitration law firms and practitioners.

3. Legislative Amendments

The current legal environment in Georgia is arbitration friendly. The Law of Georgia on Arbitration is based on UNCITRAL Model Law. In addition, Georgia is a contracting state to the New York Convention.[21] However, if Georgia has the ambition to become a regional center for resolving commercial disputes, it will take a little bit more than that. I suggest three legislative amendments, which can be made to the legislation, viz., implementation of the *competence-competence* principle to its full effect; changes to the validity requirement of arbitration agreements; and modification of the set aside procedure.

3.1 Full Effect of Competence-Competence Principle

One of the cornerstone principles that commercial arbitration is based on is the principle of *competence-competence*.[22] This principle has two ef-

[20] A. Henderson, C. Thongpakdee, "The New Frontier: Singapore launches the Singapore International Commercial Court offering a new forum for dispute resolution in Singapore", *Herbert Smith Freehills Asia Disputes Notes*, 6 January 2015. http://hsfnotes.com/asiadisputes/2015/01/06/the-new-frontier-singapore-launches-the-singapore-international-commercial-court-offering-a-new-forum-for-dispute-resolution-in-singapore/, (accessed 17 February 2017).

[21] Georgia became a contracting state to the New York Convention on June 2, 1994.

[22] J. M. Graves and Y. Davydan, Competence-Competence and Separability – American Style, in S. Kroll, L.A. Mistelis, et. al (ed.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International, 2011, p.157.

fects – positive and negative.[23] According to the positive effect of the *competence-competence* principle, an arbitration tribunal is competent to determine its own jurisdiction.[24] It is even suggested that this principle is an inherent power of any tribunal.[25] As for the negative effect, a domestic court should relinquish jurisdiction in cases where there is an arbitration agreement between parties.[26] While the positive effect is widely recognized, including the Georgian legislation, the negative effect is usually ignored except for a very few leading jurisdictions in arbitration. France is the most notable example in this regard.

The principle of *competence-competence* is specified in Article 1448 of the Decree 2011/48 of France.[27] According to this article, if a dispute subject to an arbitration agreement is brought before a court, it shall relinquish its jurisdiction.[28] Second sentence of this paragraph says that if a tribunal is not constituted, a court shall relinquish jurisdiction unless an arbitration agreement is manifestly void or not applicable.[29] As it can be seen, Article 1448 refers to two situations, viz., when arbitral tribunals are already seized of and a party brings a claim to a court, and when an arbitral tribunal is not yet constituted. In the first case, the law gives an absolute deference to the arbitral tribunal. There cannot be any type of review, even *prima facie*.[30] This approach goes even further than it is required under Article II.3 of the New York Convention, which states that deference shall be made unless the arbitration agreement is null and void.[31] As for the second situation, the French law refers to a manifestly void and inapplicable arbitration agreement. In 2001, the court of

23 G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration – Law and Practice in Switzerland*, Oxford University Press, 2015, para. 5.06

24 *Ibid*.

25 Arbitration between the Republic of Croatia and the Republic of Slovenia, Partial Award, 30 July 2015, para. 103.

26 E. Gaillard and Y. Banifatemi, "Negative Effect of Competence-Competence: the Rule of Priority in Favor of the Arbitrators", *Enforcement of Arbitration Agreement and International Arbitral Awards – The New York Convention in Practice*, p.259.

27 Article 1448 of Decree No. 2011-48 of 13 January 2011.

28 *Ibid*.

29 *Ibid*.

30 S. Brekoulakis, "The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative", *Austrian Arbitration Yearbook*, 2009, p. 240.

31 Article II.3 of the New York Convention.

cassation stated that that the *competence-competence* principle prohibits a French judge from carrying out the substantive and full review of an arbitration agreement, irrespective of where the arbitral tribunal has its seat.[32] As it can be seen, French legislation allows a maximum deference and autonomy of arbitration process.

The Georgian legislation does not fully recognize the negative effect of the principle of competence-competence. Article 9 of the Law of Georgia on Arbitration stipulates that the court should relinquish jurisdiction in favor of arbitration unless it finds that an agreement is void, invalid or incapable of being enforced. This article reflects Article 8 of the UNCITRAL Model Law and Article II.3 of the New York Convention. However, the problem is that this article does not refer to the test, which the court should employ to determine whether an arbitration agreement is invalid, void or incapable of being enforced.[33] Clearly, under this article, the court has the possibility to make full review of the case, which will be against the spirit of the *competence-competence* principle. It would improve the integrity of the arbitration process and discourage disruptive actions from the parties, if the legislation implements the similar provision, which can be found under Article 1448 of the French Decree 2011/48.

3.2 Validity of an Arbitration Agreement

An arbitration agreement is valid if it conforms to the formal and substantive validity.[34] Article 8.3 of the Law of Georgia on Arbitration sets out the writing requirement for the form of an arbitration agreement. As for the substantive validity of an arbitration agreement, three criteria can be identified from Article 8.1 of the Law, viz., intention to submit the disputes to arbitration; parties to an arbitration agreement; and defined legal relationship, which is subjected to an arbitration agreement.

