

# LEGAL AND PRACTICAL ASPECTS OF ARBITRATION IN GEORGIA





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# LEGAL AND PRACTICAL ASPECTS OF ARBITRATION IN GEORGIA

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## Abbreviations

ADR	Alternative Dispute Resolution
CRRC	Caucasus Research Resource Center
GAA	Georgian Association of Arbitrators
G4G	Governing for Growth
ICC	International Chamber of Commerce
ICC ICA	International Chamber of Commerce International Court of Arbitration,
LLC	Limited Liability Company
PROLoG	Promoting Rule of Law in Georgia
UNCITRAL	United Nations Commission on International Trade Law,
USAID	United States Agency for International Development
US	United States

## Executive Summary

From August-November 2017, a research was carried out to study the current state and development of arbitration in Georgia. The research consisted of a review of existing legislation, an in-depth analysis of ten acting arbitration institutions, and quantitative and qualitative interviews with representatives of interested groups: arbitration institutions, lawyers, business sector, including banks and financial institutions, judges, government and international organizations, and private individuals.

The main findings of the research are grouped as challenges that arbitration currently faces in Georgia and recommendations to improve the state of arbitration in Georgia.

The research identified the following challenges that arbitration currently faces in Georgia:

- Low public trust towards arbitration, which is caused by the following factors:
  - The checkered history of arbitration;
  - Close “cooperation” between arbitration institutions and banking/microfinance organizations and the perception of “arbitration of banks,” or so-called “pocket arbitrations”;
  - Natural persons’ appearance in arbitration without their acknowledgment or valid consent on the same;
  - Lack of ethical standards within arbitration institutions, as well as lack of accessibility and transparency of arbitration rules, statistics and other information on arbitration institutions;
  - Organizational form of arbitration institutions. Namely, the fact that they are, in the majority of cases, formed as limited liability companies;
- Low awareness of arbitration, particularly within the business community, including a lack of Georgian scholarship published on the topic;
- Qualification of arbitrators;
- Problems related to court practices in arbitration:
  - Inconsistent case law;
  - Violation of time frames for recognition and enforcement of arbitration awards.

To overcome these challenges and support the development of arbitration in Georgia, the following recommendations were developed:

- Develop regulations to ensure minimum standards of fairness and transparency of consumer arbitrations;
- Enhance awareness of arbitration within Georgian society, particularly among the businesses community and lawyers;

- Strengthen institutional capacity of the Georgian Association of Arbitrators (GAA) to, first, enhance arbitrators' qualifications and observance of ethical standards, and second, to increase visibility of arbitration services in Georgia;
- Promote establishment of consistent and arbitration-friendly case law in the courts;
- Develop Georgian literature on arbitration.
- Initiate a bill to ensure the permissibility of *ad hoc* arbitration, and rectify other technical/stylistic flaws of arbitration-related legislation.

This report describes the legal and practical aspects of arbitration in Georgia. It is divided into the following chapters:

- A brief history of the development of arbitration in Georgia;
- Arbitration institutions: organizational and practical perspectives;
- Court statistics and case law;
- Awareness and views of the stakeholders on the challenges of arbitration in Georgia;
- Conclusions and recommendations;
- Annex 1: List of legislative flaws;
- Annex 2: Methodology.

## I. Introduction

While Alternative Dispute Resolution (ADR) mechanisms like arbitration and mediation are not a panacea, they act as critical supplements to the formal legal system. ADR mechanisms can improve efficiency in the court system as a whole by helping to reduce case backlogs and bottlenecks and can contribute to faster and cheaper enforcement of contracts. It is for this reason that since 2016, the World Bank's *Doing Business* index's contract enforcement indicator, which traditionally measured dispute resolution through the local court system only, has broadened its focus to cover ADR mechanisms including arbitration, voluntary mediation, and conciliation.

Arbitration became part of the Georgian dispute resolution system in 1997, and it has developed over the last 20 years. The present study has been commissioned to assess the current state of arbitration and perspectives on its development in Georgia. It will help the government, donors and other stakeholders gain a better understanding of the achievements and challenges of arbitration in Georgia, as well as opportunities for its future development.

