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MISSION STATEMENT

Fostering dialogue between Georgian and European legal communities and promotion of Georgia's European aspirations through providing an expert overview of the important legal developments pertaining to the rule of law, human rights & democracy, free market economy, Europeanization of the legal culture & legal education, and the approximation of Georgian legislation with the European Union law.

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EDITORIAL

Launching a new journal in a global environment with the prevailing perception of academic overpublishing is a daring step. The group of people behind this initiative has nonetheless decided to publish this journal. Let us explain our reasons.

The very name we chose for this journal is quite telling. While the density of the market for academic publications in Europe increasingly pushes new journals to be narrower in their scope (and correspondingly, in their titles), it was a nice surprise for us to discover that such a generic and apposite title as Georgian Law Journal was still available in Georgia.

There are, of course, general law journals published in Georgia. Yet, only a handful of them are peer reviewed in some manner, which gave us further incentive. We believe that the culture of peer reviewing is one of the foremost and essential elements for controlling the quality of academic publications. It fosters critical dialogue within a community of persons interested in a particular subject and we envision room for further improvements in this regard in the field of law in Georgia. With all due respect to the existing legal periodicals, it is not an overstatement to say that an opportunity to publish

on a legally relevant topic in a blind peer review journal in Georgia is almost non-existent. On the other hand, the existence of such an opportunity is an essential part of any meaningful discourse on law, the backbone of a modern democratic society. By providing such opportunities, we hope to assist this discourse and – by extension – make our humble contribution to the strengthening of the rule of law and democracy in Georgia.

This initiative would not have been possible without the very strong effort from the Georgian-Norwegian Rule of Law Association and the generous financial assistance offered by the Norwegian Ministry of Foreign Affairs. By sponsoring this publication, Norway continues its highly committed support to the rule of law and democracy worldwide and, as usual, does so with endearing humility of seeking no credit for that. We are therefore especially keen to highlight our deep appreciation for this support.

The role of Norway in this initiative extends beyond finances. Half of our editorial board is comprised of Norwegian lawyers with solid practical and academic backgrounds. While the legal cultures of Norway and Georgia may initially seem too distant to expect any helpful input from the lawyers of one country in the legal discourse on the other, this is far from what we are hoping to achieve. Legal culture and legal education in Georgia are still based on highly formalistic, pre-Hartian positivist foundations. Conversely, Norway, as one of the Nordic countries, was central to the emergence of more sociologically grounded jurisprudence, named subsequently as Scandinavian Legal Realism. Without aiming to oppose the two legal traditions categorically, we think that our journal, with its editorial policy shaped by Norwegian lawyers, will make a novel and richer contribution to the legal discourse in Georgia.

In choosing the themes for this inaugural issue, we did our best to strike a balance between the papers received, their quality, and the diversity of issues addressed by them. Our final selection was also informed by our aim to promote the generality of the scope of the journal and consistent with our values as reflected in our mission statement.

The article by Vakhushti Menabde offers a general, yet, insightful overview of the developments concerning the ongoing major revision of the basic

law of Georgia – the constitution. The media discourse on this revision often presents it as one that follows virtually countless revisions preceding it. This view is partly echoed by some popular perceptions of the process, asserting that every new parliamentary supermajority amends the constitution in line with its preferences. Be that as it may, the level of presence the issue has on the surface of Georgia's internal politics since the original adoption of the constitution is telling in many ways. It shows that the political and, by extension, societal consensus on the core issues of Georgian state as an organized form of social coexistence between its residents is far from settled. This makes the whole process of revising the constitution even more important. It is thus hoped that the overview of the part of this process that has been accomplished so far will be an interesting read.

George Svanadze's article dwells upon some important aspects of how to establish greater synergy between domestic courts in Georgia and those in EU member states. It turns out that, while Georgia is a member of the Hague Conference on Private International Law (HCCH), it has still not acceded to a number of HCCH's very important instruments that would facilitate strengthening judicial dialogue and cooperation with various EU jurisdictions. Though the article is concise, it presents an informative overview of the potential for making Georgia a more trustworthy and attractive jurisdiction for transnational commercial disputes. It ultimately provides excellent guidance on how to increase Georgia's trade and investment potential by mitigating the risks of legal transactions in the eyes of foreign trade and investment partners through expanding judicial cooperation with EU national jurisdictions and beyond.

The theme of making Georgia more attractive for adjudicating transnational commercial disputes, albeit in the light of arbitration proceedings, is continued in this issue with the article by Vakhtang Giorgadze. Offering a sketch of global practices in this regard, it also provides guidance on how to incentivize the choice of arbitration over litigation and thus make commercial dispute settlement in Georgia faster, more flexible and business friendly. The idea of transposing a general narrative of Georgia's potential as another "bridge" between Europe and Asia into the specific area of international arbitration, subtly advanced in this article, is certainly a very commendable effort.

The point on more flexible legal framework and a stronger pro-arbitration approach, developed by Vakhtang Giorgadze, among other questions, is scrutinized with a greater degree of precaution in the article by Teo Kvirikashvili. In addressing the issue of proper balance between ensuring the independence and thus viability of arbitration proceedings on the one hand, and their compliance with the basic public policy considerations of the national legal order on the other, this article deals with a complex question of an extent to which arbitral awards may be subjected to judicial review. In weighing the pros and cons of restrictive and extensive judicial review, it addresses a set of complex and interrelated problems such as the uniformity of judicial practice in this regard and the risk of corruption in case of sticking to one-size-fits-all minimal review approach by the judiciary.

Finally, Tamar Diogidze's article on the contracts concluded off-premises offers a contribution to the ongoing discussions about the regulation of consumer rights in Georgia. It points out some striking gaps and deficiencies in the regulatory framework of this important part of consumer protection. By looking at the issue from comparative perspective and sketching the EU and some foreign national jurisdictions' approaches to it, the article provides a set of suggestions for addressing those gaps and deficiencies. On the top of its immediate value as a thoughtful analysis on the subject matter concerned, it is also a useful outline for a blueprint on approximating Georgian legislation with the EU regulatory framework in this specific part of consumer protection law.

All in all, we hope that our readers will find this issue an enjoyable read. We are open for the readers' comments and suggestions that can be submitted electronically to our e-mail address at editors@georgianlawjournal.org.

On behalf of the Editorial Board,
Teimuraz Antelava

VAKHUSHTI MENABDE*

The Third Fundamental Revision of the Constitution of Georgia**

1. Introduction

Since its original adoption, 33 amendments have been made to the Constitution of Georgia (the "Constitution"). Of those amendments, the constitutional model was substantially changed in 2004 and 2010,[1] initially from a presidential to a presidential-parliamentary subtype of the semi-presidential model, and afterwards to a prime-minister-president subtype of the semi-presidential model.[2] The supreme law of Georgia has never been totally free of heretical deviations from the principles of constitutionalism, neither during its adoption nor after reforms. However, the supreme law was often

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** This article has been translated from Georgian.

1 On constitutional changes in Georgia see V. Menabde (Head and Academic Editor), T. Papashvili, N. Kashakashvili, G. Kekenadze, and A. Beridze, *Twenty Years without Parliamentary Oversight: Oversight of the Ministry of Internal Affairs, the State Security Service and the Intelligence Service of Georgia by the Supreme Representative Body* (Tbilisi: Cezanne, 2017), 24. Available online at: https://www.academia.edu/32218360/TWENTY_YEARS_WITHOUT_PARLIAMENTARY_OVERSIGHT.

2 For the classification see *ibid*, pp. 20-21.

not what the ruling powers sought to change. The reasons for this lie in the lack of legitimacy of the present Constitution.[3] No matter how intense the doctrinal criticism of the 2010 constitutional reform, initiation of large-scale revision of the Constitution was made possible by the current Constitution's lack of political legitimacy. This is clearly demonstrated by the attitude of the current government, which holds that the previous reform was motivated by the then-president's desire to maintain power and thus current model is illegitimate.

In accordance with established practice in Georgia, large-scale revision of the Constitution is preceded by the creation of a constitutional commission, the purpose of which is to ensure the representational involvement of the public in preparing the draft amendments. The case of 2004 is an exception; in that case, reform was carried out by the government that came to power as a result of the Rose Revolution.[4]

The current State Constitutional Commission of Georgia (the "Commission") is the fourth in the country's history. The Commission was created by the Parliament of Georgia[5] on 15 December 2016 and tasked with preparing a draft revision of the Constitution that will "ensure the full compliance of the Constitution with the fundamental principles of the constitutional law and establishment of the constitutional system corresponding to the long-term democratic development interests of the country."[6] The Commission finalized its work and on 22 April 2017 approved the draft Constitution with 43 votes to 8. The present article addresses the current document, which at the time of writing is not final and might be changed following Parliamentary hearings.

3 On the needs of legitimacy of the constitution see V. Menabde – Revision of the Constitution of Georgia – What Ensures the Legitimacy of the Supreme Law. Compilation of Articles: from super-presidential to the parliamentary. Constitutional Amendments in Georgia, Ilia State University Publication, Tbilisi, 2013, pp. 116-120. http://constitution.parliament.ge/uploads/masalebi/bibliography/supersaprezidentodan-saparlamentomde.pdf, Updated on: 03.04.2017.

4 About the assessment of the 2004 reform process, see V. Menabde, Revision of the Constitution of Georgia – What Ensures the Legitimacy of the Supreme Law, pp. 129-131.

5 Decree of the Parliament of Georgia on the Establishment of the State Constitutional Commission and on the Approval of the Statute of the State Constitutional Commission, Kutaisi, 15 December 2016, N65-Is, https://matsne.gov.ge/ka/document/view/3472813, last visited on 01.04.2017.

6 *Ibid*, Article 2.

The purpose of this article is to review the constitutional reform process and the organization of the Commission and its work, to briefly describe the political context in which the draft Constitution was prepared and to analyze the main aspects of the draft Constitution.