Writing requirement of an arbitration agreement is similar to the requirements under UNCITRAL Model Law. However, it can be suggested that an

[32] Decision Cass, le civ., 26 June 2001, American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Vern, cited in Gaillard and Banifatemi, p. 264.

[33] Gaillard and Banifatemi, p. 258.

[34] N. Backaby et al, *Redfern and Hunter on International Arbitration (Sixth Edition)*, Oxford University Press, 2015, para. 2/.13.

international arbitration agreement can be stripped of any formal requirements. Realizing the importance of international commercial needs, the French legislature exempted international arbitration agreements from any sort of formal requirements, unlike domestic arbitration.[35] By doing so, French law chose an approach that is more favorable than it is provided under the New York Convention, which requires a written form for an arbitration agreement.[36] However, this shall not be considered as a breach of the New York Convention since Article VII allows the application of more favorable national laws. A similar approach can be taken in Georgian legislation too. Dismissing the writing requirement will not disrupt the arbitration process. It just emphasizes the importance of the will to arbitrate rather than to go to a court because of formal defects.

As for the substantive validity of an arbitration agreement, Georgian legislature should take into account the Swiss approach. Article 178.2 of Federal Act on Private International Law (PILA) specifies in *favorem validitatis* conflict of law provision.[37] Under this article, an arbitration agreement is valid if it complies with either the law chosen by the parties, or with the law governing the subject matter of the dispute or with the Swiss law.[38] This article clearly establishes a pro-arbitration rule and Georgia should take an example from it. This approach establishes a more favorable regime for arbitration since it increases the prospect that an arbitration agreement is valid.[39] In case of the invalidity of an arbitration agreement under the Georgian legislation, the arbitration agreement would still have the chance to survive under the law chosen by the parties or the law governing the subject matter of the dispute. Article 36 of the Law of Georgia on Arbitration will be less helpful if there is a question about the validity of an arbitration agreement. This article mirrors Article 28 of the UNCITRAL Model Law, which clearly refers to the law governing the substance of a dispute and not the jurisdictional issues.[40]

35 Article 1507 of Decree 2011-48.
36 Article II of the New York Convention).
37 Kaufmann-Kohler and Rigozzi, para. 3.30.
38 *Ibid*.
39 *Ibid*, para. 3.76.
40 UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p.121

3.3 Challenges of Awards

As much as French law grants maximum freedom and deference to an arbitral tribunal, a court retains its right to set aside an arbitral award upon an application from a party.[41] Under the law, during a set aside procedure, a court will make a full review of the arbitral award, in terms of facts and points of law.[42] This process guarantees the balance between the full autonomy of arbitral proceedings and sound administration of justice.

French law grants parties to waive their right to bring a set aside claim.[43] The relevant article requires that such a waiver shall be made expressly. Unlike Switzerland, where neither parties should have domicile in Switzerland in order to be able to fully waive the action for annulment, there is no such clause in the aforementioned French provision[44] If the parties waive their set aside right, they still retain the right to appeal an enforcement order if the enforcement order is granted by a competent court.[45] In addition, it should be noted that 2011 changes introduced the principle of estoppel, which means that if a party fails to object to an irregularity before the arbitral tribunal in a timely manner, it shall be deemed to have waived its right.[46] Those provisions are important since on the one hand, the law gives parties maximum autonomy in terms of waiving a set aside procedure, but it does not leave a losing party without any protection as the party still can challenge an enforcement order.

This paper suggests that the Georgian legislation should give the right to parties to waive the set aside procedure. This waiver should be provided expressly in their agreement. Similar to the Swiss legislation, there can be a statutory requirement that waiver is possible only in the case where none of the parties have domicile in Georgia. In addition, there should be an appeal procedure against an execution order if parties make the waiver.

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41 Article 1520 of Decree 2011-48.

42 F. Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration, 2nd Edition*, Oxford University Press, 2009, p.6.

43 Article 1522 of Decree 2011-48.

44 Article 192 of PILA.

45 Article 1522 of Decree 2011-48.

46 Article 1466 of Decree 2011-48.

4. Arbitral Institution

The third most important element for the country to become a hub for resolving international commercial disputes is the arbitration institution that is capable of administering international disputes. This was true in Singapore and in China where the SIAC and CIETEC proved themselves as the top quality arbitration institutions. In that regard, there is already such an institution in Georgia that can administer international dispute resolution, namely, Georgian International Arbitration Center (GIAC). It was established several years ago and it is the only institution in Georgia that has the capacity to administer international disputes. The rules of the institution reflect the modern practice in international arbitration and the fees are relatively lower than in major arbitration institutions in different jurisdictions.

5. Conclusion

The present paper analyzed the possibilities for Georgia to become a regional center in resolving international commercial disputes. The key reforms should be carried out in the judiciary since the Georgian courts do not have expertise and experience in international commercial arbitration. Although the Law of Georgia on Arbitration reflects UNCITRAL Model Law and it is arbitration friendly, several changes can be made to form an even more pro-arbitration jurisdiction. Apart from the reforms mentioned above, different types of incentives such as tax incentives for arbitrators or establishment of a special chamber for arbitration hearings, such as Maxwell Chambers in Singapore, can be made. In case of implementation of such changes, Georgia has the potential to become a hub for resolving international commercial disputes.