

ANDREA BORRONI (ED.)

DOING BUSINESS IN GEORGIA

A COMPREHENSIVE GUIDE

FOR INVESTORS

TBILISI

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Borroni A., Editor
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TABLE OF CONTENTS

- ♦ **Acknowledgments** - p.VIII
- ♦ **Preface** (*Karlo Sikharulidze* - Georgian Ambassador to Italy)
- p.X
- ♦ **Foreword** (*A. Borroni*) - p.XVII
- ♦ **Abbreviations** - p.XXIV
- ♦ **Index** - p.XXIX

- ♦ **Globalization and Investments: In Search of New Boundaries** (*C. M. Simeone*) – p.1
 - 1. The Globalization. Tailoring the Issue – p.2
 - 1.1 The Globalization of Legal Rules – p.5

- ♦ **Georgia Investment Law Overview** (*J. Gvelebiani & A. Borroni*) – p.19
 - Chapter I.**
 - General Overview of Georgian Legal System** (*A. Borroni*) – p.21
 - 1. Georgian Law – Historical And Doctrinal Overview – p.22

2. Key Legal Concepts Applicable To Georgian Corporations – p.28
 3. The Legal Framework For Entrepreneurial Activities In Georgia – p.36
 4. The Legal Framework For Financial Services – p.39
 - 4.1. Commercial And Investment Banking – p.39
 - 4.2. Micro-Finance Organizations – p.42
 - 4.3 Insurance Companies – p.44
 5. Intellectual Property Protection Mechanisms - p.47
 - 5.1. International Conventions In Force In Georgia - p.47
 - 5.2. Overview Of Domestic IP Law Framework– p.49
 - A. Patents – p.49
 - B. Copyright – p.52
 - C. Trademarks – p.53
 - 5.3. IP Enforcement – p.55
 6. Dispute Resolution Environment In Georgia – p.57
 - 6.1. Overview Of Georgian Court System – p.57
 - 6.2. International Cooperation In Enforcement Of Court Judgments – p.60
- Chapter II. (G. Jevlebiani)***
- Legal Framework For Investment*** – p.66

1. State Agencies And Their Role In Investment Facilitation And Protection – p.67
2. General Investment Environment In Georgia – p.68
 - 2.1. International Investment Protection Mechanisms In Force In Georgia – p.68
 - 2.2. Georgian Law On Investment – p.74
 - 2.3. Regulation Of Investment Funds In Georgia – p.78

Chapter III. (J. Gvelebiani)

Setting Up Business In Georgia – p.82

1. Establishment Of An Enterprise – p.83
2. Registration Of Business In Georgia – p.83
3. Forms For Carrying Out Business Activities In Georgia – p.86
 - 3.1. Limited Liability Company – p.86
 - 3.2. Joint Stock Company – p.87
 - 3.3 Joint Liability Company – p.88
 - 3.4. Limited Liability Partnership – p.88
 - 3.5. Cooperative – p.89
 - 3.6. Individual Enterprise – p.89
 - 3.7. Branch Office – p.89
 - 3.8. Expansion Through Local Management Company – p.90

Chapter IV. (J. Grelebiani)

Major Investment Vehicles Available In Georgia –
p.92

1. Debt Investments – p.93
 - 1.1 Legal Environment – p.93
 - a. Execution Of Loan Agreements – p.96
 - b. Interest And Penalty Rates – p.96
2. Securing Claims/Enforcement – p.98
3. Taxation Of Debt Investments – p.100
 - 3.1. Domestic Taxation Regime – p.101
 - 3.2. Italy-Georgia DTT – p.103
4. Equity Investment – p.104
 - 4.1. Legal Environment For Equity Investments – p.104
 - a. Investment Through Convertible Loans – p.105
 - b. Capital Contributions – p.106
 - 4.2. Taxation Of Equity Investment – p.109
 - a. Domestic Taxation Regime – p.109
 - b. Italy - Georgia DTT – p.110

Concluding Remarks On Investment Environment

In Georgia (A. Borroni) – p.112

- ♦ **Georgian Arbitration (A. Borroni)** – p.116

Introduction – p.117

1. Historical Overview – p.121
 - 1.1. Private Arbitration Law Of 1997: Shortcomings And Consequences – p.126
2. Drafting And Enforcing The New Georgian Arbitration Law – p.130
3. Current Arbitration Developments In Georgia And Abroad – p.134
4. Arbitration Agreement – p.141
 - 4.1. The “Kompetenz Kompetenz” Principle – p.146
5. Arbitrators – p.148
6. Due Process – p.154
7. Interim Measures – p.162
8. The Arbitral Award – p.168
 - 8.1. Remedies – p.170
 - 8.2. Final And Binding Award – p.171
 - 8.3. *Res Judicata* Effect Of The Award – p.172
 - 8.4. Setting Aside An Award – p.173
 - 8.5. Remand – p. 178
 - 8.6. Recognition And Enforcement Of An Award – p.179
 - a. The Role Of The New York Convention In Recognition And Enforcement In Georgia – p.180

b. Partial Recognition And Enforcement – p.182

c. Limitation Of Recognition And Enforcement –
p.184

d. Grounds For Denial Of Recognition And
Enforcement – p.185

Concluding Remarks – p.190

♦ **Web Resources** – p.ii

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Preface

Georgian Ambassador to Italy – Mr. Karlo Sikharulidze

Georgia and Italy have been partnering for long time now, by virtue of an affinity stemming from the deep-rooted historical and cultural traditions of both Countries.

Their solid relationship was further enhanced in 1997, when they signed, in the light of mutual respect and advantage, a joint declaration on economic cooperation. This agreement was geared towards the promotion of multilateral initiatives aimed at, among other ends, supporting and fostering the reform of the economic and financial sectors of Georgia and its integration in the world economy.¹

Since then, a number of treaties, conventions and declarations on various matters (e.g. double taxation, touristic cooperation, investment protection, etc.) have constantly strengthened the economic, institutional and business bonds between the two States.

Given this long-lasting tie, and as the Georgian Ambassador to Italy, I could not but enthusiastically endorse the project, first, and the publication, later, of the present Doing Business Guide.

¹ Joint Declaration on Economic Cooperation between the Republic of Italy and Georgia, 15 July 1997, Rome, Italy, Available at http://itra.esteri.it/Ricerca_Documenti/wfrmRicerca_Documenti.aspx (Last visited 10 September 2014).

This work provides helpful information and assistance to all prospective Italian and, generally, foreign entrepreneurs wishing and willing to set up new business ventures in Georgia.

And, what is more, it is going to serve another central purpose too, that is further consolidating the role of Georgia on a global scale, paving the way to the establishment of new business and economic partnerships.

In this regard, few remarkable indexes of Georgian economy would suffice to depict a largely unknown facet of this Country.

The latest statistics² report that in 2013 Georgia's GDP Real Growth Rate amounted to 3,2%, whereas, the GDP per capita was equal to 3596.6 USD.

As to the inflation, according to the Inflation Rate Report of August 2014, the current annual rate amounts to 3.4%, owing to, above all, the increases in the price of three main commodity groups, *i.e.*: food and non-alcoholic beverages, transport and tobacco and alcoholic beverages.³

Generally, the turnover in the business sector has been constantly growing since 1999, reaching 42.0 billion GEL⁴ in 2012,

² <http://www.geostat.ge/index.php?action=0&lang=eng> (Last visited 10 September 2014).

³ http://www.geostat.ge/cms/site_images/files/english/price/CPI%20Press%20release_08_2014_Eng.pdf (Last visited 10 September 2014).

⁴ Nearly 24 billion USD.

while the production value in the sector amounted to 23.1 billion GEL⁵ in the same year, and the value added was equal to 11.2 billion GEL^{6,7}

Furthermore, in the second quarter of 2014 foreign (direct and portfolio) investments in Georgia increased, and the amount of foreign direct investments equaled to 151 million USD.⁸ The main sectors in which foreign direct investments have been made in the same period involved, in the first place, the field of transports and communications (101 million USD), followed by the manufacturing sector (58 million USD), the energy sector (45 million USD) and real estate domain (41).⁹ Similarly, these fields represent also the primary economic sectors in which international reports suggest to invest, along with the retail and the agricultural ones.¹⁰

Especially, great attention should be paid to the Georgian energy sector.

⁵ Nearly 13 billion USD.

⁶ Nearly 6,4 billion USD.

⁷ http://www.geostat.ge/index.php?action=page&p_id=212&lang=eng (Last visited 10 September 2014).

⁸ The total inflow of foreign direct investments amounted to 480 million USD. http://www.geostat.ge/cms/site_images/files/english/bop/FDI_2014Q2-ENG.pdf (Last visited 10 September 2014).

⁹ http://www.geostat.ge/cms/site_images/files/english/bop/FDI_2014Q2-ENG.pdf (Last visited 10 September 2014).

¹⁰ http://www.infomercatiesteri.it/dove_investire.php?id_paesi=125 (Last visited 10 September 2014).

The topography of the region is distinguished by the Caucasus mountain range and its several rivers, which provide the Country with a significant amount of water resources. The hydroelectric sector, along with the exploitation of other natural resources, such as gas, may therefore represent a great potential business opportunity. Besides, the Georgian government has implemented a specific policy to foster the construction of new energy plants and facilities, based on the “Build-Own-Operate” principle. By virtue of the latter, foreign companies which engage in building plants, retain the ownership thereof and will therefore directly manage their energy supply.¹¹

Hence, the aforementioned figures and data clearly show that investments and trading activities are thriving in the Country.

And, their extent is expected to further increase.

In particular, entrepreneurial activities are likely to flourish in the near future due to an outstanding achievement made by Georgia, that is, the ability to strike a balance between a dynamic private sector and the necessary regulatory system, smoothing, at the same time, the most burdensome regulations.

The Georgian government has committed to enhancing the overall degree of legality of the system and has been concurrently

¹¹ http://www.infomercatiesteri.it/dove_investire.php?id_paesi=125. (Last visited 12 September 2014).

working against corruption and bribery; in that respect it has enacted laws on investments' protection, which are unavoidably required to effectively compete on a transnational level.

On the other hand, the Country can boast a legal framework characterized by liberalism in terms of taxation, customs¹² and employment matters^{13, 14}, thanks to which it has ranked 8th in the annual report of the World Bank on the ease of doing business¹⁵.

¹² Georgia is one of the States in which it is much easier to trade across borders (Table 1.5 Good practices around the world) <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf> (Last visited 11 September 2014).

¹³ Georgia has a very flexible regulation on labour matters, for instance: (i) fixed-term contracts are permitted also in case of permanent tasks and no maximum duration of said contract is set by law; (ii) there are no restrictions on night work, neither on the amount of weekly holiday work; and (iii) dismissal due to redundancy is allowed and no notice period is required in that regard. Cf. Employing workers data, *Doing Business 2014*, <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf> (Last visited 11 September 2014).

¹⁴ http://www.infomercatiesteri.it/perchepaese.php?id_paesi=125 (Last visited 12 September 2014).

¹⁵ <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf> (Last visited 11 September 2014). Georgia ranks better than the United Kingdom (10th), Germany (21st), France (38th) and Italy (65th). Countries raking highest are defined by the report as those “whose governments have managed to create a regulatory system that facilitates interactions in the marketplace and protect important public interests, without unnecessarily hindering the development of the private sector”. *Id.*

According to the Doing Business Report 2014, over the last decade, Georgia has undertaken several effective reforms¹⁶ that have been gradually narrowing the regulatory gap present between it and the best performing economies worldwide, consequently increasing the number of firms in the State.¹⁷

This growth proves that entrepreneurs and companies which decide to locate production in Georgia can actually make the most of the Country favourable business framework.

Although Georgia is still regarded as a ‘minor player’ in the global economic and financial context, it offers many investment opportunities. So, betting on its resources and business-friendly environment may result in valuable and profitable ventures, indeed.

What is more, making investments in Georgia and starting off business partnerships with local entrepreneurs may help achieve a mutual goal.

In other words, one of the sought-after objectives of this Doing Business Guide is a two-tier promotion of Georgia, not only in terms of a favourable investment and business environment, but also as a Country rich in culture and traditions, whose products are worth being traded and exported abroad. As to Italy, in particular,

¹⁶ Above all, the Report underlines the importance of the law on personal data protection, which has significantly improved the credit information system.

¹⁷<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Full-Report.pdf> (Last visited 11 September 2014).

fruitful partnerships may arise in the field of organic farming as well as in the wine and food sector, given the similarities between the two Countries in terms of both climate and types of production.

I am rather confident, so, that this Guide will convince Italian, and foreign investors in general, of the good prospects awaiting for them in Georgia.

Foreword

Andrea Borroni

As a Professor at the Ivane Javakhishvili Tbilisi State University, teaching Comparative Commercial Law and Investment Law, I have had the great opportunity to discover Georgia from within.

Since my first time there, I immediately fell in love with this Country; its culture, its environmental heritage and its potential coupled with the hospitality of its people have enhanced my desire to strengthen my professional bonds with it through further collaborations, like, for instance, the challenging project of drawing up a commentary on Georgia's new Labour Code.

Although a foreign visitor would usually be content with Georgia's pleasant and welcoming environment, the Country offers far more than this, especially in terms of investment and business activities. And, the present guide to 'Doing Business in Georgia' aims precisely at raising international awareness in this regard.

An additional incentive to such project and, at the same time, a proof of its usefulness, came with the meeting involving Italian enterprises and Georgian authorities which took place in Tbilisi in February 2014, geared towards the promotion of Italian food and beverage products and the establishment of profitable business relationships between the two Countries. This initiative was highly

welcomed by both groups, and its success increased my team's and my certainty of the need for a practical guide providing foreign entrepreneurs the necessary information on the Country's economic, commercial and legal system and promoting Georgia's image as a favourable investment environment.

As a matter of fact, over the last decade, Georgia's legal system has undergone a number of transformations aimed at enhancing its capacity to attract foreign investments while guaranteeing international investors both investments' protection and safety. This has been achieved through domestic regulations as well as Bilateral Investment Treaties and international agreements; by granting foreign nationals and companies the same treatment as Georgian ones; by excluding foreign assets from expropriation or nationalization, and by compensating foreign investors for damages. In line with this approach, under Georgian law foreign investors can choose the applicable law that will govern their contractual obligations, and, in case of disputes, cases are commonly referred to the International Center for Settlement of Investment Disputes (ICSID) whose awards are easily enforceable on the parties due to Georgia's ratification in 1994 of the 1958 New York Convention. Furthermore, Georgia became a contracting State of the ICSID

convention in 1992 and since then, eight cases involving the Country as respondent have been settled by ICSID tribunals.¹

As to the international organizations, Georgia has been a member of the World Trade Organization since 2000, benefiting from the WTO Most Favoured Nation Regime and participating also in the GSP Plus trading regime, favouring the Country's commercial transactions with EU.²

Taking into account specifically the range of agreements between Georgia and Italy, the cooperation between them covers various sectors: the mutual promotion and protection of investments; the cultural and scientific fields; the defence; the international road transport of passengers and goods; the agricultural and forest sectors; the diplomatic relationships; the touristic cooperation; the relationships between the respective Ministries of Foreign Affairs; a convention for the avoidance of double taxation with respect to taxes on income and on capital and the prevention of fiscal evasion; a joint declaration on the principles of relations among States as well as a declaration concerning a consultative forum on economic relations.³

¹ See the complete lists of cases and relevant awards on ICSID website, *available at* <https://icsid.worldbank.org/ICSID/FrontServlet#> (Last visited 07 July, 2014).

² Information *available at* <http://www.tradewithgeorgia.com/?94/> (Last visited 07 July, 2014).

³ *Available at* http://itra.esteri.it/Ricerca_Documenti/wfrmRicerca_Documenti.aspx and *at*

In particular, Italy and Georgia signed a Bilateral Investment Treaty in 1997, aimed at “establish[ing] favourable conditions for improved economic cooperation between the two Countries and especially in relation to capital investments by investors of one Contracting party in the territory of the other Contracting Party” and acknowledging also that “offering encouragement and mutual protection to such investments, based on international Agreements, will contribute to stimulating business ventures, which foster the prosperity of both States”⁴. Following this significant treaty, and along with several other agreements constituting a solid legal base supporting Georgia and Italy mutual cooperation, the trading and institutional relationships between the two Nations have increasingly grown, giving rise to important commercial interchanges.⁵ According to the Italian Institute of Statistics (ISTAT), in 2013 the commercial interchange between Georgia and Italy amounted to 238,4 million Euro⁶. Furthermore, the Italian Embassy in Georgia has highlighted three major fields as the most

http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=310 (Last visited 7 July, 2014).

⁴ The complete text of the BIT is *available at* http://itra.esteri.it/Ricerca_Documenti/wfrmRicerca_Documenti.aspx (Last visited 7 July 2014)

⁵ For an overview of the Countries’ commercial ventures see http://www.ambtbilisi.esteri.it/Ambasciata_Tbilisi/Menu/I_rapporti_bilaterali/Cooperazione_economica/ (Last visited 7 July 2014).

⁶ See <http://www.ambtbilisi.esteri.it/NR/ronlyres/E6D59ABB-F240-435B-A1B9-284C7EA738E7/31460/Datistatistici20062013initaliano.pdf>.

profitable economic sectors to invest in, namely the hydroelectric, agricultural and pharmaceutical fields.⁷

Moreover, it is also noteworthy that Georgia, though being a small economy, managed to withstand the international economic crisis of the past years and the concurrent conflict with Russia (August 2008); and, in 2010, the Country's financial system was already recovering, thanks also to the loans and grants by international donors (in accordance with the Donors' Conference for Georgia which took place in Brussels in October 2008⁸). Nowadays, one of Georgia's primary objectives is to raise the Country awareness on the international level, so as to become an active economic player and limit international donors' financial support.⁹

So, the constant transformations introduced to the Georgian system over the past few years have all pointed at improving the Country's 'business climate': *i.e.*, a number of measures undertaken in order to fight corruption and attract foreign investments, along

7

See http://www.ambtbilisi.esteri.it/Ambasciata_Tbilisi/Menu/Informazioni_e_servizi/Fare_affari_nel_Paese/.

⁸ See http://europa.eu/rapid/press-release_MEMO-08-626_en.htm?locale=en.

⁹ A short analysis of Georgia's socio-economic context is available at http://www.esteri.it/MAE/pdf_paesi/EUROPA/Georgia.pdf.

with a reform of the Labour law which brought the new Labour Code in line with ILO minimum requirements.¹⁰

Hence, Georgia's legal and economic systems have been reshaped in order to foster the Country's participation in the global market.

In conclusion, this brief overview of Georgia's economic context clearly shows that the Country offers a fruitful investment environment, providing both domestic and international investors and companies with a favourable regulation of business activities.¹¹

Nonetheless, it is worth bearing in mind that the present guide represents only an introduction to Georgia's business sector, and, without claiming completeness, it aims at outlining the most distinctive features of the Country's system so as to offer a general tool of practical utility which should however be complemented with the expertise of field operators, due to the inherent, and undeniable, difficulties of investment law.

¹⁰ Concerning the improvements in labour law matters, the commentary on the new Georgian Labour Code which is currently being printed, represents the final outcome of a comparative law analysis carried out by a pool of international experts of the field, under the aegis of two Academic Institutions, *i.e.* the Ivane Javakhishvili Tbilisi State University and the Second University of Naples.

¹¹The guide will specifically focus on and provide a detailed description of the domains which are of primary importance to entrepreneurs, such as corporate law, taxation, method of dispute resolution, and so on.

Abbreviations

AAA	The American Arbitration Association
ADR	Alternative Dispute Resolutions
AktG	German Stock Corporation Act
AMC	Asset Management Companies
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	German Supreme Court
BIT	Bilateral Investment Treaties
BO	Office of Business Ombudsman of Georgia
CAM	Camera Arbitrale di Milano (Chamber of Arbitration of Milan)
CIS	Commonwealth of Independent States
CISG	United Nations Convention on Contracts for the International Sale of Goods
CIT	Corporate Income Tax
CPC	Codice di Procedura Civile (Code of Civil Procedure)
DCFTA	Deep and Comprehensive Free Trade Area
DTT	Double Taxation Treaty

EF	Equity Funds
EU	European Union
FIZ	Free Industrial Zone Enterprise
GAL	Georgian Arbitration Law
GATS	General Agreement on Trade in Services
GCCI	Georgian Chamber of Commerce & Industry
GEL	Georgian Lari
GmbHG	Gesellschaft mit beschränkter Haftung (German term for limited liability company)
GoG	Government of Georgia
GSP	Generalized System of Preferences
GUAM	Organization for Democracy and Economic Development
IBA	International Bar Association
ICAA	International Commercial Arbitration Act
ICC	Chamber of Commerce
ICSID	International Center of Settlement of Investment Disputes
IE	Individual Enterprise
IFRS	International Financial Reporting Standards
ILO	International Labour Organization
INTA	International Trademark Association
IOC	International Olympic Committee

IP	Intellectual Property
ISA	International Standards of Auditing
ISTAT	Italian Institute of Statistics
JILEP	Judicial Independence and Legal Empowerment Project
JLC	Joint Liability Company
JSC	Joint Stock Company
LCIA	London Court of International Arbitration
LEPL	Legal Entity of Public Law
LGCB	Law of Georgia on Commercial Banking Activities
LGE	Law of Georgia on Entrepreneurs
LGPIIL	Law of Georgia on Private International Law
LIF	Law on Investment Funds
LLC	Limited Liability Company
LLP	Limited Liability Partnership
MF	Mutual Funds
MFN	Most Favoured Nation
MFO	Micro-finance Organization
ML	Model Law
NAPR	National Agency of Public Registry
NBE	National Bureau of Enforcement
NBG	National Bank of Georgia

NYC	New York Convention
OECD	Organization for Economic Cooperation and Development
PE	Permanent Establishment
PEF	Private Equity Funds
QIF	Qualifying Investors Fund
RB	Branch Office
SCC	Stockholm Chamber of Commerce
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
USSR	<i>The Union of Soviet Socialist Republics</i>
VAT	Value Added Tax
VCF	Venture Capital Fund
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

INDEX

- ◆ **Globalization and Investments: In Search of
New Boundaries**
(C. M. Simeone)

- ◆ **Georgia Investment Law Overview**
(J. Gvelebiani & A. Borroni)

- ◆ **Georgian Arbitration**
(A. Borroni)

GLOBALIZATION AND INVESTMENTS: IN SEARCH OF NEW BOUNDARIES

Camilla Maria Simeone

Summary: 1. The Globalization. Tailoring the Issue
2. The Globalization of Legal Rules

1. The Globalization. Tailoring the Issue

The “globalization”¹ is a social, economic, legal and financial process which combines various flows of assets, service, capital, people, technology and ideas beyond national borders.²

As a multifaceted phenomenon, the globalization³ aims at fostering the interconnection among States, and, to some extent,

¹ The Mongolian Empire embodies one of the first examples of globalization, as, along with the creation of a shared imperial culture, the development of commercial policies based on the exchange of goods among operators/agents located in different areas was also fostered. From another geographical view point, the globalized aspect of the Roman Empire dates back to the 2nd century A.C., when the Empire enlarged up to include the Mediterranean basin as well as huge areas of Europe. Within its borders, the Romans developed a global market which embraced most of the world known at the time and which was made possible above all by the connections guaranteed by the dense network of roads and streets. Like today’s more and more accelerated communication technology, the road building technology enabled the communication and trading activities within the Empire’s borders. Nowadays, thanks to technology it is possible to connect distant markets and operators/agents in a much easier, efficient and faster manner.

² For an accurate definition of the concept of globalization, see D. ZOLO, *LA GLOBALIZZAZIONE. UNA MAPPA DEI PROBLEMI*, (Rome - Bari, 2006), at 3, the author maintains that: “*the term globalization refers to a ‘global’ expansion process of the social relations among human beings so as to include the territorial and demographic space of the entire planet.*”

³ See G. A, BENACCHIO, *A COMMON LAW FOR EUROPE*, Padua, 2005 and G. A, BENACCHIO, *DIRITTO PRIVATO DELLA COMUNITÀ EUROPEA*, Padua, (3rd ed. 2004).

It is worth mentioning here the concepts of harmonization, uniformity and standardization of law. The term harmonization defines a process of national legislation rapprochement, in which the Countries once involved, will tend to base their legislation and interpretation on common standards. The most typical example of this process is represented by the EU directives and legislations, in which each State will apply legal rules that, though they may vary from the basic model, they will not substantially alter it.

among people. Given the greater accessibility of knowledge, the standardization of economic behaviours, the circulation of legal models and the gradual adaptation to common attitudes, the States currently act as if they were a huge single city.⁴

The uniformity of law is achieved when a single supranational legislative body issues legal rules, whose application (and , consequently, their interpretation) however is carried out by the judicial bodies of each State. This phenomenon involves also the case of the States accessing to a Convention (such as, for instance, the CISG), which produces uniform rules for all signatory States, whose application, however, depends on each State (that will decide on the basis of its judicial system and the application of the right to reservation upon ratification). Finally, the standardization of legal rules does not simply occur by the issue of a legal rule by a single legislative body which has been granted legal jurisdiction by the States, but it is also necessary that a judicial activity carried out by a single apparatus of judicial offices takes place, so as to guarantee a univocal interpretation and application of the rule itself.

⁴ Since its beginning, the globalization has clearly pursued the trend towards global uniformity of the economic, judicial and cultural fields. Such evident tendency has been properly explained by P. DIACONU, *Impact of Globalization on International Accounting Harmonization* (January 18, 2007). Available at SSRN: <http://ssrn.com/abstract=958478> or <http://dx.doi.org/10.2139/ssrn.958478>. (Last visited September 8, 2012). The author affirms that: “*globalization is a historical process, which has been created as a need of improving the resource allocation and to develop bigger markets for the global economy. Ideas about going global we found in Adam Smith and David Ricardo opera, going through Marx vision about the phenomena until our ages. We can consider it as one of the biggest social processes which the humanity has facing since ever. That's why it's impact in the global economy is huge and the accounting sector which is playing a vital role in the information process of the society is very important. That's why one of the main international accounting processes on the actual period is the harmonization of the national accounting systems. The harmonization process is influenced by several factors like culture, politics, economy and also sociological behaviors.*”

The idea of a supranational *polis* arises also on the basis of simple empirical observations. Just to mention few examples, the gradual decrease of customs duties and barriers between States as well as the famous statement - which has then become a common saying - that finance never sleeps, regardless of time zones.

The globalization has involved diverse aspects which have contributed to tear down the statutory barriers giving rise to a complex phenomenon of *debordening* and *rebordening*.⁵All the more

⁵ The BoRDERS project examines the significant change in both the nature of territorial borders and the understanding of the concept of “the border” as a result of globalization and, in a European context, the process of European integration. These processes have greatly increased actual and perceived mobility of people, ideas, goods, capital, and services, so that the flows and interactions that delimit the boundaries of social, political, economic and cultural space have, in effect, been de-bordered. In connection with these de-bordering processes, the adequacy of established structures and frames of references for setting the limits of society – most prominently the structures of the nation state – have been called into question, and many observers even perceive signs of their dissolution. Individuals and societies have to adapt to these de-bordering processes and seek alternative means of structuring interactions and flows. Such re-bordering process leads to the development of new forms of borders, both functional and symbolic as well as territorial, which aim at providing at least certain degree of stability, owing to the fact that traditional patterns of difference and membership are modified or become outdated. Individuals, who experience this qualitative change in the nature of borders either react to it or emerge as agents in de- and re-bordering processes. In such a context two dimensions of socio-economic and cultural integration deserve closer attention - migration across borders and trans-border socio-economic relationships. Along with accepted forms of labour migration, an expanded definition of migration will be used, including short term and transient mobility, an essential feature of contemporary societies. The dissolution of administrative borders is not usually followed by a similar dissipation of existing cognitive and symbolic borders. Therefore, the focus in this research strand lies on the investigation of the re-bordering processes that are initiated by territory de-bordering: namely, the development of new forms of community and membership in case of transient mobility as well as the construction of exclusionary narratives of belonging within the receiving communities, and the interconnection between the dissolution and tightening of internal and external borders. This study will determine the effects such de- and re-bordering processes have on the goals pursued by the policies of ever closer integration within the European Union. The impact will be to show how the depth of European integration can be fostered through the understanding of cognitive re-bordering in mobile societies.

the globalization process advances, the barriers and borders among States shrink and change, becoming permeable.⁶

Such situation has been quickly acknowledged by those jurists who have translated it into a legal framework suitable for the changes in the socio-economic needs. The European legislator has been easily created his own legal entity through the four fundamental freedoms, which represent, to different extent, the typical freedoms of a globalized world: free movement of people, goods and services, capital and the freedom of establishment. Today these freedoms are regarded as an obvious consequence arising directly from a border-free area shared by all European citizens (regardless of their nationality), however, when they were first introduced, they represented a revolutionary approach in a world which was still scarred by the post-war period.

2. The Globalization of Legal Rules⁷

Given the aforementioned factual elements, on a supranational level, the current globalization of legal rules involves, above all, the

⁶ Such as, for instance, the benefits which have resulted from the harmonization of both the legal and communication structures within the logistics field (it is crystal-clear that moving from one place to another has increased both in terms of speed and easiness) and from the technology (e.g. the enhanced speed of data transmission). See, G. PASCUZZI, *IL DIRITTO DELL'ERA DIGITALE*, (Bologna, 2010) and G. PASCUZZI, *IL DIRITTO DELL'ERA DIGITALE. TECNOLOGIE INFORMATICHE E REGOLE PRIVATISTICHE*, (Bologna, 2006).

⁷ M. BUSSANI, *IL DIRITTO DELL'OCCIDENTE*, Turin, 2010.

international trade and the investment law fields. Such observation is important for, at least, two reasons:

a) as stated above, legal solutions belonging to different legal systems can be much easily afforded; although it is clear that, owing to the different relations among the parties to a bargaining, some domestic laws recur more often than others;

b) due to the growing exchange of legal rules, a natural increase in the process aimed at standardizing them, at least on a supranational level⁸, has occurred so as to reduce as much as

⁸ The desire of achieving the uniformity of law represents one of the natural functions of comparative law and its methods. The notion of uniformity of law has been formulated to express, according to Zweigert and Kötz, “*a politics of law program*”, aimed at softening and smoothing the differences among the various global legal systems. And this goal is pursued by formulating transnational common principles. The main function of law uniformity is to “*favour the International circulation of law*”, reducing, in so doing, the related risks, above all, in terms of certainty and predictability of the law. R. David affirms, in his article focused on the “International Encyclopedia of Comparative Law” that the creation of a universal “*ius commune*” represents an adequate procedure to manage the international relations. The author mentions the example of socialist Countries, which following the development of their economy and the creation of a planned economy, could no longer rely upon an internal commercial law to manage the external business relations. Owing to such change, some Countries, like Czechoslovakia adopted a new international trade code to which they resorted in case of commercial transactions implying the national law. Moreover, further examples in this regard are the so called “*Restatements of the Law*” which point at the harmonization of the United States Common Law. Along with the specific International Conventions ratified by the States in order to achieve the uniformity of supranational commercial law, jurists may rely upon a corpus of uniform rules in case of contracts’ stipulation. There are several examples of uniform “private” rules, such as Inconterms and the UNIDROIT principles of international commercial contracts, which attempt to provide for the lack of uniform rules on the general regulation of contracts. The research carried out by a

possible the contingences and the issues connected to the international contract field.⁹

As a result, legal provisions belonging to third States are frequently adopted by other legal systems by virtue of legal transplants.

It follows that the bond between legal rules and the community within which such rules are produced tends to decrease in the light of the process of legal models circulation and its subsequent evolution.

The issue of legal transplants, which was first addressed by the Scottish and Roman Law expert Alan Watson¹⁰, lies currently at the

pool of representatives of different legal and socio-economic systems aims, in the first place, at revealing those rules which are shared by many systems as well as identifying solutions which could better suit the logics underlying the international trade than the provisions of the single States.

⁹ A. BORRONI, *Neo contractualism and comparative law*, in O. MORETEAU, J. ROMANACH, A. L. ZUPPI (Eds.), *ESSAYS IN HONOR OF SAUL LITVINOFF*, Baton Rouge, (2008), at 431-466. The **international dimension** creates further elements of complexity: **language**, jurisdiction, applicable law, knowledge of a foreign legal system, etc. The ongoing internationalization of contract law, the acceptance of generally recognized contract principles, the adoption of international conventions, and the **growth of international customary law** has led to the convergence of national legal systems in the area of international contract law. In the long-term, this movement towards international unification and harmonization is likely to reduce transaction costs relating to contract formation. In the short-term, however, it further complicates an already complex international legal regime. The legal crowding produced by the globalization means the coexistence of old and new sources of law and different juridical players.