The author of this article is honored to have served as a member of the Constitutional Commission by the quota allocated to the academic community. Consequently, the views presented in this article are the conclusions of an internal observer and participant in the process. This is an advantage – to be at the center of events and aware of all aspects of the process which are not recorded in formal documents. On the other hand, it could be considered a shortcoming: the author's perception of the constitutional reform process might lack the analytical distance with which to describe the existing situation without any impediments.

2. State Constitutional Commission

Creation of the Commission was important for legitimizing the constitutional amendment process. How the process would unfold depended significantly on the composition of the Commission, its working schedule and other organizational issues. The present chapter discusses these topics.

The composition of the Commission was determined by decree of the Parliament of Georgia.[7] The main gap in the relevant decree was the fact that the number of Commission members was left open. It defined in detail the quotas for members of political parties (both parliamentary and non-parliamentary) and constitutional bodies. However, the decree did not regulate quotas for representatives of non-governmental organizations and the academic community, the discretion of which was left up to the Parliament speaker. According to the speaker's decision, the Commission was ultimately composed of 73 individuals:[8]

7 The above-mentioned decree of the Parliament of Georgia, Article 3.

8 Order #253/3 of the Chairman of the Parliament of Georgia dated 23 December 2016 on the Approval of the Composition of the State Constitutional Commission. Available online at: http://www.parliament.ge/ge/parlamentarebi/chairman/brdzanebebi/253-3.page.

- From parliament – 35 members (the largest number);
- From the non-parliamentary parties which failed to pass the election threshold but received at least 3% of votes – 4 members;
- From the constitutional bodies – 14 members;
- From non-governmental organizations – 7 members; and
- From the academic community – 13 members.

The ruling Georgian Dream (GD) party formally controlled 30 mandates[9] in the Commission and thus held the bulk of decision-making power. Additionally, one thing was obvious from the initial sessions: the Commission was composed in such a way that the majority of the its members agreed mutually with GD on most of the principal issues, including: the classical parliamentary model of governance, the proposed parliamentary electoral system, the rights of parliamentary minorities and the procedures for indirect election of the president.

The Commission was divided into four working groups each devoted to thematic issues,[10] as follow: 1. On issues related to basic human rights and freedoms, the judiciary, the preamble to the Constitution of Georgia and general and transitional provisions; 2. On the Parliament of Georgia, finances and control and revision of the Constitution of Georgia; 3. On issues of the president of Georgia, the government of Georgia and national defense; and 4. On issues of administrative-territorial arrangement and local self-government. Each Commission member was obliged to join at least one working group. However, each additionally request participation in an additional group. Exceptionally, representatives of the non-parliamentary opposition were allowed to participate in all four groups.

The legislative body named the speaker of Parliament as chair of the Comission, who in turn appointed the first vice-speaker of Parliament as secretary of the Commission. Every meeting of the Commission and each working group was personally chaired by the speaker of Parliament.

9 Later, the number of the Commission members was reduced to 60, however, Georgian Dream did not have a formal majority even under such conditions.

10 The above-mentioned decree of the Parliament of Georgia, Article 8.

Parliament designated 30 April as the Comission's last working day.[11] Nevertheless, the speaker of Parliament noted in the very first session that in case of need, the term could be extended. However, it was obvious from the outset that the working plan and pace of the Commission was firmly established. The Commission finalized its work on 22 April with adoption of the draft constitutional law. On the day before the final vote, the chairman of the Commission made a politically and legally controversial decision to terminate the membership of 13 opposition members.[12] Boycotting of the Commission's sessions was named as grounds for the termination. Seven political parties protested the termination and refused to continue involvement in the work of the Commission. Members of these parties publicly expressed the view that the proposed draft was intended to strengthen the power of the ruling party.[13]

The working group sessions were carried out in three rounds. In certain cases, a given round took several days, as each working group discussed the issues under its competence in detail. In the first round, the working groups discussed the initiatives proposed by each member on the level of principle. In the second round, taking these preliminary discussions into consideration, the secretariat prepared an initial document containing the consensus-backed initiatives discussed during the first round. However, this process did not grant the Commission members the right to propose ideas that were not reflected in the document.

Prior to the third round, the chairman and secretary of the Commission held meetings with representatives of the non-governmental sector, business sector[14], diplomatic corps and heads of international organizations.[15]

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11 The above-mentioned decree of the Parliament of Georgia.

12 Order #146/3 of the speaker of the Parliament of Georgia dated 21 April 2017 on the amendments to the Order #253/3 of the Chairman of the Parliament of Georgia dated 23 December 2016 on the Approval of the Composition of the State Constitutional Commission http://www.parliament.ge/ge/parlamentarebi/chairman/brdzanebebi/146-3.page, last visited on 18.05.2017.

13 Opposition parties oppose constitutional amendments and boycott the commission http://www.civil.ge/geo/article.php?id=31218, last visited on 18.05.2017.

14 Irakli Kobakhidze met with representatives of the business sector, http://constitution.parliament.ge/news-30-3/03, updated on 03.04.2017.

15 Irakli Kobakhidze and Tamar Chugoshvili met with the representatives of the diplomatic corps and international organizations, http://constitution.parliament.ge/news-30-5.03, updated on 03.04.2017.

Commission members also held meetings with delegations of the Council of Europe Parliamentary Assembly[16] and the Council of Europe Venice Commission.[17] These discussions outlined the main issues that will be reflected in the basic project which will be distributed at the third round of the working groups, where members of the Commission will be able to reiterate their positions on each issue. The issues on which consensus was reached after four months of work will be elucidated. At the end of April, at its own session, the Commission will make a decision by voting on issues on which consensus has not been reached.[18]

3. Political Context

The Commission has had to carry out its activities in a divided political context. The president of Georgia and members of the opposition parties met the reform process with criticism from the very beginning. The present chapter discusses these aspects.

GD won a majority in parliamentary elections on 8 October 2016 and now holds a total of 115 seats. The number of mandates is sufficient to amend the Constitution of Georgia, a process which requires three-fourths of the full composition, or 113 MPs.[19] After the election results were announced it became clear that the ruling party would use this favorable situation to enact constitutional reform.

On 19 October 2016, Prime Minister of Georgia Giorgi Kvirikashvili announced at a government session the initiative to implement constitutional

16 Irakli Kobakhidze met with members of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, http://constitution.parliament.ge/news-28/03/17, updated on 03.04.2017.

17 Visit of the Venice Commission Delegation to Georgia, http://constitution.parliament.ge/news-30/03, updated on 03.04.2017.

18 The above-mentioned Decree of the Parliament of Georgia, Article 9. The Commission makes a decision with the full composition; i.e., with 36 votes.

19 "The draft law on the revision of the Constitution shall be deemed to be adopted if it is supported by at least two thirds of the total number of the members of the Parliament of Georgia." The Constitution of Georgia, Article 102 paragraph 3, https://matsne.gov.ge/ka/document/view/30346, updated on 03.04.2017.

reform.[20] President of Georgia Giorgi Margvelashvili responded to a statement by the speaker of Parliament on the same day, offering a concrete proposal to the public. He proposed that the constitutional commission have three co-chairs – the president, the prime minister and the speaker of Parliament.[21] The idea was rejected with the argument that "in the legal and practical terms, it is much more useful if the proposed format is implemented."[22] Ultimately, the president refused to participate in the work of the Commission. Therefore, at the time of writing the Commission has worked without the participation of three important figures (the head of the president's administration, the parliamentary secretary of the president and the secretary of the national security council).[23] The president launched campaign on 10 March 2017 called "The Constitution Belongs to Everyone." The purpose of the campaign has been to inform the public about the reforms to the Constitution of Georgia.[24] Launch of the campaign was met with criticism from the speaker of Parliament, who accused the president of pursuing narrow political interests and disrespecting constitutional institutions.[25] Nevertheless, the process announced by President Giorgi Margvelashvili went into motion and meetings have been held in regions across Georgia.

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20 The statement of the prime minister on the constitutional majority http://gov.ge/index.php?lang_id=GEO&sec_id=434&info_id=58019, updated on 02.04.2017.

21 The President is willing to create a group for preparation of the constitutional amendments http://www.tabula.ge/ge/story/113574-prezidenti-mzadaa-konstituciashi-shesatani-cvlilebebis-mosamzadeblad-jgufi-sheqmnas, updated on 02.04.2017.

22 On the session of the legal issues committee, Irakli Kobakhidze's legislative initiative was discussed http://www.parliament.ge/ge/saparlamento-saqmianoba/komitetebi/iuridiul-sakitxta-komiteti-146/axali-ambebi-iuridiuli/iuridiul-sakitxta-komitetis-sxdomaze-irakli-kobaxidzis-sakanonmdeblo-iniciativa-ganixiles.page, updated on 02.04.2017.

23 Giorgi Abashishvili – the president and the representatives of the president will refrain from participation in the Constitutional Commission, https://www.president.gov.ge/ka-GE/administraciis-siakhleebi-aq/giorgi-abashishvili-prezidenti-da-prezidentis-carm.aspx, updated on 02.04.2017.

24 The president of Georgia has launched the campaign "The Constitution Belongs to Everyone" https://www.president.gov.ge/ka-GE/pressamsakhuri/siakhleebi/saqartvelos-prezidentma-kampania-konstitucia-yvela.aspx, updated on 02.04.2017.

25 http://www.parliament.ge/ge/parlamentarebi/chairman/chairmannews/saqartvelos-parlamentis-tavmdjdomaris-irakli-kobaxidzis-gancxadeba.page, განახლებულია: 02.04.2017.

Another criticism of the composition of the State Constitutional Commission focused on quotas for members of opposition parties. According to the statute, the right to representation was granted to independent parties and the first parties of electoral blocks failing to overcome the electoral threshold but receiving at least 3% of the votes.[26] According to these criteria, 13 parties qualified for state funding were shut out of the Commission, a fact that was protested by the opposition. Those protests did not bear fruit. Ultimately, 14 representatives from seven opposition parties participated in the Commission.