It is important that stakeholders interested in the present report (donors, government entities, and arbitration institutions) understand that arbitration is promoted and applied in commercial (business-to-business) disputes. For arbitration to advance, it must offer users some advantage that would make the users choose arbitration over courts. In international contexts (international disputes), the unique value of arbitration is its neutrality (thus, arbitration has no alternative in the international context since no court may compete with it due to the inherent non-neutrality of the forum). In the domestic context, courts, particularly if the society has more or less

sufficient trust towards them,<sup>1</sup> satisfy the criteria of neutrality. Therefore, the arbitration must offer some other advantage or find a niche, which would make it more attractive than pursuing litigation in courts. This could be the speed, field-specific expertise of arbitrators, and/or the parties' ability to choose their decision-makers, as well as the opportunity to have the process adjusted to the needs of the parties. For these advantages to be in place, the flaws that exist today — distrust, partiality, prolonged times for recognition and enforcement — must be addressed. Certainly, it is important that these advantages are raised among potential users of arbitration. This may be difficult to achieve and will take time.

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<sup>1</sup> Even if there is no trust or court is corrupted, the party may prefer a guaranteed result in a court than arbitration. Therefore, it is hard to say if a well-functioning and unbiased court system is a precondition for competing with arbitration and, in theory, even a corrupted court can compete with arbitration.

## II. The development of arbitration in Georgia: a brief history

### 1. 1997 to 2009: I have not failed. I've just found 10,000 ways that won't work.<sup>2</sup>

Georgia enacted its first “Law on Private Arbitration” in 1997 (hereinafter “the 1997 Law”). It was the first attempt to move away from the Soviet legislation on arbitration. The 1997 Law among others, had the following flaws, that have impacted the way arbitration has been organized in Georgia:

- Article 7 of the 1997 Law required that all permanent arbitration courts be registered pursuant to the Law of Georgia on Entrepreneurship.<sup>3</sup> Hence, unlike the Western countries, where widely trusted non-profit organizations like chambers of commerce and arbitration associations administer arbitrations, in Georgia, arbitration courts are profit oriented companies;
- The 1997 Law allowed arbitration awards to be enforced without court’s review/recognition. This uncontrolled form of dispute resolution opened a door for abuse, with reported instances of fraudulent or collusive arbitrations that misappropriated property, led children to be given up for adoption or otherwise violated the rights of third parties;<sup>4</sup>
  - The 1997 Law allowed the courts to “change” arbitration awards in certain cases, based on the request of a party.<sup>5</sup> This has resulted in establishing the court practice of “changing” arbitration awards, diminishing the finality of arbitration awards.

The consequence of all the above was that the stakeholders of the system: arbitrators, potential users of arbitration (business/commercial entities), and judges have negative perceptions of arbitration and misunderstand its role in the system.

### 2. From 2009 to 2015: Failure is success if we learn from it.<sup>6</sup>

At the end of 2009, as part of Georgia’s strive to become attractive for investors, a new “Law on Arbitration” (hereinafter “the 2009 Law”) was adopted. The law was a slightly modified version of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Arbitration Law (hereinafter “the Model Law”), which is generally regarded as the international standard. The 2009 Law regulates issues related to the formation and conduct of arbitration in Georgia, as well as issues related to recognition and enforcement of arbitral awards, including awards rendered outside of Georgia.

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<sup>2</sup> Thomas A. Edison, The Fabulous Drone, 73 Vol. XLVI, No. 3 (March 1967), p. 52, available at: [http://www.arimi.it/wp-content/73/03\\_March\\_1967.pdf](http://www.arimi.it/wp-content/73/03_March_1967.pdf) ; seen on: 21.11.2017.

<sup>3</sup> Law of Georgia on Private Arbitration, 1997, Article 7.1.

<sup>4</sup> Michael D. Blechman, ADR Assessment in Georgia, p. 10., available at: <http://ewmi--prolog.org/images/files/6743assessment-of-adr-in-georgia.pdf>. seen: 21.11.2017 ¶.

<sup>5</sup> Law of Georgia on Private Arbitration, 1997, Article 43.

<sup>6</sup> Malcolm Forbes.