¹⁰The concept of “legal transplant” was formulated by A.P. Watson in *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, (1974). See also A.P.

core of a passionate debate, owing to the increasing necessity to understand the nature of the circulation of legal rules and institutions from a (original) social context to another, which is located beyond national borders. Hence, legal transplants are forms of partial reception of one or more parts of the “law” or of a legal institution belonging to a third State by different legal systems, and represent, in turn, the expression of the so-called “circulation of legal models”.

This circulation of legal rules has given rise to a set of supranational common rules as regards two fields particularly intertwined: the international trade law and the investment law.

So, throughout the contemporary age, the aforementioned trend has undergone two distinct development stages: the first concerned the essential requirements for the globalization process, whereas, the second dealt with the international contract law and the compliance with the supranational agreements stipulated among private individuals.

In the first place, as above stated, the first phase of the globalization of law has tackled the market deficiencies regarding safety in terms of circulation of legal rules and institutions. This first phase took place between the 19th and the 20th century, when

WATSON, SOCIETY AND LEGAL CHANGE, 1978; A.P. WATSON, *Comparative Law and Legal Change*, Cambridge L.J., at 313 and A.P. WATSON, THE EVOLUTION OF LAW, 1985.

the great Conventions on intellectual property¹¹, transports¹² and credit instruments¹³ were initialised.

¹¹ The Paris Convention on intellectual property and on industrial property of 20 March 1883 was initialized in order to protect the creations of the mind and to enhance the degree of commercial safety in relation to the circulation of knowledge and technological discoveries, in compliance with the requirements of an ever more globalized market.

In the first place, the Convention has introduced the so-called 'reciprocity principle'.

In particular, art. 2 thereof sets that:

(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

In so doing, the citizens of the Union were granted, according to a transnational approach, all rights arising from the intellectual property.

¹² The efficient development of commercial activities requires uniform legal rules, especially, in the field of international transport. The international Conventions aim at harmonizing the set of existing legal rules regulating the transport field, which, in turn, is a sector characterized by a strong inherent fragmentation, due to the availability of different means of transport. In fact, the latter are far from being considered mere means of transport which could favour the transfer of goods, as they have permitted the creation and expansion of a dense net of relations among different commercial partners belonging to various Countries, fostering, in so doing, the free circulation of goods, service and capital. Such globalization process brings about a new conception of the space, which is conceived a single unit made up of minimal distances which can be easily overcome. The International dimension reached by logistics and transport means has led to the birth of the Geneva Convention of 1956 on the contract for the International carriage of goods by road, coupled with the Convention on the International Railway Transport of May 1980.

¹³ A supranational harmonization could not but involve negotiable instruments, which represent the joining link between the early documents used during the

The process of circulation and harmonization of credit instruments and their relevant financial intermediaries has brought forth the notion of the so-called ‘financial market’ – an expression that ought to be interpreted according to its wider meaning – which represents the combination of all (legal, operating, technical, physical) structures through which financial activities are traded. However, in everyday language this term has acquired a more delimited meaning. In fact, it refers only to the exchange of standardized financial activities that can be readily “movable” through ‘market transfer’, namely through the sale to unknown purchasers: according to this sense, the expression ‘financial market’ can be used as a synonym of ‘real estate market’. A financial market

international fairs in the Middle Ages and the modern instruments of today’s financial engineering.

The international regulation of such tools, which had been created to enhance the safety degree of trading, started before World War I, when supranational agreements applied a worldwide uniform system, dating back to the Hague Convention of 1912, of negotiable instruments.

Following the Hague Convention, other Conventions were initialised, namely the Geneva Convention of 1930 on the unification of the law relating to bills of exchange and promissory notes, the Convention for the settlement of certain conflicts of laws in connection with bills of exchange and promissory notes and the Convention on the stamp laws in connection with bills of exchange and promissory notes.

Since the three Conventions came into force, they pursued the creation of a uniform international regulation so as to prevent any adjustment on the national legislators’ part. The system established in Geneva aimed at overcoming the negative consequences arising from the uncertainty in relation to the applicable law and the conflict among the rules of different legal systems. Such Conventions have been ratified by so many States that it is possible to affirm that today a global uniform regulation in this regard exists.

so defined typically includes stock and bond markets, but it does not comprise those markets entailing bank or insurance products, such as, respectively, deposit bank accounts which allow depositors to withdraw their money in the short-term, or insurance policies which, though possessing standardized characteristics, are not “movable” on demand.

Whereas, by focusing more on concrete investments, the growing liberalization of the factors of production has given rise to a competition among the various legal systems (from which it derives the phenomenon that the doctrine defines as *regulatory competition*, or, in other words, the well-known expression of *forum shopping*). Such phenomenon depends on the economic operators’ perception of the benefits they could enjoy in terms of, for instance, institutional stability, certainty of law, law observance, quality and degree of regulation, administrative and judicial efficiency, fiscal benefits, cost and quality of work and other necessary factors of production which are required in order to undertake any economic activity.

The creation of a dense net of international relations aiming, in line with a global perspective, at overcoming national and territorial boundaries has led to a process of “delocalization” and “re-localization” of resources, which has taken place outside the original territory and has implied the transfer abroad of one or all phases of the manufacturing process.

At the time, three major Conventions were initialised, i.e. the New York Convention on the recognition of foreign arbitral awards¹⁴, the Washington Convention of 1965 on abroad investment¹⁵ and the Vienna Convention of 1980 on the sale of

¹⁴ The growth of new trading activities related to globalization has equally increased the risk of commercial disputes among different States. In order to settle international commercial disputes, the parties frequently resort to arbitration as it is considered a valid alternative to a national jurisdiction. As foreign investments increased, so did this practice, for it represents a perfect compromise between impartiality and participation in case of disputes between hosting and investor States. The hosting and the investor States confront each other during the international arbitration proceedings. In the past, the applicable law was determined by national laws, afterwards, the globalization has allowed to go beyond those territorial barriers and to look for similar principles among different legal systems.

The New York Convention on the recognition and enforcement of foreign arbitral awards was adopted in 1958 and came into force the following year, in June 1959, and up to today has been ratified by 143 States. This Convention has highly favoured the recognition of those foreign arbitral awards rendered within the boundaries of other signatory States. The development of an expedited recognition procedure of foreign arbitral awards has substantially decreased the risk connected to the refusal of their recognition by legal systems other than those in which the award had been rendered. Further on, the signatory States are forbidden to apply to the recognition and enforcement of foreign awards more onerous conditions than those applied to national ones.

¹⁵ The first formalized attempt to give rise to a uniform regulation in the investment field dates back to 1964, when the United Nations in charge of encouraging the trading, investment and development activities, by fostering the cooperation among the various commercial agents. The spiraling growth of foreign investments and the subsequent need to protect the new participants in the international trade from any disputes with foreign Countries have led the World Bank to establish a system of agreements which governs the protection of private investors abroad. As the economic globalization increases, the number of *international / transnational litigations* grows as well, and a uniform judicial protection has become unavoidable.

In this regard, the Washington Convention of 1965 laid down the relevant judicial framework. In fact, the Convention establishes the ICSID (International Centre

movable properties, which represents the most important Convention in terms of uniformity of law.¹⁶

Such changes have clearly revealed the inappropriateness of an institutional system based on a mass of distinct legal systems which do not communicate among themselves, along with the necessity to establish a new legal order that, starting from the previous one,

For Settlement of Investment Disputes), an international institution belonging to the World Bank Group, as the body in charge of settling international investment disputes. In addition, the Convention sets forth the ICSID's mandate and defines which disputes can be resolved under its jurisdiction as well as the eligible instruments to settle them. The system which has emerged from the ICSID's implementation has deeply changed the method of international dispute resolution. It has replaced the typical recourse to diplomatic protection and has provided for an active participation of the field operators (both enterprises and individuals) within a supranational context, whose participation was previously constrained as they were not regarded as subjects of international law but mere beneficiaries of such rules.

¹⁶ Further on, the Vienna Convention of 1980 on Contracts for the international sale of movable goods, was adopted by the United Nations in order to regulate the sale of goods among parties located in different States, which are both geographically distant and belong to different legal traditions. The main goal pursued by this Convention was to provide for a valid tool to adequately meet the requirements of the international sale of goods. The Vienna Convention's provisions include international private law rules, which make the Convention self-executing within national legislations and consequently avoid the need for procedure of national adaptation .

The second fundamental objective of this Convention was to reduce the legal uncertainty jeopardizing the international trade among different legal systems. This point highlights also the importance of the contract as the fundamental tool of the trade society: for financial products grow owing to the existence of single legal rules.

It has been proved that within a globalised community the communication – well before the negotiation – occurs on the basis of uniform conditions, and this results in the disuse of both legal peculiarities and the supremacy of one's own national law.

could favour the interchange among those different systems as well as the cohesion within the international organizations which represent them. The effects arising from either economic and financial or political and cultural events that occur in a specific geographical area spread subsequently throughout other territories, and acquire, in so doing, an even more global dimension.¹⁷

Even if no unity of purposes, values and principles neither on a global nor on a regional scale can be possibly reached, the globalization process carries on in any case.

The legal tool which enables to achieve such results is represented by the Bilateral Investment Treaties (BIT) that aim at safeguarding the foreign investments made in the territory of a third State.¹⁸

¹⁷ In order to manage this phenomenon, it is necessary and unavoidable to implement a *rule based system* which would deeply regulate the international economic and political relations through an efficient, certain and transparent legal framework. Moreover, in order to take advantage of the benefits arising from the globalization, the essential characteristics of the rule of law should apply not only on an international level, but also within the single States, so that to reshape the structure national legal systems on their basis.

¹⁸ F. COSTAMAGNA, *Promozione e Protezione degli Investimenti Esteri nel Diritto Internazionale*, in A. COMBA (ed.), *NEOLIBERISMO INTERNAZIONALE E GLOBAL ECONOMIC GOVERNANCE, SVILUPPI ISTITUZIONALI E NUOVI STRUMENTI*, (2004), at 250. The author recalls that the historical forerunner of this type of instrument was represented by the so-called “*friendship, commerce and navigation treaties*” signed by the United States by the end of the 18th century.

The first BIT was signed by Germany and Pakistan in 1959, thereafter these treaties spiraling grew by the end of the 1990s.¹⁹

On the one hand, BITs have connected States, as (owing also to their own nature) they have created a path for development between industrialized investor States and developing Countries²⁰. And, on the other hand, they have given rise to a standardized model which could apply to all investment relations among States, along with the international Conventions of the same field. The latter have in turn been influenced by the BITs' content, namely such treaties have urged the creation, *rectius* the introduction in the Conventions' text of provisions belonging to the worldwide practice of such field.

Further on, when a contracting State signs a BIT, the latter guarantees the investor's protection through a system of substantive rules (such as, for instance, the Most Favoured Nation clause) as well as procedural ones (e.g. the ICSID arbitration).²¹

¹⁹*Id.*

²⁰ M. POTESTÀ, *Il Consenso all'arbitrato ICSID contenuto in una legge nazionale dello Stato ospite all'investimento*, in *Dir. comm. Internaz.*, 2010, at 375. The author states that, in order to attract foreign capitals, the developing States have often adopted national legislations (usually labeling them as «law on foreign investments» or «investment code») so that to guarantee protection and treatment standards to foreign investors.

²¹ The ICSID arbitration, as set forth by art. 25 of the Washington Convention of March 1965 that has introduced it for the first time, applies to all disputes arising directly out of an investment between a contracting State and a national of another contracting State. The Convention establishes three necessary requirements to resort to arbitration: 1) the dispute shall concern an investment; 2) the parties of the dispute shall be a contracting State and a party belonging to

In other words, in order to meet the common requirements of the global market operators, the BITs provide for a predetermined and generally uniform regulation of certain issues concerning the application field, the transfer of capital, the protection of technology and the profits taxation, the regulation of expropriations as well as nationalizations that occur in accordance with the models of certain supranational organizations (which tend to mutually influence each other).²²

another contracting State; c) the agreement shall expressly provide the ICSID's jurisdiction in case of dispute. As regards the first requirement, the Convention does not include a definition of 'investment'; however, this deficiency has not been much debated. Regarding the second requirements, paragraph 2 of art. 25 of the Convention sets forth that the notion of "National of another Contracting State" includes, along with any natural or juridical persons who have a nationality of a Contracting State other than the State involved in the dispute, the juridical person of the hosting State if the parties have agreed that such juridical person should have the nationality of another contracting State. Finally, in relation to the third requirement, the parties must express in their agreement their will to submit their possible disputes to the ICSID's jurisdiction. For a comprehensive analysis of this issue, see F. BORTOLOTTI, *Diritto dei contratti internazionali*, MANUALE DI DIRITTO COMMERCIALE INTERNAZIONALE, (Padua, 1997), at 370 ff.

²² See M. POTESTÀ, *supra* note 21, at 376. According to Potestà, a domestic legislation on foreign investments pursues the same goal of an investment treaty, namely they both aim at fostering the investments of foreign enterprises in the hosting State as well as at reducing the former's hesitations regarding the instability and unpredictability of the legal frame work which could affect their investments. Similar to BITs, domestic legislations on foreign investments (i) set certain definitions («investment», «investor», etc.); (ii) deal with protection and treatment standards (the hosting States tend to grant investors a *fair and equitable treatment*; the so-called most favoured nation treatment, the protection against domestic arbitrary and discriminatory measures as well as against nationalizations and expropriations, along with the right to freely export their capitals); (iii) finally, their final section usually comprise provisions concerning dispute resolutions

It is, therefore, apparent that the existence of a BIT between an investor State and a hosting State represents (along with the treaties against double taxation) a particularly favourable condition in order to evaluate whether or not to invest in a foreign State. Although nowadays locating investments in a State geographically distant from the one where a company is settled represents a common practice, the search for the conditions leading to such decision acquires great importance to the lifecycle of a company, which shall be prepared to face an internationalization phase in a coherent and effective manner.²³

between the hosting State and the foreign investor, and generally refer to the international arbitration.

²³ In this regard, the prospective investor could draw up a prearranged *check list* of data that should be verified before undertaking any investment abroad. For instance, he should check whether or not the hosting State has ratified the aforementioned major Conventions, has signed any BITs or DDT, if it possesses an adequate company law, if it is deemed an “*arbitration friendly*” Country and he should be granted the possibility to rely upon a pool of professionals operating in the territory of the hosting State, but, to some extent, linked to his own State.

GEORGIA INVESTMENT LAW

Jaba Gvelebiani & Andrea Borroni

CHAPTER I.
GENERAL OVERVIEW OF GEORGIAN LEGAL
SYSTEM

Andrea Borroni

Summary: **1.** Georgian law – historical and doctrinal outlook. **2.** Key legal concepts applicable to Georgian corporations. **3.** Overview of the legal framework for entrepreneurial activities in Georgia. **4.** The legal framework for financial services **4.1.** Commercial and investment banking. **4.2.** Micro-finance organizations. **4.3** Insurance companies. **5.** Intellectual Property Protection Mechanisms. **5.1.** International conventions in force in Georgia. **5.2.** Overview of domestic IP law framework. **a.** Patents. **b.** Copyright. **c.** Trademarks. **5.3.** IP enforcement. **6.** Dispute Resolution Environment in Georgia. **6.1.** Overview of Georgian court system **6.2.** International cooperation in enforcement of court judgments.

1. Georgian Law – Historical And Doctrinal Overview

Georgia is a Transcaucasian State, bounded by the borders of the Russian Federation to the North, Armenia and Turkey to the South, Azerbaijan to the East, and the Black Sea to the West.

The territory of the Country ranges from highlands to flat regions which are located between the mountain ranges in the North and in the South. Thanks to the specific geological conformation of the area, Georgia is rich in underground waters and mineral resources (such as, oil, coal, copper, talc, marble, *etc.*).

The administrative-territorial units in which the Georgian territory is divided are: Ajara, Samegrelo-Zemo Svaneti, Guria, Samtskhe-Javakheti, Racha-Lechkhumi-Kvemo Svaneti, Kakheti, Kvemo Kartli, Shida Kartli, Mtskheta-Mtianeti and Imereti (except for the two breakaway regions of South Ossetia and Abkhazia).

Georgia's statehood has very ancient origins and its territories hosted powerful monarchies even before Christ. The region was already known to Greeks and Romans and in the 4th century A.D. the peoples inhabiting those areas adopted Christianity as a consequence of the influence of Byzantium.

Close connections with the European civilizations emerged in the *Bagrat Kurapalati Law Book*, issued under the reign of Bagrat III (978-1014), setting rules for the appointment of judges and the

principles of fair and just judgments.¹ Georgian law further developed in the 13th century when enhanced notions of ownership, credit ventures and fault were introduced.² In the 14th century King Giorgi V promulgated the rules outlining the various forms of criminal liability required for certain specific types of crimes.³

Whereas, the organizational arrangement of the State of Georgia, powers of monarchs and governmental bodies have always been regulated in various acts.⁴ One of the most advanced statute enacted during the first period of Georgian independence is the Vakhtang's Law Collection dating back to the 18th century.⁵

The period between the 10th and 13th century is generally regarded as the 'Golden Era' of Georgia, for notwithstanding the several foreign invasions (e.g., the Arabs, the Turks, the Persians and the Mongolians) the Country managed to remain united and Georgian people developed a spirit of national unity and self-awareness as an independent State that would be preserved throughout the centuries of Russian domination.

The constant evolution of Georgian law was halted, in fact, by the Russian occupation of the Country in 1801 (until 1918). During

¹ I. DOLIDZE, *Bagrat Kurapalati Law in GEORGIAN LEGAL HISTORY, CHRESTOMATHY*, 1ST ED., GEORGIA UNIVERSITY PUBLISHING (2011), at 23.

² I. SURGULADZE, *Kbelmtsipsis Karis Garigeba in GEORGIAN LEGAL HISTORY, CHRESTOMATHY*, 1ST ED., GEORGIA UNIVERSITY PUBLISHING (2011), at 32.

³ *Id.*, at 39.

⁴ *Id.*

⁵ *Id.*, at 45.

that period, Georgia's sovereignty and law-making power were limited while its legal system was strongly affected by the statutes promulgated by the Russian Empire. In 1918 Georgia gained a historical independence and experienced its first democratic republic, which, however, lasted only three years for in 1921, only three days after the adoption of the first Georgian constitution, the Country was once again occupied by the Soviet Union. The first Georgian constitution could not actually prove the actual feasibility of its arrangements; nevertheless, modern constitutional scholarship widely acknowledge the viability of the democratic model of governance and State system contemplated under it.

After Russian occupation in 1921 Georgia became part of the Soviet Union political, legal and economic system. In 1991 Georgia declared its independence and started sovereign legislative activities. Georgia's second Constitution entered into force on 24 August, 1995, establishing the democratic republic of Georgia characterized by a strong presidential centralized system. In 2004, the presidential character of the Georgian Republic was further increased since the State's parliament passed the first of a number of constitutional amendments which were aimed at changing the Country's system of powers, strengthening those of the President while diminishing those of both the Parliament and the judiciary. In ensuing years, several other amendments were passed concerning the various

branches of the government and their mutual relations; all of them have had a serious impact on the Georgian legal system until the 2010 reform which finally restricted the powers of the President, favouring instead the Parliament and the Prime Minister.

In general, Georgia represents a traditional continental European legal system. Like in Germany, France and Italy, the State acts as a law maker, setting rules and standards via legislative acts adopted by the Parliament or other governmental bodies in compliance with the principle of *statutory supremacy*.⁶ Following the separation of powers

⁶ The concept of statutory supremacy represents a basic distinctive feature of continental European or civil law system. The principle is found in Article 20.3 of Germany's Supreme Law declaring that executive and judicial bodies are bound by law enacted by the legislator [D. P. CURRIE, *Republication - Separation of Powers in the Federal Republic of Germany - Part I-IV*, 9 German Law Journal 2113-2178 (2008), at 2122-23]. The same constitutional arrangement is established for Italian judges bound to follow the law only under Article 101 of the Constitution [M. GARVEY ALGERO, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 La. L. Rev. (2005), at 790]. Competence to create a persuasive interpretative law is saved for French judges as well having no authority to create the law itself [*Id.*, at 789]. Though traditional civil law Countries have long recognized the power of judiciary to fill the legislative gaps for the sake of constitutional order, the idea of statutory supremacy is still a common feature of said legal family [*ex* Princess Soraya case, where Supreme Court of Germany acknowledged a power of German courts to cure legislative failures for safeguarding "the constitutional legal order as a whole" in D. P. CURRIE, *supra*, at 2124]. As to Georgia, Article 21 of its Civil Code sets that "the Civil Code, other acts of private law and their interpretation, shall conform to the Constitution of Georgia"; this provision simply means that the Constitution of Georgia represents the basic law of the State and, as such, it is at the top in the hierarchy of legal norms. Right after the Constitution there are international treaties, ensued by laws (specifically, organic laws followed by ordinary laws). Finally, at the bottom of the hierarchy, there are sub-legislative normative acts which have a general character and, therefore, are applicable to a

enshrined in the Constitution, judiciary is not empowered to decide the law. Contrariwise, courts apply the law as established by legislative authorities and are not allowed to act beyond the pre-determined legislative frames. Furthermore, as opposed to England and the US, court judgments in Georgia do not give rise to binding precedents. Though the practice of the Supreme Court is influential, said court acts as a persuasive authority to lower courts' interpretation of the law⁷.

In 1997, shortly after the adoption of the new Constitution, Georgia's Civil Code was enacted. The drafting of the Code drew strongly on German BGB. Major civil law legal institutions, such as the contract's formation and validity, the capacity of the parties, the law of obligations and the tort law were reshaped on the basis of the German model. Moreover, the tie between the German and

number of social relations and several different groups of persons (hence, they are adopted to regulate private law matters). As a consequence, such acts are admissible only if they complement the aforementioned legal sources and do not contravene the law. Cf. Cf. I. ALADASHVILI, GUIDE TO GEORGIAN LEGAL RESEARCH, Hauser Global Law School Program, New York University School of Law, (2005), (updated version by A.V. Dolidze, 2010), *available at* <http://www.nyulawglobal.org/globalex/Georgia1.htm>.

⁷ The US and the UK, being common law legal systems, feature the principle of *stare decisis* requiring courts to adhere to the previous judgments in case of subsequent disputes pertaining to the same factual circumstances [F. SCHAUER, *Has Precedent Ever Really Mattered In The Supreme Court?*, 24 Georgia State University Law Review 381, (2007), at 386]. Unlike these countries, under Georgian law there is no statutory requirement to apply the same holdings to the cases with similar facts. Nevertheless, the obligation to ensure a uniform application of the law, being inherent to the judicial system, still results in due deference to authoritative interpretative decisions.

Georgian Civil Codes are so evident that Georgian legal scholarship often resorts to the BGB for the interpretation of vague provisions in the Country's Civil Code. The decision to draw on the German system was strongly determined by the close academic link between the two Countries, for a significant number of Georgian legal scholars have German academic background. As a result, the Country's private legal system can be regarded as primarily grounded on German law.⁸

Georgian private law is centered on the Civil Code, which is the major act providing legal framework for civil transactions throughout the country. The Code consists mainly of directory norms giving priority to the parties' agreement having capacity to deviate from the codified rules of conduct. The Civil Code strongly influences the corporate life of Georgian companies as well. Being a sole act determining both the legal personality and the general rules for non-commercial and commercial activities, the Code (along with the Law of Georgia on Entrepreneurs (*hereinafter* LGE)) sets the legal environment for Georgian corporations.⁹

⁸ In order to identify the close connection between the Georgian and German Civil Codes, we may examine these documents' structure. The Codes start with a general part including regulations on natural and legal persons, capacity to contract, validity of transactions, statute of limitation, etc.; the following part includes the law of obligation with rules on contract formation, performance and breach; then the codes provide for the regulation of specific fields of private law, such as property law, family law, lease, service, sale, tort etc.

⁹ Law of Georgia on Entrepreneurs, dated October 28, 1994.

2. Key Legal Concepts Applicable To Georgian Corporations

The Georgian legal system aims at providing a corporate environment fit for an easy and quick admission of new businesses from all over the world. Understanding the need to ease business activities in Georgia, Government has focused on the liberalization of corporate law by establishing minimum standards of protection for third parties dealing with legal entities. Consequently, Georgian corporate law envisions a two-fold corporate life for enterprises. On the one hand, corporations are subject to essential publicity requirements such as mandatory registration in the NAPR, binding nature of online available data in dealings with third parties etc. On the other hand, shareholders enjoy contractual freedom to arrange internal corporate structure in a way completely different from the outward corporate face. Such freedom enables shareholders to bind each other with the undertakings, corporate arrangements and schemes of liability distribution without altering publicly available data on conventional corporate life.¹⁰

¹⁰ Article 3.4¹ of the Law of Georgia on Entrepreneurs introduces the possibility for Georgian corporations to have two distinct documents (i) articles of incorporation (charter) or (ii) shareholders agreement. Charter is itself divided into two parts – document including registration data (shareholders names, company name, share distribution, legal address etc.) and document regulating corporate relationships between the founders. While the first part of charter is

As already mentioned above, Georgian corporations are subject to minimum publicity requirements for the purposes of protection of third parties. The first main feature of Georgian corporate law relates to the moment of acquisition of legal personality, which is the moment in which legal entities appear in the publicly accessible database of NAPR.¹¹ According to a long-standing principle of Georgian company law, **corporations acquire legal personality only upon registration** with the National Agency of Public Registry (NAPR), which has a constituent effect for the

subject to registration with the NAPR, the other part may not be available for public based on the decision of founders. Consequently, founders are free to select what additional information they want the public to have access in except for registration data. Moreover, the shareholders are allowed to execute shareholders' agreement, which is not subject to registration or submission to the NAPR. Shareholders' agreement is a contract between the founders determining rules of corporate life binding the shareholders only. It is general practice to conclude such agreements on matters of profit distribution, financing obligations, stock options, distribution of intellectual property, know-how etc. The freedom enables founders to bind each other with the liability regime different from the publicly available corporate shield. The agreements are enforceable upon the signatories and serve as a mechanism for corporate arrangements that fits the particular circumstances best.

¹¹ National Agency of Public Registry is a Legal Entity of Public Law (LEPL) founded by the Ministry of Justice of Georgia. The Agency was established in 2004 for handling real property registration issues and later acquired functions of registrations related to attachments, liens on movable and immovable properties, entrepreneurial and non-entrepreneurial activities, and political unions. NAPR offers an electronic system of registrations with an online platform including updated information on each and every registration process. If the registration is not indicated in the pages of relevant corporations or property items, no change contemplated under the registration application may legally bind the third parties. The system provides free of charge access of registration data and electronic services giving possibility to submit specific applications based on payment of determined fees.

establishment of organizations.¹² Registration is mandatory; however, it only involves the submission of registration data and the payment of a very small registration fee.¹³ Once registration is complete, the business acquires legal personality and is free to start the planned activities. The ease of registration, being a sole requirement for unlimited business activities, ranks Georgia 8th in Starting of Business category of the 2014 *World Bank Doing Business In Report*.¹⁴ The Report is based on the analysis of key indicators for doing business in 189 economies and ranks countries on the basis of their ability to host business effectively. *Doing Business In* represents the most extensive study on the topic, which is updated every year by World Bank Group through contributions made by

¹² LGE, art. 4.1.

¹³ In order to understand how simple the registration may be, we may answer the question – what a person needs to register a company in Georgia? Georgian citizens are required to show the identification card, fill the registration application in the NAPR and pay registration fee in the amount of euros 50 to have the company registered on the following business day. Georgian law does not require the involvement of a notary during the preparation of the registration documents. Each and every document the founders wish to submit may be certified by the registrar subject to payment of Euros 2.5 per document. NAPR offices host bank representatives and required payments are affected without leaving the premises right after the application is submitted. Once the application is filed, applicants may check the status of requested registration online by using a individual code granted via electronic system. Lastly, excerpt on enterprises including all registration data is posted online. Printed version of the excerpts require no additional certification for authenticity and may be relied for any purposes by any interested party.

¹⁴ Available at <http://www.doingbusiness.org/data/exploreeconomies/georgia#starting-a-business>.

international legal practitioners. According to the Report, starting business in Georgia requires six (6) times less than the average time required for the same in Europe and Central Asia.¹⁵

The second key concept is the **publicity of registration data**. Once a business is successfully registered in NAPR, the data concerning its name, identification code, founding partners, directors, legal and e-mail address are included in an excerpt which is available online.¹⁶ This excerpt serves as the sole official document and is automatically updated in case of any change to the data provided.¹⁷ Publication of the excerpt on the internet database

¹⁵ *Doing Business In* report serves as a guide for investors interested in quick and reliable data on different economies. According to the Report, Georgia ranks 1st for the ease of registering property, 2nd for getting construction permits and 3rd for obtaining credits in the region of Europe and Central Asia. One may conclude on the basis of said data that Georgia hold one of the best legal environment for starting business in the region.

¹⁶ Excerpt from Entrepreneurial Registry is a sole document certifying legal status of enterprises. Based on the request of the founders, the document may also be prepared in English language having the same legal force as the original Georgian version. Each company attains a 9-digit unique code after registration. Every interested person may access individual company's page online by entering the code on NAPR website. The individual pages post the excerpts and all other documents submitted to the NAPR. Consequently, everyone may freely download registration documents without need to visit the registry [LGE art. 7].

¹⁷ The Online portal is available at: <http://napr.gov.ge/?lng=eng>. The portal combines different public services, which can be provided online. The online system contains databases of immovable property, business entities, tax pledges, liens on movable property and intangibles, attachments, debtors registry and other services. At the same time, the portal provides electronic applications for obtaining archived information and documents, preparing cadastral maps and plans of estate properties, information about property and shareholdings registered under the name of specified persons etc. The system also hosts full

serves two purposes, (i), the printable version of the excerpt is the one and only official document certifying the entire company data and (ii) the third parties dealing with the companies are legally bound by the information given in the data only.

The point emphasized in the paragraph above brings us to the next feature of Georgian corporate law, which is based on **the separation between internal and external internal corporate relationships**. This principle ensures that any entrepreneur dealing with third parties complies with the mandatory rules applicable to that particular type of entrepreneurial activity. At the same time, shareholders are free to determine their internal corporate dealings irrespective of the corporate arrangement introduced by LGE. In order to have a clearer understanding of the concept, it is worth considering Georgian Limited Liability Partnerships (LLP). According to LGE, LLP is an entity where the liability of limited partner is limited to her contribution to the capital of the company, while general partners are liable with their entire personal property.¹⁸ Consequently, there is no LLP if the default distribution of liability (which distinguishes LLP from LLC) as explained above is not

database of registrations related to business entities. Any interested party is able to download any document submitted for business registration free of charge. Since the system is publicly accessible, there is no need to present certified hard copies of registration documents for the purposes of the company representation before public notaries or other third parties.

¹⁸ LGEL, art. 34.1.

satisfied. Irrespective of the mandatory liability distribution scheme applicable to LLPs in relation with the third parties, LLP founders may freely contract for limited liability of general partners and oblige limited partners to indemnify general partners if the personal property of general partners is endangered for the liabilities of the company. If such case occurs, nothing prevents third parties to enforce their claims on the personal property of general partner, but at the same time, the latter will be entitled to request compensation of the loss from limited partners. As a result, claim of general partners against limited partners, based on the different internal corporate arrangement, is enforceable based on the general law of contracts. The concept of distinction between external and internal corporate dealings enable shareholders to act with third parties in line of the determined corporate liability and at the same time, establish different liability scheme vis-à-vis other shareholders. The founders of are free to structure and regulate internal corporate relationships as they deem appropriate based on the understanding that such structuring, if not in line with mandatory rules, will only be enforceable with regard to the internal corporate dealings.¹⁹

¹⁹ As already explained above, the external dealings of corporations envision relationships with outsiders, i.e. third parties, and are regulated by LGE. Third parties dealing with companies are bound by the publicly accessible data and not required to undertake due diligence and check correctness of the data against the internal corporate documents not available to public. The public face of corporations may differ from the internal arrangements established by

Georgian entrepreneurs also enjoy an almost absolute freedom of economic activities, which means that they are generally allowed to carry out any activity not expressly prohibited by Georgian law. The freedom is achieved due to the lack of mandatory objects clause.²⁰ No company is required to determine a specific sphere of

shareholders. Such arrangements may extend to liability regime, obligations related to company financing, distribution of management responsibilities etc. According to the legal regime applicable to LLCs, each shareholder is responsible for the company's liability as per their contributions to the enterprise. Based on the specific needs of shareholders, founders may agree that in case of corporate indebtedness only one shareholder is obliged to provide additional capital contributions within specified time without right to increase his shareholdings. The shareholders may also go further and decide that in case of founder's failure to provide additional finances, the latter shall pay indemnification amounts to the remaining shareholders. Consequently, while the liability of shareholders vis-à-vis third parties is still limited to their respective contributions, internal arrangements may still guarantee financial interests of shareholders having right to request compensation from individual shareholder undertaking to extend his liability compared to default liability regime applicable to corporations. The internal corporate arrangements are also helpful in terms of distribution of intellectual property rights. According to applicable law, company trademarks and particularly, firm name, is owned by the company and shareholders have no direct ownership right over such properties. Based on the shareholders' agreement, the partners may decide that the trademark is owned by individual partners and if such partners leaves the company or the company is liquidated, the trademark shall be transferred to the other partners without the right of former to demand compensation.