Widespread dissatisfaction was also caused by the fact that the Commission's working term was scheduled to be less than than months. Members of the Commission were given just one month to provide initial drafts.

The work of the Commission was met with criticism from opponents, as well. In order to neutralize this criticism, the government made one promise from the very beginning, which it has continued to reiterate. At the beginning of work, the speaker of Parliament stated clearly that the parliamentary majority will not adopt any amendments that are negatively assessed by the Venice Commission.[27] This statement indicates the government's interest in deflecting internal criticism and seeking external sources of legitimization for the draft Constitution.

In terms of reform of the Constitution, the sequence of events was the following: after approval of the final draft by the Constitutional Commission, the document will be subject to general public discussion and sent to the Venice Commission for review. The final draft will be produced by the beginning of June, and the Venice Commission's conclusion will be issued in mid-June. At the end of June, the draft Constitution will be approved with by Parliament in the second hearing. The final vote will take place three months later, during the fall session.

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26 The above-mentioned decree of the Parliament of Georgia, Article 3 paragraph 2 (c).

27 Joint statement by Irakli Kobakhidze and President of the Venice Commission Gianni Buquicchio for the press, https://www.youtube.com/watch?v=9mwieyEWRgA, updated on 03.04.2017.

4. Prospects of the Constitutional Reform

During the Commission's inaugural session, the speaker of Parliament stated that the only issue on which the ruling majority had theretofore formed a clear opinion, was the desired form of government – classical parliamentary republic.[28] This indicated that GD, while not excluding some kind of compromise on the part of the Commission, had already determined the main direction of the constitutional reform. However, this direction was somewhat general. As later turned out to be the case, the members of the Commission did not all understand the meaning of the concept in the same way. They were unable to reach agreement during assessment of the existing model; one group referred to it as a parliamentary model, and another group – a semi-presidential model. This is not surprising, given there is heated discussion within the field of constitutionalism on the different models of governance and the forms they take.

The main topic of discussion in this regard have been issues related to the institution of the presidency, which can be divided into two aspects. The first concerns procedures for electing the head of the state, and the other, presidential powers. After heated discussions during the first round, the majority of members of the Commission's working group came to the conclusion that direct election of the president should be abolished. In the second round, the Commission submitted the following draft amendment: the next presidential elections should be conducted via popular vote and by 2023 the president should be elected indirectly. Finally, compromise was achieved, according to which the president will be elected by an electoral college consisting of 150 delegates from municipal councils in addition to 150 MPs.

At this stage, the most important changes to the powers of the president are related to the president's competences as the supreme commander-in-chief. The draft Constitution envisages the abolition of the National Security Council and creation of a Defense Council in its stead, which will be active only in wartime. The prime minister will be granted powers of op-

[28] Irakli Kobakhidze: the Parliamentary ruling will not change, http://1tv.ge/ge/news/view/145591.html, updated on 03.04.2017.

erational management during wartime. The president's competences with regards to foreign relations will also be reduced. The president will no longer have the right to veto international treaties which address territorial issues and membership in military alliances and international organizations. As for powers of complectation, the transfer of power to nominate Supreme Court judges to the Parliament is the most important.

The most important issue in the draft Constitution is the electoral system for the Parliament of Georgia. That system is the cornerstone of the proposed separation of powers. The election system will essentially determine the logic of separation of powers in Georgia. Creation of a pluralistic and consensus-oriented system is possible by getting the electoral system right. According to the proposed amendments, all 150 MPs will be elected through a uniform proportional system. The threshold will be 5%, only parties will have the right to participate in elections (blocks will be banned from running), and the rule of distribution of mandates will be as follows: the votes going to parties which surpass the threshold are multiplied by 150 and divided by the number of real votes. The undistributed mandates are taken by the party receiving the most total votes.[29]

Another issue is related to confidence and non-confidence. According to the proposed Constitution, the procedures for announcing confidence may take a maximum of one month. Parliament will have two attempts to form a government, after which the president will have the power to dismiss it. The vote of non-confidence is also addressed. It covers one ballot for a maximum duration of two weeks, and the sufficient number of votes is 76. The draft also stipulates that the maximum term of execution of the vote of non-confidence is one month and may result in the dissolution of Parliament by the declaration of confidence in a new government.

The constitutional amendments also foresee ensuring the Prosecutor's Office independence from the cabinet. The chief prosecutor will be elected by Parliament upon the nomination of the Prosecutorial Council. Moreover, the first chapter of the Constitution will include three new articles on the reg-

[29] According to this formula, the undistributed mandates would have reached 30 in the most recent election.

ulation of principles of democracy, the constitutional state and social state and, lastly, the principle of electoral pluralism. According to the last principle, support of 2/3 of the Parliament will be needed to amend the Constitution.

5. Conclusions

This article discusses three aspects of constitutional reform: the work of the State Constitutional Reform Commission, the political context surrounding the reform and the most essential aspects of the draft Constitution. The purpose of the article is not to assess the merits of the constitutional reform but to relate facts about it. At this stage, it is difficult to predict with accuracy the final results of the reform, which will largely depend on the political situation and the opinion of the Venice Commission. While the government has a constitutional majority, and thus has the possibility to carry out effective measures, the current arrangement includes an aspect of inconvenience. That inconvenience comes from excessive power, as the ruling party can alone decide the fate of the Supreme Law of the country. However, the ruling party understands perfectly that a constitution adopted by the principle of handover cannot be legitimate, and it will eventually suffer the same fate as its predecessors. The Commission thus should have reached consensus to the maximum extent possible (which has not happened, as demonstrated by the most recent developments in the Commission). The assessment of the Venice Commission is another important condition.

It is difficult to predict the potential consequences, especially of the last aspect. The government may have the intention to change the Constitution in a particular direction, but the importance given to the Venice Commission's conclusion makes the outcome dependent on external expertise. One thing is clear, at least in the coming months: discussions on constitutional issues will not quieten. Hopefully, these discussions will support the strengthening of constitutional institutions that can ensure the establishment of a political system in Georgia where access to politics is not restricted only to the elite.

GEORGE SVANADE*

Perspectives on Reciprocal Judicial Cooperation in Civil and Commercial Matters between EU Member States and Georgia: Which Way Forward?

1. Introduction

In light of the fact that the European Union (EU) cooperates with Georgia in the framework of the European Neighborhood Policy and its eastern regional dimension, the Eastern Partnership, it is obvious since the signing of the Association Agreement[1] and the Deep and Comprehensive Free Trade Area[2] (Association Agreement/DCFTA) with the European Union in June 2014 that Georgia has taken a further step on its path toward EU integration.[3] The obligations undertaken by Georgia under the Association Agreement/DCFTA again are testimony to Georgia's expressed intention to continue its reform-

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1 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 signed on June 27, 2014: http://www.parliament.ge/uploads/other/34/34754.pdf.

2 For available texts in Georgian and English, see: http://www.economy.ge/?page=economy&s=7.

3 For details of the European Neighborhood Policy and Enlargement Negotiations, see: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/georgia_en.

ist approach to approximating its domestic regulatory standards with the EU acquis communautaire. In particular, the Association Agreement sets forth important issues with respect to judicial cooperation in civil and commercial matters, approximation of which brings Georgia to an enhanced level in the international framework of judicial cooperation. The present article is an attempt to analyze Georgia's perspectives on becoming an attractive and flexible jurisdiction within the framework of judicial cooperation in civil and commercial matters on the international level.

According to Article 21 of the Association Agreement, which refers to legal cooperation, *"[t]he Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of The Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children."* Article 21 makes clear that Georgia should take further steps to become more active in The Hague Conference on Private International Law (HCCH), which provides a forum for its members to develop and implement common rules in the sphere of private international law.

Reducing barriers to cross-border commercial litigation through the clear allocation of mechanisms for cross-border recognition and enforcement of foreign judgments will bring benefits not only to businesses that engage in international transactions, but also to the Georgian state as an interested party seeking to establish a regulatory environment conducive to international trade and investment.

It is worth mentioning that Georgia has been a party to the Statute of The Hague Conference on Private International Law (entry into force: 15 July 1955) since 2001[4] and is thus bound by the following conventions:[5]

- Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

[4] https://www.hcch.net/en/states/hcch-members/details1/?sid=40.
[5] https://www.hcch.net/en/states/hcch-members/details1/?sid=40.

- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; and
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Since signing the Association Agreement in 2014, Georgia has taken steps toward implementation by introducing three national action plans, as follow:

- Decree no. 1516 of the Government of Georgia as of 03.09.2014 on approving the 2014 National Action Plan for the Implementation of the Association Agreement (Action Plan 2014)[6];
- Decree no. 59 of the Government of Georgia as of 26.01.2015 on approving the 2015 National Action Plan for the Implementation of the Association Agreement (Action Plan 2015)[7]; and
- Decree no. 382 of the Government of Georgia as of 07.03.2016 on approving the 2016 National Action Plan for the Implementation of the Association Agreement (Action Plan 2016).[8]

Each of the above action plans expressly stipulates[9] that Georgia's planned further actions are to enhance judicial cooperation in civil and commercial matters by acceding to and implementing the below-listed conventions:

- The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention);
- The 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention);
- The 1980 Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention); and
- The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Convention on Parental Responsibility and Protection of Children).

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6 https://matsne.gov.ge/ka/document/view/2496190.
7 https://matsne.gov.ge/ka/document/view/2702520.
8 https://matsne.gov.ge/ka/document/view/3222307.
9 Compare action item 195 of the Action Plan 2014, item 226 of the Action Plan 2015 and item 78 of the Action Plan 2016.

The Service Convention and the Evidence Convention are subject to future accession, while the Child Abduction Convention[10] and the Convention on Parental Responsibility and Protection of Children[11] are currently applicable in Georgia.