The 2009 Law therefore incorporates the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “the New York Convention”). The 2009 Law, among other advantages, reformed arbitration practices in a number of ways:

1. Arbitration awards became subject to recognition and enforcement by courts;
2. Set out exhaustive grounds, based on which arbitration awards could become subject to setting aside or for refusal of their recognition and enforcement;
3. Set flexible requirements towards the form of arbitration agreement;
4. The intervention of courts in arbitral proceedings was limited to the extent allowed by the 2009 Law itself;
5. Provided many default provisions which operate in case there was no agreement of the parties on a certain issue (e.g. on the number and procedure for appointment of arbitrators). This is particularly important in terms of fostering *ad hoc* arbitration.

Nonetheless, issues with legislation remained, and the following flaws were identified:<sup>7</sup>

- State fees for recognition and enforcement of arbitration awards were set at the same rate as for lodging a claim at court.<sup>8</sup> When one would add to this the costs the party had to pay to the institution and the arbitrators, arbitration appeared to be more expensive than litigation in courts;
- There was no regulation mechanism for arbitrators. No standards for qualification, professional code of conduct, or disciplinary rules of arbitrators was set;
- The 2009 Law itself had a number of flaws and deviated from the Model Law in several ways, including:
  - Limitation of parties’ choice to institutional arbitration only;
  - Procedural irregularities at the recognition and enforcement stage;
  - No opportunity for court-ordered interim measures prior to the commencement of arbitral proceedings.

Much of the above was addressed in reforms between 2012 and 2015. In 2014, the Ministry of Justice of Georgia initiated draft amendments to the 2009 Law, with the aim of making arbitration financially more attractive, legally more certain and generally closer to international best practice. The amendments significantly decreased fees for recognition and enforcement of awards<sup>9</sup> and fixed flaws that existed in the 2009 Law.

Early in 2013, the Georgian Association of Arbitrators (GAA), the first professional body of arbitrators in Georgia, was established.<sup>10</sup> The association developed and adopted a Code of Ethics for Arbitrators with the help of international experts.<sup>11</sup>

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<sup>7</sup> These flaws are noted in Michael D. Belchman, ADR Assessment in Georgia, available at: <http://ewmi-prolog.org/images/files/6743assessment-of-adr-in-georgia.pdf>, seen: 21.11.2017.

<sup>8</sup> Civil Procedure Code, Article 39, 2014 edition.

<sup>9</sup> Civil Procedure Code, Article 39.1. A fixed fee for the request for recognition and enforcement or setting aside of an arbitral award is GEL 150.

<sup>10</sup> For more information, see: [www.gaa.ge](http://www.gaa.ge); seen: 21.11.2017.

<sup>11</sup> The Code of Ethics is available at: <http://www.gaa.ge/gaa-saxelmdzgvanelo/resursebi-da-masalebji/>; seen: 21.11.2017 ¶.

### 3. From 2015 to present: He who has waded through it, knows the water best.<sup>12</sup>

Arbitration carries baggage in Georgia, having been abused from its start. In the second stage of its development, however, significant reform led to changes in attitudes towards arbitration as well as changes in arbitral practice. Arbitration not only survived, but has established a certain (albeit small) place in Georgian legal practice. Currently, the legislative basis of arbitration is, in principle, solid (except for minor technical/stylistic flaws, which are noted in Annex 1), and the government promotes the use of arbitration as an alternative to litigation in courts.

In order to determine arbitration's potential for wider use as a dispute resolution mechanism in Georgia, the views of all stakeholders, an assessment of the practical framework and case law must first be described. From this understanding, the perspectives regarding arbitration and measures necessary for its development can be discussed.

#### III. Arbitration in Practice: Arbitration Institutions in Georgia

An initial identification of about 35 institutions took place within the scope of the study. However, contact information was only available on the internet or through information centers (08 and 09) for 19 institutions. Accordingly, the research team attempted to contact all 19 institutions, of which 11 agreed to be interviewed.

One of the surveyed institutions was founded in 2004, nine were founded between 2008 and 2010, and one in 2013. Ten of the institutions are registered as limited liability companies (LLC) according to the Law of Georgia on Entrepreneurs. Only one is a non-profit (non-commercial) legal entity. Notably, one arbitration institution operates within a legal/consultancy firm, and therefore, is managed by the same person who owns the firm. In some cases, the institution may be an independent legal entity, but its shareholders are either legal/consulting firms themselves or private persons who hold shares in such firms (three institutions). There are also cases in which one person is associated with several arbitration institutions, having the role of managing director and/or shareholder partner (two institutions). One respondent is a sole founder, partner, director and arbitrator in two separate institutions.