²⁰ The Objects clause is a provision included in the constituent documents of companies determining their sphere of activities. The clause ensures that the company management does not act against the pre-determined sphere of economic activities. The limitation of company's contracting power is connected to *ultra vires* doctrine, which dates back to the introduction of statutory companies under the legal acts enacted by the Parliament of the United Kingdom [S. GRIFFIN, *the Rise and Fall of the Ultra Vires Rule in Corporate Law*, Mountbatten Journal of Legal Studies, June 1998, 2 (1), at 5]. The EU legislation aimed to achieve the higher standards of protection of third parties dealing with the

activities in its charter. Though founders often list the types of entrepreneurial activities they plan to carry out, the power to go beyond the regular activities is almost always retained. As explained above, the contracting power of Georgian corporations can only be limited if so indicated in the electronic excerpt of the company accessible in NAPR database. Shareholders may decide, for instance, that the director is entitled to contract for specific list of transactions only with the consent of shareholders or the supervisory board, or register specified value thresholds limiting the representation power. If the limitation is given in constituent documents, directors breaching the obligation not to act without the approval of shareholder are liable for the shareholder and the company. Shareholders may only rely on the limitation of managerial authorities if the third party are aware of the lack of capacity of director.²¹

companies having limited capacity to contract. According to Article 9.1 of EC's First Directive on Company Law, breach of objects clause by company management may not be a ground for invalidation of transactions concluded with the third parties unless the power to contract is allowed by the law. The directive granted Member States the power to introduce laws enabling companies to invalidate transactions not complying with the objects clause if third parties knew or could not have been unaware of such limitation [art. 9]. It is argued that full implementation of the directive equals to the abolishment of the *ultra vires* doctrine within European Union [S. GRIFFIN, *supra*, at 19].

²¹ According to art. 9.4 of LGE, shareholders may seek to invalidate the transactions concluded at variance with the limitation of the representation powers under the constituent documents within eighteen (18) months of the transaction's date, provided that the other party knew about such limitation. The

In addition to the absence of limitations imposed on the scope of activities a company may engage in, under Georgian law there are no minimum capital requirements unless the company in question intends to carry out insurance or banking activities.²² Although a corporation may include in its registration documentation a clause specifying its capital, this information is neither required nor subject to registration with the NAPR. Moreover, even if the constitution documents (articles of association) specify the amount of capital, no proof of capital fill-up is to be presented.²³ As a result, the only financial resource required to start a business in Georgia is GEL 100 for registration.

3. The Legal Framework For Entrepreneurial Activities In Georgia

statute of limitations was recently challenged by the Constitutional Court of Georgia. According to the judgment of the Court of January 29, 2014, the eighteen (18) months period was found unconstitutional due to unreasonable restriction of ownership right of shareholders enshrined under Article 21 of the Constitution.

²² According to art.5.6 of LGE, companies' registration does not require any evidence of the capital actually paid. Moreover, LGE expressly authorize LLCs to determine any amount of capital [art. 45]. Consequently, there is no minimum legal capital requirement for Georgian entities. Even if the shareholders decide to have a charter capital, there is no need to present any proof that capital actually exists.

²³ If a third party wants to check whether the company is actually solvent, financial due diligence or audit shall be conducted.

The regulation of entrepreneurial activities in Georgia is mainly contained in the Law of Georgia on Entrepreneurs, which is the sole legal act regulating all types of corporations, listing all applicable mandatory rules and providing the general legal framework for undertaking an entrepreneurial activity in Georgia. LGE starts with general rules and standards applicable to all companies and their respective managerial/representative bodies and ends with separate chapters dealing with each forms of entrepreneurial activity allowed in Georgia.²⁴

Compared to the German and English systems where each different type of company is regulated by an independent set of rules, Georgia applies a simpler form of regulation of entrepreneurial activities.²⁵ From a practical point of view, the

²⁴ LGE provides a general definition of entrepreneurial activities, namely: “any legal and multiple activity, carried out independently and in organized manner with the purpose of getting profit” [art. 1.2]. The law lists also the exempted activities, such as: art, scientific, medical, architectural, legal, notarial, audit, consultancy, agricultural and forest production activities carried out by natural persons [art. 1.3]. Further on, LGE contains provisions on corporate liability, capital contributions, registration, liquidation and reorganization, branches and statute of limitation. After general part, the law has separate chapters about joint liability companies, limited liability companies, limited liability partnerships, joint stock companies and cooperatives.

²⁵ Many countries choose to regulate individual types of enterprises through independent legal acts. In England entrepreneurial activities are regulated in three major legal acts such as Companies Act 2006, Partnership Act 1890, Limited Partnerships Act 1907, and Limited Liability Partnerships Act 2000. Likewise, Germany provides separate laws for different types of enterprises – Limited Liability Companies’ Act (GmbHG), Stock Corporation Act (AktG) and Civil Code for partnerships (BGB).

minimum set of rules established by LGE ensures a more cost and time effective management of business activities in Georgia. Though the lack of detailed regulations may hinder the development of corporate law as such, both, practitioners and entrepreneurs find the freedom and flexibility quite convenient for doing business in Georgia. In fact, the decision to provide for a minimum set of rules applicable to entrepreneurs was mainly due for third parties' protection. Moreover, the ease of doing business relates strongly to the requirements set by law. In other words, the easier the law is to understand, the lesser the maintenance costs will be. Consequently, Georgia introduced such a simple law for, on the one hand, it establishes basic protection mechanisms and, on the other hand, is easy to be complied with.

Although the LGE represents the most important law in the field, the Civil Code of Georgia (*hereinafter* the Civil Code)²⁶ regulates the legal personality of enterprises, non-entrepreneurial legal entities, contractual partnerships and certain financial activities.²⁷

²⁶ Civil Code of Georgia, dated June 26, 1997.

²⁷ Civil Code is the sole act determining legal personality. According to the Code, a legal person is defined as: “organizational establishment created to achieve specified goal and having own property, liable independently with its own property and able to acquire rights and obligations on its name, having capacity to transact and act in a court as claimant or respondent” [art. 24.1]. The Code distinguishes between entrepreneurial and non-entrepreneurial legal persons and links legal capacity of legal persons to the moment of their registration [art. 25.4]. The Civil Code also determines legal framework applicable to insurance and commercial banking transactions. While the institutional compliance of the

The Civil Code sets the general framework for contractual freedom, the validity of parties' agreement, etc., which play a significant role in corporate relationships.

Hence, LGE is the sole source regulating Limited Liability Companies (LLC), Joint Liability Companies (JLC), Limited Liability Partnerships (LLP), Individual Enterprises (IE) Cooperatives and Joint Stock Company (JSC), however the rules applicable to securities are strongly linked with those governing JSC and contained in the LGE. As a result, the Law of Georgia on Securities provides the legal framework for JSCs issuing securities in Georgia.²⁸

The legal environment as so described above increasingly changes in case of corporations subject to greater public interest and increased State control. One of the spheres of commercial activities with a higher level of regulation and increased public accountability is represented by financial services.

4. The Legal Framework For Financial Services

4.1. Commercial And Investment Banking

financial institutions are regulated by separate laws, rules applicable to respective transactions are found in the Civil Code.

²⁸ Law of Georgia on Securities' Market, dated December 24, 1998.

To begin with, Georgian law does not make a distinction between commercial and investment banking. In other words, commercial banks are allowed to invest in securities and trade them on capital markets.²⁹

The legal framework for commercial banking is established by the Civil Code, the Law of Georgia on Commercial Banking Activities (LGCB),³⁰ the LGE and the regulations adopted by the National Bank of Georgia (NBG). Commercial banking is one of the exceptional situations when the form of JSC with a two-tier corporate governance system is required. LGCB and LGE establish the internal arrangements, the scope of activities and the applicable limitations (such as capital and liquidity requirements),³¹ whereas the

²⁹ The legal barrier to carry out commercial and investment banking at the same time is a key feature of US banking law. The wall between the two types of banking in the US was established in 1933 with the Glass-Steagall Act following the Great Depression. Consequently, no commercial bank is allowed to trade in securities and vice versa. Whereas, Georgia follows the typical European system of banking which does not distinguish between investment and commercial banking activities.

³⁰ Law of Georgia on Commercial Banking, dated February 23, 1996.

³¹ According to LGCB, commercial banks are managed by the shareholders meeting, the supervisory board and the board of directors. Shareholders' meeting is the highest management body of the bank and is authorized to appoint supervisory board [art. 13]. Supervisory board is supervising the banking activities and is composed of minimum three (3) and maximum twenty-one (21) members [art. 14.1]. The law establishes the following non-eligibility criteria for supervisory board membership: (i) a person is member of supervisory board or board of directors in more than seven (7) enterprises in Georgia; (ii) a person is administrator in other non-related commercial bank; (iii) is declared bankrupt [art. 14.4]. Supervisory board members are obliged to carry out their functions with due care and diligence.

commercial banking service as a contractual relationship between the bank and client is regulated by Chapter XXVII of the Civil Code.

The main regulatory body responsible for the control and supervision of commercial banks as well as other financial institutions (e.g. micro-finance institutions, credit unions) is the National Bank of Georgia.³² Along with this regulatory function, the NBG is also responsible for issuing commercial banking licenses within three (3) months of the application.³³ There are two major requirements for a JSC to be granted a commercial banking license (i) evidence of having a minimum regulatory capital in the amount of GEL 12,000,000.00 and (ii) compliance with *fit and proper criteria* of management.³⁴ Such criteria applies to the shareholders owning significant share amounts, *i.e.* at least ten (10)% of the bank's shares. And, in accordance with said criteria, a person may not hold significant amounts of shares if he is convicted for grave or

The last tier of corporate management is the board of directors, composed of at least three (3) directors appointed by the supervisory board [art. 15.1]. Director may at the same time sit as the supervisory board member.

³² The National Bank of Georgia (NBG) is the central bank of Georgia which was founded in 1919. NBG implements the Country's monetary policy and ensures price stability. Moreover, NBG is responsible for the supervisory function of the financial sector such as commercial banks, securities market, credit unions, micro-finance organizations, money remittance units and currency exchange bureaus of supervision.

³³ LGCB, art. 4.2.

³⁴ *Id.*

particularly grave crimes, terrorism funding, money laundering or other economic crimes. Moreover, the same criteria prohibit commercial banks from having an administrator convicted for the aforementioned crimes, suffering from legal incapacity, having no adequate education/experience or holding the position of administrator in another, unrelated commercial bank.³⁵

The Georgian commercial banking system is basically composed of local banking institutions with a relatively small number of regional and international banks. From a practical perspective, commercial banks are greatly involved in equity investment in Georgia. By virtue of convertible loans (exercising options to convert debts into equity of borrowers), banks control the major enterprises doing business on retail, construction and other leading markets in the country. Commercial banks also act on insurance market holding the largest insurance companies in Georgia.

4.2. Micro-Finance Organizations

Micro-Finance Organizations (MFO) control a significant share of the local commercial lending market, along with commercial banks. MFOs appeared in Georgia in the form of non-entrepreneurial legal entities having no profit-making purpose primarily. Accordingly, MFOs were registered as non-profit

³⁵ *Id.*, 4¹.

organizations providing funds for small businesses without the possibility to modify their scope in order to include significant profit-making activities. Since non-profit organizations are not subject to profit tax payment and enjoy lesser tax supervision, MFOs substantially abandoned their *status* and engaged in commercial activities. As a result of MFOs role in financing Georgian economy, a specific regulatory regime for their activities was deemed essential. By regulating the services, the State gained a much greater control over the institutions representing a crucial part of small-sized financing in Georgia. The status and activities of MFOs are presently regulated by the Law of Georgia on Micro-Finance Organizations,³⁶ which represents the basic law in this field.

MFOs are currently among the largest financers in Georgia. There is a regulatory limit of GEL 50,000 set as the highest threshold MFO is authorized to lend to a single borrower. However, large MFOs manage to enjoy said *status* while engaging at the same time in greater commercial lending by affiliating with regular LLCs having no lending limit.³⁷ In other words, shareholders of Georgian MFOs having acquired substantial capital on the market through micro-finance activities frequently resort to

³⁶ Law of Georgia on Micro-Finance Organizations, July, dated 18, 2006.

³⁷ *Id.*, art. 5.2.

the establishment of regular limited liability companies (i.e. no MFOs) through which they carry out separate lending businesses. Though the legal entity registered as MFO is required to comply with the regulatory limit provided for by law, such obstacle can be overcome through regular companies having the same shareholders and using the same resources of MFOs, which became significant players on the market.

Similar to commercial banks, MFOs are subject to licensing from NBG and are required to have a mandatory supervisory board in compliance with the rules contained in LGE.³⁸ MFOs are also required to have the form of a JSC or LLC and a minimum charter capital in the amount of GEL 250,000 paid in with monetary contributions only, consequently, no asset contributions are allowed into the minimum capital.³⁹

4.3 Insurance Companies

³⁸ *Id* art. 3.3. Rules for registration of MFOs at the National Bank of Georgia are determined by the Order no. 33/04 of the President of the National Bank of Georgia. According to said Order, the decision of granting license to carry out micro-financing activities is issued within fifteen (15) business days of application with thirty (30) days extension possibility in case of failure of the applicant to meet the statutory requirements. MFO status may be revoked by the NBG if the MFO monitoring authority reveals breach of statutory requirements by the licensed organization.

³⁹ *Id*, art. 6.

Insurance services fall under the limited number of controlled financial services subject to mandatory law provisions, regulating corporate structure and financial accountability. Insurance activities are primarily regulated by the Law of Georgia on Insurance,⁴⁰ which establishes the system of mandatory and voluntary insurances in the Country.⁴¹ The voluntary insurance can be issued by any licensed insurance company based on the free will of the insurance seeker. On the other hand, mandatory insurance acts as both a right and an obligation of the actors in this field subject to the specific laws requiring mandatory insurance of certain professions and individuals.⁴²

The Law of Georgia on Insurance serves as a legal guarantee for foreign insurance and reinsurance companies to act directly on the Georgian market through a registered branch office.⁴³ The Law also allows the local branch of a foreign insurance companies company to act as an independent agent before Georgian courts.⁴⁴

⁴⁰ Law of Georgia on Insurance, dated May 2, 1997.

⁴¹ Mandatory insurance is introduced for specific professions, like public notaries. Consequently, every individual or entrepreneur providing services subject to such insurance is statutorily obliged to obtain it upon commencement of his activities. On the other hand, voluntary insurance may be obtained by any person based on his free will and no obligation to attain it exist.

⁴² *Id.*, art. 5.

⁴³ *Id.*, art. 7.4.

⁴⁴ *Id.*, art. 7.4¹.

As a result of the amendments to said Law in 2011, a list of the activities prohibited for an insurance company has been included: (i) the issuance of a loan to buy out its own stocks; (ii) the issuance of a loan to buy the stocks of a company shareholder having a significant percentage of shares or the stocks of the administrator; (iii) the issuance of a loan to buy the stocks of a subsidiary.⁴⁵

Striving to ensure the international standards of financial compliance for insurance companies, the LGI requires the companies to provide financial reports audited in accordance with the International Financial Reporting Standards (IFRS) and International Standards of Auditing (ISA) issued by the International Federation of Accountants.⁴⁶

The State supervision on the insurance activities is carried out by the LEPL Insurance Supervision Agency newly established as a result of the latest reform in the regulation of financial services. One of the main functions of such Agency is to grant insurance licenses.⁴⁷

⁴⁵ *Id.*, art. 13.4.

⁴⁶ *Id.*, art. 14.3.

⁴⁷ By the virtue of amendments to LGI adopted on March 20, 2013, LEPL State Insurance Supervision Agency was created. The Agency is assigned the supervision and controlling functions of insurance activities currently undertaken by the National Bank of Georgia. The Agency carries out the following functions: implementation of state insurance policy, facilitation of financial stability of insurance market, protection of consumers' rights, ensuring capacity and solvency of insurance companies, ensuring competitive insurance environment and facilitating improvement of regulatory environment for insurance activities [art. 2

Georgia's insurance market is mainly controlled by local insurance companies and, as an example, the market was strongly affected by the takeover of one of the oldest Georgian insurance companies by its long-standing competitor, which is itself held by a Georgian commercial bank.

The insurance market is also significantly influenced by the State insurance policy, which had dramatically increased the number of insured population and currently represents one of the greatest parts of revenues in the field.⁴⁸

5. Intellectual Property Protection Mechanisms

5.1. International Conventions In Force In Georgia

Georgia is part of the most important international agreements and Conventions in the field of IP protection. Georgia is a member

of the Resolution #102 of May 2, 2013 of Government of Georgia on Adoption of Statute of LEPL State Insurance Supervision Agency].

⁴⁸ State insurance extends to greater part of vulnerable groups of the population of Georgia, including socially unprotected families, internally displaced persons after 2008 Russia-Georgia war, children and women receiving State housing services, beneficiaries and staff of trafficking victim service centers, abandoned children temporarily adopted by families, State renowned artists and scientists, public school personnel, families living nearby of the occupied territories of Abkhazia and South Ossetia. State insurance covers emergency care, in-service medical care, planned surgeries and other basic health care services. By the virtue of State insurance system reform of 2012, beneficiaries of State insurance program were increased by 0-5 years children, students, pensioners, disabled population.

of the World Trade Organization, and a signatory to the Agreement on Trade Related Intellectual Properties (TRIPs), as well as a member of the World Intellectual Property Organization (WIPO) Georgia also enforces the conventions promulgated under the auspices of WIPO.

As to patent protection, Georgia is a member State of the Paris Convention on Protection of Industrial Property,⁴⁹ and Patent Cooperation Agreement.⁵⁰ Copyright protection is guaranteed by participation of Georgia in the Berne Convention for the Protection of Literary and Artistic Works⁵¹ and in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.⁵²

Georgia is part of the international design regime system being a signatory to the Hague Agreement Concerning the International Deposit of Industrial Designs⁵³ and the Locarno Agreement on Adoption of International Classification of Industrial Designs.⁵⁴

⁴⁹ Paris Convention on Protection of Industrial Property, dated March 20, 1883.

⁵⁰ Patent Cooperation Treaty, dated June 19, 1970.

⁵¹ Berne Convention for the Protection of Literary and Artistic Work, dated September 9, 1886.

⁵² Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, dated October 26, 1961.

⁵³ Hague Agreement Concerning the International Registration of Industrial Designs, dated November 6, 1925.

⁵⁴ Locarno Agreement Establishing an International Classification for Industrial Designs, October 8 1968.

Georgia enforces the international system of geographic indications by adhering to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.⁵⁵

5.2. Overview Of Domestic IP Law Framework

a. Patents

International instruments for the protection of intellectual property are also supported by Georgia's national regulations of the IP field. The Law of Georgia on Patents⁵⁶ sets the basic legal framework for the enforcement of patent rights. According to Article 5.2 thereof, patented inventions are protected for twenty (20) years from the moment in which the application is filed with the patent office.⁵⁷

The law on Patents sets the following patentability criteria for an invention: to be novel, to include inventive step and have an industrial application.⁵⁸ In accordance with the Paris Convention priority rule, the patent seeker enjoys one year priority period to

⁵⁵ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958.

⁵⁶ Patent Law of Georgia, dated February 5, 1999.

⁵⁷ In compliance with the international pharmaceutical patent protection standards, protection for medical products subject to regulatory approval can be extended with the amount of time spent from the patent application until its approval but no more than five (5) years. See *Id.* art. 5.5.

⁵⁸ *Id.*, art 12.1.

apply for a patent in Georgia once the application is duly submitted in another Paris Convention member State.⁵⁹

The patent-granting process entails three main steps: i) confirmation of application date; ii) formal expertise; iii) substantial expertise. The first step requires the patent office to issue a confirmation of the application within two weeks of the application and the submission of all the supporting documents.⁶⁰ Afterwards, the patent office has to carry out a formal check to make sure the application complies with the established application requirements within two weeks of the confirmation of the application date.⁶¹ The patent-granting process's last phase concerns the substantive examination, namely the identification of the protected object and its level of technology which shall occur within six (6) months of approval of its formal compliance.⁶² To summarize the process,

⁵⁹ *Id.*, art. 30.1.

⁶⁰ Law of Georgia on Patents art. 33.1.

⁶¹ In order for an applicant to qualify for substantive application analysis, the patent application should be filled in with the information required under the Law of Georgia on Patents. Such requirements are: request for patent issuance filled in the officially approved format, description of invention, invention formula, drawings and other documents if required for invention explanation, invention abstract having informational nature (*Id.*, art. 34.1)

⁶² Substantive examination process involves checking patentability of the claims by analyzing its description and unity as well as compliance with legally defined patentability criteria. After establishing that invention is clearly derived from the state of art, patent office examines existence of inventive step and decides on issuance of patent (*Id.*, art. 35.1).

Georgian patents can be obtained within seven (7) months of the application.

Another important point concerns the costs for obtaining patents in Georgia. While the regular patent-granting procedure costs in total approximately USD 620, if international experts' reports pertaining to the level of technology involved in the invention are presented throughout the granting procedure, the cost of the patent can be decreased by 50% .⁶³

Patent infringement suits can be brought within three (3) years after the infringement has become known to the patent owner.⁶⁴ Based on reasonable doubt, Georgian courts may advise against infringement and/or decide to freeze the goods allegedly produced in violation of the exclusive rights before commencing hearings on the merits.⁶⁵ The remedy of last resort available against the infringer is the destruction of the property created as a result of infringement if no other less severe remedy is sufficient to rectify the negative effects of his infringement.⁶⁶

⁶³ Resolution no. 182 of the Government of Georgia on Approval of Service Fees for Patenting, Registering and Depositing Intellectual Properties, dated July 3, 2010, annex no. 1.

⁶⁴ Law of Georgia on Patents, art. 68².3.

⁶⁵ *Id.*, art. 68³.

⁶⁶ *Id.*, art. 68⁴.

b. Copyright

The Law of Georgia on Copyright and Neighboring Rights contains the basic set of rules in the field of copyright protection in Georgia.⁶⁷ In line with the international standards in copyright protection, Georgia Copyright Law also regulates computer software and databases issues.

Computer software is considered as a literary and artistic work for the purposes of copyright protection under the Law of Georgia on Copyright.⁶⁸ It can be observed that Georgian regulation on computer software protection resembles that contained in the EU Directive 2009/24/EC on the Legal Protection of Computer Programs.⁶⁹ Namely, the list of restricted acts, the exceptions to the acts⁷⁰ and the general exception for decompilation are almost

⁶⁷ Law of Georgia on Copyright and Neighboring Rights, June 22, 1999.

⁶⁸ *Id.*, art. 6.1(a).

⁶⁹ Directive 2009/24/EC on the Legal Protection of Computer Programs, April 23, 2009.

⁷⁰ Under Georgian Copyright Law, the protection of computer programs extends to any type of computer program including operative systems that can be expressed in any language or form, basic text and objective code. Holders of copyright over computer programs enjoy the exclusive right to rent out or otherwise dispose possession over the protected objects. Same as the EU Directive, Georgian Copyright Law provides the copyright holders to prohibit any unauthorized reproduction of programs, transfer of program from one language to another, adaptation or systematization. At the same time, the user, without prior consent of the holder of copyright on computer program, is however entitled to modify the program for the purposes of technical functioning of specific equipment of the user or actions related to functioning of databases of the user for single computer or single network users as well as rectifying obvious

identical both in the Directive as well as in the Georgia Copyright Law.⁷¹

The same applies to database protection, whose basic concepts mirror those of the EU Database Directive⁷² regulating object of protection, restricted acts and respective restrictions and term of protection limited to 15 years.⁷³

c. Trademarks

Trademark registration and administration is carried out by the LEPL National Intellectual Property Center of Georgia - Sakpatenti based on the Law of Georgia on Trademarks.⁷⁴ The Law establishes registration requirement for trademarks as a condition for the establishment of the owner's exclusive rights.⁷⁵ Enjoying the

mistakes unless otherwise determined by the licensing agreement (Georgian Copyright Law., art. 28).

⁷¹ Georgian Copyright Law, art. 29.

⁷² Directive 96/9/EC on the Legal Protection Databases, dated March 11, 1996.

⁷³ The Georgian legal protection of databases grants owners additional rights to prohibit any unauthorized full or partial reproduction of database, translation, adaptation or systematization of such databases, any kind of public appearance of protected objects (art. 19). Databases are subject to protection if the creator establishes that she undertook substantial in terms of quantity or quality (art. 54).

⁷⁴ Law of Georgia on Trademarks, dated February 5, 1999. Sakpatenti is a State regulatory agency responsible for registration, monitoring and enforcement of intellectual property rights in Georgia. Sakpatenti administers the electronic system of trademarks and patent applications, which enables interested parties to fill in the applications, pay State fees and electronically control the process via their personal accounts.

⁷⁵ Law of Georgia on Trademarks, art. 6.1.

same system of priority under the Paris Convention⁷⁶, examination pertaining to the form of the application is completed within two (2) months,⁷⁷ while substantive examination is completed within six (6) months after positive formalistic expertise decision.⁷⁸ As a result, a trademark is granted within eight (8) months of the application to Sakpatenti.

The Law of Georgia on Trademarks allows for an expedited procedure, which enables Sakpatenti to register trademarks within ten (10) days of the application based on payment of an increased registration fee whose amount is approximately twice as much as the fee for regular procedure.⁷⁹ Once the decision for expedited procedure is issued, interested parties are granted three (3) months from the publication of the registration data to appeal the decision in the appellate body of Sakpatenti.⁸⁰ If a positive decision is not appealed within three (3) months, the trademark is then registered

⁷⁶ Trademark protection priority is an internationally available instrument in trademark protection granting trademark applicants a priority right on the applications submitted later in time. Georgian Trademark Law envisions three types of priority: *national priority* – available throughout the territory of Georgia, *convention priority* – available internationally in the Paris Convention Countries and *exhibition priority* – right derived from Article 11 of the Paris Convention obliging countries to grant temporary protection to trademark in respect of “goods exhibited at official or officially recognized international exhibitions held in the territory of any of them”.

⁷⁷ Law of Georgia on Trademarks, art. 13.1.

⁷⁸ *Id.*, art. 14.1.

⁷⁹ *Id.*, articles 15.5 and 15.6.

⁸⁰ *Id.*, art. 15.7.

in the trademarks registrar system of the State.⁸¹ The registration is valid for ten (10) years and is subject to renewal for another ten-years period.⁸² The total cost for trademark registration equals USD 420.⁸³

Trademark infringement results in civil liability under the legislation of Georgia.⁸⁴ Along with traditional civil damages, remedies may also include destruction of the materials containing the illegal trademark or destruction of the plates, matrices and printing locks prepared for making it, as measures of last resort if no other less severe remedy is sufficient to rectify the damage.⁸⁵

5.3. IP Enforcement

The main IP enforcement authority of Georgia lies with Sakpatenti. Georgian law sets licenses for attorneys representing clients in intellectual property related matters before the Sakpatenti and the courts of Georgia. Anyone having permanent residence in Georgia, a higher technical, natural science or legal education and

⁸¹ *Id.*, art. 17.

⁸² *Id.* art. 20.1.

⁸³ *Id.*, annex 2.

⁸⁴ *Id.*, art. 45.1.

⁸⁵ *Id.*, art. 45.2.

successfully passing the patent attorney certification exam is authorized to register with Sakpatenti as a patent attorney.⁸⁶

The primary body tasked with the enforcement of industrial property is the Chamber of Appeals of Sakpatenti, a dispute settlement division chaired by the Chairman of Sakpatenti.⁸⁷ While, under the law of Georgia, the Chamber of Appeals has direct adjudicatory function on patents, trademarks and design, it also serves as an authority confirming *well-known criteria* of trademark based on the application.⁸⁸ An interested party has three (3) months to file appeals in the Chamber after publication of respective decisions.⁸⁹

⁸⁶ Statute on Patent Attorneys of Georgia, approved by Order no. 1 of the Chairman of Sakpatenti, dated January 12, 2011, art. 3.1.

⁸⁷ Statute of the Chamber of Appeals at Sakpatenti, approved by Order no. 2 of the Chairman of Sakpatenti, dated March 18, 2011, art. 1.2.

⁸⁸ International protection of well-known trademarks is guaranteed under Article 6 of the Paris Convention. While the Convention lacks further definition of the concept, International Trademark Association (INTA) adopted special resolution on September 18, 1996 and established the following criteria for determining well-known trademarks:

- a) The amount of local or worldwide recognition of the mark;
- b) The degree of inherent or acquired distinctiveness of the mark;
- c) The local or worldwide duration of use and advertising of the mark;
- d) The local or worldwide commercial value attributed to the mark;
- e) The local or worldwide geographical scope of the use and advertising of the mark;
- f) The local or worldwide quality image that the mark has acquired;
- g) The local or worldwide exclusivity of use and registration attained by the mark, and the presence or absence of identical or similar third party marks validly registered for or used on identical or similar goods and services.

⁸⁹ Paris Convention, *supra* note 88, art. 6.3.

As a general rule applicable to State adjudicatory agencies, the decisions of the Chamber can be appealed to the Georgian courts of first instance within one (1) month after the delivery in writing of the decision of the Chamber to the parties of dispute.⁹⁰

6. Dispute Resolution Environment in Georgia

6.1. Overview Of Georgian Court System

The current Georgian judicial system is set out in Chapter 5 of the Georgian Constitution, pursuant to which the judicial bodies which are authorized to implement justice in the Country are: the Constitutional Court, the Supreme Court and the common courts.

Georgia's judiciary is based on two different kinds of jurisdictions: the jurisdiction to decide on matters related to criminal, administrative and civil law lies with the common courts, whereas the authority to check the constitutional compliance rests only upon the Constitutional Court of Georgia.

The latter is made up of nine judges (3 appointed by the President, 3 elected by the Parliament and 3 appointed by the Supreme Court of Georgia) with a 10-year term of office.

The Constitutional Court safeguards individuals' constitutional rights, settles constitutional disputes between public bodies,

⁹⁰ *Id.*, art. 15.9.

considers questions of constitutionality concerning normative acts, international treaties, referenda and elections, the activity of political parties; any decision of this Court is final and, therefore, any act, or part of it, which is deemed to be unconstitutional ceases to have legal power from the moment when the Court's decision is published.

Whereas, the common court system is composed of the courts of first instance, the courts of appeal and the Supreme Court of Georgia, giving rise to a mechanism of double-review of court judgments before the latter may gain final force.

In particular, the courts of first instance comprises regional (city) courts (where cases are considered by one judge) and district courts (made up of 3 judges) and are composed of independent divisions for criminal, administrative and civil law cases. Judgments of the courts of first instance can be appealed without any substantive admissibility, *i.e. filter phase* criteria, to the second instance within a month after due delivery of the judgment.⁹¹

⁹¹ Many legal systems provide for the so called *filter phase* for granting a deed of appeal, *i.e.* the substantive admissibility criteria for accepting cases in the courts of appeals. In 2012 the Civil Procedure Code of Italy has been amended and art. 348*bis* has been included in the Code introducing stricter requirements for the admissibility of appeal claims - (i) the alleged erroneous sections of the first instance decision; (ii) the amendments that the court should make to the representation of the facts of the dispute; (iii) the alleged breaches of law constituting the grounds of the appeal, together with a clarification of their relevance and impact on the first instance decision. Moreover, Italian law allows court of appeals to strike out the cases if based on the preliminary examination

There are two Courts of Appeals in Georgia. While Kutaisi Court of Appeals hears cases from the courts of first instances of Western Georgia, Tbilisi Court of Appeals exercises jurisdiction on the Eastern part of Georgia. Each Court of Appeals is composed of three distinct chambers of criminal, administrative and civil cases.

The Courts of Appeals may hear both factual and legal arguments over the dispute, provided that the new facts, brought by the parties, could not have been reasonably presented during the proceedings in the court of first instance.

Decisions of the Courts of Appeals may be appealed to the Supreme Court of Georgia, which represents a court of cassation, the highest judicial authority in the system of common courts of Georgia, and which, as set in art. 90 of the Georgian Constitution, supervises “in accordance with existing legal procedure [...] the enforcement of justice of every court of Georgia, and reconsiders cases determined by law in the court of first instance.”