The analysis provided in this article is mainly limited to perspectives on Georgia's creation of a respective legal framework for judicial cooperation on commercial matters in which the Evidence Convention and/or the Service Convention play a decisive role. Additionally, this article examines whether there are other international instruments which should be also taken into consideration for the purposes of developing and enhancing judicial cooperation in commercial matters. The main goal of this article is to identify and analyze the opportunities available for Georgia to: (i) become an attractive jurisdiction for cross-border transactions and commercial litigation cases; and (ii) bring Georgia closer to the EU. The article ends by providing some brief concluding remarks.

2. The Importance of Georgia's Acceding to the Service and Evidence Conventions

In order to support the need of businesses and citizens for access to justice in cases of cross-border litigation, two key aspects must be taken into consideration: (i) service of documents; and (ii) taking of evidence. The Service and Evidence Conventions introduced in the previous section are the main instruments applicable to facilitating international cross-border litigation. Georgia is currently contracting several multilateral and bilateral conventions and agreements[12] on judicial cooperation. However, the number of the contracting states to the referred conventions and agreements does not exceed 16 and is thus insufficient.

10 https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.

11 https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

12 Please see the list of the conventions and agreements which apply to both Georgia and the following countries: Azerbaijan, Uzbekistan, Ukraine, Kazakhstan, Turkmenistan, Armenia, Belorussia, Kyrgyzstan, Moldova, Russia, Tajikistan, Greece, Bulgaria, Cyprus, Turkey, and Czech Republic: http://www.justice.gov.ge/Ministry/Index/336.

2.1. Service Convention

The Service Convention applies in all cases involving civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.[13] The Service Convention serves as an essential tool facilitating the transmission of documents for service abroad. Thus, it significantly reduces the time required to complete process services abroad.[14] Failure to ensure proper service can seriously harm the legal interests of respective parties and causes manifold difficulties in cross-border litigation. The low number of multilateral and bilateral agreements concluded by Georgia results in a lack of international regulations applicable to the service of documents in cases of cross-border commercial litigation involving Georgia. Hence, once Georgia becomes a contracting state to the Service Convention, it will have rules in common with 72 contracting states on the cross-border service of documents. These common rules will contribute to the flexible management of cross-border commercial litigation cases in which Georgia is involved.

Apart from the above advantages, accession to the Service Convention will bring Georgia closer to EU member states for the following reasons. First, the majority of EU member states are contracting states to the Service Convention.[15] Second, the main principles of the Service Convention are mirrored in Regulation (EC) No. 1393/2007 of the European Parliament and of the European Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000[16] (2007 EU Service Regulation).[17]

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13 Article 1 of the Service Convention: https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

14 HCCH, Practical Handbook on the Operation of the Service Convention, 2016, p. IX.

15 https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.

16 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007R1393.

17 Judicial cooperation in civil matters in the European Union, A guide for legal practitioners, 2015, p. 85: http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf

2.2. Evidence Convention

The Evidence Convention is, after Service Convention, a major international treaty covering cross-border civil procedures The Evidence Convention is an essential instrument that greatly streamlines the procedures for taking evidence abroad, thus significantly reducing the time required for obtaining evidence.[18] According to Article 1 of the Evidence Convention, in civil and commercial matters a judicial authority of a contracting State may in accordance with the provisions of the law of that state: request the competent authority of another contracting State, by means of a letter of request, to obtain evidence or perform some other judicial act.[19] Similar to the Service Convention, Georgia's accession to the Evidence Convention brings with it a number of advantages.

First, by becoming a contracting state to the Evidence Convention, Georgia will have a common legal framework with 61 other states with respect to cross-border taking of evidence.[20] Second, most EU member states are contracting states to the Evidence Convention. Hence, accession will facilitate cross-border judicial cooperation between EU member states and Georgia on the multilateral convention level. Furthermore, as a matter of fact, the basic principles of the Evidence Convention are in line with those of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[21]; thus, accession to the Evidence Convention will further advance the approximation of Georgian laws to EU regulations.

3. Choice of Court Convention

Another international instrument relevant to cross-border civil and commercial litigation is the Hague Convention of 30 June 2005 on Choice of Court

18 HCCH, Practical Handbook on the Operation of the Evidence Convention, 2016, p. IX.
19 https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.
20 https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.
21 Judicial cooperation in civil matters in the European Union, A guide for legal practitioners, 2015, p. 91: http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf; http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32001R1206.

Agreements (Choice of Court Convention), which is aimed at ensuring the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international commercial transactions.[22] The Choice of Court Convention provides considerable certainty to businesses engaging in cross-border activities by creating a legal environment better adapted and tailored to the needs of international trade and investment, thus allowing parties to better manage risks and barriers related to cross-border litigation.[23] In particular, parties to international transactions may, based on the Choice of Court Convention, agree in advance how to resolve disputes arising out of or in connection with the concluded transaction. The main issue arising from choice of forum clauses in international practice is the difficulty of ensuring proper enforcement, as applicable laws on the validity and enforcement of respective jurisdiction clauses differ and vary from jurisdiction to jurisdiction.[24] In order to ensure the validity and enforceability of forum selection clauses, the Choice of Court Convention contains three basic rules pertaining to choice of court agreements:[25]

1. The chosen court must in principle hear the case (Article 5);
2. Any court not chosen must in principle decline to hear the case (Article 6); and
3. Any judgment rendered by the chosen court must be recognized and enforced in other contracting states except where a ground for refusal applies (Articles 8 and 9).

In contrast to international arbitration agreements which are extensively recognized according to the 1958 New Your Convention on the Recognition and Enforcement of Foreign Arbitral Awards, forum selection clauses allowing choice of respective state courts are not always duly respected and declared enforceable due to the particularities of the national jurisdiction of the

22 https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.
23 Outline of the Convention, May 2013: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.
24 Schack, Internationales Zivilverfahrensrecht, 6. Auflage, 2014, Paragraphs: 500-553.
25 Outline of the Convention, May 2013: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.

referred court. Consequently, one of the main purposes of the Choice of Court Convention is to rectify this situation by creating a legal environment more favorable to international trade and investment.[26]

The Choice of Court Convention applies to exclusive choice of court agreements "concluded in civil or commercial matters" (Article 1) and excludes consumer and employment contracts and certain specified subject matter (Article 2).[27]

As Georgian case law does not provide a unified and well-established interpretation of the legal nature and outcome of choice of court agreements under the Private International Law of Georgia and existing multi- and bilateral treaties on judicial cooperation,[28] it is reasonable for Georgia to accede to the Choice of Court Convention in order to create a better-defined legal framework for resolving international commercial disputes in Georgia and for the recognition and enforcement of Georgian court judgments outside of Georgia. Such an outcome should occur, especially in light of a promising project launched by the Ministry of Justice of Georgia in October 2016 related to the creation of a special commercial court judiciary system.[29]

Georgia will benefit in various ways by acceding to the Choice of Court Convention. First, it is worth mentioning that 30 states and Regional Economic Integration Organizations (REIOs)[30] are currently bound by this Convention. It is clear that the Choice of Court Convention has continued to gain momentum since its entry into force on 1 October 2015; Singapore ratified the Convention on 2 June 2016, becoming the first Asian state to ratify, and the United States of America and Ukraine are now signatory states to the Convention.[31] Second, it is important to note that the EU is a signatory to the

26 Outline of the Convention, May 2013: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.

27 For further details, see Explanatory Report by Trevor Hartley and Masato Dogauchi, 2013: https://www.hcch.net/en/publications-and-studies/details4/?pid=3959.

28 Gamkrelidze, International Competence in International Private Law in: Justice and Law, Legal Journal, #3(30)11, p. 15; Svanadze, in: Beiträge und Informationen zum Recht im postsowjetischen Raum (www.mpipriv.de/gus), http://mpipriv.de/files/pdf4/2016_05_23.pdf.

29 For more information, see: http://www.justice.gov.ge/News/Detail?newsId=5307

30 Regional Economic Integration Organizations.

31 Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts, Council on General Affairs and Policy of the Conference – March 2017, please follow the link: file:///C:/Users/ThinkPadT410/Downloads/March%202017.pdf.

Choice of Court Convention.[32] Hence, accession to the Choice of Court Convention will bring Georgia closer to those EU member states (which include every EU member state except Denmark) which are bound by the Convention. Accession will thus greatly contribute to the establishment of legal certainty in cross-border investment and business transactions and related disputes involving businesses from EU member states and Georgia.

4. Judgments Project

The above-referred Choice of Court Convention is linked to the "Judgments Project", an important project current led by the HCCH.[33] The project goes back to work undertaken by the HCCH since 1992 on two main aspects of private international law in cross-border litigation regarding civil and commercial matters: (i) the international jurisdiction of courts; and (ii) the recognition and enforcement of such court judgments abroad.[34] Introduction of the Choice of Court Convention was one of the outcomes of the Judgments Project.

Currently, the Judgments Project is focused on the creation of a worldwide convention on the recognition and enforcement of foreign judgments. Conclusion of such a convention will bring international litigation and cross-border recognition and enforcement of foreign judgments to an enhanced level in terms of facilitating international trade and investment, especially in a time when cross-border commerce and international business transactions are becoming increasingly important.[35] Achievement of uniformity of recognition and enforcement of foreign judgments on a global level will reduce the legal obstacles encountered by individuals and corporations involved in cross-border transactions and create a more reliable judicial infrastructure in support of international trade and investment.[36]

32 https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.
33 https://www.hcch.net/en/projects/legislative-projects/judgments.
34 https://www.hcch.net/en/projects/legislative-projects/judgments.
35 For an overview of the Judgments Project, see: https://www.hcch.net/en/projects/legislative-projects/judgments.
36 For an overview of the Judgments Project, see: https://www.hcch.net/en/projects/legislative-projects/judgments.