Ten of the eleven institutions operate in Tbilisi and one in Batumi. All institutions have their own office where hearings are also held. The interviews with the respondents were also held in their offices. According to the respondents, six institutions are actively engaged in this field and systematically administer disputes, and four respondents said they no longer hear cases (two institutions) or they have had only a few cases in recent years (two institutions). One interviewee did not name the number of disputes, but noted that the demand for arbitration services was lower than in the past.

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<sup>12</sup> A Danish proverb.

## *1. Access to information*

The majority of institutions have rules as well as a charter. In most cases, this information is not easily accessible. Most institutions do not have a well-maintained website where (potential) users can obtain comprehensive information. Three institutions do not have any website or an official page on social media. One institution has only a Facebook page, which is not active: the latest activity on the page is from 2014. Four arbitration institutions have a website with only minimal information available, such as arbitration rules and contact information. One institution has a list of active arbitrators available on its website. The other three institutions have relatively complete information available on their website including arbitration rules, a list of arbitrators, a calculator for determining arbitration costs, news/updates, and contact information. Additionally, these three institutions also use the social media platform Facebook to disseminate information. Two of the three institutions' websites offer further information on the internal structure of the organization, model arbitration clauses to incorporate in respective contracts, and some informational brochures and guides on the field of arbitration.

The arbitration rules for some of the institutions are available on the website of Georgia's official legislative herald ([www.matsne.gov.ge](http://www.matsne.gov.ge)), because of the requirement in the 1997 Law<sup>13</sup> that required arbitration institutions to disseminate arbitration rules through mass media.

In three of eleven cases, the arbitration rules could not be obtained online (neither on the institution's website nor on the legislative herald website). Thus, the rules were requested directly from the institutions. Only one institution's rules could not be obtained by any means.

## *2. Management bodies/structure*

The majority of the institutions (9 of 11) studied have organizational structures and management bodies typical of LLCs. They are defined by the standard charter of the organization, in which the general meeting is the highest management body and the director has the authority to manage and represent the organization. In three institutions, the same individual is the founder, the director, and the sole arbitrator.

However, two arbitration institutions have bodies particular to their institution within their organizational structure. One, which is an LLC, includes the arbitration court and secretariat (under the direction of the Secretary General) in addition to the general meeting and director. The arbitration court does not resolve the disputes itself, but rather assists in the tribunal formation, making decisions on the replacement of arbitrators, formal scrutiny of the final award, approving the award of the tribunal, and maintaining documents. While performing these duties, the arbitration court is assisted by the secretariat under the leadership of the Secretary General.

The other institution that differs is a non-profit (non-commercial) legal entity and its structure includes a board, an arbitration council and a secretariat. The board makes decisions on corporate matters and does not play a role in arbitration proceedings. The secretariat administers and handles disputes submitted to the institution and organizes the arbitration proceedings. It is involved in the institution's day-to-day activities and assists the arbitration council, as well as the tribunal in carrying out their functions. The functions of the arbitration council aim to ensure

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<sup>13</sup> The 1997 law on Private Arbitration, Article 7.2.

efficient arbitration proceedings and the compliance of these proceedings with the institution's arbitration rules. The arbitration council makes decisions on issues such as the appointment of members of an arbitral tribunal or its chairperson, issues related to the challenges of arbitrators, and other matters prescribed by the arbitration rules of the respective institution.

### *3. Arbitrators*

The list of the arbitrators is made available on the websites of only four studied institutions. These four institutions listed the number of arbitrators they have as 56, 30, 7, and 1, respectively. In the last institution, the chairman of arbitration institution mentioned in the interview that (s)he does not have the list and usually decides cases alone. However, when needed, (s)he can also appoint other people as arbitrators. Of the other interviewees, four mentioned that they have other arbitrators ("our arbitrators") or, if necessary, they can invite others to serve as arbitrators. For example, according to the information provided by one of the interviewees, they have 14 arbitrators on their list, however, disputes are mainly resolved by only four. Another interviewee mentioned that the cases are primarily decided by him/her, and other arbitrators are added only if necessary. In the remaining two institutions, only one arbitrator hears the cases. As noted above, one of these interviewees is a sole arbitrator, a director, and the founder of two separate institutions.