The judges of the Supreme Court are nominated by the President and elected by the Parliament; the Court has three Chambers of Cassation and a Collegium of Criminal Law.

there is no reasonable probability of a positive result [F. PETRONIO, F. COZZI & F. FALCO, *The Latest Reform of Italian Appeal Proceedings in Recent Case Law: A Step Towards Faster Civil Proceedings Involving a Higher Standard of Defense*, 2013] (Available at http://www.paulhastings.com/docs/default-source/PDFs/the_latest_reform_of_italian_appeal_proceedings_in_recent_case_law_a_step_towards_faster_civil_proceedings_involving_a_higher_standard_of_defense.pdf).

Unlike the Courts of Appeals, the Supreme Court scrutinizes the cases against admissibility criteria before commencing cassation proceedings. The Supreme Court exercises its jurisdiction if: 1) the present case is important for the development of law and for the establishment of uniform legal practice; 2) the decision of the appellate court differs from the practice previously established by the Supreme Court for the same category of cases; 3) the appellate proceedings were conducted in a grave procedural violations which could have affected the outcome of the dispute.⁹²

Specifically, the Chambers of Cassation consider complaints regarding the judgments of the Courts of Appeal, whereas the Collegium of Criminal Law hears serious criminal cases concerning, for instance, terrorism, assassination of high-ranking officials, etc.

6.2. International Cooperation In Enforcement Of Court Judgments

The State of Georgia fosters international cooperation in recognition and enforcement of foreign court judgments. The international system is backed by the general rule on enforceability of foreign court judgments contained in the Law of Georgia on

⁹² Code of Civil Procedure of Georgia, art. 390¹.5.

Private International Law (LGPIIL).⁹³ Although LGPIIL establishes general pro-enforcement rule calling for deference for foreign court judgments, the enforcement may still be refused in case of judgments are contrary to Georgia's public order. In the first place, the LGPIIL establishes the principles of reciprocity⁹⁴ and exclusive jurisdiction⁹⁵ authorizing Georgian courts to refuse recognition if (i) the case is subject to exclusive jurisdiction of domestic courts, (ii) if a foreign court is not competent under Georgian law or (iii) if the country of origin of the judgment does not enforce Georgia's judgments.⁹⁶ A further ground to refuse recognition derives from the principle of *res judicata*, which prevents parties from litigating

⁹³ Law of Georgia on Private International Law (LGPIIL), dated April 29, 1998, art. 68.1.

⁹⁴ The principle of *reciprocity* in the process of recognition of foreign court judgments is an international phenomena. In most of countries, State courts recognize foreign court judgments only if the country of origin also recognizes judgments coming from the country where recognition is sought [R. A. BRAND, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, Federal Judicial Center International Litigation Guide, (2012)]. In *Hilton v. Guyot* the Supreme Court of the United States refused to recognize French court judgment due to the lack of reciprocity in the French law (*Id.*, at 3).

⁹⁵ LGPIIL establishes specific areas of exclusive jurisdiction of Georgian courts, such as claims related to immovable property located in Georgia, legal entity or decisions of its corporate bodies if the entity has a residence in Georgia, registration of legal entities, registration of patents, trademarks or other rights if the registration or request for registration of such rights took place in Georgia, forceful enforcement proceedings if the proceedings were initiated or completed in Georgia [art. 10, LGPIIL]. If the case falls under the exclusive jurisdiction of the courts of Georgia, foreign court judgment deciding on the matter will not be recognized.

⁹⁶ LGPIIL, art. 68.1(a)-(d).

disputes already adjudicated by Georgian courts or foreign court judgments recognized under Georgia law.⁹⁷ Lastly, the court asked to recognize foreign court judgments also undertakes procedural scrutiny of the cases and can refuse recognition in case of due process violations, such as, for instance, failure of the court system of the Country of origin to serve the party against whom the judgment was rendered with the due notice on appearance in court or other procedural misbehaviours.⁹⁸

The LGPIL does not set any detailed provisions pertaining to the burden of proof in relation to the recognition of cases. According to the practice of the Supreme Court, the respondent is burdened to prove that recognition should be refused on the basis of the *res judicata* principle and due process violations, while grounds related to exclusive jurisdiction, reciprocity etc. are checked *ex officio* by the court where recognition is sought.⁹⁹

If none of the aforementioned grounds are present, the Supreme Court of Georgia recognizes foreign court judgments.

Though the text of the LGPIL distinguishes between the processes of recognition and enforcement, the Supreme Court deals with both of them at the same time based on the motion of the

⁹⁷ LGPIL, art. 68(c)-(f).

⁹⁸ LGPIL, art. 68.2(b).

⁹⁹ Cf. *Genki LLC v. Kviteni LLC*, Supreme Court of Georgia, Resolution on Recognition and Enforcement, case no. a-2443-y-83-09, dated January 11, 2010.

interested party.¹⁰⁰ Generally, enforcement cases are dealt with without oral hearings unless the interested party requires otherwise.¹⁰¹ International cooperation in the field of foreign court judgments' enforcement is mainly regulated through the mechanism of multilateral and bilateral [legal aid] conventions and agreements providing additional guarantees for cooperation in civil, family and criminal matters.

In the first place, Georgia is part of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, concluded through the Commonwealth of Independent States (CIS) in Minsk on January 22, 1993 (*hereinafter* Minsk Convention).¹⁰² Compared to the domestic regulation of enforcement described above, the Minsk Convention limits grounds for refusal of enforcement mainly by removing the general public order exemption contained in the Law.¹⁰³ In other words, the Convention provides an exhaustive list of grounds whose absence guarantees the enforcement of court judgments originating from the member States. As a result, if a judgment originates from a Member State of the Minsk Convention, Georgian courts may not refuse

¹⁰⁰ LGPIL, art. 70.

¹⁰¹ LGPIL, art. 70.1.

¹⁰² Minsk Convention calls upon cooperation in legal aid between Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Azerbaijan and Georgia.

¹⁰³ Minsk Convention, art. 52.

recognition on the basis of its contradiction with the public order of the State.

The importance of the Minsk Convention is not limited to the ease of multilateral deference to the judgments originating from member States. The Convention provides rules determining exclusive jurisdiction of the State courts to avoid conflicting foreign decisions on the same matter. According to the interpretation given by the Supreme Court of Georgia to Article 55, if the jurisdictional rules of the Convention determine Georgian courts' competence, the recognition of the judgments which do not respect the rule should be refused.¹⁰⁴ Moreover, the Supreme Court grants particular deference to the conflict of law set forth in the Minsk Convention. In an inheritance dispute decided on June 23, 2009, the Court dealt with the conflict of applicable laws under the LGPIL and the Convention. By emphasizing the priority of the Convention's rules over the Georgian national law, the Court determined that notwithstanding the application of Russian law in case of domestic conflict of law, the dispute was governed by Georgian law as the law applicable under the Minsk Convention.¹⁰⁵

¹⁰⁴ In the recognition and enforcement of judgment of October 13, 2009 of Traktorzavod District Court of the City Volgograd, Russian Federation, the Supreme Court of Georgia, case no. 2-403/2009.

¹⁰⁵ Decision of the Supreme Court of Georgia, dated June 23, 2009, case no. as-146-476-09.

Along with the multilateral agreement through CIS, Georgia is also part of bilateral agreements with different Countries providing easier recognition and enforcement of the court judgments originating from the major trade partners.¹⁰⁶

¹⁰⁶ Agreement between Georgia and Turkey on Legal Aid in Civil, Trade and Criminal Cases, dated April 4, 1996; Agreement between Georgia and Greece on Legal Aid in Civil and Criminal Cases, dated May 10, 1999; Agreement between Georgia and Bulgaria on Legal Aid in Civil Cases, dated January 19, 1995; Agreement between Georgia and Ukraine on Legal Aid in Civil Criminal Cases, dated January 9, 1995; Agreement between Georgia and Azerbaijan on Legal Aid in Civil, Family and Criminal Cases, dated March 8, 1996; Agreement between Georgia and Armenia on Legal Aid in Civil Cases, dated June 4, 1996; Agreement between Georgia and Turkmenistan on Legal Aid in Civil and Criminal Cases, dated March 20, 1996; Agreement between Georgia and Kazakhstan on Legal Aid in Civil and Criminal Cases, dated September 17, 1996; Agreement between Georgia and Turkey on Legal Aid in Civil, Family and Criminal Cases, dated May 28, 1996.

CHAPTER II.

LEGAL FRAMEWORK FOR INVESTMENT

Jaba Gvelebiani

Summary: **1.** State agencies and their role in investment facilitation and protection. **2.** General Investment Environment in Georgia. **2.1.** International Investment Protection Mechanisms in Force in Georgia **2.2.** Georgian law on investment. **2.3.** Regulation of Investment Funds in Georgia.

1. State Agencies And Their Role In Investment Facilitation And Protection

General investment facilitation function is carried out by the Government of Georgia as the executive branch of government. The Ministry of Economy and Sustainable Development of Georgia is responsible for investment support in the country. In 2002 the Ministry established Georgian National Investment Agency - Invest in Georgia. Invest in Georgia acts as a facilitation body creating information resources for potential investors, assisting investment in-flow and out-flow, international marketing of Georgian investment climate and support of foreign investors on all stages of investing in the country.

Services provided by Invest in Georgia can be divided in three categories: informational, communication and support. Within its informational update function, the Agency provides extensive data, statistics and general research of key points of potential investor's interest. On the second stage of investing, the investors may freely benefit from the liaison function of the Agency communicating investors with local government and private sector through various events. Under its *AfterCare* service, the Agency provides legal advisory and different supporting services for the investors coming in Georgia.

Out of the above-described services of Invest in Georgia, the most valuable section of the portal is overview of basic investment related legal issues such as taxation system, preferential trade treatments, guide to starting business in Georgia and investment vehicles subject to preferential tax treatment in the country.

Another State body tasked to advise and support investors is the Office of Business Ombudsman of Georgia (BO). BO position was introduced by the virtue of 2011 Tax Code of Georgia and is mainly oriented at protecting taxpayers' rights against state authorities. Having the functions of legislative analysis, statistics creation and direct reporting to the Government of Georgia (the GoG), BO is authorized to acquire confidential tax data from the tax administration and facilitate tax payers in their relations with the State.

2. General Investment Environment in Georgia

2.1. International Investment Protection Mechanisms in Force in Georgia

Discussing Georgian investment protection standards should start with describing international instruments the country is part of in this sphere. Shortly after gaining independence in 1992 Georgia became a signatory of the Convention of the International Center

of Settlement of Investment Disputes (ICSID).¹⁰⁷ After Georgia's adherence to the convention, foreign investors have extensively used ICSID facility for solving disputes with the country. Currently, ICSID website records eight (8) cases concluded with participation of Georgia.

Out of the eight disputes settled under ICSID, we should make particular emphasis on *Zhinvali Development Ltd. v. Republic of Georgia*.¹⁰⁸ *Zhinvali case* is widely cited on the issue of understanding value of pre-investment expenditures under international investment protection regimes. Rejecting development costs reimbursement request of Zhinvali Development Ltd., ICSID tribunal ruled that in the absence of implicit or explicit consent of Georgia to treat pre-investment expenditures as an investment, such costs could not qualify for protection under ICSID Convention.¹⁰⁹

¹⁰⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965.

¹⁰⁸ In *Zhinvali case*, ICSID tribunal was asked to determine whether pre-investment expenditures undertaken by the Investor in Georgia fell under the definition of investment under the Georgian Investment Law. In a precedential award widely cited in modern investment law literature, the tribunal decided that pre-investment costs and expenses did not qualify as investment neither under the Georgian law nor under the ICSID Convention [*Zhinvali Development Ltd. v. Republic of Georgia*, January 24, 2003, ICSID Case No. ARB/00/1 in TODD WEILER, INTERNATIONAL LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 69, Cameron May, 2005].

¹⁰⁹ T. WEILER, INTERNATIONAL LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 69 (2005).

The development of foreign investments in the Country impacted the increase of bilateral investment treaties (BIT) as well. Since 1992 Georgia concluded twenty-five (25) BITs with major trading partners.¹¹⁰

Georgia is a party to World Trade Organization (WTO) since June 14, 2000. As a result, transnational trade in Georgia enjoys all guarantees provided by the WTO system throughout the world. More importantly, any violation of international trade obligations undertaken by joining WTO can be brought to WTO Dispute Settlement Body for final consideration.¹¹¹

It should also be noted that Georgia benefits from a Generalized System of Preferences (GSP)¹¹² when trading with the USA, Canada, Switzerland and Japan. Accordingly, lower tariffs are applied on goods exported from Georgia into these countries. Georgia is beneficiary of GSP Plus trading regime, which allows Georgia to export 7200 products to the 495 million EU market duty free.¹¹³

¹¹⁰ Georgia has signed BITs with the following Countries: Greece, Czech Republic, Lithuania, Latvia, Romania, Islamic Republic of Iran, Moldova, Uzbekistan, Kirgizstan, Turkmenistan, Kazakhstan, Austria, Belgium, Luxemburg, Finland, France, Italy, Netherlands, Sweden, Switzerland, USA, China, Turkey, Armenia, Ukraine and Azerbaijan.

¹¹¹ Over the fourteen (14) years as Member of the WTO system, Georgia has not been part of any dispute yet.

¹¹² GSP is a system providing programs by developed Countries granting preferential tariffs to imports from developing Countries.

¹¹³ World Trade Organization, Trade Policy Review – Report by the Secretariat, Part 2, available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-

Lastly, Georgia has Free Trade Agreement with CIS, GUAM countries and Turkey (since November 1, 2008).

Apart from ICSID and WTO system, Georgia is party to the EU initiative, the European Neighborhood Policy, which means that Georgian legislation should be brought in line with the EU laws. Furthermore, Georgia has recognized technical regulations of European Council, Organization for Economic Cooperation and Development (OECD), and its main trading partner countries and permitted their comparable activities, which will consequently promote the development of business environment and the reduction of technical obstacles in trading.

Georgia-EU trade and investment partnership is planned to go beyond the GSP+ and WTO/GATS since negotiations on Deep and Comprehensive Free Trade Area (DCFTA) was announced to enter final phase last year. During Vilnius Summit for Eastern Partnership Georgia and EU initialed the Association Agreement. Together with greater political cooperation and integration, central part of the Agreement is DCFTA aimed to enhance trade in goods between the economies.

Announced features of DCFTA includes rules of origin, customs and trade facilitation, anti-fraud provisions and trade protection

[DP.aspx?language=E&CatalogueIdList=66726,98276,105138&CurrentCatalogueIdIndex=0&FullTextSearch=](#)).

mechanisms as well as bilateral dispute settlement system.¹¹⁴ Compared to GSP+ system, DCFTA is focused on much greater liberalization of trade removing tariffs for almost all goods and addressing regulatory barriers to trade between EU and Georgia.¹¹⁵ Explaining the new trade environment DCFTA will bring, we should firstly emphasize actual trade liberalization features. As a general rule, DCFTA establishes elimination of customs duties on imported goods subject to exceptions for specific categories enlisted in the agreement.¹¹⁶ Describing the exceptions, DCFTA subjects garlic import to the EU to 220t duty free quota and applies MFN tariff to the garlic import exceeding the value.¹¹⁷ Georgian fruit and vegetables products, as given in Annex 2-B to the Agreement, is still subject to import duties with exemption of *ad valorem* component of the goods.¹¹⁸ Last category unites meat products subject to anti-circumvention mechanism given in Article 27 of the Agreement.¹¹⁹ According to the mechanism, each product listed in Annex 2-C has a determined value of average annual export volume. If the export

¹¹⁴ European Commission Memo on EU-Georgia Deep and Comprehensive Free Trade Area, July 22, 2013, available at: [http://europa.eu/rapid/press-release MEMO-13-705_en.htm](http://europa.eu/rapid/press-release_MEMO-13-705_en.htm)

¹¹⁵ Georgia Moving Towards DCFTA, EU Delegation, available at: http://ec.europa.eu/delegations/georgia/documents/eu_georgia/dcfta2012_01_en.pdf

¹¹⁶ EU Georgia Association Agreement, Title IV, Sect. 1, Art. 26.1/

¹¹⁷ DCFTA, Art. 26.2, Annex 2-A.

¹¹⁸ DCFTA, art. 26.3, Annex 2-B.

¹¹⁹ DCFTA, art. 26.4, Annex 2-C.

reaches 80% of the value, Georgia has to provide a “sound justification” for the Union that it has capacity to produce export above the indicated value. If export reaches 100% of the given value and no justification is provided, the EU enjoys the right to temporarily suspend the preferential tariff treatment contemplated under DCFTA.¹²⁰

DCFTA liberalizes trade in services and electronic commerce as well. If trade in goods is generally exempted from duties with exceptions enlisted in the text, cross-border services is liberalized only in the extent provided in the commitments and reservations given in Annexes XIV-B and XIV-F of the Agreement.¹²¹ To take an example of legal services, Belgium subjects full admission to bar, as a pre-requisite for legal representation, to nationality and residency requirement, while Hungary limits scope of work of Georgian lawyers to legal advice only.¹²² At the same time, Georgia grants full liberalization of EU legal services subject to no nationality or residency requirement in Georgia.¹²³

After detailed regulation of trade in goods and services, DCFTA provides rules for public procurement, IP protection, competition law and dispute settlement. Chapter 14 establishes two-tier dispute

¹²⁰ DCFTA, art. 27.2.

¹²¹ DCFTA, art. 86.

¹²² DCFTA, Annex XIV-B.

¹²³ DCFTA, Annex XIV-F.

resolution system, starting with consultations and finalized with arbitration if no amicable agreement is achieved.

We have described international instruments for protecting foreign investment and trade in Georgia. For due understanding of Georgian investment protection standards, domestic legislative environment should also be discussed.

2.2. Georgian Law On Investment

Domestic investment facilitation and protection system is based on the Law of Georgia on Investment Activity Promotion and Guarantees (*hereinafter* the Investment Law).¹²⁴ According to the Investment Law, “investments shall be deemed to be all types of property and intellectual valuables or rights invested and applied for gaining possible profit in the investment activity carried out in the territory of Georgia”.¹²⁵

According to the Investment Law, a foreign investor is a foreign citizen, an individual having no citizenship and not permanently residing in Georgia, a Georgian citizen having no permanent residence in Georgia or a legal entity registered outside of Georgia.¹²⁶

¹²⁴ Law of Georgia on Investment Activity Promotion and Guarantees, dated November 12, 1996.

¹²⁵ Law of Georgia on Investment Activity Promotion and Guarantees, art. 1.1.

¹²⁶ *Id.*, art. 2.2.

Georgian Investment Law establishes general availability of any forms of investments for any investor subject to exhaustive list of prohibited and restricted activities. According to the Investment Law, investing in the following fields is not allowed in Georgia:

- Creation, manufacture and sale of nuclear, bacteriological and chemical weapons;
- Construction of testing facilities for nuclear, bacteriological and chemical weapons;
- Importing nuclear and toxic waste from foreign countries;
- Conducting scientific studies related to human cloning;
- Producing narcotic drugs and cultivation of plants having drug use purposes;
- Activities related to certain dangerous categories of liquid gas for communal use purposes.¹²⁷

After listing prohibited investments, the Investment Law limits certain activities to exclusive investment power of state of Georgia in the sphere of currency management, narcotic drugs for medical use, special psychotropic drugs, stamping valuable metals and electricity dispatch management.¹²⁸

Finally, the Law determines the fields where foreign investors and private investors may invest without right to manage such as

¹²⁷ *Id.*, art. 9.1.

¹²⁸ *Id.*, art. 9.2.

activities related to transportation management, control and supervision in territorial waters of Georgia, railway dispatching services, flight management, control and supervision in air space of Georgia, creation and testing new weapons for defense purposes subject to agreement with national security council, military production industry and nuclear activities for peaceful purposes.¹²⁹

Observing Georgian investment protection framework, first significant conclusion has to be made as to the equal treatment of foreign and national investors subject to minor exceptions spread out in different laws. The general equal treatment policy is supported with internationally recognized guarantees for foreign investors. To begin with, Georgia recognizes *national treatment* principle ensuring an equal treatment to the one accorded to national investors in Georgia.¹³⁰ Rights relating to freedom to invest in desired currencies are safeguarded through the right to repatriate investment from Georgia.¹³¹

Georgia undertakes to protect investments in their entirety and allows expropriation only in cases prescribed by the law, based on the decision of court or in case of necessity as set out in organic laws of Georgia subject to appropriate compensation.¹³²

¹²⁹ *Id.*, art. 9.3.

¹³⁰ *Id.*, art. 3.1.

¹³¹ *Id.*, articles 3.2 and 3.7.

¹³² *Id.*, art. 7.

Compensation given to the investor shall equal market value of investment for the time of expropriation with guarantees to convert the amount of compensation in any currency and transfer outside of Georgia.¹³³

One of the most significant restrictions for investing capacity of foreign investors is given in the Law of Georgia on Ownership of Agricultural Lands.¹³⁴ The Law was based on long-standing principle of prohibiting agricultural land ownership for foreign individuals and legal entities. By the virtue of decision of the Constitutional Court of Georgia of June 26, 2012, the restriction was found to be unconstitutional and was abolished for more than one year. After change of government, the Parliament of Georgia adopted a moratorium on the right of foreigners to own agricultural lands until December 31, 2013.¹³⁵ By the virtue of the moratorium and subsequent practice established by the NAPR, no foreigner or a Georgian legal entity established with shareholdings of foreign individuals or corporations is allowed to acquire agricultural lands. While the government justifies the moratorium by the need to elaborate a state policy on disposition of natural resources, real estate investment process is significantly frustrated.

¹³³ *Id.*, art. 8.

¹³⁴ Law of Georgia on Ownership of Agricultural Lands, dated March 22, 1996.

¹³⁵ Amendments to the Law of Georgia on Ownership of Agricultural Lands, dated June 28, 2013.

Another law setting standards for investment facilitation is the Law of Georgia on State Support of Investment.¹³⁶ The main feature of said law is the introduction of the status of *particularly important investments*. Any investment the value of which exceeds eight (8) million GEL or plays a significant role in economic development of Georgia may qualify for the status subject to application to the Government of Georgia.¹³⁷ The only incentive one can identify from the text of said Law is the particular attention displayed by Georgia's State in relation to such kind of investments. No other benefit is found to be applicable for the investors having the mentioned status.

2.3. Regulation Of Investment Funds In Georgia

On July 24, 2013 Georgia introduced first regulation for controlled investment funds in the country. Based on the study of investment funds regulations of Montenegro, Slovenia, Slovakia, Estonia, Bulgaria and Lithuania, Parliament of Georgia adopted Law on Investment Funds (LIF).¹³⁸ The Law provided three types of collective investment schemes: Mutual Funds (MF), Qualifying Investors Fund (QIF) and Equity Funds (EF).¹³⁹

¹³⁶ Law of Georgia on State Support of Investment, June 30, 2006.

¹³⁷ *Id.* art. 9.

¹³⁸ Law on Investment Funds, dated July 24, 2013.

¹³⁹ Art. 3.3. of the Law of Georgia on Investment Funds.

Mutual Fund is a collective investment scheme, composed of monetary valuables transferred from investors for management and assets generated from the management without acquiring legal personality. Ownership of MF shares is evidenced in a form of security issued by asset management company.¹⁴⁰ According to the law, MF can be open-ended (continuously selling and buying back securities), closed-end (placing securities in case of need without obligation to redemption) and interval fund (placing securities for sale as per determined intervals).¹⁴¹

Qualifying Investment Fund is a mutual fund established for sophisticated investors qualifying for higher thresholds of financial power. According to LIF, QIF shall not be composed of more than fifty (50) investors having minimum capital of GEL 500,000.00.¹⁴²

Equity Fund is a joint stock company investing accumulated financial resources in financial instruments and undertaken related financial operations.¹⁴³ EF can be Ventured Capital or Private Capital fund.¹⁴⁴ *Venture Capital Fund (VCF)* is EF investing in start up businesses (of less than 2 years experience) and/or ideas. VCF is limited to fifty investors and ability to issue public securities is restricted to 20% of the Fund's assets. Moreover, VCF is not

¹⁴⁰ Law of Georgia on Investment Funds, art. 2.2.

¹⁴¹ *Id.*, Art. 2., 2.4, 2.5

¹⁴² *Id.*, Art. 4.5(a) and (b).

¹⁴³ *Id.*, Art. 2.6.

¹⁴⁴ *Id.*, Art. 3.c

allowed to get a loan the value of which exceeds 20% of its assets.

¹⁴⁵ On the other hand, *Private Equity Funds (PEF)* are the vehicles acquiring controlling power in existing companies with the purpose of their further restructuring. PEF is also limited to fifty investors but is free to finance its activities through loan financing without any limitation. ¹⁴⁶

All abovementioned investment funds are subject to mandatory registration with state supervision authority. A fund established for investment purposes shall apply for the status within ten (10) days after establishment, while the registration authority decides on application within fourteen (14) days after application. ¹⁴⁷ In case of failure to render decision within the given period, investment fund is deemed to be duly registered. ¹⁴⁸

Investment fund management is carried out by Asset Management Companies (AMC), registered in a form of Limited Liability Companies or a Joint Stock Companies and having the corresponding license. ¹⁴⁹

The Law on Investment Funds has introduced the concept of institutional investments for the first time in the history of Georgian law. As a result, the institutions having the aforementioned status

¹⁴⁵ *Id.* art. 2.7.

¹⁴⁶ *Id.*, art. 2.8.

¹⁴⁷ *Id.*, articles 4.1. and 4.2.

¹⁴⁸ *Id.*, art. 4.3.

¹⁴⁹ *Id.*, articles 8.1. and 8.2.

enjoy the VAT exemption for the related services, since formation of investment funds is a financial operation for the purposes of the Tax Code.¹⁵⁰ Moreover, if the investment fund has a status of International Financial Corporation, the profits generated from investment operations are exempt from profit tax.¹⁵¹ The status of an 'International Financial Corporation' may be obtained from the Revenue Service if the profit generated by a financial institution from its financial operations or services carried out in Georgia does not exceed 10% of company's total income.¹⁵²

¹⁵⁰ Tax Code, art. 15.2(e), 168.2(a).

¹⁵¹ *Id.*, art. 99.1(p).

¹⁵² *Id.*, art. 23.

CHAPTER III.

SETTING UP BUSINESS IN GEORGIA

Jaba Gvelebiani

Summary: 1. Establishment of an Enterprise 2. Registration of Business in Georgia. 3. Forms for Carrying out Business Activities in Georgia. 3.1. Limited Liability Company. 3.2. Joint Stock Company. 3.3. Joint Liability Company. 3.4. Limited Liability Partnership. 3.5. Cooperative. 3.6. Individual Enterprise. 3.7. Branch Office. 3.8. Expansion through Local Management Company.

1. Establishment Of An Enterprise

Georgian law envisions entrepreneurial activity in six different organizational-legal forms, such as: Limited liability Company (LLC), Joint Stock Company (JSC), Joint Liability Company (JLC), Limited Liability Partnership (LLP), Individual Enterprise and Cooperative.¹ In addition, any type of enterprise established and existing under the laws of any foreign country is authorized to have Branch Office (RB) in Georgia.² Before explaining the procedure for establishment of legal entities, we would firstly like to provide short overview of each organizational-legal forms of enterprises under Georgian law.

2. Registration Of Business In Georgia

To begin with, Georgia has introduced unified system of public register for both, enterprises and immovable properties. The system is administered by NAPR. NAPR unifies Entrepreneurial Registry – registrar for enterprises, Public Registry – registrar for immovable property and registries for pledge and lien on movable and immovable properties.³

¹ Law of Georgia on Entrepreneurs, art. 2.1.

² *Id.* art. 16.1.

³ The NAPR is a Legal Entity of Public Law established and managed by the Ministry of Justice of Georgia. NAPR is currently incorporated in the House of Justice, *i.e.* the unified system of public services providing property registration,

As a result of reforms undertaken in 2003, Georgia strives to achieve 100% transparency in activities of enterprises and legal status of real estate. The trend is driven by the need for protection of the third parties. The system is based on general principle of reliance on the publicly available data provided on the website of NAPR. According to Article 312 of the Civil Code, a party relying on the public database is protected with the presumption of correctness of the information rebuttable only if the party knew about the wrongfulness of the provided data.

Moreover, inclusion of information subject to registration in the electronically accessible public registrar has constituent effect. In other words, no change in the status of legal entity or immovable property can be invoked against the third parties unless the amended data is duly registered and published through the unified system of public registrar.

Business registration envisions a single-stage process of application in NAPR. Regular registration is completed in one (1) business day and costs GEL 100, but it can also be completed on the same day of the application if the cost for expedited procedures equaling GEL 200 is paid.⁴ Registration is completed by issuing an

business registration, civil services, citizenship and residence permit services in the single house located in each city in Georgia.

⁴ Resolution no. 509 of the Government of Georgia on Adoption of the Service Fees, Payment Rules and Service Provision Terms Applicable to NAPR, dated

excerpt indicating name, legal address, electronic address, identification code, date of registration, requisites of shareholders and directors of the company. Moreover, newly registered companies are offered automatic opening of account in one of the commercial banks of Georgia. The latter might become an issue of unfair competition practice once, but now, it serves as a very practical mechanism for starting business immediately after registration.

In order to have overall picture in this regard, documentation required for registration should also be shortly discussed. In case of establishment of a company by Georgian natural person, only identification card, charter of the company and decision on establishment are required. If a partner is a Georgian company, charter and excerpt of that company is to be additionally presented by its authorized representative.

Situation is different in case of foreigners. Foreign companies willing to register as companies in Georgia have to ensure notarization, apostilization/legalization of mentioned documents in their Country of origin, then notarized translation into Georgian and submission of the package to the NAPR. If a foreign corporation wants to register its branch office in Georgia, NAPR

December 29, 2011, art. 2(l), 4(c); Applicable registration fees are decreased to GEL 20 for regular registration of an Individual Enterprise and GEL 50 in case of respective expedited procedure.

should be presented with the duly certified decision of the corporation on establishment of the branch and appointment of branch manager accompanied with the information on the foreign company and its management.⁵ If the aforementioned documents are submitted, NAPR (located in the place of legal address of the branch) is obliged to register a branch immediately.⁶

3. Forms For Carrying Out Business Activities In Georgia

3.1. Limited Liability Company

LLC is the most widespread form of enterprise in Georgia. It is the most popular choice of business because of its simple organizational structure and less restrictions from the point of mandatory law. According to Article 44.1 of LGE, LLC is an enterprise where the responsibility of a shareholder is limited to its contribution made to the capital of the company. LLC can be founded even by one partner and can exist with no mandatory requirements as to the selection of directors, corporate governance system or internal or external control. All shareholders together

⁵ Law of Georgia on Entrepreneurs, art. 16.4.

⁶ *Id.*, art. 16.5.

with directors in LLC are to be registered in the Entrepreneurial Registry.⁷

Georgian law provides liberal treatment to the capital contributions in corporations without establishing any minimum amount of capital or limitations on the cash or in kind contributions made in the company.⁸

3.2. Joint Stock Company

Compared to LLC, Joint Stock Company is defined as a company whose capital is divided into stocks.⁹ Georgian JSC reflects all the core characteristics of such enterprises, having ability to self-investment by issuing and selling stocks. Georgian law establishes two-fold registration system for JSCs. While JSCs having more than 50 stockholders are obliged to have Independent Register for registering stocks, companies falling out of the threshold are entitled to carry out stock registrar by its internal staff or Independent Register.¹⁰

In contrast with LLCs, two-tier corporate governance system is mandatorily introduced for certain types of JSCs.¹¹ Even in cases of

⁷ *Id.*, art. 5.1.

⁸ *Id.*, art. 45.

⁹ *Id.*, art. 51.1.

¹⁰ *Id.*, art. 51.3.

¹¹ According to Article 55.1 of the Law of Georgia on Entrepreneurs, mandatory supervisory board is introduced for the JSCs: a. publicly trading with their stocks

statutory supervisory board, Georgian law abandons principle of severability between management and supervisory bodies and allows companies to have same stockholder, director and supervisory board member.¹²

3.3 Joint Liability Company

JLC can be established by two or more persons. Unlike the partners in LLC, the founders of JLC have unlimited liability against creditors and are jointly liable for the obligations of the company to the extent of their entire personal property.¹³

3.4. Limited Liability Partnership

Limited Liability Partnership (Commandite Society) is one of the least popular types of enterprises in Georgia. It is defined as a company where liability of some partners is limited to their contributions in the company (limited partners), while the others are liable with their whole personal property (general partners).¹⁴

Georgian LLPs are flexible form for partners having different interests from the business activities. Limited partners limiting their liability to the contributions made to the company are deprived of

on stock markets; b. licensed by the National Bank of Georgia; or c. number of shareholders exceeds 100.

¹² *Supra note* 123, art. 55.

¹³ *Id.* art. 20.1.