According to estimates, on average there are more than 70 cases heard by the Supreme Court of Georgia each year with respect to the recognition and enforcement of foreign judgments in Georgia.[37] This number is not low in the Georgian context. Georgia will benefit by actively establishing for itself "[...] the goal of finding the means to improve [...] all in its current legislation that still hampers trade, [...] and does so with the intent [...] of seeing accepted the principle of mutual recognition of judgments"[38]. Hence, it would be a major step forward for Georgia in terms of judicial cooperation in cross-border recognition and enforcement of foreign judgments if the country succeeds in becoming an active participant of the Judgments Project with the final aim of acceding to the respective convention after its successful introduction. Moreover, it is worth nothing that the current applicable laws of Georgia set forth such principles as Res Judicata, Indirect Jurisdiction, Conflicting Judgments, Lis Pendens, Reciprocity and Public Policy all in a manner comparable to German, Swiss, and European principles.[39] Such principles establish a reasonable base for simplified implementation of the respective convention in Georgia.

5. Conclusion

The present article analyzes the perspectives of reciprocal judicial cooperation between EU member states and Georgia in civil and commercial matters. The analysis shows that for Georgia the way toward closer approximation with EU standards in international judicial cooperation goes through and via The Hague regime; more specifically, the HCCH. The establishment of an efficient and dependable legal framework for regulating cross-border litigation constitutes a fundamental role of the HCCH.[40] Consequently, the

[37] Letter N: p-84-16 of supreme court of Georgia as of 02.06.16.

[38] E. Hirsch Ballin (ed.), A mission for his time: Tobias Asser's inaugural address on commercial law and commerce, Amsterdam 1862 (The Hague: T.M.C. Asser Press, 2012) pp. 33-34.

[39] For further analysis of the comparison of Georgian rules on recognition and enforcement of foreign judgments with German and European principles, see: Svanadze, Grundlagen des deutsch-georgischen Anerkennungsrechts, 2014.

[40] For an overview of the Judgments Project, see: https://www.hcch.net/en/projects/legislative-projects/judgments.

HCCH is a main forum for Georgia's participation with the ultimate goal of successfully implementing the Association Agreement in the context of enhanced international judicial cooperation.

In particular, it would be reasonable for Georgia to proceed with identification of the respective Hague conventions subject to further accession by Georgia and applicable to the sphere of international judicial cooperation.

Within that context, it is a significant step taken by Georgia to include the Service and Evidence Conventions in the respective agendas of the Action Plans referred above.

Additionally, it is reasonable for Georgia to consider potential accession to the Choice of Court Convention in terms of its contribution to the removal of inherent risks and obstacles involved in matters of cross-border litigation arising out of or in connection with international trade and investment transactions involving Georgian parties.

Taking respective steps toward accession to the Choice of Court Convention will create a reasonable and adequate base for Georgia to actively participate in the Judgments Project. Participation in the Judgements Project would bolster Georgia's image as a nation with primary goal of creating an attractive jurisdiction for international trade and investment and respective disputes.

VAKHTANG GIORGADE*

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.

TEO KVIRIKASHVILI*

The Permissible Extent of Court Review of Arbitral Tribunal Findings at the Setting Aside and Enforcement Stages: Examples Addressing Corruption in International Arbitration

1. Introduction

The purpose of the paper is to illustrate the different approaches adopted by national courts with regard to the extent of judicial scrutiny of the findings of arbitral tribunals and identify the approach most appropriate for balancing two competing considerations: the principle of finality of arbitral awards; and the discouraging of corruption in international trade. This article also reviews the standards of intervention which are given preference by the Supreme Court of Georgia, based on the tendency revealed in its rulings. Furthermore, the article provides analysis of the legislation applied when rendering decisions and the appropriateness and accuracy of such application using examples of important rulings rendered since 2003.

International arbitration has long been practiced as a means of international dispute resolution. As one commentator noted "commercial arbitration

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must have existed since the dawn of commerce."[1] Correspondingly, arbitral tribunals often have to deal with issues involving corruption while resolving commercial and investment disputes.

Corruption is rife in international commercial relationships and the problem is worsening. The consequences are severe and dramatic; therefore, it is logical that corruption is generally abhorred and widely denounced. In recent years a number of states have acceded to multilateral conventions condemning illegal contracts, bribery of public officials, and other forms of corruption.[2]

Accordingly, there is unanimity on the issue that corruption violates the main tenets of international public policy. Violation of the fundamental tenets of public policy has long been grounds for setting aside or refusing recognition and enforcement of arbitral awards. Accordingly, the purpose of this paper is to illustrate the different approaches adopted by national courts with regard to the extent of judicial scrutiny of the findings of arbitral tribunals and identify the approach most appropriate for balancing two competing considerations: the principle of finality of arbitral awards; and the discouraging of corruption in international trade.

2. The Permissible Extent of Court Review of Arbitral Tribunal Findings at the Setting Aside and Enforcement Stages

An arbitral tribunal is allowed to set aside or refuse to enforce an award if one of the grounds stipulated in international arbitration rules is established. Article V(2)(b) of the New York Convention and Article 36(1) of UNCITRAL Model Law provide that: *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition*

1 Lord Mustill, Arbitration: History and Background, in: Journal of International Arbitration 1989, Volume 6, Issue 2, p. 43.

2 OECD (Organisation on Economic Cooperation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; United Nations Convention against Transnational Organized Crime, 2000.

or enforcement of the award would be contrary to the public policy of that country.[3]

In similar terms, Article 34(2)(b)(ii) of UNCITRAL Model Law provides that an award *may* be set aside on grounds of public policy. Accordingly, an arbitral tribunal may still enforce an award even if that entails contravention of public policy. The court has the discretion to determine the nature and significance of the illegality and decide whether it would be reasonable or not to enforce an award.[4] Two competing considerations arise while exercising that power: protecting the forum state's public policy interests; and respecting the finality of the arbitral award. Choosing between these two considerations involves several trade-offs which must be taken into account.

The principle of finality of arbitral awards is reflected in most national and international arbitration rules.[5] This principle clearly reflects the spirit of international arbitration; i.e. to resolve the dispute in one instance without the possibility of appeal. Respecting the finality principle has several advantages: avoiding relitigation of the merits already adjudicated in arbitration; increasing the predictability of dispute resolution through international arbitration; preserving the principle of international comity; and respecting the capacities of foreign and transnational tribunals.[6] On the other hand, public policy covers a broad area of state interest and goes beyond the policy objectives underlying preservation of the finality of the award. For the present purposes, the most relevant and significant manifestation of public policy that is in tension with finality of the award is prohibition against contracts that violate good morals and/or public order, such as agreements involving bribery and other obvious forms of corruption. It is therefore understandable that national courts are usually reluctant to enforce agreements which are deemed contrary to the main interests and fundamental moral values of the

3 New York Convention 1958, Article V(2)(b;) UNCITRAL Model Law 2006, Article 36(1).

4 Takahashi, Koji, Jurisdiction to Set Aside a Foreign Arbitral Award, in Particular an Award Based on an Illegal Contract: A Reflection on the Indian Supreme Court's Decision in Venture Global Engineering, in: American Review of International Arbitration 2008, Vol. 19, Issue 1, p. 183.

5 German Arbitration Law 1998, Section 1055; Swiss Federal Code on Private International Law 1987. Article 190; English Arbitration Act 1996, Section 98.

6 Unites States Supreme Court, 83-1569, Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc, 1985.

forum state, and which therefore undermine the principles of fair competition and integrity in public administration.[7]

The crucial issue that arises during the weighing of these two competing considerations is the following: whether the courts are entitled to re-examine the arbitral tribunal's findings; or they have to base their judgments purely on the findings obtained during arbitration proceedings. In practice, after an award is rendered and no evidence of corruption is found, the dissatisfied party usually challenges the arbitral ruling on the following grounds: that the relevant evidence of corruption was discovered only after the close of arbitral proceedings; and that either the arbitral tribunal did not properly consider the evidence proving corruption or it did not correctly apply the law governing issues of corruption and illegality. Even courts belonging to the same jurisdiction sometimes take different approaches with regard to the extent of judicial review of the arbitral tribunal's findings. Attitudes toward judicial scrutiny of arbitral awards can be placed in the following categories: i) minimal judicial review; ii) maximal judicial review; and iii) contextual judicial review.[8]

2.1. Minimal Judicial Review

Courts conducting minimal judicial review tend to be reluctant to scrutinize and re-examine evidence of corruption on the part of arbitrators issuing an award. However, under certain circumstances courts following the minimal judicial review approach may reinvestigate the issue of corruption and therefore re-examine the award's findings of law and fact.[9]

This paper analyzes situations in which a given court showed a high degree of deference to the tribunal's findings and consequently upheld the

7 Hwang, Michael and Lin, Kevin, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, August 2011, Singapore, supra note 25, p. 51.

8 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague 2004, p. 391–421.

9 Harbst Ragnar, Korruption und Andere Ordre Public-Verstöße als Einwände im Schiedsverfahren – Inwieweit Sind Staatliche Gerichte an Sachverhaltsfeststellungen des Schiedsgerichts Gebunden, Zeitschrift für Shciedsverfahren 2007, Vol. 17, Issue 1, p.26.

award. *Northrop v. Triad*[10] is an apt illustration of that particular aspect of the minimal judicial review approach.

In that case, an American defense company, the Northrop Corporation (Northrop), sought to sell military equipment and related backup services to the government of Saudi Arabia. For those purposes, the company entered into an intermediary agreement with two Liechtenstein-based companies wholly owned by a well-known Saudi businessman, Mr. Adnan Khashogi. The dispute arose due to the commission for intermediary services, payment of which was resisted by Northrop. Northrop argued that a Saudi decree prohibited the sale of military equipment to the Saudi government, thereby claiming that the intermediary agreement was unenforceable. However, the arbitral tribunal came to the conclusion that, despite the promulgation of the Saudi decree, under California Law (the governing law) Northrop was obliged to perform the agreement. As a consequence, the arbitral tribunal rendered the award enforcing payment of the commission to the intermediary. Although Northrop successfully challenged the award in a US court, the Ninth Circuit Court of Appeal later reversed the lower court's judgment setting aside the award. The Court of Appeal held that: *The mere error of interpretation of California law would not be enough to justify refusal to enforce the arbitrators' decision...The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the Arbitrators; the Arbitrators carefully considered and decided them in a lengthy written opinion*.[11]

It is evident that the court relied fully on the findings of the tribunal and did not reconsider the issue of illegality of the intermediary agreement. Thus, this judgment demonstrates a high degree of deference to the principle of finality of arbitral awards.