The survey showed uniform criteria for selecting arbitrators among institutions. The criteria include qualifications, competence, ability to be recognized, reputation/authority and trustworthiness. One interviewee noted that "an arbitrator should enjoy the reputation of an honest and unbiased person". Preference is given to lawyers and attorneys. One interviewee noted that, "[An arbitrator] should necessarily be a lawyer, and I should be able to trust him/her as a qualified arbitrator." However, two interviewees noted that they try to invite arbitrators who do not have legal education and who have qualifications/competence in the field the case is in.

### *4. General and specific characteristics of arbitration rules*

The majority of the arbitration rules are structured around the Civil Procedural Code. The rules include the definitions of terms, general provisions, provisions on delivery of arbitration notices to the parties, provisions on the conduct of arbitration proceedings, the period for examining the case and rendering the award, scope of arbitration, appointment and challenge of arbitrators, and arbitration costs, among other rules. Of the ten institutions reviewed, four provide a confidentiality clause. Another four institutions provide for the provision of the delivery of the arbitration notice to the parties via public means including through publication on the institution's website, through the local government/self-government, or through a newspaper.

One of the institution's arbitration rules are accessible in Georgian and English, and another in English, Georgian, and Russian. Others are available only in Georgian.

Three of the institutions include a provision allowing the parties to agree on the language of proceedings. If they fail to agree, the tribunal decides the matter, taking relevant circumstances into account. Four institutions allow the parties' agreement on the applicable language, however,

if they fail to agree, the language of the proceedings is deemed to be Georgian by default. One of the institution’s rules envisions the conduct of the proceedings only in Georgian.

The periods for rendering the awards also differ, as shown in Table 1.

*Table 1: Period for reviewing the case*

Period (days)	Number of the arbitration institutions
180 days	3
90 days	2
60 days	1
30 days	3
15 days	1

Issue	Number of the arbitration institutions
Default period for review	4
Imperative period for review	6
The possibility to extend the period for review (along with the terms of possible extension)	3 (extension by 90 days, 60 days, 30 days)

The institution which has arbitration rules that provide for a one-month review period, also has a rule saying that in case of failure to render a final award by the tribunal, “arbitration” (meaning the tribunal deciding the case), shall recuse itself and the parties shall appoint new members of the “arbitration” within ten days.

The rules of four arbitration institutions include a model arbitration clause for the parties wishing to resolve their disputes in accordance with those rules. Two sets of arbitration rules have relatively modern regulations. Compared to other institutions, their rules also regulate the following issues:

- Consolidation of cases;
- Exclusion of the arbitrator’s liability;
- Fast track arbitration procedures for small disputes;
- Scrutiny of awards by one of the institutional bodies.

Only one of the other institutions has a provision on the exclusion of the liability of the “permanent arbitration employees”.

One set of arbitration rules includes a clause stating that if parties agree, “Arbitration” [i.e. tribunal] will ensure the consideration of the case and rendering the award pursuant to the ‘UNSI TRAL [sic.] 1976’ standard rules.

### 5. Fees and remuneration for arbitrators

The surveyed institutions have different approaches towards arbitration fees and arbitrators’ remuneration. In most cases, the method of calculation arbitration fees is modelled after the Civil Procedural Code stipulations related to calculation of the court fees. These fees include costs for arbitration and costs beyond arbitration. Costs for arbitration also include the administrative fees. The distinctive calculation methods of arbitration costs are provided in Table 2, below:

*Table 2: Arbitration fees*

Method for calculating arbitration fees	The number of arbitration institutions	Amount
Fixed percentage from the disputed amount	3	Between 1.5%- 2 % of the disputed amount. The minimum fee is set by each institution (GEL 100, 400, 500).
Fixed fee for disputes on intangible subjects	1	GEL 500
Separate registration fee	3 (fixed)	GEL 150, GEL 1000, EUR 1000
	1 (pursuant to the disputed amount)	For disputed amounts below USD 20 000 a USD 500 fee; For disputed amounts above 20 000 USD, 1000 USD; Fast track procedure – 150 USD.
Gradation mechanism	5	The administrative fees decrease as the disputed amount increases.