¹⁴ *Id.* art. 34.1.

major corporate decision making power. On the other hand, management and representation of LLP is reserved to general partners having unlimited personal liability for the debts of the company.¹⁵

3.5. Cooperative

Cooperative is an enterprise mostly based on the labor activities of its members and oriented at development, welfare of those members. In contrast to all other organizational-legal forms, Cooperative is not primarily oriented at profit generation.¹⁶ Due to specific nature of the enterprise, Cooperatives are found in agricultural, industrial relationships and financial sector such as non-bank organizations - Credit Unions.

3.6. Individual Enterprise

Individual Enterprise is the only type of enterprise not qualified as a legal entity under the Georgian law. It is registered under the name of natural person, liable before creditors with its whole personal property.¹⁷

3.7. Branch Office

¹⁵ *Id.* art. 37.1.

¹⁶ *Id.* art. 60.1.

¹⁷ *Id.* art. 3.1.

Georgian law allows any foreign legal entity established and existing under any jurisdiction to have its branch registered in Georgia. From the corporate perspective, branch is not a separate legal entity but is subject to mandatory registration in the Entrepreneurial Registry and is granted Georgian nine-digit Identification Code.¹⁸ From the tax perspective, branch office is qualified as a Permanent Establishment (PE) of non-resident legal entity.¹⁹ Moreover, such office is considered as a separate enterprise having independent tax obligations applicable to the resident legal entities in Georgia.²⁰

3.8. Expansion Through Local Management Company

One of the possible ways for foreign business to carry out investment activities in Georgia is to avoid acquisition of resident status by having separate company managing its activities with no corporate affiliation. It is a common practice for foreign investment funds to regain place of incorporation abroad and carry out investments through managing corporations on the territory of Georgia. In fact, such management corporations serve as a body authorized to represent/manage the foreign entity and is not qualified as a branch or representative office neither for corporate

¹⁸ *Id.* art. 16.

¹⁹ Tax Code of Georgia, art. 29.1(d)

²⁰ *Id.* art. 66.3.

nor for tax purposes. From the corporate and civil law perspective, the scheme allows foreign business to enjoy the favorable jurisdiction of its incorporation and to be safe from any kind of alterations in the law of host state prejudicing activities of the company. From the tax perspective, such corporation retains its non-resident status; enjoys the preferential treatments by the virtue of tax treaties, if any; selects the most favorable tax regime; limits its taxable income (subject of payment of Georgian taxes) to the income received on the territory of Georgia; and lastly, enjoys the decreased tax rates due to the non-resident status.

CHAPTER IV.
MAJOR INVESTMENT VEHICLE AVAILABLE
IN GEORGIA

Jaba Gvelebiani

Summary: **1.** Debt Investments. **1.1** Legal Environment. **a.** Execution of Loan Agreements. **b.** Interest and Penalty Rates. **2.** Securing Claims/Enforcement. **3.** Taxation of Debt Investments. **3.1.** Domestic Taxation Regime. **3.2.** Italy-Georgia DTT. **4.** Equity Investment. **4.1.** Legal Environment for Equity Investments. **a.** Investment through convertible loans. **b.** Capital contributions. **4.2.** Taxation of Equity Investment **a.** Domestic Taxation Regime. **b.** Italy - Georgia DTT.

1. Debt Investments

1.1 Legal Environment

We have discussed procedures for starting business in Georgia. Once foreign business has a legal basis for entering Georgian market, the most relevant decision such as sphere and type of investment should be made. While target market is not part of legal discussion, form of investment is a crucial point to be considered for the purposes of our study. Based on the experience of Georgia, two major forms of investment can be identified, such as: debt investments and equity investments. Despite the fact that all the mentioned constitute separate methods of investment, the two are very much inter-related and connected. It will be addressed legal and tax environment for the types of investment in Georgia in turn.

We have decided to start with debt investment as this kind of investment represents one of the most popular choice of foreign investment funds and companies operating in Georgia. While thinking of the features of the trend, pro-creditor treatment should be emphasized. To be more precise, debt investment is a typical creditor-debtor relationship based on the law of contracts in force in the Country.

To highlight the proofs of the trend, we will refer to the recent amendments in terms of foreclosure of mortgaged collateral. If the

parties agree on enforcement based on the writ of notary in the collateral agreement, the creditor is entitled to refer to the notary and request issuance of the writ with no proof of default on the side of the debtor. As a result, lender can always avoid court judgment and proceed with foreclosure through notary and the National Bureau of Enforcement (NBE) precluding the borrower to prevent foreclosure based on the bad faith misbehavior of the lender.¹

Notarial writ of execution is a favorite choice of institutional lenders and a non-negotiable offer for borrowers. After the abolishment of mandatory notarization for real estate sale and mortgage agreements, transactional costs and influence of notaries were significantly decreased. Justifying such innovation by referring to market financing needs, the legislator introduced the new role of the notary – ensuring immediate enforcement of creditors' claims without any due process guarantees. Before said change, each creditor was required to refer to the court, plead the case and obtain a writ of execution for foreclosure. The current Georgian lending environment permits the lenders to avoid the lengthy court proceedings and start foreclosure without the risk that the borrower challenges the claims in a balanced and neutral forum.

Georgian mortgage law undertook significant reform in late 2013. By the virtue of the latest amendments introduced to the Civil

¹ Georgia's Civil Code, art. 302.

Code, Georgia established once again the mandatory notarization requirement for the mortgage agreements concluded for securing loan transactions.² While the amendment was justified for the reasons of protection of home owners from the lenders' abuse, the notarization requirement does not apply to the collateral agreements concluded for securing claims of commercial banks, MFOs, Credit Unions and other qualified credit institutions.³

From a practical viewpoint, it is possible to observe that most cases in which the owners' financial hardship is exploited in order to force unfair mortgage terms actually relate to collateral agreements concluded by financial institutions. As a result, the mortgage reform may not be assessed as a step forward to improve individual home owners' protection. Moreover, due to the mandatory participation of notary in the process, transaction costs are increased that will increase cost of lending financial burden of which always lies on the borrowers.

As already mentioned above, legal basis for lending is found in the Georgian law of obligations, provided that the lender is not a commercial bank, credit union or micro-finance organization subject to specific regulations by the National Bank of Georgia.

² Article 289.1¹ of the Civil Code. Before the amendment, mere registration in the NAPR of mortgage agreement was sufficient.

³ *Id.* art. 289.1³.

a. Execution of Loan Agreements

We would like to provide a step-by-step analysis of debt investments in Georgia. Following the due diligence study that shall be conducted before making any investment, the subsequent step is conclusion of loan agreement. According to the Civil Code of Georgia, loan agreement is to be concluded either orally or in writing, requiring no notarization or registration for entry into force.

⁴ The freedom of form does not work well in practice due to the enforceability problems of oral loan contracts particularly because of the clause of the Civil Code stating that existence of loan cannot be proved based on the witness statements only. ⁵

b. Interest and Penalty Rates

Georgian legislation does not provide any fixed interest or penalty rates. As a result, from civil law perspective, decision on rates totally lies on the parties' agreement. Few years ago there was as widespread misuse of the freedom by lenders. Most of loan agreements included late payment interest rate equaling to **daily 0.3% calculated from the principal amount of loan**. In order to protect debtors from unreasonably high penalty rates, Appellate Courts of Georgia established penalty interest rate reduction

⁴ *Id.* art. 624.

⁵ *Id.*

practice meaning that at the stage of appeal or in case of recognition of arbitral awards, the courts reduce **rate to 0.1% *ex officio***. The practice of Appellate Courts impacted reduction of rates in contracts as well.

Georgia has de-liberalized its interest rate policy being it one of the greatest factors of attraction for both domestic and foreign investors to invest in secured debt transactions. By the virtue of 2013 amendments, the Civil Code established an higher interest rate limit for debt agreements secured with mortgage. According to the amended version of article 625 of the Civil Code, monthly interest rate should not be higher than the average market commercial banks' interest rate of the preceding year multiplied by 2.5 and divided by twelve (12).⁶ Interestingly enough, the requirement is not applicable to commercial banks, MFOs, credit unions and other qualified financial institutions.

⁶ The new law also requires inclusion of monthly interest rate in the debt agreements secured with mortgage. The interest rate limit is not applicable to the debts value of which is less than GEL 1000 or equivalent in foreign currency. The limit includes interest rate amount as well as loan disbursement fees except for the costs of notarization and registration. For determining the upper limit, the Civil Code refers to the official monthly statistics published by the National Bank of Georgia. The analysis include the schedules of market interest rates for different types of loans being secured, non-secured, consumer or business. According to the latest data, market interest rate in April, 2014 was 17%. Consequently, upper interest rate limit should be approximately 3.5%.

Different conclusions should be made from the tax perspective. If the parties of lending transaction are related persons, ⁷ Tax Code requires market interest rate to be applied. ⁸ The market interest rate is fixed NBG monthly **and ranges from 13-20% for different types of loans**. In case of failure of such persons to apply the market interest rate, expenses and revenues generated from such loan can only be accounted as if transacted on market rate for tax purposes.

2. Securing Claims/Enforcement

Georgian law envisages the following secured transactions: mortgage over immovable property and pledge over the movable property (shares, rights, claims, other movable items). The above-mentioned pro-creditor bias is once more reiterated in the remedies creditor has in case of default or alleged default. In case of mortgage transactions, the mortgagee is authorized to: (i) request transfer of collateral into its ownership based on the joint application to the NAPR;⁹ (ii) affect private direct sale of property (applicable only to pledge); ¹⁰ (iii) conduct realization through auction based on the writ

⁷ *Supra note* 129, art. 19.

⁸ *Id.* art. 18.2.

⁹ *Supra note* 141, art. 300.

¹⁰ *Id.* art. 283.

of execution issued by notary;¹¹ or (iv) opt for default rule for enforcement through court proceedings.

As to the first legal remedy, 2013 amendments also affected the possibility of direct acquisition of ownership over collateral in case of owners' default. For a long period of time, article 300 of the Civil Code granted the mortgagors the right to receive the collateral into ownership in case of default if so provided in the collateral agreement. Following the reform, the mechanism is available only if the owner and the mortgagor jointly refer to the NAPR demanding for the transfer of the property in order to offset the debt obligation. Although the legal basis for the option was provided for by law, the uniform practice of the NAPR rendered the provision unworkable, requiring the consent of the owners on transfer. Consequently, the amendment should be deemed as a necessary abolishment of dead provision of the Civil Code.

Though the private direct sale of collateral by the mortgagor is not subject to the same enforcement problems, it remains however one of the least common way of foreclosure.¹²

¹¹ *Id.* art. 302.

¹² If the parties agree in the movable property pledge agreement, the pledgor may affect private sale of the collateral in case of the borrower's default. In such case, the creditor shall act in good faith and sell the property for reasonable and fair price [art. 283 of the Civil Code]. Although the private sale of pledged assets is available remedy in many countries like the US and Italy, Georgian law lacks regulations related to default notice and warning on private sale. Unfortunately,

While the fourth one still remains one of the fairest remedy for foreclosure, the third became the most popular choice of lenders since introduction of such authority for notaries. As described above, the remedy is easiest way to satisfy claims. The agreement of parties on that particular remedy need also be explicitly provided in the collateral agreement subject to notarization of substance. Despite the fact that transaction costs significantly increase as notary fees are calculated from the value of collateral, as explained in section 1(a) above, **lenders always opt for the method of foreclosure to ensure timely realization of property.**

3. Taxation of Debt Investments

3.1. Domestic Taxation Regime

We have already described legal framework for debt investments in Georgia. After having analyzed the general legal framework and environment for commercial lending, we can characterize the system as highly liberal with clear pro-creditor approach due to the lack of interest rate regulation, ease of debt transaction closure and subsequent enforcement.

due to the lack of State monitoring over the pledge enforcement, we could not verify the actual use and abuse of the remedy in Georgia.

As pointed on above, Georgian tax system is still in the process of transformation, pointing at decreasing both administrative and financial burden of taxpayers during the next few years. Before discussing the details of the taxation of debt investments, we should recall the basic difference between the taxation of resident and non-resident individuals – subjecting residents to Georgian tax for their world-wide income and limiting non-resident tax to the income generated from the Georgian source only.¹³ In order to achieve a clearer understanding of taxation of debt transactions, we should focus on identifying tax burdens for both parties – lender and borrower. As the main stake of the lender is to gain interest through the period of loan, the borrower is more active side, using the borrowed finances to invest and develop its business activities. From the perspective of the lender, interest received through lending transaction is taxed by 5% at the source of payment.¹⁴

Despite the 5% interest tax rate applicable to general debt transactions, specific emphasis should be made on abolishment of interest tax applicable to certain financial operations, such as:

¹³ Georgian taxation system follows international trend of different treatment of resident and non-resident tax payers. According to the Tax Code, a natural person acquires resident status in case he spends more than 182 days in the territory of Georgia for any continuous 12 months period or serving in Georgian State agency abroad [art. 34. 2]. With respect of residency of legal entities, enterprise having management or business place in Georgia is deemed to be resident.

¹⁴ Interest tax represents one of the three withholding taxes together with dividend tax and royalty tax [art. 131].

interest paid to resident commercial banks, interest received from freely traded securities, interest received by licensed financial institution from another licensed financial institutions¹⁵, interest received from the lending securities issued by Georgian enterprise and admitted for trading in stock exchange listing of foreign country, interest received from Free Industrial Zone Enterprise¹⁶ in the Free Industrial Zone, interest paid by resident legal entity to the state of Georgia.¹⁷ Taking into account the principle of taxation at the source of payment, interest received by **natural person and taxed at the source**, is not included in the total income of the person resulting in the sum being qualified as an income tax exclusive.¹⁸

¹⁵ Licensed financial institutions are institutions, which have respective license based on the Law of Georgia on Licenses and Permits. List of financial institutions is provided in the Law of Georgia on Securities and includes: commercial banks, insurance companies, re-insurance companies, investment banks, stock exchange, central depository, brokerage companies, MFOs, Credit Unions and investment funds [art. 2.54]. However, the rule does not apply to the MFOs [NADARAI, ROGAVA, RUKHADZE, BOKVADZE, COMMENTARY TO THE TAX CODE OF GEORGIA 659, Book I, Tbilisi, 2012].

¹⁶ Free Industrial Zone Enterprise (FIZ Enterprise) is an enterprise established in the Free Industrial Zones (FIZ) in accordance with the Law of Georgia on Free Industrial Zones. Georgian enterprises registered outside the FIZ may carry out activities in the FIZ via permanent establishment (PE). At the same time, FIZ Enterprise acts outside the zones as non-resident legal entity. While FIZ Enterprises are subject to import and export restrictions in the territory of Georgia, they are exempt from corporate income tax (CIT) [art. 25 of the Tax Code].

¹⁷ *Id.*

¹⁸ *Id.*

3.2. Italy-Georgia DTT

Convention between Georgia and the Government of Italian Republic for the Avoidance of Double Taxation with Respect to Taxes of Income and Capital and the Prevention of Fiscal Evasion (*hereinafter* DTT) serves as an international instrument regulating income and capital taxation system for the income flowing between the two countries.

From the perspective of interest tax, Article 11.1 of the DTT stipulates that interest paid by Georgian taxpayer to an Italian one is taxed only in Italy and *vice versa*, if the interest is not related to the PE of the receiving enterprise located in the country of residence of interest paying enterprise. In the latter case, the interest is subject to taxation in the country of residence of payer enterprise.¹⁹

It should be noted that DTT regime applies only to the portion of interest, which is not affected by the special relations between the source and beneficiary of the payment. If owing to said special relation, a greater rate of interest is imposed, the surplus part is taxed in accordance with general taxation rules of each Contracting State.²⁰

¹⁹ DTT, art. 11.3.

²⁰ DTT, art. 11.4.

4. Equity Investment

4.1. Legal Environment For Equity Investments

Compared to debt investment with a passive role of investor receiving predetermined sums through the entire period of investment, equity investment is based on the concept of cooperative business activities with shared risks and efforts of investor and investee. Before turning to the description of Georgian equity investment environment, two ways for investing in equity should be identified.

Equity investment is very much linked to debt investment since in many cases equity acquisition is an option offered for lender by Georgian companies in case of inability of the latter to re-pay the debt. The option enables investors to acquire shares in an investee and become business partner of the debtor.²¹

Another way for investing in equity of a company is to acquire shares through capital contribution. While direct equity investment is a commonly used mechanism in Georgian JSCs, **convertible loans represents one of the main features of local LLCs for**

²¹ Although convertible debt securities represent widely accepted means of financing around the world, the field is not regulated in Georgia. It is left upon the freedom of contract of the parties to agree on options to request conversion of outstanding debts into the debtor's shares in any kind of legal entity. However, commercial banks are subject to specific regulations on convertible bonds and debentures, which go beyond the scope of the present overview.

attracting investments. The trend is easily understandable if we go back to the strong feeling of ownership and personal attachment shareholders of Georgian companies have in relation to the enterprises. The trend is also reflected in corporate governance of local companies, where in most cases founding shareholder appears as a director or SB chairman at the same time.

a. Investment Through Convertible Loans

As already mentioned above, convertible loans are one of the most popular choices of foreign financial institutions and investment funds investing in local companies. **Moreover, it can already be qualified as a trend of putting equity conversion option in case of default of a borrower.** From the legal perspective, the sole requirement for affecting conversion is inclusion of relevant option in the loan agreement. As long as there is the party's agreement on conversion, **the lender is entitled either to request repayment of outstanding amounts or transfer of shares into its ownership in case of default.** Upon receipt of conversion request from the lender, the borrower is given a chance to transfer shares voluntarily. **If the investee is not cooperative, the lender applies forceful enforcement measures to receive ownership title over the equity.** As a result of the conversion, investor becomes a shareholder of the investee and tries

to earn profit admitting the risk of losing invested amounts in case of business failure.

In case of the exercise of a conversion option, the debtor is obliged to transfer the shares to the creditor in return for offsetting the outstanding debt. Although conversion options are enforceable clauses under the general Georgian law, the consent of debtor is still required for carrying out the conversion since the NAPR does not allow the transfer of shares without the owner's consent except in case of a legally binding final judgment of court.

b. Capital Contributions

Having discussed indirect equity investment through convertible loans, we can now turn to direct equity investment through capital contributions. Georgian law allows acquisition of shares in any type of legal entities through contributing certain amounts in the company's capital. Before going into details of capital contribution, several important principles of Georgian corporate law should be highlighted. One of the most significant incentives for foreign investors to invest in Georgian enterprise **is lack of minimum capitalization requirement**. As a result of corporate law reforms implemented in Georgia, minimum capitalization requirement has been set at zero. Moreover, Georgian law allows **share distribution to be disproportionate to capital contribution leaving**

determination of internal corporate relationships upon sole discretion of the shareholders. The freedom of internal relationships extends to the possibility to freely arrange rights and obligations of the partners.

No minimum capitalization requirement and the possibility of corporate decision-making power distribution regardless of shareholders' financial contributions grants investors the unique opportunity to do business with almost no solvency control from the State. Moreover, flexibility granted to shareholders increase self-investment capabilities of Georgian enterprises easily attracting foreign capital seeking a free corporate life and minimum governmental interference in the internal corporate and financial dealings.

Not surprisingly for such a liberal corporate law, acquisition of shares through capital contribution contains almost no burden from financial or administrative point of view. The only procedural step for acquisition of shares is execution of the shareholders' decision specifying the identification information of investor, number of shares, amount of contribution and new share distribution. The decision is subject to registration at NAPR in case of LLCs and independent or internal register in case of JSCs.²² As soon as relevant registration authority issues updated excerpt including

²² LGE, art. 5.1.

investor as a shareholder of the company, title over shares is deemed to be transferred.²³

It is noteworthy that registration authority does not require any proof of capital contribution. The latter can be qualified as a second stage of equity investment. **Georgian law admits monetary contributions as well as contribution by transferring material assets or intellectual resources in the company.**²⁴ Monetary contribution may be done through transfer of cash directly or bank transfer on the company's account.²⁵ Moreover, Georgian legal system allows monetary capital contribution to be carried out in foreign currency if the contributor shareholder is a foreign natural or legal entity.

While debt investment results in interest receivable by the investor, equity investment provides the possibility to receive dividends from the company. Apart from the possibility to distribute shares disproportionately to actual contributions, **shareholders are allowed to agree on the dividend distribution scheme disproportionate to the shares held by the partners.**²⁶ The right to receive dividends from distributable profit is a right of shareholders having unlimited power to dispose the right according

²³ *Id.* art. 4.

²⁴ *Id.* art. 3.9.

²⁵ *Id.* art. 3.5.

²⁶ *Id.* art. 8.

to their free will. As a result, shareholders may agree, for example, that only specific partners are entitled to request dividend for the specific financial year. Founders are also allowed to decide that only a specific percentage of dividends is to be distributed. In other words, dividend distribution is a financial relationship between the company and the shareholders and falls within freedom of contract of the parties involved.

Georgian JSC provides more flexible form of regulating the rights of the shareholders including the right to receive dividend and to decide on corporate matters. Law of Georgia on Entrepreneurs allows two types of stocks to exist in JSC. Out of the two, regular stocks enables shareholders to exercise voting powers proportionately to its shares and receive dividends depending on financial standing of the company. On the other hand, ‘privileged shares’ normally do not grant any voting rights, but guarantee a fixed amount of dividend payable to the privileged shareholder despite the financial abilities of the enterprise.²⁷

4.2. Taxation of Equity Investment

a. Domestic Taxation Regime

²⁷ *Id.* art. 52.1.

Taxation of Capital Contribution Transaction

According to the Tax Code of Georgia, **capital contribution is qualified as a financial operation,²⁸ which is exempt from VAT.** Compared to the purchase or the free of charge transfer of assets, capital contribution being VAT-free represents one of the most popular method of transferring assets between inter-related companies.

Dividend Tax

Dividends paid to natural persons, non-resident legal entities and non-commercial (non-entrepreneurial) legal entities are subject to **taxation with 5%.**²⁹ Tax Code of Georgia applies same ratio to the dividend tax as we have already described in relation to the interest tax. Nevertheless, **Tax Code stipulates that dividends received by Georgian legal entities, other than Individual Enterprise, are not subject to taxation.**³⁰

b. Italy - Georgia DTT

According to Article 10.1 of the Italy-Georgia DTT, dividends paid by Georgian legal entities to **Italian residents is subject to taxation in Italy.** DTT further stipulates that such dividends may

²⁸ Tax Code, art. 15.2(g) and 168.2(a).

²⁹ *Id.* art. 130.1.

³⁰ *Id.* art. 130.2.

also be taxed at the Country of origin of the dividend payer's enterprise, provided that a) the dividend tax does not exceed 5% and the beneficial owner of the dividends owns at least 25% of dividend payer company; b) 10% of the company's capital in all other cases. Similarly to interest tax, dividends received through the activities related to the PE of the company located in another contracting State is taxed in the contracting State. ³¹

³¹ DTT, art 10.3.

CONCLUDING REMARKS ON INVESTMENT ENVIRONMENT IN GEORGIA

Andrea Borroni

We have analyzed the general legal framework for foreign investment and the debt and equity investment environment existing in Georgia. The basic feature of the Georgian legal system is its pro-investment bias which grants private actors greater freedom to do business in a liberal commercial environment. At this point, we can highlight the major incentives foreign business may benefit from when investing in Georgia.

First, **Georgia is part of the international legal framework for facilitation and protection of investments**, by determining ICSID jurisdiction, enforcing New York Convention and intellectual-property- and trade-related conventions within the system of WTO and WIPO. As a result, foreign investment is equipped with almost all mechanisms existing for protection of cross-border flow of business.

Second, **Georgian commercial law features a liberal approach and a pro-investment bias**, by granting civil actors almost unlimited right to transact and structure civil relationships

without intensive interference on the State's part in relation to the private dealings. Such freedom enables investors to increase production productivity with decreased transactional costs and additional social burdens. This is particularly highlighted in deregulation of commercial and consumer lending interest rates, pro-creditor enforcement procedures and ease of foreclosure.

Third, **Georgian corporate law establishes minimum publicity requirements and allows investors to have internal corporate life different from its public face.** Georgian business may start in one business day and the State has no interest in internal corporate dealings of shareholders. In other words, founders may even disrespect mandatory corporate structure of selected enterprise contemplated under the law and agree on specific rules of internal operations giving unlimited flexibility to beneficiaries.

Fourth, **Georgian law requires no minimum capitalization and admits dividend and share distribution disproportionate to actual contributions made by the founders.** Foreign investors may start business with no capital subject to State's supervision or control. Moreover, investors may agree on distribution of corporate powers and rights in the company irrespective of their contributions. As a result, Georgian companies represent an

attractive place to invest with freedom to arrange financial relations between the shareholders and enterprise.

Fifth, **Georgian corporate income tax is only 15% for resident enterprises and 10% for non-residents.** Non-residents receiving income from Georgian source are subject to taxation for that source only, while residents are taxed on their world-wide income. No citizenship tax exists in the Country. Moreover, Georgia is part of international double-taxation avoidance system with signed bilateral agreements with many States.

Lastly, **Georgia will soon enter EU free trade area getting greater trade and economic integration with Europe.** DCFTA is part of the Association Agreement initialed in Fall 2013. The Agreement was recently announced to be signed in August 2014 resulting in trade liberalization with the EU in an extent far beyond GSP+ system.

GEORGIAN ARBITRATION

Andrea Borroni

Summary: Introduction **1.** Historical Overview **1.1.** Private Arbitration Law of 1997: Shortcomings and Consequences. **2.** Drafting and Enforcing the New Georgian Arbitration Law of. **3.** Current arbitration developments in Georgia and abroad. **4.** Arbitration agreement. **4.1.** The “Kompetenz Kompetenz” principle. **5.** Arbitrators. **6.** Due process. **7.** Interim Measures. **8.** The Arbitral Award. **8.1.** Remedies. **8.2.** Final and binding award. **8.3.** Res judicata effect of the award. **8.4.** Setting aside an award. **8.5.** Remand. **8.6.** Recognition and enforcement of an award **a.** The role of the New York Convention in recognition and enforcement in Georgia **b.** Partial recognition and enforcement **c.** Limitation of recognition and enforcement **d.** Grounds for denial of recognition and enforcement. Concluding remarks

Introduction

Nowadays, it is commonly affirmed that one of the main advantages brought forth by arbitration as a method of private dispute resolution lies in two essential characteristics of the award, namely its being final (the so-called ‘finality’) and binding on the parties.

From a functional viewpoint, in fact, apart from the controversial issue pertaining to the legal status of the decision rendered by arbitrators, the award shall be as effective as a court decision in respect of the parties to an arbitration: many national legal systems expressly provide for such an effectiveness, at least in principle.

A short summary of the advantages that are usually ascribed to arbitration – that is, in particular, its being fast, private, confidential, along with the expertise and specialization of arbitrators and the separation from national legal systems - is sufficient to determine the reasons why the finality of the award constitutes a necessary requirement to ensure the latter’s actual effectiveness.

In other words, by resorting to arbitration, the parties seek a resolution of the dispute which is, on the one hand, fast and immediately binding on them (and, in addition, easily enforceable against them) and, on the other hand, which is generally not subjected to a re-examination on the part of state courts, for, if an

award is liable to be newly adjudicated by State courts, then it is not worth rendering it.

Moreover, especially on an international level, the final and binding nature of the award is of utmost importance, since it represents the characteristic which provides the basis for entrepreneurs' and international trade actors' decision to resort to arbitration rather than to court proceedings.

By means of an arbitration agreement, in fact, the parties to an international contract may decide to remove the disputes that may arise throughout the duration of their contractual relation from the jurisdiction of the domestic judiciary systems and to submit them, instead, to a private, independent body which has the power to definitively and authoritatively resolve disputes, and which is, in principle, free to operate in compliance with the provisions of the law that the parties have chosen. Hence, in so doing, some of the uncertainties that are inherent in the international legal relations, especially those that derive from the determination of the competent jurisdiction to resolve disputes, and, in great part, also those concerning the identification to the applicable law, are removed, or at least, largely reduced.

It is widely acknowledged, in fact, that international arbitration institutions, due to their private and autonomous nature and the fact of not being formally bound to any specific national

legal system, enjoy a greater degree of liberty in resolving disputes since they are not subjected to procedural formalities and substantive constraints that characterize instead judicial proceedings. Furthermore, arbitrators have to settle the case according to, theoretically, the law chosen by the parties, or, in the alternative, according to the laws which the arbitral tribunal deems to be appropriate to adjudicate the case at issue, while being granted also a broad discretion and being subjected, at least in principle, to a single restriction, that is, the parties' will. So, in short, the striking lack of formality that characterizes international arbitration is concretely realized on a twofold – i.e. procedural and substantive – level, and this, in turn, clarifies, on the one hand, the closed relationship between arbitration and the principle of private autonomy, and on the other hand, the vocation of international arbitration to constitute the 'judicial moment of *lex mercatoria*'.

Nonetheless, the idea, or rather the hope that arbitration may amount to an instrument to 'denationalize' contracts, as well as the belief that international arbitration may actually exist in a sort of regulatory vacuum, even though both of them may be sharable, turn out to be rather illusory in practice.

As a matter of fact, the private autonomy of the parties to resort to arbitration and that of arbitrators in deciding disputes narrows or widens depending on the more or less punctual

influence of national laws, where applicable, or of uniform regulations, where existing.

In general, over the last decades the resort to arbitration as an effective method of dispute resolution has increased in the majority of States worldwide.

Georgia's involvement in this global trend is, however, a novelty; its complex domestic politics along with the economic stagnation of the nineties have contributed to slow down the implementation of an effective private law system.¹ The Georgian government has acknowledged only recently the need for a decrease in the interference and predominance of the State in the private sector and has consequently started to liberalize several domains with the purpose of reducing the bureaucratic barriers that hindered both the economic growth and a potential thriving business sector.

To this end, in 2010 the government enacted the new Georgian Arbitration Law (hereinafter, GAL) as the field's initial reform. Despite some successful changes which have been obtained within the business sphere so far, Georgia's system of dispute resolution is still affected by time-consuming court proceedings in both civil and commercial law. Although the GAL represents an important step forwards, its enforcement alone could not tackle all problematic

¹ G. TSERTSVADZE, BRIEF COMMENTARY TO THE GEORGIAN ARBITRATION LAW 2009, (2011), at 1.

issues regarding the Country's arbitration system, nor could it answer all questions arising from the practice. The major problems in this regard concern, in particular, practitioners' insufficient experience and knowledge of other arbitration systems, the inadequate integration of Georgia into the international arbitration society along with the lack of documentation attesting the current situation of the Country's arbitration field which could, instead, enable the system to gradually evolve and improve.

Notwithstanding these deficiencies, the private dispute resolution system represents a viable and valuable alternative to judicial proceedings in Georgia, therefore, the recourse to it shall be encouraged among both private citizens and entrepreneurs, while the system's reliability and efficiency shall be further enhanced. In view of this objective, it is worth taking into the evolution of the Georgian arbitration system over the last decades so as to highlight both its strengths and weaknesses to pave the way for future developments.

1. Historical Overview

Since the current status of Georgia's private dispute resolution system is the result of the Country's legal history, it is necessary to first address it from a diachronic perspective.

In 1801 Georgia became part of the Russian Empire, thereafter, new laws and institutions along with a foreign language were forcedly introduced in the Georgian legal system. As a consequence, the Georgian system became alien to its citizens, who had to deal with both an unfamiliar judiciary and legislation for nearly two centuries. In fact, in 1921, after only three years of independence, Georgia was once again occupied by Russian military forces, and became a member of the USSR. Under the Soviet rule, the private sector as well as all private commercial activities were abolished and replaced with the statutory control and administration of economics and commerce.² Thus, it was not until the late nineties (1997), six years after the collapse of the USSR, that the newly independent State of Georgia enacted a new law, namely the “Private Arbitration Law”, and resumed to autonomously ruling private sector matters. In the same year, Georgian “Arbitrazh” courts, which mirrored Russian “Arbitrazh” courts³ having specific jurisdiction in settling

² For a comprehensive overview of these historical developments, see 1 K. ZWEIGERT & H. KÖTZ, INTRODUZIONE AL DIRITTO COMPARATO, (Barbara Pozzo trans. 1992), A. GAMBARO & R. SACCO, TRATTATO DI DIRITTO COMPARATO, *Sistemi Giuridici Comparati*, (1998) and G. AJANI, SISTEMI GIURIDICI COMPARATI, (2006).

³ The Arbitrazh court or *gosarbitrazh* was “a quasi-administrative agency that resolved disputes between state enterprises”, and which “operated within the confines of the administrative-command system”. (K. HENDLEY, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 Am. J. Comp. L. 93 (1998)). As to role of *gosarbitrazh* in Soviet Russia, see S. POMORSKI, *State Arbitrazh in the U.S.S.R.: Development, Functions, Organization*, 9 Rut.-Cam. L. J.

commercial disputes, were abolished as well. Despite their name, these courts were part of the ordinary judicial system, so they did not deal with private dispute resolution. Besides, owing to their Russian origin, their abolition pursued a twofold objective: for one thing, Georgian authorities' will to remove all traces of the Russian rule, and, on the other hand, their belief that such abrogation would have improved the separate development of the Country's arbitration and judicial systems.⁴ Nonetheless, though the Private Arbitration Law was regarded as a political turning point for the Country, such law was unsuccessful. In fact, it proved to be flawed and formulated by an immature legislator, who had little knowledge of the private law field⁵ as well as commercial disputes, and, though involuntary, it betrayed the Russian legal education of its drafters.