[10] United States District Court, C.D. California, CV83-7945, Northrop Corp. v Triad Financial Establishment, 1984.

[11] *Ibid*., para. 1269.

2.2. Maximal Judicial Review

Maximal judicial review is defined as the total scrutiny of the arbitral tribunal's findings of fact and law.[12] The main justification for courts taking this approach is to preserve state values and interests as enshrined in public policy.

The first main characteristic of the maximal judicial review approach is that the arbitral tribunal's findings can be re-examined *de novo*. The court has the freedom to re-evaluate the findings of facts and re-examine not only the non-application, but also the wrong interpretation of the law.[13] Second, the court may consider evidence which was available and obtainable at the time of the arbitral proceedings but was not presented before the tribunal by the challenging party.[14] Third, the court has the *"total control"* over *de novo* review of allegations regarding the facts, even if those allegations were rejected by arbitral tribunal.

The maximal judicial review approach has been adopted by many European courts, including the Court of Appeals of Brussels, the Court of Appeal of The Hague, the Higher Court of Düsseldorf, and the Federal Court of Germany. All of these courts have taken the view that they are entitled to judicially scrutinize arbitral awards without any limitation.

However, recent practice shows that the judicial attitude of European courts toward the maximal review approach has shifted somewhat. Below, this paper analyzes cases in which courts belonging to jurisdictions supporting the maximal judicial review approach opted not to undertake *"total control"* of the arbitral award and therefore did not conduct *de novo* review of the tribunal's findings of fact and law. For illustration of that practice, this paper analyzes the practice of the Paris Court of Appeal. The Paris Court of Appeal's reluctance to conduct de novo review of awards dates back to its decision in the *SA Thales Air Défense v. Euromissile case*,[15] where the court held that, on

12 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, The Hague 2004, p. 406.

13 Ibid., p. 407-408.

14 Enonchong Nelson, The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, p.514.

15 Paris Court of Appeal, No. 2002/60932, SA Thales Air Défense v. Euromissile, 2002.

the public policy ground, an award may be reviewed de novo if recognition or enforcement of that award would "breach French legal order 'in an unacceptable manner," such breach constituting a 'manifest' violation of an essential rule or a fundamental principles."[16] Accordingly, in France there is no longer unanimous support for the maximal judicial review approach.

Similarly, German courts in several cases have opted against conducting maximal judicial review of arbitral awards. In the High Regional Court of Hamburg, an alleging party was challenging the enforcement of an arbitral award rendered in Swiss arbitration on grounds that the money paid under the contract constituted a bribe and not payment for performing services. However, the High Regional Court of Hamburg held that the court's power to re-view arbitral awards was limited to procedural errors and therefore it was impermissible to re-examine the findings of the tribunal.[17]

The same approach was adopted by the High Regional Court of Bavaria, which held that it is generally forbidden for the court to replace the evidence of the arbitral tribunal with its own evidence. It also underlined the independence of arbitration and the finality principle of arbitral awards.[18]

Hence, the approaches to judicial review taken by courts can vary even among courts belonging to the same jurisdiction.

2.3. Contextual Judicial Review

In order to strike a balance between two important public policy considerations – sustaining international arbitration awards, on the one hand, and discouraging corruption in international trade, on the other – courts must conduct contextual judicial review of arbitral awards. Contextual review is a two-stage process which provides a structure under which the competing considerations can be balanced.[19]

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16 Gaillard, Emmanuel, Extent of Court Review of Public Policy, in: New York Law Journal, 05.04.2007, p.3.

17 High Regional Court of Hamburg, 6 U 110/97, 1998.

18 High Regional Court of Bavaria, 4Z Sch 23/02, 2003.

19 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p.4.

The leading form of contextual review was suggested in the *Soleimany v. Soleimany* case, where an English court at the enforcement stage looked behind an award rendered by Beth Din. The court considered issues regarding corruption and illegality of the underlying contract. Notably, Waller L.J., when delivering the court's judgment, explained how a court must scrutinize an award which does not find any illegality underlying the contract of the parties. The court took the view in *obiter dictum*, that in order to respect both aforementioned public policy concerns, a two-stage process should be adopted. At *the first stage*, the court has to determine whether the alleging party provided prima facie evidence about the illegality of the contract, and then the court must conduct preliminary enquiry (short of full-scale investigation) in order to determine whether *"full faith and credit"* should be given to the arbitral award.[20] Waller L.J. suggested that it was unnecessary to conduct full-scale investigation in the first stage since it *"would create the mischief which the arbitration was designed to avoid*.[21] Only after the court concludes that *"full faith and credit"* should not be given to the arbitral award should a full-scale enquiry into the issue of illegality be conducted as a *second stage*.[22]

The following is an illustration of the factors that must be considered at the *first stage* in order to determine the necessity of a full-scale enquiry as a *second stage*. Sayed restated these factors, as follow:

1. Available evidence of legality and illegality;
2. The manner in which the arbitrator reached his or her conclusion of illegality;
3. The degree of competency of the arbitrator; and
4. The manner in which the arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion, or bad faith.[23]

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20 Enonchong Nelson, The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, p.506.

21 Court of Appeal of England, 97/0882 CMSI, Sion Soleimany v Abner Soleimany, 1999, para. 824.

22 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p.3.

23 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, The Hague 2004, p.415.

Waller L.J made it clear that while evaluating the illegality of the underlying contract (at both stages) the court had the freedom to consider not only fresh evidence, but new evidence as well; it may even consider the evidence already submitted before the arbitral tribunal. Such broad discretion to consider all kinds of evidence echoes the standards of maximal judicial review, whereas preliminary enquiry — rather than full-scale investigation at the first stage — illustrates the degree of deference to the arbitral tribunal's findings. This is in line with the standards of minimal judicial review.[24] Thus, the contextual judicial review approach holds an intermediary position between minimal and maximal review standards.

2.4. The Appropriate Standard of Judicial Review

The main question involves determining which of the above approaches better balances the two competing public policy considerations: the finality of awards; and the discouragement of corruption in international trade.

First, this paper discusses the minimal judicial review approach, which demonstrates a great degree of deference to international arbitration and the finality of arbitral awards. Although respecting the principle of finality of arbitral awards serves a number of functions and therefore has number of advantages, it is also undisputable that the minimal judicial review approach ignores other fundamental public policy concerns, such as the discouragement of morally-repugnant and/or corrupt agreements. By contrast, the maximal judicial review standard goes too far, ignoring the public policy goals that underlie the principle of finality of arbitral awards. It is correctly argued that arbitration cannot be a "means to circumvent public policy rules"[25]. Therefore, contextual judicial review, which holds the intermediary position that both the minimal and maximal review standards, can be the appropriate way to balance the two competing considerations, depending on the context. Through contextual judicial review there is a greater chance of

[24] Hwang, Michael and Lin, Kevin, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, August 2011, Singapore, p.66.

[25] Hanotiau, Bernard, Satisfying the Burden of Proof: The Viewpoint of a Civil Law Lawyer, in: Arbitration International 1994, Vol. 10, Issue 3, p. 804.

discovering corruption and other illegalities – in contrast to the minimal judicial review standard. This paper concludes that the intermediate approach allowing courts to interfere in the award in cases where there is new but not necessarily fresh evidence is the most appropriate means for balancing the two competing public policy considerations.

3. Review of the Practice of the Supreme Court of Georgia on Deciding on the Recognition and Enforcement of Foreign Arbitral Awards

The practice of the Supreme Court of Georgia on deciding on the recognition and enforcement of foreign arbitral awards dates back to 2003. The first such ruling by the Supreme Court of Georgia was rendered on 4 July 2003.[26] In that case, an arbitral award was rendered by the court of arbitration under the Chamber of Commerce of the Russian Federation. Following that award, the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia invoked Articles 62-63 of the Law of Georgia "on Private International Law", which concerns the petition for legal assistance and the granting of such petition; and Article 51 "b" of the Minsk Convention "on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters", which concerns the recognition and enforcement of awards. According to Article 51 "b" of the Minsk Convention, each of the contracting states should recognise and enforce the following judgements rendered in other contracting states: a) judgments rendered by institutions of justice in civil and family cases, including amicable settlements approved by the courts in such cases and notarial documents relating monetary obligations; and b) judgments rendered by the courts in criminal cases ordering compensation for damages. This provision clearly demonstrates that the court of arbitration incorrectly cited paragraph "b" of Article 51, as the case concerned arbitral proceedings on a civil dispute. Furthermore, the ruling states that the motion had to be

[26] Supreme Court of Georgia, no. 3a-102, 4 July 2003, Collection of Civil Cases no. 8, 2003, p.213.

granted on the basis of Article 69 of the law "on Private International Law" concerning decisions on marriage issues. The ruling clearly indicates that the disputed parties were two legal persons, meaning that the foregoing ground was also used incorrectly, presumably due to a technical inaccuracy. The court had to apply Article 68 of the same law, according to which it had to assess the issue of recognition of decisions of foreign countries.

It is noteworthy that Georgia joined the 1958 New York Convention "on the Recognition and Enforcement of Foreign Arbitral Awards" in 1994. Contracting states to the New York Convention should apply the rules of the convention when deciding upon issues of recognition and enforcement of arbitral awards rendered in foreign states. However, the Supreme Court of Georgia referred to the convention for the first time in its ruling of 16 September 2005.[27]

The ruling rendered by the Chamber of Civil Cases of the Supreme Court of Georgia on 31 January 2011 is also noteworthy.[28] It is the first ruling which refers to the Law of Georgia "on Arbitration" enacted on 1 January 2010. In its prior rulings, the Chamber of Cassation only referred to the Law of Georgia on "Private International Law" and the Minsk Convention. In particular, it is worth noting that the Law "on Arbitration" is in place precisely to regulate the issue of recognition and enforcement of foreign arbitral awards, and while Georgia has been a party to the New York Convention since 1994, the Court of Cassation invokes the Law "on Private International Law" and the Minsk Convention. This practice indicates a major shortcoming in judicial practice. In the motivational section of the foregoing ruling, the Chamber of Cassation also refers to the New York Convention, but the resolutive section states that the Supreme Court of Georgia relied upon Article 68 of the Law on "Private International Law" while making the decision. The motivational section of the ruling thus provides reasoning on the basis of the New York Convention and the Law of Georgia "on Arbitration" while the resolutive section incorrectly states that the Court was guided by the Law on "Private Inter-

[27] Supreme Court of Georgia, no. a-2156-sh-63-05, 16 September 2005, Collection of "Civil Process" no. 6, 2005, p.74.

[28] Supreme Court of Georgia, no. a-2652-sh-72-2010, 31 January 2011, Collection of "Foreign Court Decisions", no. 3, 2012, p.85.

national Law." This clearly poses a problem for the court with respect to the recognition and enforcement of foreign arbitral awards. Only two rulings of the Supreme Court of Georgia, the ruling of 24 February 2012[29] and the ruling of 14 February 2012[30], refer to Article 731 of the Law of Georgia on "Private International Law", pursuant to which arbitration decisions adopted outside Georgia's territory shall be recognized and executed under the procedures established by the Law of Georgia on Arbitration. Despite the above-mentioned provision having been in force since 1 January 2010, the Chamber of Cassation had been invoking the Law of Georgia on "Private International Law" in its decisions adopted before and after the above-mentioned rulings, a clear indication of inexperience and lack of professionalism with respect to arbitral awards.

The ruling of 24 February 2012 is also noteworthy for the fact that the Court of Cassation specifies the scope of court intervention in arbitral proceedings, indicating that "the court may not address the merits of the case." This once again demonstrates that the Supreme Court of Georgia applies the minimal standard of court intervention when deciding upon issues of recognition and enforcement of foreign arbitral awards. The latter court is to be highly respected for its protection of the principle of finality of international arbitration awards. Although many aspects of the principle of finality of arbitral awards are respected – and therefore the foregoing principle has many advantages – it is undisputable that the minimum standard of intervention denies other fundamental principles of public order; for instance, contracts concluded as a result of corrupt agreements that contradict public order.

4. Conclusion

The underlying theme of this paper has been illustration of the discrepancy between denunciation of corruption in international commercial relation-

[29] Supreme Court of Georgia, no. v-56-sh-5-2012, 24 February 2012, Collection of "Foreign Court Decisions", no. 3, 2012, p.89.

[30] Supreme Court of Georgia, no. a-562-sh-13-2012, 14 February 2012, Collection of "Foreign Court Decisions", no. 3, 2012, p.108.

ships and persistent resistance to such denunciation. Corruption contravenes the main aims of public policy in virtually every national jurisdiction; it is thus internationally condemned and denounced. At first glance, such condemnation is reinforced by arbitral and judicial practice. However, this study finds that arbitral tribunals and national courts often take different approaches while dealing with cases involving corruption. This paper provides an explanation as to why there is no uniformity in international dispute resolution practice with regard to usage of the public policy defense as grounds for rulings based on allegations of corruption.

The main cause of this discrepancy, which is analyzed in this paper, is that the approaches adopted by national courts with regard to the extent of judicial review of arbitral tribunal findings of law and fact, are so divergent that they lead to disparate court decisions even in the cases having similar circumstances.

Overview and study of the practice of the Supreme Court of Georgia with respect to its decisions on the recognition and enforcement of foreign arbitral awards demonstrates that the Court of Cassation applies the minimum standard of court intervention; i.e., studies and examines only the facts that influenced the award, which is insufficient even for reducing obstacles caused by corruption in international arbitration. While studying the practice of the Supreme Court of Georgia on the foregoing topic, becomes clear that judicial practice is not uniform in this respect. Although Georgian arbitration legislation is being updated to adopt the approaches to arbitration law practiced at the international and national levels, it is a fact that many problems remain with respect to the recognition and enforcement of foreign arbitral awards.

This paper provides possible solutions some of the above-mentioned controversies existing in arbitral and judicial practice. However, questions remain as to the level on which arbitral awards should be examined. It is undisputable that harmonization of the different jurisdictions with regard to this issue will reduce the discrepancies currently existing in the practice of international dispute resolution of corruption cases.

TAMAR DIOGIDZE*

An Off-Premises Contract Under the Georgian and European Laws**

1. Introduction

The present article discusses the concept of a contract concluded off-premises. The main objective of the article is to discuss the content of contracts signed on the street, the parties and the place of its conclusion, and develop the Georgian legal doctrine in this regard. The article explores the Georgian consumer market and identifies the problems related to the realization of consumer rights. The article also reviews the existing European and Georgian legal frameworks on the issue and elaborates recommendations for the improvement of the latter.

An off-premises contract can be regarded as a novelty in the Georgian legislation. It became a part of civil law in 1997, when the new Civil Code of Georgia entered into force.

An off-premises contract, a contract that is closely linked to consumer law, and the legal issues related to it are quite topical in many countries

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** This article has been translated from Georgian.

across the modern world. Diversity in the scope of consumer markets and concluding a contract in a "non-contractual environment" are not very rare in the 21st century. However, due to the fact that legal regulation of the issue is absent, it is almost impossible to ensure strong safeguards for consumers. Despite the fact that an agreement that is signed off-premises is already regulated by the Civil Code of Georgia for quite a long time, the relevant article is not frequently invoked in Georgian practice, which is caused by the obscurity of the norm. The concept of these types of contracts, the place of their conclusion, as well as the parties and their rights and obligations are unclear. In addition, it is noteworthy that the 1996 Law of Georgia on Consumer Rights Protection was annulled on May 8, 2012. Consequently, there is practically no legislation in Georgia in terms of protecting consumer rights.

2. Legal Regulation of Off-Premises Contracts

When discussing the concept of an off-premises contract, it is necessary to pay attention not only to the definition provided by the Georgian legislation, but also to the experience of the European countries. Among the European countries, special attention should be paid to the German law, since the majority of the Georgian Civil Code's norms of liability law were developed in accordance with the model of the German Civil Code (*Bürgerliches Gesetzbuch Deutschlands* – BGB;). The majority of Georgian norms were implemented from the German Civil Code and other German laws.[1]

Focus on the European legislation stems from the country's external outlook and the obligation to ensure the implementation of the commitments undertaken by Georgia since 2014.[2] In particular, in June 2014, after the Association Agreement was signed between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter referred to as the Association Agree-

1 Z. Tchetchelashvili, *Contract Law* (Tbilisi, 2010), 10.

2 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, available at: http://eeas.europa.eu/georgia/pdf/eu-ge_aa-dcfta_en.pdf.

ment), Georgia undertook a number of commitments, including approximation of its legislation with the European Standards. The sectoral cooperation part of the agreement, namely, Chapter 13 of Section 6 (Articles 345-347) deals with the issues related to consumer policies. Under Articles 345-347, Georgia should ensure a high level of consumer protection and implement a thorough legislative reform in favor of consumer protection. This is the purpose of the draft Law on the Protection of Consumer Rights (hereinafter referred to as the draft law), initiated by the Parliamentary Committee on European Integration the main objective of which is to create the legislation focused on consumer protection in Georgia and share practices of European countries in this regard. Each one of us is a consumer; therefore, protection of consumer rights is the main task of any state. Creation of a consumer-oriented legislation is a priority for the countries of European legal order, since modern law recognizes the supremacy of a person and the most effective realization of rights and freedoms is the factor that determines the supremacy of a person.

It should be noted that an off-premises contract and the related issues were first regulated in the context of agreements concluded through the negotiations held outside non-profit institutions (under the Georgian legislation – an off-premises contract) in Council Directive 85/577 EEC of 20 December 1985 to protect the consumer with regard to contracts negotiated away from business premises.[3] Later, one more directive was added to the above-mentioned directive, viz., Directive 97/7/EC of the European Parliament and of the Council of May 1997 on the protection of consumers with respect to distance contracts,[4] which to certain extent complemented its predecessor.

However, development of modern technologies and expansion of consumer market have created the need for new regulations. Consequently, the European Parliament has developed a new directive. As of today, in the majority of the EU states, an off-premises contract and the related issues are regulated by Directive 2011/83/EU of the European Parliament and the Direc-

[3] Council Directive 85/577 EEC of 20 December 1985 to protect the consumer with respect to contracts negotiated away from business premises, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:en:HTML

[4] Directive 97/7/EC of the European Parliament and of the Council of May 1997 on the protection of consumers in respect of distance contracts, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0007&from=en

tive of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Directive of the Council, and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, (hereinafter referred to as the Directive).[5]

The purpose of the new Directive was to eradicate the existing deficiencies and discrepancies effectively, based on the existing experiences. In addition, the Directive has established general rules in relation to distance contracts and contracts negotiated away from business premises that allow Member States to bring their internal legislations in conformity with the Directive and, thereby, provide a guarantee for consumers' protection.