61 (1977). For a study of the transition from *gosarbitrazh* to current Arbitrazh Courts in Russia, see K. HENDLEY, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 Am. J. Comp. L. 93 (1998), and K. PISTOR, *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22 Rev. Cent. & E. Eur. L. 55 (1996).

⁴ It is worth bearing in mind that Georgia, at the time, had just gained independence after more than one century, so, its political elite aimed at eliminating further interferences coming from Russia or based on Russian way of thinking. Further on, due to the fact that Arbitrazh courts dealt with private commercial disputes, but were part of the ordinary judiciary, their maintenance in the post-independence Georgian system could have led to difficulties in distinguishing their role from the one held by real arbitration tribunals.

⁵ The first Georgian private law was enacted in 1994 and concerned the entrepreneurs, while the Country's Civil Code was formulated on the basis of the German BGB and enacted in 1997.

In the former Soviet Union, in fact, non-judicial legal proceedings used to play a very important role, as opposed to other legal systems, for two main reasons:

1. due to the USSR economic system it was rather common to submit disputes between State companies to non-judicial courts and it was anyhow necessary to exclude the jurisdiction of ordinary courts in relation to disputes concerning international trade. Furthermore,

2. on the basis of the Marxist doctrine and the longed-for disappearance of the law, it was necessary, when possible, to avoid commencing legal proceedings in courts which applied the law and resort, consequently, to other procedures.⁶

From the viewpoint of taxonomy, the USSR legal system recognized two different forms of arbitration: the public arbitration which had the power to resolve disputes between State companies or between the various Ministries; and, the conventional arbitration which settled international commercial disputes, while it played a merely secondary role in disputes involving USSR citizens.

⁶ Such tradition was particularly evident in relation to labour law matters, since those disputes were settled before "social organizations" which were distinguished from State courts (for instance, they were decided by the general assembly of the Kolkhoz; or there were also the so called "Comrades Courts". As to the latter, see J. N. HAZARD, *COMMUNIST AND THEIR LAW*, (1969), at 117-126). As regards the trend towards an 'informal' justice, see J. N. HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY. THE FORMATIVE ERA OF LEGAL INSTITUTION*, (1960).

Such option was particularly agreeable to foreign entrepreneurs who did business with the Soviet Union and wanted to avoid being tried before ordinary courts – which, as stated above, were deemed unfit to ensure the issuance of decisions pursuant to the law (besides, even Soviet citizens disliked bourgeois judges...).⁷ In order to foster the recourse to such kind of ADR, the USSR ratified international Conventions and set up an *ad hoc* institution: the Arbitral Tribunal of the USSR Chamber of Commerce.⁸

Such tribunal established its own rules of procedure and settled disputes in accordance with the agreement concluded by the two parties; it resorted only to a lesser extent to commercial customary business practices and to the applicable law according to the rules of the conflict of law.⁹

In the USSR the decisions of said tribunal could not be appealed against and the organizations which were authorized to conclude commercial contracts with foreign parties¹⁰ worked to include a

⁷ S. PISAR, COEXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST, (1970).

⁸ It was created in 1932, and it issued nearly 300 decisions every year. R. DAVID & C. JAUFFRET-SPINOSI, I GRANDI SISTEMI GIURIDICI CONTEMPORANEI, at 179 and footnote 41. The rules were rewritten in 1975.

⁹ D. F. RAMZAITSEV, *La Jurisprudence En Matière De Droit International Privé De La Commission Arbitrale Soviétique Pour Le Commerce Extérieur*, in Rev. Crit. Dr. Int. Privé, (1958), at 459-478.

¹⁰ U. B. QUIGLEY, THE SOVIET TRADE MONOPOLY, (1974).

clause into the agreement which assigned such tribunal the exclusive competence to settle any disputes arising between the parties.¹¹

1.1. Private Arbitration Law Of 1997: Shortcomings And Consequences

The 1997 Law on Private Arbitration represented Georgia's first attempt to depart from the model of Soviet Arbitrazh courts, even though said Law "was far from the international best practice."¹²

As a matter of fact, the drafting of the **Private Arbitration Law of 1997** was accompanied by **three main erroneous attitudes** that have consequently conditioned the role of arbitration in Georgia for the subsequent decade.

1. In the early nineties many European Countries completed reforms concerning their arbitration system, in order to enhance its role as an alternative method of dispute resolution; the drafters of the abovementioned law did not take into account such developments.
2. As a consequence of the Soviet past, Georgian judges and lawyers did not have any experience in relation to neither the domain of private dispute resolution, nor the specific

¹¹ J. H. GIFFEN, THE LEGAL AND PRACTICAL ASPECT OF TRADE WITH THE SOVIET UNION, (1969).

¹² JILEP Study – *Assessment of ADR in Georgia*, 2011, available at www.ewmi-jilep.org/download/23 (Last visited 17 July, 2014).

requirements of arbitration proceedings; nevertheless, they did not succeed in attracting the interest of any expert or high-qualified practitioner of the field to support them.

3. The provisions of the UNCITRAL Model Law (hereinafter, ML)¹³, which had been successfully adopted and implemented worldwide, were not followed, nor was any other international source.¹⁴

The Georgian legislator's failure to rely upon foreign support or experience resulted in evident **shortcomings** of the Private Arbitration Law both at the domestic and international level.

As regards the **national** sphere, such law contained provisions which openly **disregarded ML** ones¹⁵, such as, for instance, the

¹³ UNCITRAL stands for United Nations Commission on International Trade Law. The UNCITRAL issued the Model Law on International Commercial Arbitration in 1985, which was adopted by the United Nations Commission on International Trade Law on 21 June 1985, and subsequently amended by the United Nations Commission on International Trade Law on 7 July 2006. The establishment of a Model Law on arbitration was regarded as a necessary measure, due to the “value of arbitration as a method of settling disputes arising in international commercial relations” and as a way to contribute “to the development of harmonious international economic relations” (see *Resolutions adopted by the General Assembly*, UNCITRAL Model Law on International Commercial Arbitration, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (Last visited April 3, 2014).

¹⁴ G. TSERTSVADZE, *supra* note 1, at 14-16.

¹⁵ Par. 1 of Art. 35 of the aforementioned UNCITRAL ML deals with recognition and enforcement of awards and sets that “an arbitral award, irrespective of the country in which it is made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced [. . .]”, Art. 35, Ch. VIII – Recognition and Enforcement of Awards, UNCITRAL Model Law on

decision to deprive courts of the power to confirm or enforce arbitral awards, while entrusting “the right to enforce an arbitral award [. . .] to the chair of arbitration”¹⁶. Besides, the terminology which emerged in the wordings of the law of 1997 was not in line with the international practice¹⁷, causing difficulties with regard to the correct understanding of its provisions.

Moreover, owing to the **lack of any supervisory authority**, the proper development of the early Georgian arbitration system was hindered by corrupt and fraudulent attitudes.¹⁸ The main aim of

International Commercial Arbitration, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited April 3, 2014). Moreover, part 2 of the ML contains the Explanatory Notes on the 1985 ML, whereby it is clarified that the ML does not establish any detail provisions in relation to recognition and enforcement because the rules that should apply to arbitral awards “should follow closely the New York Convention.” (Part 2, paragraph 8, n. 49 of the UNCITRAL ML). It follows that the Georgian Private Arbitration Law disregarded both the UNICITRAL ML of 1985 as well as the New York Convention.

¹⁶ See G. TSERTSVADZE, *supra* note 1, at 17. Art. 42 of 1997 Law “empowered the chairman of an arbitration panel to issue an enforcement order within 5 days after a party’s request”, so no judicial review was accomplished prior to the enforcement of arbitration awards, leading consequently to power abuses and frauds. JILEP Study, *supra* note 6.

¹⁷ For example, under the internationally recognized terminology, we talk about “setting aside procedure” as regards to arbitration awards, while according to the Georgian Private Arbitration Law, the courts may “change” the awards. G. TSERTSVADZE, *supra* note 1, at 17.

¹⁸ For instance, a well-known case involved an arbitrator who rendered an award in a dispute between two brothers pertaining however to a real estate that belonged to a third party (which had not been notified of the arbitral proceedings); and, as a result of the award’s enforcement, one of the two brothers obtained the ownership of said property. JILEP Study, *supra* note 6.

arbitration institutions at the time was, in fact, to attract customers, and in order to achieve such goal, they would carry out even unlawful procedures or activities¹⁹. Consequently, most of the new arbitration institutions that were established pursued purposes other than the dispute resolution. As a result, Georgian citizens and entrepreneurs began to mistrust the domestic arbitration system.

The shortcomings related to the **international** sphere concerned, in particular, “the absolute **lack of regulation** regarding the **recognition and enforcement of foreign arbitral awards**”²⁰; in fact, although Georgia had ratified the New York Convention²¹ in 1994, it used to apply the International Private Law and the Minsk Convention²², which, as opposed to the former, excluded the enforcement of foreign arbitral awards.

¹⁹ For instance, arbitration institutions rendered voidable awards as regards to a dispute which had already been resolved. As a consequence of art. 7 of 1997 Law, which required arbitration institutions to be registered as limited liability companies, a great number of for-profit institutions arose competing with each other for attracting new ‘clients’ (*i.e.* parties that would rely on them in case of arbitration), and, in order to reach such objective, arbitration institutions started to be biased, acting in favour of their ‘clients’. Cf. JILEP Study, *supra* note 6.

²⁰ G. TSERTSVADZE, *supra* note 1, at 19.

²¹ Namely, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which took place in New York in 1958. For an overview of the NYC as well as the field of international arbitration, see F. BORTOLOTTI, DIRITTO DEI CONTRATTI INTERNAZIONALI, 1998, at 12-14, and G. B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, (2009).

²² Minsk Convention of 1993 on Civil, Family and Criminal Law Issues Legal Assistance and Legal relationships.

2. Drafting And Enforcing The New Georgian Arbitration Law Of 2010

As stated above, the Georgian arbitration system that emerged in pursuant to the Private Arbitration Law of 1997 required a deep restructure in order to reach the necessary standards of reliability and trustworthiness. Such need became particularly compelling after the so called “Rose Revolution” in 2003, when the newly elected government affirmed “the urgency of reforming the Georgian legal system”²³. However, it was not until 2008, after the amendment of the Law of Entrepreneurs, that the legislator’s attention focused on drafting the new Arbitration Law (GAL), which finally came into force on 1st January 2010, abrogating the Private Arbitration Law of 1997.²⁴

The task of drafting a new law raises always questions pertaining to the principles and the legal framework upon which it should rely.

²³ G. TSERTSVADZE, *supra* note 1, at 20. In November 2003, national elections were held in Georgia but afterwards serious allegations of election rigging in favour of the ruling party spread among Georgian citizens who started demonstrating against the government in charge demanding for a change of power. After days of street protest and the threat of a contingent civil war, the then President Shevardnadze resigned. Such peaceful though non-electoral change of power was named “Rose Revolution”. Cf. I. ALADASHVILI, GUIDE TO GEORGIAN LEGAL RESEARCH, Hauser Global Law School Program, New York University School of Law, (2005), (updated version by A.V. Dolidze, 2010), available at <http://www.nyulawglobal.org/globalex/Georgia1.htm>.

²⁴ For a commentary on the transition phase of Georgian law from the 1997 Law on Private Arbitration to the drafting of the 2009 GAL, see P. M. BINDER, *Comments on the Draft Georgian Arbitration Law*, Georgian Law Review 10/2007-2/3.

Hence, the first issue that the Georgian legislature had to address was whether to choose a separate or a unified regulation of **international and domestic arbitration systems**.²⁵ And, in order to reach such a decision, a comparative analysis of the arbitration systems as well as the international regulation was carried out. As a result of the comparison, the final resolution was to adopt a **uniform regulation** (such as Sweden, for instance), as it was deemed to reduce the risk of misinterpretation of different laws and to avoid problems related to the necessary interconnection between two separate systems. It is worth noticing that the Georgian choice in this regard represents an exception among post-soviet States (for example Russia²⁶ and Ukraine enforce a separate regulation).

Further on, in order to tackle the corruption problem affecting Georgian arbitration system, a deep reorganization of the system was unavoidable. The legislator undertook to re-define the role of courts as well as their powers in supporting the lawfully

²⁵ Georgia's legislature was faced with a specific methodological decision and resorted to the adoption of a uniform approach for all awards, regardless of their Country of origin, mirroring in so doing ML provision (Art. 35, part. 1, Ch. VIII and paragraph 8, part 2 of the Explanatory Notes, UNCITRAL ML on International Commercial Arbitration, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, last visited April 3, 2014).

²⁶ "International arbitration in Russia is governed by the ICAA, whereas the provisions on domestic arbitration are set out in the Private Arbitration Tribunals Act 2002." *Available at* <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2013/russia> (last visited April 2, 2014).

development of the arbitration system and the respect of proper arbitration proceedings. This resulted in the **diversification of powers among courts** of first instance, courts of appeal and the Supreme Court.²⁷ Such distinction substantially means that the courts of first instance are authorized to deal with cases concerning the appointment of arbitrators²⁸ and, in addition, are also required to ensure the correct procedure as well as the compliance with the “Kompetenz Kompetenz” principle²⁹. The two courts of appeal³⁰ decide instead cases regarding interim measures issued by either an arbitration tribunal or the courts of appeal themselves; besides, they are also responsible for recognizing and enforcing domestic arbitral awards as well as executing the setting aside procedure.³¹ Finally, the Supreme Court is granted the power to recognize and enforce foreign arbitral awards. It is worth adding that, as a rule, “**Georgian courts’ decisions concerning arbitration are not appealable**”, including also the Supreme Court’s judgments, as set forth in Article

²⁷ Similar to French and German court structure. G. TSERTSVADZE, *supra* note 1, at 24.

²⁸ This is in line with France, England, the USA, Sweden and Switzerland. Whereas, in Russia and Ukraine, instead, this power is granted to the President of the national Chamber of Commerce and Industry. *Id.*

²⁹ These two powers are respectively established by Article 34 and Article 16 of the Georgian Arbitration Law, and mirror the provisions of articles 1050 and 1062 (4) of German Civil Procedure Code (CPC). For a description of the “Kompetenz Kompetenz” principle, see par. 4.1 hereunder.

³⁰ Namely, the Tbilisi Court of Appeal and the Qutaisi Court of Appeal.

³¹ G. TSERTSVADZE, *supra* note 1, at 25-26.

356²¹(6) of the Georgian Civil Procedure Code (CPC). The provision preventing parties from appealing such court decisions was conceived to avoid long hearings dealing with arbitration issues in courts. Notwithstanding the valid separation of powers among courts, Georgian arbitration system is still lacking a unified practice, as well as the presence of specialized judges, who could effectively advise on problematic arbitral proceedings or awards, so as to increase their speed and quality.³²

Furthermore, the GAL does not provide for the parties' possibility to exclude the so called **supportive power of courts** and submit the case to the exclusive jurisdiction of an arbitral tribunal. However, since courts represent the last chance for a case to be settled if an arbitration does not succeed in issuing an enforceable award, the exclusion of their supportive power is commonly not considered acceptable in Georgia.

Pausing on the historical and legal context in which the GAL was formulated, it is worth bearing in mind that though Georgia was an independent State, it was still undergoing a transition from the old regime's institutions, laws and structures to the new ones. Clearly, this brought about some '**transition problems**', among

³² In France, for instance, there are specialized judges who provide this kind of support in arbitral proceedings.

which, the issue concerning the applicability of the GAL: specifically, whether or not the provisions of the new law had to apply to those awards, whose arbitration proceedings had started before the enactment of the GAL, but which were rendered after its enforcement. On the basis of Georgian courts' practice, this issue has been addressed in two distinct ways: set aside procedures were regulated by the GAL provisions, while, the recognition and enforcement of those national awards produced prior to the enactment of the GAL were governed by the 1997 law.

In addition, also with regard to the Supreme Court's function of recognizing and enforcing foreign awards, inconsistencies have been recorded, for in some cases the law of 1997 has been applied to awards issued after the GAL enforcement.³³

It is evident that maintaining a double, and to some extent contradictory, approach in dealing with transition awards is not an effective solution. Hence, it is advisable that Georgia definitively abandons the application of the 1997 law on arbitration, which, furthermore, does not ensure as much protection of the parties' interests as the GAL does.

3. Current Arbitration Developments In Georgia And Abroad

³³ G. TSERTSVADZE, *supra* note 1, at 29-30.

Georgian authorities have grounded their decision to implement an arbitration system on the basis of the expected advantages which such system is deemed to offer.

In general, arbitration is a valid alternative to litigation in resolving disputes concerning commercial and civil matters, although it cannot replace courts in all cases. Arbitration agreements are frequently included in commercial contracts, and their attractiveness lies precisely in their being a faster and more flexible way to resolve disputes, based on the arbitrators' obligation to efficiently cooperate in order to reach equitable solutions.

Nevertheless, the actual efficiency of the current system of international commercial arbitration seems to have reduced over the past decades. Many practitioners and parties to arbitration proceedings argue, in fact, that this alternative method has grown much more similar to litigation in terms of costs and time.

Therefore, international arbitration appears to have undergone a process of "judicialisation", which has consequently lowered the satisfaction level of the parties involved, in favor of other methods of Alternative Dispute Resolutions (ADR), such as, for example, mediation.³⁴

³⁴ Mediation attracts a great deal of interest in Georgia, for it is regarded as a valuable solution to reduce the excessive workload of courts, save the costs of litigation (and arbitration) and preserve fruitful business relations. Nonetheless, mediation's "development is still at an early stage of study and education." (JILEP

As to Georgia, notwithstanding the need for high-qualified arbitrators along with a more efficient *praxis*, which represent two unavoidable aspects in order to cope with the demands of entrepreneurs, an increase in the demand for recognition and enforcement of arbitral awards has been recently recorded in the Country. Nonetheless, for the time being, court litigation remains the most widespread method to resolve disputes in Georgia.³⁵ It might be argued, though, that since the Georgian civil justice is lengthy and time-consuming - just like the Italian one³⁶ - the recourse to arbitration will gradually grow since it constitutes (or, at

Study, *supra* note 6). Therefore, owing to the great potential of this ADR method, the ADR Center at Tbilisi State University has been developing a program of ADR education. The main goal of the Center (as envisioned by Dr. Irakli Burduli – Dean of the Faculty of Law, and Prof. Dr. George Tsertsvadze, Acting Director of the Center) is to foster the development of mediation in the Country, therefore it is partnering with the Technical College of Law and cooperating with the South Texas School of Law and the Pepperdine Law School). *Id.*

³⁵ It is worth adding that one reason for arbitration still lagging behind in Georgia is the negative perception that both practitioners and businessmen have of the entire system, for they do not consider it to be “either fairer or more efficient than adjudication in the state courts.” *Id.* Nonetheless, according to information provided for by Dechert Georgia LLC, around 1300 cases were submitted to the arbitration institutions in 2013 as opposed to the rough 1000 requests for arbitration submitted in 2012. Therefore, it might be argued that these figures highlight a positive trend for Georgia’s arbitration’s system.

³⁶ According to OECD figures, in Italy the average duration of civil court proceedings is 788 days. See OECD 2013, ‘Giustizia Civile: Come promuoverne l’efficienza?’, *OECD Economics Department Policy Notes*, No 18 June 2013.

least, it will) a valuable alternative in the resolution of domestic civil and commercial disputes.

Concerning the structure of the Georgian private system of dispute resolution, it is worth reference its arbitration institutions.

Generally, these institutions play an important role in the organization of arbitration proceedings, especially in their initial and final stages, as well as in the determination of timing and expenses. The rules set by arbitration institutions are binding not only on the institution itself, but also on the parties to a dispute and the arbitrators as well.

Although arbitration institutions exist in all Countries, Georgian permanent arbitration institutions are, in part, different. In the first place, Georgia had no permanent arbitration institution operating on an international level until very recently, when the Georgian Chamber of Commerce & Industry (GCCI) founded the Georgian International Arbitration Center.³⁷

The Country's arbitration institutions have an autonomous structure and are differently administered, as opposed to the international field practice. In fact, the former do not act as part of the big Chambers of Commerce (such as the International Chamber of Commerce (ICC)), or important institutions, like the London

³⁷ See the website of the GCCI, *available at* <http://www.gcci.ge/?31/413/&lan=en> (last visited April 04, 2014).

Court of International Arbitration (LCIA), but “are independent legal entities”³⁸, in the form of limited liability companies.³⁹ Furthermore, these institutions are frequently founded and managed by partners of Georgian law firms and often strictly related to commercial banks and financial institutions.⁴⁰ Moreover, the employees of Georgian permanent arbitration institutions may both provide technical assistance and expertise to the parties and their arbitrators, just like international arbitration institutions’ staff, and serve also as arbitrators. Generally, many listed arbitrators are

³⁸G. TSERTSVADZE, *supra* note 1, at 41.

³⁹ The fact that Georgian arbitration institutions are for-profit legal entities represents a relic of the preceding Law on Private Arbitration of 1997, “under which a permanent arbitration institution was allowed to commence its activities after its incorporation according to the rules of the Law of Georgia On Entrepreneurs”, which regulated the activities of commercial, for-profit legal entities. Cf. JILEP Study, *supra* note 6.

⁴⁰ So, while in Western Countries arbitration institutions are generally “administered by widely trusted non-profit organizations (like the American Arbitration Association in the U.S.), in Georgia the Arbitration Courts are for-profit companies that depend upon -- and therefore favor -- their “clients”, *i.e.*, the large institutions which select the Arbitration Court in their arbitration clauses.” *Id.* It is therefore plain that many practitioners distrust arbitration proceedings. As a matter of fact, owing to the aforementioned bonds between arbitration institutions and credit and financial institutions “the overwhelming majority of Georgian arbitrations today are brought by banks against borrowers who have signed contracts of adhesion providing for arbitration before private Arbitration Courts that are generally perceived to be under the control of the claimants.” Just to mention an example, according to the data provided by the largest arbitration institution in Georgia, in 2010-2011 banks which had selected that institution in their arbitration agreement won 100% of the arbitrations in which they were involved in extremely expeditious proceedings. *Id.*

independent lawyers who work for law firms or larger organizations.⁴¹

Moreover, given the “autonomy” of these institutions, the issues of expenses and timing are of great importance to the parties in selecting the most suitable institution.

As regards expenses, the parties are required to pay a certain amount of fees before the commencement of the arbitration, which is subsequently divided and allocated in small part to the arbitrators and in greater part to the institution⁴².

According to an international widespread practice⁴³, the parties and the arbitrators determine in an agreement the amount of fees

⁴¹ As a commonly accepted principle, the recourse to international arbitration institutions guarantees a higher degree of reliability and much formal correctness of the awards than *ad hoc* arbitration (like in Georgia), which may be characterized by high fees and flawed procedures instead.

⁴² Such unequal allocation of fees is common in post-soviet Countries. Moreover, arbitration in Georgia is rather expensive because the court fees for enforcing an arbitration award are nearly the same as those charged for litigating the case *ab initio*, that is 3% of the award value and however not less than 300 GEL (as provided for under art. 39 1, (a)2 of the Civil Procedural Code of Georgia. Cf. JILEP Study, *supra* note 6.

⁴³ Just to mention few examples, the UK Arbitration Act 1996, par. 28, sets that the “The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.” Available at <http://www.legislation.gov.uk/ukpga/1996/23/section/28> (Last visited April 4, 2014). Besides, in case of international arbitration institutions, like for example the ICC, art. 36 and 37 of the ICC Rules of Arbitration, set that “the costs of the arbitration include the fees and expenses of the arbitrators and ICC administrative costs fixed by the Court”. Available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and->

due which do not entail the administrative costs, that are separately charged by the institution. Conversely, in Georgia no contractual relation arises between the arbitrators and the parties, but arbitration institutions charge the latter with the payment of a single fee, by means of which they subsequently pay the arbitrators. It follows that many Georgian arbitrators tend to maintain a constant relation with the same arbitration institution.

Whereas, in relation to timing, the GAL establishes that, unless otherwise agreed upon by the parties, the arbitral award shall be rendered within 180 days of the proceedings' commencement, and the tribunal may extend such threshold for other 180 days. However, Georgian arbitration institutions usually try to reduce the duration of the proceedings, when possible, in order to enhance the attractiveness of their service;⁴⁴ anyhow, arbitration proceedings are faster if compared with the average duration of court proceedings.

[ADR/Arbitration/ICC-Arbitration-process/Cost-of-arbitration-in-detail-\(articles-36-and-37\)/](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Arbitration-process/Cost-of-arbitration-in-detail-(articles-36-and-37)/) (Last visited April 4, 2014).

⁴⁴ According to data gathered by JILEP Study regarding the largest arbitration institution in Georgia, arbitrations generally last 1-3 months, as opposed to the one-year-period usually required for litigation. (JILEP Study, *supra* note 6).

Under ICC Rules of Arbitration, art. 30 lays down that “The time limit within which the arbitral tribunal must render its final award is six months” and “The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.” Available at [http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Arbitration-process/Cost-of-arbitration-in-detail-\(articles-36-and-37\)/](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Arbitration-process/Cost-of-arbitration-in-detail-(articles-36-and-37)/) (Last visited April 4, 2014). The same time threshold is established by the Italian Camera Arbitrale di Milano (CAM) under art. 32 of its arbitration

4. The Arbitration Agreement

As arbitration is an alternative method to court litigation, the cases that can be submitted to an arbitration procedure must comply with specific requirements which fall under the label of “**arbitrability**”. Such essential features are the enforceability of the arbitration agreement and the suitability of the subject matter of the dispute to be resolved through arbitration. In Georgia, the principle of arbitrability is set in Article 1 of the GAL⁴⁵.

The arbitration agreement is the “tool” by means of which the parties determine their will to avoid court proceedings in favor of arbitration.

As contracts or agreements must comply with **form requirements**, it might be assumed that the same applies also to arbitration agreements.

Article 8(4) of the GAL sets, in fact, that, as opposed to the provisions of the Model Law or other arbitration-friendly jurisdictions such as England or France, oral agreements are not allowed, therefore, only those concluded in writing are enforceable. Nonetheless, in case no arbitration agreement has been signed by

rules. Available at http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf (Last visited April 4, 2014).

⁴⁵ The article states that “arbitrators are entitled to resolve economic disputes based on the equality of rights in respect of which the parties may reach a settlement”. G. TSERTSVADZE, *supra* note 1, at 46.

the parties, but they have first resorted to arbitration instead of court litigation, then the judges can enforce an arbitration agreement by conduct, for the parties' behaviour proves their tacit will to arbitrate.⁴⁶

Moreover, if an arbitration agreement involves either the State or any state bodies or individuals, the form of the agreement must comply with a specific provision set in article 8 of the GAL, establishing that "change of claim or defense might not constitute a valid arbitration agreement"⁴⁷ and, in addition, electronic means of communication cannot stand for an evidence of such agreement. This provision is however in contrast with the current trend of Georgian State bodies to rely upon electronic services.⁴⁸

Arbitration agreements should also comply with specific **content requirements**. The main reason for such requirements lies in the fact that if an arbitration clause is drafted in an ambiguous or poor manner, in all likelihood, it will lead to interpretation problems, which, in turn, will slow down and aggravate the proceedings and,

⁴⁶ *Id.*, at 49.

⁴⁷ *Id.*

⁴⁸ In 2008 Georgia enacted a law (Law on Electronic Signatures and Electronic Documents) concerning specifically the use of electronic means in official documents, establishing no restriction for state bodies in this regard. *Id.*, at 49.

In any case, such new technologies have recently started to be accepted as opposed to the red-tape that initially characterized the reformed Georgian system and which derived from the distrust of the private system of dispute resolution and the preceding legal tradition.

in most cases, require the involvement of courts so as to obtain a clear definition of the clause content. Therefore, as a general and fundamental rule, a dispute resolution clause is required to be the most **accurate**, including especially the reference to the appointment of arbitrators and the seat of the arbitral tribunal, or at least of the arbitral institution, and the parties' will to exclude court litigation in favor of arbitration.⁴⁹

Moreover, the use of an uncertain wording in drafting the arbitration clauses may give rise to the so called “**pathological arbitration agreements**”⁵⁰, namely, those agreements in which the parties' intention to resort to arbitration is not clearly stated. In Georgia, the interpretation of arbitration agreements relies upon the same principles applied to the interpretation of private declarations of will, that is, the rules and laws of the Georgian Civil Code.

⁴⁹ For instance, ICC Rules of Arbitration lays down in art. 4 (Request for Arbitration) a list of the required information that a proper request shall contain, for instance, the contact details of the parties, the description of the nature and the circumstances of the dispute, all particulars or observations concerning the arbitrators, the place of the arbitration, the applicable rules and the language of the arbitration, etc. the complete text is available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_30 (Last visited April 4, 2014). Similarly, art. 9 of the CAM arbitration rules sets in detail the content of the request for arbitration. These rules are available at http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf (Last visited April 4, 2014). As regards Georgia's arbitration practice, one of the most common defects affecting arbitration clauses is related to the inclusion of the non-perfectly correct name of the arbitration institution in the clause itself.

⁵⁰ G. TSERTSVADZE, *supra* note 1, at 54.

Nevertheless, in case of pathological arbitration agreements judges often hesitate to enforce arbitration.⁵¹

Besides, it may also occur that parties decide to “**bifurcate**” their **arbitration agreements**, namely they stipulate that the different parts of the dispute shall be resolved by distinct arbitration institutions, which represents a bad practice in the domain of arbitration. Such decision, in fact, may lead to problems concerning the possibility of contradictory arbitration rules among the selected institutions, which however do not directly result in the annulment of the agreement.⁵²

Furthermore, in general, parties may add an alternative to the dispute resolution clause, that is, the possibility to choose between arbitration or litigation. Obviously, the inclusion of such an alternative may give rise to doubts regarding the parties’ real intention towards arbitration. Nevertheless, the prevailing trend among arbitration-friendly jurisdictions consists in allowing for arbitration if the circumstances of the case are arbitrable and provided that there is enough evidence of the parties’ will for arbitration.

⁵¹ This cautious attitude is the consequence of the previous phase of Georgian arbitration, in which arbitration institutions often acted in pursuance of misleading intentions.

⁵² G. TSERTSVADZE, *supra* note 1, at 57-58.

Event though the possibility of an alternative clause sounds alluring, especially to those Georgian entrepreneurs who are mistrustful of their domestic arbitration system, Georgian courts have excluded this chance and have opted for defined agreements, in which the State selects the court by appointing it.⁵³

After having focused on the form and the content of the arbitration clause, we shall pause on the scope⁵⁴ of such agreements, and, in particular on the **binding effects** issue of arbitration agreements.

It is commonly recognized that arbitration agreements are binding only on signatories. However, owing to the evolution of the private dispute resolution field, the possibility to extend those effects also to a third non-signatory party cannot be excluded, although the various jurisdictions do not share a common view in

⁵³ *Id.*, at 59-61.

⁵⁴ An issue which emerges in this regard concerns the jurisdiction on arbitration agreements. Under Georgian law, the Civil Procedure Code sets that courts are obliged to terminate proceedings and refer the parties to arbitration. Moreover, the jurisdiction of the arbitrators may be challenged by the presence of legal relations whose competence is not easily defined, such as for example a counterclaim which is not covered by the arbitration agreement; in this case the scope of the agreement sets if the arbitrator has or not jurisdiction over it. (*Id.*, at 63). Furthermore, another issue emerges with respect to the jurisdiction of arbitrators concerning the limitation of the arbitral proceedings in case of long-term contracts that may give rise to ongoing disputes. Courts may decide to stay the arbitral proceedings or to terminate their limitation. However, such limitation provision is not included in the GAL, therefore the Civil Code provisions (Sections 128-146 of Georgian Civil Code) should apply in this regard.

this regard; as to Georgia, the Country's approach towards this issue is still uncertain, as the GAL does not expressly provide for it.⁵⁵ Further on, it is noteworthy that the **assignment of an arbitration agreement** is considered admissible, since, in this way, also a third party may be involved in the arbitration agreement. And, in such case, the assignor ceases to be party to the agreement at the time when the arbitration clause is transferred to the assignee, who subsequently gives notice of his assignment to the other party and the arbitrators. Besides, the assignment of an arbitration agreement may also imply its transfer together with the main contract, which means that if the entire case is transferred, then the arbitration clause moves automatically with it.