3. Parties to an Off-Premises Contract

One of the characteristics of an off-premises agreement is its parties. Under Article 336 of the Civil Code of Georgia, a consumer and a person conducting sales within his/her business constitute the parties.[6]

Law of Georgia on the Protection of Consumer Rights, 1996, defined a consumer as a natural person, who uses, purchases, orders goods (work and service) or has such an intention for personal needs. The definition of a consumer is also provided in Decree no. 3, dated March 17, 2006, of the Georgian National Communications Commission. Under Article 3 of the above decree, a consumer is an individual, who uses or intends to use a service provided through commonly used electronic communication networks and means for personal needs, and does not intend to sell it to another consumer. According to the legal encyclopedia by S. Tezelashvili, a consumer is a citizen, who

5 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2011.304.01.0064.01.ENG

6 A contract concluded on the street, at the doorstep or in similar places between a consumer and a person conducting sales within his/her trade shall be valid only if the consumer has not rejected the contract in writing within a week, unless the contract is fulfilled upon its conclusion.

wants to purchase or order any goods; a buyer of goods and services; a client or a user for personal, family or any other needs that are not related to entrepreneurial activities.[7]

Unfortunately, what is meant by the term "individual conducting sales" was not defined by the above-mentioned Law on the Protection of Consumer Rights. Presumably, an entrepreneur (trader) is considered its subject. At the same time, it is also disputable whether the term "person" envisages only a natural person, or also a legal entity. Under the Civil Code, a person can be both an individual and a legal entity.

The Georgian draft law clearly envisages a "consumer" and a "trader" as parties to an off-premises contract.[8] In particular, under Article 3 paragraph "a", a consumer is a physical person, who is offered, or who purchases or further uses, goods or services for personal use and not for entrepreneurial or other professional activities. Under paragraph "b" of the same article, a trader, either a natural or legal person, is a provider and/or seller of goods within an entrepreneurial or other professional activity, as well as a service provider. Unlike the existing norms, the draft law already contains a detailed definition of the parties.

Unlike the Georgian legislature, a very specific definition is made by the German legislature, which considers a consumer and an entrepreneur as the parties. Under paragraph 13 of the German Civil Code, a consumer means every natural person who enters into a legal transaction for a purpose that is outside his/her trade, business or profession[9]. Under paragraph 14, an entrepreneur means a natural or legal person or a partnership with legal personality that, when entering into a legal transaction, acts in exercise of his/her or its trade, business or profession.[10]

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7 S. Tezelashvili, Legal Encyclopedia (Tbilisi, 2008), 373.

8 The draft law of Georgia on the Protection of Consumer Rights is available at: http://info.parliament.ge/file/1/BillReviewContent/120599.

9 § 13 BGB – Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu einem Zwecke abschließt, der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann.

10 § 14 BGB – (1) Unternehmer ist eine natürliche oder juristische Person oder eine rechtsfähige Personengesellschaft, die bei Abschluss eines Rechtsgeschäfts in Ausübung ihrer gewerblichen oder selbständigen beruflichen Tätigkeit handelt. (2) Eine rechtsfähige Personengesellschaft ist eine Personengesellschaft, die mit der Fähigkeit ausgestattet ist, Rechte zu erwerben und Verbindlichkeiten einzugehen.

Under the Directive, a consumer and a trader are the parties to this type of contract. Under Article 2 of the Directive, 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his/her trade, business, craft or profession; 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his/her name or on his/her behalf, for purposes relating to his/her trade, business, craft or profession in relation to contracts covered by this Directive.

Although the terminological aspect has little importance in this case, it would be appropriate for the Georgian legislature to indicate in express and clear terms the parties to an agreement and provide their definition accordingly. Vague terms always fall "victim" to suspicion.

4. The Place of Conclusion of an Off-Premises Contract

The main characteristic of an off-premises contract is that it is concluded in a "non-contractual environment", where a person does not intend to conclude a contract and it happens without planning. The "effect of unexpectedness" is decisive in these types of contracts. "Such agreements are usually concluded by chance, so that a consumer is not ready for them." However, it should be noted that in spite of the unpreparedness of the customer, customers are still attracted to such contracts; "he/she experiences self-satisfaction, when individual attention is paid to him/her, especially during a visit at home."[11]

Under Article 336 of the Civil Code of Georgia, the place of concluding a contract can be: "on the street, at the doorstep or in similar places," which "requires interpretation, since literal meaning of the word street can cause many misunderstandings." For example, an exhibition shop might be organized on the street, in front of a house, etc. Purchasing any item in these situations constitutes an off-premises contract due to the location; however, it cannot be qualified under Article 336 of the Civil Code of Georgia, since a consumer was ready to conclude a contract. The term "own business" is generally considered as a permanent location of the provider of a service or

[11] E. Kardava, 'Comparative review of European standards for Consumers' Rights Protection on the Example of the Contract Concluded in the Street', special edition of Georgian Law Review (2007), at 134.

goods; however, in this case it is not a permanent base of a particular trade.

Under the draft law, a contract is deemed to be concluded on the street if it is conducted outside a seller's business premises in the physical presence of the seller and the consumer, as well as within the business premises of a trader or distantly, however, immediately after the customer is personally and individually approached with an offer outside the trader's premises.

Unfortunately, the Georgian counterpart to the above-mentioned norm does not contain a detailed definition of the place where a contract is concluded. This issue has not been studied from a legal perspective. Only three cases are discussed in the commentaries to the Civil Code of Georgia, in the context of the place of conclusion of a contract in Article 336.[12] The user is quite confused with the obscure composition and title of the norm. All this, in turn, makes it difficult to invoke the above-mentioned norm in practice, which is why this article is not actually used in the Georgian practice.

A detailed definition of an off-premises contract and the place of conclusion of such a contract are defined by the Directive, under which, an off-premises contract is, for example, the place of residence or work. The definition of such a contract should also include the situation, where a consumer receives an offer to conclude a contract personally and individually in a non-contractual environment; however, the contract is concluded later, on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer. Definition of this article should not foresee the situations in which a trader initially goes to a customer's home to provide consultation, provides an estimate or carries out surveying, and, only after the expiration of a certain period of time, the contract is concluded on the trader's business premises. In this case, a contract is not considered to be immediately concluded, since a consumer had sufficient time to analyze the offer presented by a trader, before concluding a contract.[13] Off-premises contracts are also those purchases, which a consumer makes during promotional trips organized by a trader, where products are offered for sale.

12 L. Chanturia, Commentaries to the Civil Code of Georgia, Book III, (Tbilisi, 2001), 151-153.

13 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, preamble (21) 304/67. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_. 2011.304.01.0064.01.ENG

With regard to the German legislation, it should be noted that as of June 13, 2014, the Law on the Implementation of the Consumer Rights Protection Directive[14] is in force in Germany. The law has made significant amendments to the norms regulating off-premises contracts. The German legislature accepted in full the Directive developed by the European legislature and has implemented it comprehensively in the domestic legislation.[15] The name of this type of a contract has been changed, according to which, the term for the contract was established in the Georgian law, namely, a doorstep contract. In particular, under the German law, its name was *Haustürgeschäft* – a contract concluded at the doorstep. Under the current regulations, it is called – *Außerhalb von Geschäftsräumen geschlossene Verträge* – a contract concluded outside entrepreneurial activities, like its European counterpart, off-premises contracts.[16]

Despite the fact that an off-premises contract has been regulated by the Civil Code of Georgia for a long period, this article is not used in the Georgian legal practice, which is due to the vagueness of the norm. The location of concluding such a contract, as well as the rights and obligations of the parties and the legal effects of their relations are unclear. Therefore, it will be positively assessed if the Georgian legislature takes into consideration, in order to avoid misunderstanding, the existing international practice in relation to the term for a contract concluded on streets, and considers the possibility to change the name of the norm, for instance, into "a contract concluded in a non-contractual environment,"[17] or "a contract concluded outside the business premises of an trader," as established by the Directive. The above will contribute to the elimination of the problem in the way of application of the norm, and will make it more practical.

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14 Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung (VerbrRRLUG). Available at: http://www.buzer.de/gesetz/10934/index.htm.

15 Prütting/Wegen/Weinreich/Stürner §312 Rn. 1.

16 German Civil Code in English available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1070.

17 The term "non-contractual environment" is a kind of novelty in Georgian law. It means all places, where the consumer does not expect to conclude a contract, is not ready for contractual relations, where sufficient information is not provided, and becomes a participant of such relations considering the external circumstances. The main feature of the contract concluded on the street is that the contract is concluded in a place where the consumer was not ready to do so. The "non-contractual environment" is broader than the "contract concluded on the street", which limits the area of conclusion of a contract stemming from the name.

5. Conclusion

One of the most important functions of law is to ensure the equality of parties in any type of a relationship. When a contract is concluded on the street, the consumer is less secure. Consequently, the Georgian legislature, through implementing safeguard mechanisms in its legal acts, attempts to ensure the protection of consumer rights as that of a "weak" party in this relationship. The issues discussed in the present article give an opportunity to develop certain recommendations. Namely:

(1) It is necessary to define the place of concluding a contract – in particular, to specify what is implied in a contract concluded on the "street, house and similar places," as stipulated in Article 336 of the Civil Code of Georgia. In order to achieve the purpose of the provision, it is necessary to interpret it. A consumer must know exactly what the place of conclusion of a contract is, in case of which he/she has a right to refuse it within a fixed term.

(2) It will be positively assessed if the term, "a contract concluded on the street (a doorstep contract)" is changed in accordance with existing international practice, to avoid misunderstanding.

(3) It is quite important to improve the terms defining the parties to an agreement. It is especially important to define what is meant by the term, "an individual trading within his/her own business".

It is noteworthy that, due to the vagueness of the norm, Georgian jurisprudence is not familiar with a single decision in relation to contracts concluded on the street. Article 336 of the Civil Code of Georgia is a so-called "dead rule", which is not used in practice because of the shortcoming in its connotation.

It can be concluded that the Georgian legislature's attempt to protect consumer rights is very important and any improvement on this front will undoubtedly be quite useful to consumer market. The main purpose of this norm is to protect the rights of a consumer, the "weak party".

Taking the above recommendations into consideration will facilitate a better implementation of the rights and interests of a consumer and his/her contractor. Creation of a legislation oriented towards the interests of each individual and ensuring high standards for protecting their rights is the main objective of any state.