And, the fact that the contract which is transferred includes an arbitration clause does not implies additional formalities in respect of the transfer of the contract itself. However, if the assignment takes place once the award has already been rendered, the former is required to be in writing⁵⁶.

4.1. The “Kompetenz Kompetenz” Principle

⁵⁵ In case of piercing the corporate veil, *i.e.* when judges treats a corporation not as a separate legal entity from its shareholders but as a single legal entity in terms of rights and liabilities, the award against non-signatory parties is generally permitted and enforceable on the basis of the link between the shareholders and the company itself. However, Georgia's stance in this regard is unknown as no adequate case law exists. *Id.*, at 67.

⁵⁶ Article IV (1) of the New York Convention.

Under the “Kompetenz Kompetenz” principle, the arbitration tribunal holds the **exclusive authority** to resolve the disputes, while courts are required not to interfere in the jurisdiction of the tribunal. The jurisdiction of the **arbitral tribunal** concerns its authority over those individuals involved in an arbitration; nevertheless, such jurisdiction may also be regarded as a form of obligation on the arbitrators’ part to render the awards.⁵⁷

This principle is connected to the application of the ‘**severability doctrine**’ to arbitration agreements, according to which if the main contract is set aside, the arbitration clause included therein is not.⁵⁸

Focusing on Georgian stance in this regard, the GAL recognizes the **autonomy of the arbitration clause**.

Nonetheless, such autonomy may be challenged and abolished in case of alleged criminal actions connected to one of the party or to the staff of the arbitration institution itself. Besides, in order to prevent arbitration institutions from involving parties in doubtful arbitration proceedings, as it happened in the past, the GAL sets that if an arbitral tribunal rules its jurisdiction, this ruling may be appealed in a district court and the subsequent court decision will be binding. Therefore, in Georgia the “Kompetenz Kompetenz” principle is not so strictly applied as it is in other Countries, since

⁵⁷ G. TSERTSVADZE, *supra* note 1, at 86-87.

⁵⁸ In arbitration-friendly legislations these two principles tend to occur together.

courts may interfere in arbitration proceedings in relation to the arbitrability of the case at issue.

5. Arbitrators

As stated above, since arbitration stands for an alternative to litigation in court, in order to actually fulfil this function, it shall prove to be more efficient than court proceedings, and, to that end, arbitrators have an important role to play. They should in fact possess the necessary skills to cope with the variety of business and technical issues that may arise in the course of a dispute.

Notably, following the practice of other international arbitration institutions (e.g., CIETAC), also in Georgia arbitration institutions are publishing lists of arbitrators including foreign international practitioners, arbitration experts and academics.

Taking into account the criteria for the appointment of arbitrators, according to the rules generally established, the GAL mandates that arbitrators shall be characterized by **impartiality** and **independence**, which can be assessed on the basis of the arbitrators' customary practices and social values as well as their personal relationships (with friends, relatives, colleagues, etc.).⁵⁹

⁵⁹ Besides, as set in art. 11 (7) of the GAL, only individuals can serve as arbitrators, while legal entities, communities or corporate bodies cannot.

Additionally, the impartiality of arbitrators may be evaluated also in relation to the circumstances pertaining the case at hand. Such feature represents a particularly delicate issue to Georgian arbitrators, for, once appointed, they “should avoid entering into any business, professional or personal relationship”⁶⁰, as well as being involved in situations that may hinder their impartiality or independence. In fact, if an arbitrator is deemed to be closely related to the business or the law field, this connection may be regarded as an impediment to a proper arbitration; nonetheless, sometimes depending on the circumstances of the case, the parties may voluntarily choose such an ‘connected’ individual as their arbitrator.

The **ethic factor** is of great importance for the reliability of an arbitration; hence, standardized rules of conduct as well as self-regulation criteria may actually be effective tools that both Georgia and as well as the international arbitration system shall implement.

As to the former, the GAL introduced criteria to improve judicial supervision in order to prevent bad faith arbitrations.⁶¹

⁶⁰ G. TSERTSVADZE, *supra* note 1, at 101.

⁶¹ As to the importance of ethical behaviours in the domain of (international) arbitration, see C. A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION*, Oxford University Press, (2014), as well as C. A. ROGERS, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int’l L. 341

Notwithstanding the endeavors to fight arbitrators' bias, Georgia still requires more effective regulations of both arbitration institutions and arbitrators' conducts, such as, for example, "some kind of certification and an enforceable code of ethics"⁶², along with the implementation of a different system made up of non-for-profit arbitration institutions, so as to avoid "preferential treatments".⁶³

In line with the international practice concerning the **number of arbitrators** composing an arbitral tribunal, the GAL sets that the parties (or the authorities empowered by them) can appoint one or three arbitrators. However, article 11 thereof allows the appointment of two arbitrators as well. This provision may bring forth the risk of potential deadlock.

Since the arbitrators are two and both of them are appointed by the parties, it is apparent that, in this way, the arbitration proceedings may not only be deprived of their impartiality, but, at the same time, no decision by majority may actually be taken.

(2001-2002), and C. A. ROGERS, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 Stan. J. Int'l L. 53 (2005).

⁶² As suggested by some lawyers interviewed by the JILEP team. See JILEP Study, *supra* note 6.

⁶³ An example of the bias which still affects arbitration proceedings in Georgia was a case of 2011 in which a court refused to enforce an award of one of Georgia's arbitration institutions for it deemed it to be contrary to public policy because one of the institution's owners was also a partner of the claimant. *Id.*

Therefore, even though the designation of two arbitrators is permitted by law, it is not advisable.

However, as a basic rule, all arbitrators (*i.e.*, those appointed by the parties as well as those designed by a third party or a judge) shall be deemed to be impartial, independent and acting in good faith. In fact, it is generally assumed that if an arbitrator lacks impartiality and independence, he should either refuse to serve, or be replaced.⁶⁴

Given the importance of the choice of a valuable arbitrator, in USA the parties have the opportunity to conduct interviews⁶⁵ with probable arbitrators before their official appointment, in order to assess their competence, knowledge and their skills as regards the case at issue. This is however not a common practice in Georgia, where parties may rather resort to courts' support for the designation of the arbitrators.⁶⁶

⁶⁴ G. TSERTSVADZE, *supra* note 1, at 102-103.

⁶⁵ Such a provision is unpopular with civil law systems in that it may lead to offences involving the parties as well as the risk of anticipating the arbitrators' opinion.

⁶⁶ This provision is set in article 11.3 of the Georgian Arbitration Law. Although when the GAL came into force, judges lacked the due experience and, consequently, several individuals who they appointed as arbitrators refused to serve. Consequently, the courts had to accept, though reluctantly, to rely upon the lists of arbitrators offered by arbitration institutions. (G. TSERTSVADZE, *supra* note 1, at 105). Arbitration institutions usually provide closed lists of arbitrators, parties may however appoint additional arbitrators who must be approved by the arbitration institution, which, in turn, may select the arbitrator in case of the parties' failure to nominate one. Cf. JILEP Study, *supra* note 6.

Moreover, under the GAL, if the parties fail to appoint arbitrator(s), courts may appoint one within 30 days of the receipt of the application from either of the involved parties.

In case of third authorities empowered by the parties to design the arbitrators, courts may be requested to ascertain whether or not any shortcoming in the tribunal composition has occurred, owing to the discretion that the authority is granted in relation to the appointment of arbitrators.

Another peculiarity of Georgian legislation, though rarely applied, lies in the possibility to include the arbitrator(s)'s name in the arbitration clause, a practice which is not advisable in most of arbitration-friendly jurisdictions, due to its possible “side-effects”.⁶⁷

With respect to the possibility for the arbitrators to deliver dissenting opinions, it is commonly assumed that if no reference to it is provided for by law, such omission shall be interpreted as a tacit acceptance.

Delivering **dissenting opinions** substantially means that an arbitrator is allowed to send his individual opinion to the parties, in

⁶⁷ This practice bears several risks. For instance, if the resolution of a dispute is bound to a specific arbitrator, in the event that the latter cannot serve, the dispute cannot be settled through arbitration.

case he does not agree with the considerations expressed by the other members of the panel.⁶⁸

This practice derives from Common Law systems, so, it is not usually included in civil law jurisprudence. Nonetheless, although Georgia relies upon a civil law framework, the practice of delivering dissenting opinions⁶⁹ is allowed under the GAL.⁷⁰ Finally, an arbitrator is concerned also with a responsibility issue in relation to his conduct throughout his office.⁷¹

However, no unified international approach exists in this regard within the arbitration society, and differences emerge among the different States and international arbitration institutions.⁷² The GAL does not set any provisions or rules regarding the responsibility of

⁶⁸ G. TSERTSVADZE, *supra* note 1, at 110 – 111. However, it is worth noticing that such an independent action is not welcomed in international arbitration.

⁶⁹ Article 39 (2) of Georgian Arbitration Law. It follows that the Georgian system can be considered a mixed system, including both civil law and common law legal principles and practices.

⁷⁰ In that case it will be indicated in the judgment that one or more arbitrators did not agree on the final decision.

⁷¹ “Traditionally, the doctrine of quasi-judicial immunity has insulated the arbitrators from liability for their misconduct”, however, questions arises in relation to such immunity. See E. TRULI, *Liability V. Quasi-Judicial Immunity Of The Arbitrator: The Case Against Absolute Arbitral Immunity*, 17 Am. Rev. Int'l Arb. 383 (2006).

⁷² Arbitration-friendly legal systems tend to regulate this issue case-by-case: for instance, in France lawsuits against arbitrators or arbitral tribunals are excluded, except under certain circumstances. In Common Law Countries, like the UK, arbitrators (like judges) are provided with immunities preventing them from civil claims that may emerge from their activities, unless, of course, they are not considered to be acting in bad faith throughout their office.

arbitrators under tort law. Whereas, it addresses the issue of **liability** under criminal law. In 2008, in order to improve the quality of arbitration in Georgia, the Country's Criminal Code was amended and a new provision was introduced concerning the "responsibility of the members of arbitration"⁷³, including arbitration institutions as well, which are held liable in case they do not afford the proper means for an efficient arbitration.

Nonetheless, arbitration rules, legislators and international regulations usually do not to include any provisions in this regard;⁷⁴ and, in line with this prevailing trend, Georgian arbitration institutions do not provide for any responsibility rule either.

6. Due Process

⁷³ See Georgian Criminal Code, section 332 remark (1). Arbitrators are equated with public officials for the purposes of the criminal laws regarding the abuse of public office. So, arbitrators can be prosecuted in case of abuse of public authority (pursuant to art. 332 of the Criminal Code), exceeding their authority (art. 333 of the Criminal Code) and indifference to the public office (art. 342 of the Criminal Code).

⁷⁴ One exception thereto is represented by Article 40 of the ICC Rules, which states that "the arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law." Art. 40, Limitation of Liability, ICC Rules, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_40 (Last visited April 7, 2014).

The main criterion for evaluating due process in arbitration is represented by the parties agreement on the proceedings in which they have been involved.⁷⁵

In general, the notion of “**due process**” entails the parties right to be heard in case of dispute, or in other words, to exercise their rights of defence⁷⁶. Hence, it is a form of procedural **public policy** and a set of **mandatory rules** with which courts (and arbitral tribunals) have to comply in relation to the parties’ opportunity, and request, to take part to the hearings. Failure to comply with the due process requirement in arbitration proceedings may lead to procedural problems and, in some cases, also to the invalidation of the award itself.

As a result, this requisite is usually regarded as a protection of the parties against possible violations, and it acquires particular importance in those legal and judicial systems the adherence to such protections is rather controversial.

Nevertheless, the due process policy is not so strictly applied to arbitration proceedings as it is in case of courts proceedings, for

⁷⁵ See article 24 of the Georgian Arbitration Law.

⁷⁶ The *Black’s Law Dictionary* defines ‘due process’ as “a course of legal proceedings according to those rules and principles which have been established in [the] systems of jurisprudence for the enforcement and protection of private rights.” Available at <http://thelawdictionary.org/due-process-of-law/> (Last visited April 10, 2014).

arbitrators shall balance the observance of due process with the parties' will to obtain a fast resolution of their dispute.

The due process requirements followed in arbitration proceedings are however based on the judicial practice, so that to ensure, at least, the compliance with the minimum standards that permit the recognition and enforcement of the awards.

In the USA⁷⁷, for instance, arbitrators are not bound to, but tend to implement those procedures which usually belong to ordinary judicial proceedings (such as, the discovery procedure or the rules of evidence), if so requested by parties, in order to prevent any due process claim.⁷⁸ Whereas, in Georgia, arbitration institutions tend to rely upon court proceedings' standards so as to ensure compliance with due process.⁷⁹

⁷⁷ For an overview of due process standards under United States Law, see G. B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS*, (3th ed. 1996), and also O. INOUE, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 *Am. Rev. Int'l Arb.* 247 (2000).

⁷⁸ See P. ASHFORD, *Documentary Discovery And International Commercial Arbitration*, 17 *Am. Rev. Int'l Arb.* 89 (2006). The author outlines the importance of documentary evidence and the different approaches towards it under common law and civil law jurisdictions, while providing also an overview of the main international and arbitration institutions' rules in this regard.

⁷⁹ G. TSERTSVADZE, *supra* note 1, at 120.

Furthermore, a controversial issue falling within the scope of arbitration proceedings is constituted by confidentiality⁸⁰, *i.e.* the limited access to information, namely documents and evidence of the arbitration, which is protected by secret. In some jurisdictions confidentiality is considered necessary, such as, for example, in UK. According to the English doctrine, the concepts of confidentiality and privacy are strictly interrelated and they are largely applied in courts proceeding; this is however not the case in arbitration proceedings, whereby confidentiality is merely encouraged. Whereas, according to other systems, confidentiality hinders the access to the arbitration practice. For instance, in Switzerland and in Sweden confidentiality is respectively considered neither an absolute criteria, nor a mandatory one.⁸¹

⁸⁰ “The duty of confidentiality has always been considered as originating naturally from the private nature of the arbitration proceeding”, hence arising from the parties’ will to arbitrate. It follows that “the extent to which arbitration proceedings, their content, the nature of the dispute and all aspects of the arbitration remain confidential is, in the first place, a matter for agreement by the parties.” G. WEIXIA, *Confidentiality Revisited: Blessing Or Curse In International Commercial Arbitration?*, 15 Am. Rev. Int'l Arb. 607 (2004). The author provides a comprehensive description of the confidentiality issue in arbitration proceedings.

⁸¹ Specifically, art.46 of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) reads that “unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.” Available at <http://www.sccinstitute.com/skiljeforfarande-2.aspx>. The Geneva Chamber of Commerce, Industry and Services (CCIG) administers international arbitration in accordance with the Swiss rules of International Arbitration, which deal with the issue of confidentiality under art. 44. Available at <http://www.ccig.ch/Fournirdesservices/Arbitrage/Rules/tabid/111/language/en-US/Default.aspx>. Similarly, under the Italian legal system, the principle of

Thus, the English approach in favor of confidentiality stands for an exception, as most jurisdictions consider it unessential, and, accordingly, in case the parties want their arbitration proceedings to be confidential, they are required to express such will in their agreement. A fundamental reason for limiting absolute confidentiality in arbitration proceedings is linked to the fact that arbitrations dealing with commercial matters can be of great interest to the public opinion, especially, in relation to the consequences such awards may bring forth within the domain of trade. Given the complexity of this issue, no unified international trend or commonly applied rules currently exist in this regard, and courts tend to deal with this issue case-by-case. In general, the main problem consists in determining the extent to which confidentiality may, on the one hand, be ensured, and on the other hand, not interfere with the public interest. Hence, except in case the parties agree on confidential proceedings, the courts are responsible for interpreting the principle of confidentiality to the an extent that preserves the public interest as well.⁸²

confidentiality is neither mandatory nor absolute. Cf. G. CRESPI REGHIZZI, *L'arbitrato internazionale e la comparazione giuridica*, in *Atti del Convegno "To comparo, tu compari, egli compara"*, Minutes of the Conference that took place in Genoa on 13 June 2003, as cited by A. FRIGNANI, *L'arbitrato commerciale internazionale*, in F. GALGANO (ed.), *TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA*, (Padua, 2004), at 1.

⁸² G. TSERTSVADZE, *supra* note 1, at 125-126.

A further aspect concerning arbitration proceedings is represented by **multi-party arbitration**. As a rule, arbitration is legitimated by the parties' agreement, so arbitrators are not entitled to consolidate different arbitration proceedings on their own initiative.⁸³ Consequently, the parties' agreement is necessary for establishing a multi-party arbitration, and their consent thereto may be tacit or expressed. If an arbitration agreement includes provisions relating to consolidation, then the consent of the parties is accordingly presumed.

Since multi-party agreements often represent the most favorable choice for parties involved in complex contractual relations and other commercial circumstances, arbitration institutions may support parties in dealing with the drafting of said agreements by offering them a model to follow. An example of multi-party arbitrations in Georgia are the financial projects sustained by Georgian banks.⁸⁴

⁸³ Consolidation of arbitration proceedings takes place when the parties to a dispute make separate contracts concerning the same legal relationship and including the same arbitration agreements, and accordingly a party decide to submit to a single arbitral tribunal the claims arising from the different contracts. For an example of consolidation provisions, see art. 10 of the ICC Rules, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_10 (Last visited April 7, 2014).

⁸⁴ G. TSERTSVADZE, *supra* note 1, at 128.

It is worth noticing that a unified method to conduct arbitration proceedings does not exist, and such fragmentation particularly increases in relation to the admissibility of **evidences** (although such differences do not influence the validity of the arbitration itself). In particular, the first significant distinction lies in the different approaches adopted by common law and civil law Countries towards evidence gathering.

On the international level, such distinction is balanced by the application of the IBA rules;⁸⁵ whereas, on a domestic level, the recourse to traditional evidence gathering procedures tends to prevail, even though these procedures are, in part, tailored to the circumstances of the case at issue. Besides, gathering evidence procedures may differ also in relation to the acceptance of electronic documents⁸⁶, which however represent the widespread method of communication and storage of data and information within the economic field.

⁸⁵ The IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration of 2010 were issued to be intended to “provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions.” Cf. the Preamble of the IBA Rules, *available at* <http://www.ibanet.org/Default.aspx> (Last visited July 21, 2014).

⁸⁶ European jurisdictions allow for it, while the Russian approach towards evidence gathering is very formal and does not welcome documents in electronic form as evidence before the court, see G. TSERTSVADZE, *supra* note 1, at 131.

As to the Georgian stance in this regard, the Country relies upon the framework of ordinary court proceedings, therefore, as a civil law system, witnesses⁸⁷ are rarely examined by arbitrators and the major source of evidence is constituted by the documents submitted by the parties submit to the tribunal.

The issues that may arise throughout an arbitration may be of a very technical level; consequently, along with arbitrators, **experts** might be necessary too.

The role of experts consists in offering substantive assistance to arbitrators; their independent opinion is treated as an ordinary evidence, even though they are not binding and cannot be enforced against a party. Furthermore, experts may be appointed by the parties (especially in common law Countries and in international arbitration) or by the tribunal (in civil law systems). In Georgia, party-appointed experts are allowed in compliance with article 34(2) of the GAL, however the decision to rely on experts' opinion is not a very popular choice.⁸⁸

In addition, during arbitration proceedings it may also occur that a party **fails or refuses to attend the hearing**. Accordingly, the

⁸⁷ Witnesses statements are widely present in Common law jurisdictions and are considered as indispensable tools for arbitration. *Id.*, at 134.

⁸⁸ *Id.*, at 155.

default of one party is governed by the provisions included in article 25 of the ML⁸⁹, which are mirrored by those of the GAL. As a rule, if a party fails to attend hearings, the arbitral tribunal is allowed, under certain circumstances, to continue the proceedings and render the award. This represents also the most widespread approach: for instance, the Tbilisi Court of Appeal stated that an award by default in favor of the plaintiff when the respondent does not appear in tribunal is permitted, provided that the arbitration rules includes such a provision⁹⁰.

The last issue which ought to be addressed in this regard concerns the **representation** of the parties. Article 28 of the GAL allows for advocates or other types of representatives to stand for the parties in an arbitration, and, in addition, sets no constraints or limits in respect of their expertise or qualification.⁹¹

7. Interim Measures

⁸⁹ Art. 25 of UNCITRAL ML on International Commercial Arbitration lists three possible circumstances to which a party default may lead, i.e. “if the claimant fails to communicate his statement of claim [. . .] the arbitral tribunal shall terminate the proceedings”, whereas if “the respondent fails to communicate his statement of defence [. . .] the arbitral tribunal shall continue the proceedings” and if “any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings”, *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998-Ebook.pdf> (Last visited April 7, 2014).

⁹⁰ G. TSERTSVADZE, *supra* note 1, at 135.

⁹¹ *Id.*, at 137.

Interim measures and preliminary orders⁹² are the tools upon which the parties to a pending arbitration may rely so as to ensure concrete results prior to and at the end of the dispute resolution.⁹³

The various jurisdictions deal differently with the enforcement of interim measures and these measures represent one of the most controversial issues in the domain of arbitration, since they grant a private adjudicator - who is not the lawful judge - the capacity to issue legal measures without a preliminary investigation and hearing.⁹⁴

As regards Georgia, the GAL does not distinguish between interim measures and preliminary orders (as opposed to the ML's provisions⁹⁵), but it regulates only the former, and allows for the

⁹² The difference between these two tools is that interim measures are temporary measures which can be made by a court upon a party request, while the dispute has not been decided so as to prevent the other party (mis)conduct until resolution of the case. Whereas, preliminary orders are aimed at avoiding that a party prevents the fulfillment of an interim measure.

⁹³ As regards the issue of interim measures in international arbitration, see P. J.W. SHERWIN & D. C. RENNIE, *Interim Relief Under International Arbitration Rules And Guidelines: A Comparative Analysis*, 20 *Am. Rev. Int'l Arb.* 317 (2009).

⁹⁴ Here are two examples: in Germany interim measures can be enforced only after the confirmation of the state court, cf. art. 940 and 942 of German Civil Procedure Code, ZPO, available at <http://dejure.org/gesetze/ZPO/942.html> (last visited April 8, 2014); in France, such measures might be ordered either by the tribunal or by the court, but court enforcement is more effective (art. 808 and 812 of the French Civil Procedure Code, available at http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=19795ABEF3405E60387A349620494960.tpdjo13v_1?idArticle=LEGIARTI000006411297&cidTexte=LEGITEXT000006070716&da (Last visited April 8, 2014).

⁹⁵ Cf. Chap. IV A. Interim Measures and Preliminary orders. Section 1, art. 17 on Interim Measures states "an interim measure is any temporary measure, whether

issuance of interim measures on the part of arbitral tribunals (article 17⁹⁶) and ordinary courts (article 23⁹⁷) as well, likewise the ML.

in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Prevent evidence that might be relevant and material to the resolution of the dispute” and section 2, art. 17 B on Preliminary Orders sets that “the arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.” *Available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf* (Last visited April 7, 2014).

⁹⁶ Under Article 17 of GAL, any party may request the issuance of interim measures for securing claim before the commencement of arbitral proceedings unless otherwise provided in the arbitration agreement. The rules and procedures applicable to arbitration interim measures are highly similar to those applicable to courts. Moreover, Georgian arbitration institutions also provide rules for interim measures and, in general, the decision whether granting interim measures is made by the chair of institution.

⁹⁷ In a judgment of July 7, 2013 the Supreme Court of Georgia ruled in favor a party seeking to arrest a ship in Georgian seas after having filled the request for arbitration in the London Maritime Arbitrators’ Association. The Supreme Court reaffirmed the procedural right granted to parties seeking injunctive reliefs from the courts of Georgia for securing arbitration claims irrespective of the place of arbitration or the rules governing the procedure or substance of the dispute resolution process. Though accepting the validity of such request, the court indicated that the only difference between domestic and foreign arbitration leading to specific treatment of the latter for the purposes of granting interim relief was the “particularities of international arbitration”, which could be found in the instruments governing the process. In search for said “particularities” that could have requested refusal to grant injunctive relief, the court analyzed the New York Convention, the Model Law and the rules of the arbitration institution in question and concluded that nothing in the mentioned instruments prohibited Georgian courts to apply treatment to foreign individuals seeking reliefs for foreign arbitration no less favorable than the one applicable to domestic arbitration under the GAL and the Civil Procedure Code of Georgia.

The arbitral tribunal can order interim measures once it has been constituted; nonetheless, it often occurs that such measures are required prior to its composition. Therefore, in recent years special rules have been introduced by arbitration institutions in order to provide for this need. In particular, one of said rules is represented by the arbitrator's emergency decision which is provided for by certain European institutions, such as the Stockholm Chamber of Commerce (SCC) (art.8 on emergency decisions on interim measures) or the ICC (art.29 and Appendix V). Such practice is however not included in the GAL provisions.

As to the enforceability of interim measures in Georgia, this practice rests on the procedures that have been developed by court decisions; so, a court is required to rule on the recognition and enforcement of the interim measures within 24 hours of their issuance, and, it has no jurisdiction to revise the part of the award which has granted those measures⁹⁸. In general, interim measures issued by courts constitute a more reliable way to preserve the parties' rights in a pending arbitration than those issued by arbitral tribunals, even though, from a legal viewpoint, once the latter have

⁹⁸ G. TSERTSVADZE, *supra* note 1, at 141.

been recognized by a court, they acquire the same validity as those issued directly by courts.⁹⁹

Furthermore, the question regarding the enforceability of interim measures should also be extended so as to include the issue of the enforceability of interim awards, containing interim measures issued abroad. Some scholars have argued that such interim awards can be enforced under the provisions of the New York Convention (NYC); this proposal has however been challenged, in particular owing to the fact that such awards are not regarded as final, since they may be subjected to further changes and amendments, and, therefore, are deemed to lack essential enforceability criteria. However, those Countries, such as Georgia¹⁰⁰, which have enacted ML's provisions, allow for "the recognition and enforcement of

⁹⁹ This happens because public bodies are more favorable to interim measures issued by courts, for the latter can grant interim measures without resorting to the constitution of an arbitral tribunal, and, in addition, they are also entitled to directly enforce them. *Id.*, at 142. According to the author, however, the parties to an arbitration shall be afforded interim measures ordered by arbitral tribunals, for, in the current globalized and interconnected society and economy, one party may easily and quickly move and even conceal his assets as well as the evidence of his misdemeanors within the period of time required by courts to issue interim measures; furthermore, this type of measures falls within the scope of the branch of international private law aimed at recognizing foreign judgments or, from a theoretical viewpoint, the recourse to them may be justified by the staples of the international cooperation and the various agreements and conventions that actually implement it.

¹⁰⁰ Pursuant to Article 21 (1) of the GAL, the Courts of Appeal are required to apply the recognition and enforcement of interim measures.

interim measures ‘irrespective of the country in which [they were] issued’¹⁰¹.

Lastly, before focusing on the arbitral award, it is worth briefly addressing the question of the applicable law.

The GAL¹⁰² simplifies the approach proposed of the ML provisions¹⁰³ and lays down the parties’ right to select the applicable law with respect to the issue at hand, while authorizing the tribunal to define the law, in case the parties fail to determine it¹⁰⁴.

As regards, instead, international arbitration, in Georgia as well, the choice of the law is more flexible as arbitrators are not bound to the rules of a specific State. Hence, arbitrators and parties may choose to rely upon substantive rules of a law only and not upon the whole body of laws of a Nation.¹⁰⁵

¹⁰¹ G. TSERTSVADZE, *supra* note 1, at 144.

¹⁰² Article 36 of the GAL.

¹⁰³ Article 28 (1) of the UNCITRAL ML, establishes that “(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.” *Available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (Last visited April 7, 2014).

¹⁰⁴ The provisions governing the applicable law to arbitration disputes in Georgia are based on the French Code of Civil Procedure.

¹⁰⁵ G. TSERTSVADZE, *supra* note 1, at 146. Moreover, in international arbitration arbitrators may have different options as regard the selection of the applicable law, such as transnational law or taking also into account trade usages and ruling

8. The Arbitral Award

An arbitral award is the final outcome¹⁰⁶ of an arbitration and it is expected to meet the following requirements: i) it should be final, certain and sufficient to resolve the parties' dispute while satisfying their intentions, ii) its wording must be clear and grounded on the governing law, iii) all the circumstances related to the case must have been taken into account before its issuance and iv) the reasoning of the award should be, on the one hand, understandable to the parties and their lawyers and, on the other hand, it should enable them to assess the advantages and disadvantages that its enforcement may bring about, while being enforceable by the courts¹⁰⁷; in addition, due regard shall be paid to the drafting of the reasoning of the award, for depending on its formulation, the reasoning may give rise to a ground of appeal.

ex aequo et bono. On the basis of the case law of the Supreme Court of Georgia, the parties more often choose the National law of the State, rather than *lex mercatoria*. Specifically, according to our sources, no case in which arbitrators have opted to apply *lex mercatoria* has so far been reported.

¹⁰⁶ Here is the definition of arbitral award provided by the Black's Law Dictionary, "The decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision.", available at <http://blacks.worldfreemansociety.org/1/> (Last visited April 8, 2014).

¹⁰⁷ As regards the enforceability of an arbitration award, this derives from the fact that such award meets certain minimum requirements of certainty and completeness, which in particular pertain addressing and deciding all the issues of a case.

Arbitral awards shall include not only the final award but also the previous partial ones; besides, in case the parties settle their dispute during the arbitration proceedings, the arbitral tribunal shall terminate the latter and, if so required by the parties, record the settlement as an agreed award. Such provision is adopted in almost all arbitration-friendly Countries as well as in those adopting ML's provisions on arbitral awards, such as Georgia (though deviations from the ML's rules are apparent in the GAL).

Furthermore, the content of an arbitral award, that is, the claims and the defenses of the parties, determines either its validity and its subsequent enforceability, or the possibility for either party to challenge it. In this regard, arbitrators are also required to state the reasons for their decision, so as to prevent possible attacks towards the award.

The resulting 'reasoned award' comprises the arbitrators' opinions and stances which had led them to the final resolution of the dispute, along with the evidence that proves that the parties' different claims as well as the significant circumstances pertaining to the case at issue have been equally considered. It is noteworthy that the aforementioned requisites do not amount to merely formal requirements, but they may constitute grounds of appeal, because the consistent reasoning of an award represents the expression of

the proper application of the due process principle and, therefore, its incorrect formulation is instead a violation thereof.

Besides, arbitrators are required to afford explanations concerning procedural decisions (such as, for example, the inclusion of oral witnesses) which in turn must prove to be valid and not in violation of due process, otherwise the award will not be enforced. The failure to provide reasons for an award is widely considered a common ground for its setting aside, along with the following cases: (i) the infringement of the right to a fair hearing, (ii) if the award is contrary to public policy, (iii) if the reasoning of the award is contradictory, (iv) due to abuse of power, (v) due to the breach of construction rules, and (vi) due to the non-compliance with the due process standards.

8.1. Remedies

The arbitral tribunal may render remedies¹⁰⁸ under the provisions of the applicable law. Such remedies are similar to those rendered by courts, although arbitrators are not entitled to enforce and execute them.

¹⁰⁸ By means of remedies, arbitrators may order either party to do or to refrain from doing something.

It is noteworthy that, in this regard, art. 24 of the GAL sets that the remedies that could be rendered may be included in the parties' agreement beforehand.

The list of available remedies that the parties may claim against each other varies and differs according to the specific circumstances of the case at issue. The most common forms of remedies, which are also those rendered by Georgian arbitrators, may involve a general performance, that is a monetary compensation, or a special performance, namely the invalidation, cancellation, rectification of the contract or of any relevant document, declaratory relief, the payment of the costs by the losing party, interests on the sum of money awarded and injunctions.¹⁰⁹

8.2. The Final And Binding Award¹¹⁰

The binding effect of an arbitral award depends on the *lex fori* of the seat of arbitration.

¹⁰⁹ G. TSERTSVADZE, *supra* note 1, at 157.

¹¹⁰ As to the 'final and binding nature' of the award, it is worth adding that even though the issue of the legal status of arbitration is rather thorny on both the domestic and international level, (for an overview of the issue, see J. LEW, L. A. MISTELIS, S. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, (the Hague, 2003), at 92 ff.), this does not set aside the parties' need that the awards shall be as binding on them as any court decision would be, for, conversely, arbitration would not actually constitute a feasible alternative to judicial proceedings. For an analysis of the issue based on the Italian perspective, see E. GARBAGNATI, *Sull'efficacia di cosa giudicata del lodo arbitrale rituale*, in *VV. AA., SCRITTI SCELTI*, (Milan, 1988), at 597ff.

As a rule, an award is considered final (and binding), so, no longer liable to amendments or alterations, starting from the moment of its publication and subsequent delivery (except for the correction or rendering of an additional award).

Besides, only those awards which have been recognized as binding by courts can be subsequently enforced.

Therefore, it is necessary, in the first place, to determine whether an award can be actually considered final and binding, although no restrictions exist as regards the number of the possible final awards deriving from the separation of the arbitration proceedings of a single case.

8.3. The *Res Judicata* Effect Of The Award

In compliance with the doctrine of *res judicata*, an arbitral tribunal is not entitled to deal with a case that has already been resolved by a court or another tribunal. Moreover, “a party cannot raise in subsequent proceedings, which could, and therefore should have been litigated in earlier [ones]”¹¹¹. The effect of this doctrine are deemed to apply also to interim awards, in other words, the parties and the arbitrators are bound by the previous partial awards if these had not been challenged.

¹¹¹ G. TSERTSVADZE, *supra* note 1, at 162.

With regard to the application of the *res judicata* principle to international arbitration, no unified stance has been developed so far. As a result, for instance, U.S. courts apply such doctrine also to arbitral awards; however, they tend to first examine the compliance of the arbitration proceedings with the procedural requirements (for instance, with due process standards), so that to automatically exclude the application of such doctrine in case of violation.¹¹²

Georgian courts¹¹³ generally adopt the principle of *res judicata* in relation to arbitral awards. The application scope of the *res judicata* doctrine is established by the Georgian Civil Procedure Code Rules, in art. 106 and 266. Article 266 permits the application of *res judicata* to court decisions and forbids remedies against them. Such provision has been extended by the Tbilisi Court of Appeal to arbitral awards alike and it has been stated that its violation in Georgian domestic arbitration is deemed to constitute the ground for setting aside or for refusing the enforcement of an arbitral award.¹¹⁴

8.4. Setting Aside An Award

¹¹² See for example the judgment of the United States Court of Appeal, Eleventh Circuit, of 25 June 1985, *Greenblat v. Drexel Burnham Lambert*.

¹¹³ See for instance the sentence of the Tbilisi City Court Division for Civil Matters, Decision n. 2/7628-09, of March 5, 2010.

¹¹⁴ See the sentence of the Tbilisi Court of Appeal, n. 2B/1637, of 11 July, 2011.

One of the most widespread remedies against arbitral awards is represented by the setting aside procedure.¹¹⁵ Courts, thanks to their supervisory function and power, are entitled to prevent arbitrators' misconduct and, accordingly, have the power to set aside an award (under the specific circumstances provided for by law).

The setting aside procedure varies depending on the different jurisdictions. Just to mention few examples, French setting aside procedure relies upon a series of concise principles, deriving from cases' decisions and listed in art. 1492 of the French Civil Procedure Code.¹¹⁶ Whereas, English courts are granted more discretion in dealing with the challenge of an award¹¹⁷ and in Switzerland, the

¹¹⁵ The Black's Law Dictionary defines the setting aside of an award as "to cancel, annul, or revoke [it] at the instance of a party unjustly or irregularly affected by [it]."

¹¹⁶ Art. 1494 of French CPC lays down six circumstances under which an award can be set aside, namely: 1) the arbitral tribunal is not the competent tribunal, 2) the arbitral tribunal has not been lawfully composed, 3) the arbitral tribunal has rendered an award which is not in line with the settlement of the dispute at hand, 4) the contradiction principle has been violated, 5) the award is against public policy and 6) the award is not reasoned or lacks fundamental information, such as the date of its issue, the arbitrators' name, the required signatures, or it has been rendered without the majority's agreement. Available at <http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEX000006070716&cidArticle=LEGIARTI0000023450708&dateTexte=20140408> (last visited April 8, 2014).

¹¹⁷ Art. 68 of the Arbitration Act 1996 sets that "If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part." Moreover, the same article establishes that the court shall resort to setting aside an award only in case "it would be inappropriate to remit

“sole judicial authority to set aside is the Swiss Federal Supreme Court”^{118 119}.

Notwithstanding such distinctions, it is possible to affirm that the regulation of the setting aside procedure in arbitration-friendly jurisdictions, as well as in those which have adopted the ML provisions, is almost harmonized. The common trend among European Countries points towards extreme caution and accuracy in examining the possibility of enforcing the losing party’s request to set aside the award.¹²⁰

Georgia’s domestic regulation of the setting aside procedure is laid down in Article 42 of the GAL and the content and the terminology of said provisions mirror those of ML^{121 122}.

the matters in question to the tribunal for reconsideration.” Available at <http://www.legislation.gov.uk/ukpga/1996/23/section/68> (Last visited April 8, 2014).

¹¹⁸ See art. 19, Ch. 12 of the Swiss Federal Statute on Private International Law. And art. 190 thereof sets the grounds for the annulment of an award. Available at https://www.swissarbitration.org/sa/download/IPRG_english.pdf (Last visited April 8, 2014).

¹¹⁹ Another issue concerning arbitration awards is the definition of the “home country”, that is the Country where the award is deemed as domestic. The seat of arbitration is the feature generally referred to in order to determinate the home country of an award, however, it is not the only one possible. G. TSERTSVADZE, *supra* note 1, at 166-167.

¹²⁰ *Id.*, at 168.

¹²¹ Art. 34, chapter VII Recourse Against Award of UNCITRAL ML on International Commercial Arbitration, lays down the circumstances under which the application of the setting aside procedure is allowed upon a party request, the period of time within which a setting aside application can be filed to a court and the possibility for a court to remit the arbitral award to the tribunal so as to remove the grounds for the setting aside.

Although the Country's practice in this regard is still limited, it might be reasonably assumed that the choice to challenge the award at the moment of its recognition and enforcement is currently preferred in Georgia to the setting aside procedure¹²³.

Furthermore, a competence issue emerges under the GAL in relation to the execution of two procedures in case of domestic awards. Specifically, the latter may be set aside as well as recognized and enforced by the same courts. Hence, the two procedures are in conflict due to the lack of separate competent bodies authorized to apply them.¹²⁴ Whereas, no conflict arises with regard to international awards, for Georgia follows the ML provisions¹²⁵. Hence, although Georgia has adopted the uniform regulation of international and domestic arbitration awards as provided for by the Model Law, further improvements are still necessary on the

¹²² The number of domestic arbitral awards which have been subject to such a procedure is claimed to be very small, and no international award has, allegedly, ever been set aside by Georgian courts. However, since arbitration practice is confidential and Court of Appeals decisions are not published, such data cannot be confirmed.

¹²³ This is mainly due to the fact that setting aside is much more time-consuming. G. TSERTSVADZE, *supra* note 1, at 169.

¹²⁴ In order to clarify this point, it is worth adding that if a court decides to recognize and enforce an award, the underlying assumption should be that such award fulfills all the requirements provided by law. Though, if the same court then agrees to set aside the award that has previously enforced, this stance would be rather contradictory, as the court would go against its own decision, and, on the other hand, it would also imply that the expected requirements were not met, instead. G. TSERTSVADZE, *supra* note 1, at 170.

¹²⁵ See article 1 of the NYC.

domestic level.¹²⁶ This point is of particular importance in case foreign businesses incorporated in Georgia, which are thereby subjected to the Country's domestic regulations.

It is worth noticing also that, along with Georgia, other States have opted for a single regulation of international and domestic arbitration awards, while following the ML's provisions¹²⁷, without experiencing such "competence issues".

Lastly, as a rule, that is referenced also in article 42 (1) of the GAL, only arbitrators are entitled to deal with the merits of a dispute. Nevertheless, controversial approaches exist among the

¹²⁶ The main reason for this clash lies in the malfunction of enforcement proceedings. As Georgia has only two Courts of Appeals the excessive workload prevents them to effectively follow all steps set under the applicable law. Hence, Courts of Appeal check all the grounds for refusal of enforcement *ex officio*, even though the grounds laid provided for by the New York Convention may be invoked by the party only. Once the court enforces award, it then notifies the losing party of the outcome. Subsequently, the losing party initiates the setting aside procedure with the same court, which may overturn its own decision. The malfunction is therefore evident. Therefore, an amendment to the relevant GAL provision appears to be necessary.

¹²⁷ Such provisions deal with International commercial arbitration, and, accordingly, set rules regarding the enforcement and set aside of awards establishing a distinction between the Country of origin of the award and the one where it ought to be recognized and enforced, while the setting aside procedure is applicable by a State in case the award has been rendered by the international arbitral tribunal within its territorial boundaries.

different jurisdictions as regards allowance for substantial review or appeal of an award¹²⁸.

8.5. Remand

A further circumstance that may occur with respect to arbitral awards is represented by its remission, that is, when a court establishes that an award should be remanded to the arbitral tribunal that has rendered it, for it should be improved or corrected. Nonetheless, as remissions are not very frequent, the majority of arbitration institutions¹²⁹ does not include any guidelines in their statutes nor do they provide for any rules in this regard, which would instead be very helpful to arbitrators. Consequently, arbitrators often find themselves in an unpleasant position when dealing with a remanded award, which can lead to various consequences, such as, for example, rendering a new award in case

¹²⁸ G. TSERTSVADZE, *supra* note 1, at 171. For instance, French law allows for the appeal of a domestic award, under art. 1482 of French CPC setting that “la sentence arbitrale est susceptible d’appel à moins que les parties n’aient renoncé à l’appel dans la convention d’arbitrage.” (*Available at* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=CD5E060E0737DC5CB97384C8930D51D0.tpdjo13v_2?idSectionTA=LEGISCTA000006117273&cidTexte=LEGITEXT000006070716&dateTexte=20051021 (last visited April 8, 2014)). However, international awards cannot be appealed. Whereas, Swiss law does not properly address the issue. In general, it might be affirmed that the substantial appeal of an arbitral award is more of an exception than a rule of international arbitration rule

¹²⁹ Nevertheless, art. 35 (4) of ICC Rules deals with the Remission of awards. *Available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_35 (Last visited April 8, 2014).

of the setting aside of the previous one, or resolving the new disputes arising from the same contract.

As to Georgia, in light of the aforementioned difficulties, the GAL deals with the remission of the award in article 43 and sets that, as a rule, an award should be remanded to the tribunal in case of serious irregularities and mistakes on the arbitrators' part or in the application of the procedures.¹³⁰

8.6. Recognition And Enforcement Of An Award

Recognition¹³¹ and enforcement¹³² are usually mentioned together, however their application as a single or a separate procedure is still debated.

Under the NYC the expression 'recognition and enforcement' denotes a single procedure; however, the two terms composing it may also be considered as two separate stages, which, in some cases, may not be necessarily interrelated, as there may be awards that require recognition but not an (subsequent) enforcement.

¹³⁰ G. TSERTSVADZE, *supra* note 1, at 173.

¹³¹ Recognition is the process by means of which a court gives legal effect to an award, preventing the parties from reviewing the case or litigating it once again, as well as from violating the rights laid down and confirmed in the award. Therefore, recognition can be considered a sort of defensive procedure for the parties. *Id.*, at 175.

¹³² The enforcement procedure binds the parties to respect the award and its effects, hence the enforcement supports the winning party in ensuring the losing party's compliance with the content of the award as well as in receiving his proper redress. *Id.*

The GAL, as above stated, displays adherence to the rules of the NYC¹³³ and the provisions of the ML¹³⁴, consequently, it does not separately deal with recognition and enforcement.

Moreover, under the GAL the only enforceable awards are those which are deemed final and entail “concrete remedies in order to preserve the successful party’s rights.”¹³⁵ As a result, those awards dealing with procedural orders or the termination of the process do not imply any enforceable elements, and, as such, owing to the fact that the two procedures are not separable, they are not considered acceptable neither for recognition, nor for enforcement.¹³⁶

a. The Role Of The New York Convention In Recognition And Enforcement In Georgia

The issue of recognition and enforcement is affected also by the law of the seat of arbitration, as well as by the law of the Country where the party seeks the enforcement of the award. The New York Convention offers a unified procedure and purposes in this regard;

¹³³ The NYC deals with recognition and enforcement as a single procedure. As Georgia is a party to New York Convention, its membership positively affects the recognition and enforcement of foreign arbitral awards in the Country, since Georgian courts, becoming more aware of the principles of international arbitration, are more willing to apply the Convention and interpret it according to the internationally adopted uniform practices.

¹³⁴ See Art. 35, Ch. VII, Recognition and Enforcement.

¹³⁵ G. TSERTSVADZE, *supra* note 1, at 175.

¹³⁶ *Id.*

however, among the signatory States differences emerge in relation to the standards applied by their domestic courts.¹³⁷

Further on, the NYC does not specify the proceedings that should lead to the recognition and enforcement of an award, so different Countries apply diverse types of proceedings.¹³⁸ Nevertheless, arbitration-friendly jurisdictions¹³⁹ share a common attitude, namely, they restrict the application of those provisions that may cause time- and cost-consuming enforcement. Similarly, remedies against the decision to recognize or enforce an award are not limited nor fixed by the NYC, therefore, States allow for several types of remedies. And, accordingly, the *lex fori* decides who is entitled to challenge such court decision.¹⁴⁰

¹³⁷ For instance, Russia represents a sort of exception among the NYC signatory States, for “there is anecdotal evidence that the post-Soviet Russian courts are less inclined to enforce [foreign] awards than are the courts of most other signatory states to the New York Convention”. For a complete analysis of the current Russian courts’ practice in this regard, see W. R. SPIEGELBERGER, *The Enforcement Of Foreign Arbitral Awards In Russia: An Analysis Of The Relevant Treaties, Laws, And Cases*, 16 Am. Rev. Int’l Arb. 261 (2005). As to France, art. 1488 of French CPC sets that “L’ordonnance qui accorde l’exequatur n’est susceptible d’aucun recours”, allowing for a wider scope of enforcement than the one provided for in the aforementioned Convention, which is, instead, the one applied by Georgia. Nevertheless, it is worth noticing that Georgia ratified the NYC in 1994, but prior to the enforcement of the Georgian Arbitration Law (2010), Georgian courts did not extensively apply the Convention’s provisions.

¹³⁸ These may entail ordinary adversary proceedings, summary proceedings, ex parte proceedings, oral proceedings. G. TSERTSVADZE, *supra* note 1, at 177.

¹³⁹ For instance, USA courts do not apply discovery rules to a pending recognition and enforcement procedure. *Id.*, at 179.

¹⁴⁰ Since in 1992 Georgia acceded to the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and National of

b. Partial Recognition And Enforcement

Article V(2) of the NYC lists the objections to the recognition and enforcement of an award.

Additionally, parties may seek only partial recognition and enforcement of an award, in case there exist grounds for the denial of part of it. As a rule, if the enforcement of certain elements of an

Other States, it is worth shortly pausing on the description of said Convention, which was, among other things, promoted by the World Bank. The main achievement of the Washington Convention was to create an international arbitration system, managed by the International Centre for Settlement of Investment Dispute (ICSID), and focused on legal disputes arising from investment contracts between a signatory State and a national of another signatory State. In practice, it is an arbitration system that is governed by international rules (those that were laid down in the Convention and those that have been established in the regulations that have been adopted on the basis of the Convention itself) and which therefore fall under neither the jurisdiction of national laws nor the control of the domestic judicial systems.

As to the enforcement of the awards which are rendered under the provisions of the Washington Convention, they cannot be challenged before state courts, as set in article 53 thereof, which reads:

“1. The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

2. For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.”

Whereas, concerning the effectiveness of ICSID awards, the signatory States are required to recognize and enforce the awards as if they were final and binding decisions issued by national courts (and, consequently, without subjecting them to any type of control). This obviously represents a significant guarantee to a foreign investor who deals with a state body of another Country.

award would violate the law of the enforcing State, whereas others, if enforced, would not, then the partial enforcement of the award part dealing with matters that can be lawfully arbitrated is accepted, as long as the two parts of the award could be reasonably divided. Partial enforcement can be deemed similar to *infra petita* awards (*i.e.* those awards which take into account merely part of or additional aspects of the general case that has been submitted to the tribunal), and which are not included among the grounds for the denial of enforcement under the NYC. Nonetheless, since the former are permitted, it might be assumed the latter are accepted as well.

Partial enforcement is particularly useful when the enforcement of an entire award would violate the public policy of the enforcing State, whereas, at the same time, no other ground exists for denying the enforcement of the other elements of the award.¹⁴¹

As regards Georgian approach towards this issue, partial enforcement is permitted, provided that the part to be enforced does not violate its public policy. However, in case the rights and obligations of the parties included in an award are not separable, Georgian courts refuse the enforcement of the entire award.¹⁴²

¹⁴¹ G. TSERTSVADZE, *supra* note 1, at 182-183.

¹⁴² *Id.*, at 183. It may also occur that parties to an arbitration request the confirmation of the award by the court of the place of arbitration, rather than seek for recognition and enforcement of it in another country. In this case, the issue of “double enforcement” of the arbitral awards arises. Double enforcement occurs when courts are requested to recognize decisions deriving from other

c. Limitation Of Recognition And Enforcement

The application of the recognition and enforcement of an arbitral award can be limited in time. The NYC does not fix any precise threshold in this respect, even though under art. 3 it sets that such procedure should rely upon the national law of the enforcing Country.

Generally, courts tend to follow the notice provisions, if any, included in the contract at the core of the dispute. However, under Georgian law, mandatory rules have been laid down as regards limitation. Article 142 of the Georgian Civil Code sets a 10-year-timespan for the enforcement of courts judgments, which applies also to the enforcement of arbitral awards. Besides, art. 146 establishes that the period of time provided for by law is not subjected to any change arising from the contractual agreement between the parties.¹⁴³

countries, which have recognized the arbitral awards. Parties resort to such choice in order to ensure those legal effects that are for their exclusive benefit. See, for example, the following decision in this regard: the Supreme Court Decision #A 1985-S -68-09 Polestar, 26 March 2010. Here, the Supreme Court of Georgia refused to enforce a judgment of the English court that recognized and enforced the award against the Georgian Government in favor of the company from Panama, Polestar. Nevertheless, the NYC has abolished the double enforcement procedure. *Id.*, at 185-186.

¹⁴³ *Id.*, at 187-188.

d. Grounds For Denial Of Recognition And Enforcement

As mentioned above, different grounds exist for refusing recognition and enforcement of an arbitral award.

In the first place, serious irregularities or substantial injustice stand out among the most common reasons for refusal, as they imply significant violations of the due process standards throughout the duration of arbitration proceedings.

According to the predominant legal theory, a **procedural defect** is deemed substantial when, pursuant to procedural law, it has influenced the final outcome of the award. And, in such case, the award does not possess the necessary requirement to be recognized and enforced.

Similarly, Georgia enforces provisions in this regard which reflect the ML's ones¹⁴⁴, establishing process irregularity as a fundamental ground for refusal.

A further ground for denial is represented by the **legal incapacity of the representatives** of a company or a legal entity to sign an arbitration agreement or to appear before the tribunal, due to the unsuitableness of their authority in this regard.¹⁴⁵ Georgian approach follows the international trend, which tends not to

¹⁴⁴ Art. 36 of UNCITRAL ML on International Commercial Arbitration.

¹⁴⁵ G. TSERTSVADZE, *supra* note 1, at 191. Moreover, it is still doubtful whether this incapacity should concern the time when an arbitration agreement is concluded or, instead, when the proceedings begin.

enforce an award against an agent of a company or its representative if the individual in question is not directly mentioned and personally involved both in the contract and in the award, because it would amount to an error of the *vocatio in ius*.¹⁴⁶

Moreover, Article V of the NYC lists among the causes for refusal also the inability to present the case, which occurs when the defendant has not been afforded the opportunity to fairly present his case before the tribunal, since the principle of the fair hearing is a fundamental rule of the defence whose breach is an overt violation of the principle of due process.¹⁴⁷ The extent of a party's inability to present a case depends on the laws of the different Countries and from the variety of the features inherent in each single case.¹⁴⁸

¹⁴⁶ See for example the Supreme Court Decision #A 2584-S -86-09 Kahraman, 14 January 2010.

¹⁴⁷ It is noteworthy that defendants are required to provide valid proof in case they challenge an award on the basis of a substantial defect in the proceedings or procedures adopted, for failure to submit such explanations leads to the rejection of their defense by the courts.

¹⁴⁸ For instance, in Germany no violation of the right to be heard arises if the party does not understand the language of the arbitral tribunal, provided that he can hire a translator. Whereas, in Georgia the language of the contract stipulated between the parties (belonging to different nationalities and speaking different languages) ought to be considered also the language of the arbitration proceedings. G. TSERTSVADZE, *supra* note 1, at 193.

Further on, the notion of public policy¹⁴⁹ may constitute a solid ground for attacking the recognition and enforcement of an award, for its breach leads to injustice as well as to the violation of States' fundamental values.¹⁵⁰ Given the broad scope of this concept¹⁵¹, public policy stands for the most invoked reason for challenging an

¹⁴⁹ The Black's Law Dictionary defines public policy as "the policies that have been declared by the state that covers the state's citizens. These laws and policies allow the government to stop any action that is against the public's interest. There may not be a specific policy that an action pertains to but if it is not deemed good for the public it will be quashed."

¹⁵⁰ Although GAL acknowledges 'public policy' as one of the grounds for setting aside an arbitration award, no precise definition of that concept is however included therein, raising issues pertaining to the extent of the applicability of such ground. In particular, many courts of appeal have been deemed to have applied this notion in a very 'liberal' manner, that is in order to review and revise awards on whose merits they disagreed. JILEP Study reports various decisions in which the court of appeal drew on the notion of public policy to deny recognition and enforcement of arbitration awards. In the case *Bizged Holdings Georgia v. Dematrashvili* (Case No 2b/2747-11; Tbilisi App. Ct. Sept. 12, 2011) the Court of Appeals refused to enforce the award which required the borrower to pay a penalty for late payment in the amount of USD 180 per day. The Court held that such penalty was against public policy and therefore reduced it to USD 30 per day. (Cf. JILEP Study, *supra* note 6). Notwithstanding the criticism towards the courts of appeals' decisions, the cases examined in the JILEP Study do not involve, at least apparently, manifest unfairness or oppression.

¹⁵¹ Under the notion of public policy it falls also the issue of penalties and compound interests. In fact, States set distinct thresholds for the amount of interest which is considered in compliance with public policy. For example, Austria fixes a determined percentage for such violation, *i.e.* 107.35%. As regards Georgia, the Tbilisi Court of Appeal stated that penalties that exceed the percentage of 5 or 6% per year ought to be considered in violation of public policy. However, no fixed threshold is specified in this regard by the GAL. G. TSERTSVADZE, *supra* note 1, at 204-205.

award under the NYC's case law.¹⁵² However, a uniform approach for the interpretation of this notion has not been developed yet, and differences emerge in relation to national courts' stances.¹⁵³ So, relying on the violation of public policy as a ground for challenging an award is often risky, owing to its different interpretations and its

¹⁵² *Id.*, at 197-198. However, frequently the applications for refusing the recognition and enforcement of an award upon public policy violation are rejected by courts, due to the parties misuse, and misunderstanding, of this ground.

¹⁵³ For instance, Russian courts apply a broad interpretation of public policy, which entails also political, economic and social aspects. Whereas, European jurisdictions tend to adopt a strict interpretation of said notion. In Germany, the refusal for the enforcement of an award on the ground of public policy violation (set under art. 1059 of German Arbitration Law 98, Book X of the Code of Civil Procedure) is more frequent than in Sweden, although the German Supreme Court (BGH) has laid down restrictions on the recourse to the public policy ground (see the case *Werner Schneider (liquidator of Walter Bau AG) v. Kingdom of Thailand*, January 30, 2013, whereby the Court held that State immunity may be invoked against the recognition and enforcement of an award, switching, in so doing, from a claim of public policy violation to a case of sovereignty matter. For a thorough overview in this regard, see C. DE STEFANO, *Arbitration Agreements as Waivers to Sovereign Immunity*, *Arbitration International*, vol. 30, (2014), at 59-90). While, in Switzerland, public policy violations are so rare that they are not admitted in practice, unless they include a violation of the values at the basis of the Swiss legal system (cf. art. 190 of Swiss Federal Statute on Private International Law). French courts admit public policy violations in case the breach is explicit and has led to substantial defects in the award (see art. 1484 of French Code of Civil Procedure). As regards Common Law jurisdictions, art.68(g) of the British Arbitration Act 1996 ([available at http://www.legislation.gov.uk/ukpga/1996/23/section/68](http://www.legislation.gov.uk/ukpga/1996/23/section/68)) sets that if “the award [is] obtained by fraud or the award or the way in which it was procured [is] contrary to public policy”, such violation is considered a valid ground for refusing the enforcement of the award. However, English courts appear reluctant to validate the refusal of an award on the basis of public policy violation. Whereas, based on US courts' practice, if foreign awards break substantial or procedural due process standards and/or do not comply with the provisions of the Federal Arbitration Act, their enforcement is denied for public policy violation.

wider or limited application.¹⁵⁴ It follows that frequently, along with public policy, further grounds are brought forward by parties, so as to increase their chances to be accepted by the court.¹⁵⁵ In

¹⁵⁴ The extent of public policy cannot easily be outlined due to the interrelations between this concept and other aspects or parts of the law (*i.e.* public law, human rights, general principles of law and mandatory rules. (i) Public law and public policy are distinct, though strictly interconnected notions. In fact, arbitration is forbidden by law, if the dispute's subject matter is exclusively governed by public law, and, a public policy violation is regarded as a breach of the public law. (ii) As a rule, human rights do not directly influence arbitration. However, it should not be assumed that they do not play any role in arbitration matters. For example, English courts have described several points of interrelation between human rights and public policy and accordingly, for instance, the parties' choice to resort to arbitration, by consequently waiving their right to be heard in courts and to appeal the subsequent judgment, is not considered as a violation of human rights. (iii) As regards general principles of law (such as, for instance, good faith and the principle of *Vertragstreue* in Germany), German and Swiss case laws often refer to them as part of public policy, though they are not directly mentioned in their legislations. (iv) Mandatory rules are meant to protect public interest and apply to the parties to a contract, regardless of the provisions they stipulated therein. However, no unified view among arbitrators exists as regards their application. A common trend among courts is to work out separate approaches with respect to the application of mandatory rules in domestic and international decisions. The interrelation of mandatory rules and public policy on a domestic level is eased by the fact that States have defined certain areas of law or transactions, such as employment law or consumer contracts, in which domestic mandatory rules prevail. Whereas, the difficulties emerge on the international level. Only few mandatory rules of a Country can apply also to international arbitration, as a part of the international public policy. However, given to the importance of such rules to preserve aspects of the domestic law in commercial activities, they should be considered inherent part of the public policy as well. Therefore, given the complexity of the issue, when courts are required to determine the violation of the public policy on an international level, they base their decision on to the concrete effect and impact of such award on a transnational level. G. TSERTSVADZE, *supra* note 1, at 214-220.

¹⁵⁵ It is noteworthy that the majority of the grounds for denial listed under article V(1) of the NYC can, at least theoretically, represent a violation of the public

particular, as regards Georgian court practice, the parties can refer to the coexistence of more than one ground at a time, in addition to the one of public policy, for the refusal of the enforcement of an award.

Concluding Remarks

After the first unsuccessful law of 1997, the GAL can be regarded as a turning point in Georgian arbitration system. In particular, the drafting of this law has been noteworthy, for it shows a twofold comparative base. For one thing, the GAL represents the final outcome of a comparative methodological approach, which has taken into account the laws of different States, in order to single out the most suitable patterns. And, on the other hand, said law is grounded on a model (*i.e.* the ML provisions) which is characterized by a comparative nature.

Hence, although some amendments are still to be made, as regards, in particular, the setting aside and the recognition and enforcement of the awards rendered before the enactment of the GAL, the 2010 law may be deemed to be compatible with the principles of international arbitration.¹⁵⁶

policy. However, not all violations of procedural rules are to be considered in breach of the procedural public policy. *Id.*, at 208-209.

¹⁵⁶ As Georgia is member of the ICSID (International Centre for settlement of Investment Disputes) and the IOC (International Olympic Committee), it may be

Furthermore, even though some parts of the GAL and the Georgian Code of Civil Procedures may seem questionable from outside, it is worth bearing in mind that such ‘strict’ provisions are essential to the further improvement of the Country’s system of private dispute resolution. The GAL has paved the way, in fact, towards the implementation of a more reliable and efficient system that its citizens and entrepreneurs would actually trust and on which they may rely in order to effectively solve their disputes, thanks to an increased efficiency and quality.

In conclusion, it might be maintained that the Georgian arbitration system is gradually evolving and improving, and even though it still includes some aspects of the “old regime”, it appears to be on its way towards a positive development.¹⁵⁷

deemed to be, at least on an international level, an arbitration-friendly Country, with procedures and approaches substantially in line with the field best practice. For a description of the main traits of international arbitration, see the followings works: A. REDFERN, M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, (London, 2004), at 26 ff.; A. FRIGNANI, *L’arbitrato commerciale internazionale*, in F. GALGANO (ed.), *TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL’ECONOMIA*, (Padua, 2004), at 10 ff.; R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE*, (1985).

¹⁵⁷ G. TSERTSVADZE, *supra* note 1, at 224-225.

WEB RESOURCES

Georgia's sources:

- The Constitutional Court of Georgia: <http://constcourt.ge/>
- The Supreme Court of Georgia: <http://www.supremecourt.ge/eng/>
- The President of Georgia: <https://www.president.gov.ge/en/>
- The Parliament of Georgia: <http://www.parliament.ge/en/>
- The Government of Georgia: http://www.government.gov.ge/index.php?lang_id=ENG
- The Office of the State Minister of Georgia on European & Euro-Atlantic Integration: <http://www.eu-nato.gov.ge/en/node>
- The Ministry of Economy and Sustainable Development: <http://www.economy.ge/en/home>
- The Ministry of Justice: <http://www.justice.gov.ge/>
- The Ministry of Labour, Health and Social Affairs: http://www.moh.gov.ge/index.php?sec_id=10&lang_id=ENG
- The Ministry of Energy and Natural Resources: <http://www.energy.gov.ge/index.php?lang=eng>
- The Ministry of Finance: <http://www.mof.ge/en/5092>
- The Ministry of Foreign Affairs: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=1

- The National Parliamentary Library of Georgia:
<http://www.nplg.gov.ge/eng/home>
- Georgia International Chamber of Commerce:
<http://www.icc.ge/>
- Georgian National Investment Agency:
<http://www.investinggeorgia.org/>

International sources:

- United Nations Development Programme in Georgia:
<http://www.ge.undp.org/>
- World Bank in Georgia:
<http://www.worldbank.org/en/country/georgia>
- NATLEX - Georgia (Provided by the International Labour Organization):
http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=GEO
- The Georgia's Constitution is also available at :
<http://confinder.richmond.edu/> (provided by the *University of Richmond T.C. Williams School of Law*)
- Guide to Georgia Legal Research:
<http://www.nyulawglobal.org/globalex/georgia1.htm>
- World Legal Information Institute (provided by WorldLII):
<http://www.worldlii.org/ge/>
- Guide to Law Online – Georgia (provided by the Library of Congress):
<http://www.loc.gov/law/help/guide/nations/georgia.php>
- The Italian Embassy, Tbilisi:
http://www.ambtbilisi.esteri.it/Ambasciata_Tbilisi

- The Georgian Embassy in Italy:
http://italy.mfa.gov.ge/index.php?lang_id=GEO&sec_id=71&lang_id=LA6sec_id=71

DOING BUSINESS IN GEORGIA

A COMPREHENSIVE GUIDE FOR INVESTORS

Guides for investments in foreign Countries represent the first tool by means of which businessmen may become familiar with other States' legal systems.

Over the past years, Georgia has emerged as one of the new actors in the international trade sector, thanks, in particular, to the latest political policies and the increasing economic growth.

The present guide pursues, therefore, the general aim of assisting foreign investors who are willing to start a business venture in Georgia.

Specifically, the guide offers a general overview of the Country, encompassing historical and cultural aspects of the Georgian system. The second part centers on the legal and commercial practical aspects of 'doing business' in Georgia, including a specific section on taxation and fiscal benefits; while, the third part outlines the main features of the Georgian judicial system with a focus on ADR.

Andrea Borroni is a lawyer and a researcher at the Political Science Department "Jean Monnet" of the Seconda Università degli Studi di Napoli, where is currently responsible for the course on International Trade Law. He earned a PhD at the University of Trento and an LLM with all the honors at the Louisiana State University (LSU) in 2006. He has authored several publications, and edited the "Commentary on the Labour Code of Georgia".

Andrea Borroni is the Italian Affiliated Country Expert for the PEPPER IV REPORT for the European Union. He has also been Professor at *Iv. Javakbshvili Tbilisi State University* (Georgia), where he has taught *International Private Law* and *Investment Law*.

DOING BUSINESS IN GEORGIA

A COMPREHENSIVE GUIDE FOR INVESTORS

Guides for investments in foreign Countries represent the first tool by means of which businessmen may become familiar with other States' legal systems.

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