There is no uniform approach to the arbitrators’ fees. Only two institutions offer schedules with pre-determined arbitrators fees. They are prescribed in the respective arbitration rules and differ according to the composition of the tribunal (whether the case is decided by one or three arbitrators). In two institutions, the cooperation between the institution and arbitrators takes place within the scope of the arbitration rules, meaning that, when an arbitrator agrees to the appointment on a case, (s)he further agrees to conduct of arbitration according to a particular set of rules, and hence, to remuneration as per said rules. Thus, there is no separate contract concluded between the institution and the arbitrator. One of the interviewees, noted that in the past, when they used to have arbitration cases, they did not conclude any contracts with the arbitrators. Rather, they offered the arbitrator an opportunity to become listed arbitrator and

thus, if the arbitrator agreed, he or she would receive remuneration in accordance with the prescribed rules. In other cases, arbitrators are remunerated based on employment (two cases) or service (two cases) contracts, in the amount of a certain percentage of paid administrative fees. One of the interviewees pointed out that they used to sign memorandum with arbitrators. Interviewees who are only arbitrators in the institutions they themselves have established receive remuneration for their services from the administrative fees in the form of salary.

In one of the institutions, when the cases are decided by the main arbitrators (those who are involved in the management of the institution), they receive remuneration by way of issuing an internal order, while invited arbitrators have one-off contracts. The same institution calculates the arbitrators' fees as 40% of the administrative fees if the tribunal is composed of a sole arbitrator. If case of three-member tribunal, each receives 30% of the fees or the chair receives 30% and the other two receive 20% each.

In one institution, arbitrator's fees are determined by the head/chair of the institution on case-by-case basis taking into account the complexity of given case. Another interviewee noted that often arbitrators accept low percentages (1.5-3%) to attract more cases and through corporate memoranda/contracts, receive 3%, 2% or even 5% of the disputed amount. In two institutions, the arbitrators' fee is calculated by subtracting the registration fee from the overall fee for arbitration services and the remaining amount is divided equally between the institution and the tribunal.

## *6. Ethical norms*

None of the institutions has its own code of ethics for arbitrators. Only two incorporate the Georgian Association of Arbitrators (GAA) Code of Ethics as an integral part of their arbitration rules. Consequently, the arbitrators acting under the rules of these institutions are bound by the the GAA Code of Ethics. One institution pointed out that they try to support the raising of awareness on the GAA Code of Ethics, however, it becomes binding under their rules only if the parties agree to it. Another institution mentioned that some of its arbitrators have become members of the GAA and, thus, they are bound by the Code of Ethics. 80% of the institutions interviewed have not heard about the professional union of arbitrators or have very limited knowledge about GAA and its activities.

## *7. Caseload and types of disputes*

The majority of the caseload is comprised of consumer loan disputes, and the interviews conducted during the study reinforced the idea that this is the main type of cases arbitration institutions receive. Most of the interviewees said that their "permanent clients" are financial institutions (banks and microfinance organizations) who cooperate with them and put their arbitration clauses in their consumer loan contracts. Arbitration institutions with clients from the finance industry resolve many more cases than those without such clients. For example, one arbitration institution administered about 2,000 cases a year, while another handled about 700-1000 cases, according to their own data. In contrast, the caseload of the arbitration institutions

with a business-to-business focus is much smaller. For example, one such institution stated it has had about five cases in the last three years. Two institutions said they have administered about 100 cases, three noted that they used to have a lot of cases, however, nowadays, “the cases are not coming in anymore.”

Some institutions also resolve other types of disputes. For example, besides the consumer loan disputes, one institution resolved disputes arising from lease, service, or sales contracts, as well as disputes connected to employment remuneration. One institution noted that in 2010-2011 they had a commercial and several employment disputes. However, these types of disputes are a small share of business, and 80% of the surveyed institutions note that 90% of their disputes are between a financial institution and a private person. Even those arbitration institutions with “basically no caseload” today, had mainly resolved loan-related disputes. As one of the interviewees noted, “We provide a service for microfinance organizations, because still, today, in Georgia, the disputes are mainly in relation to loans, either in arbitration or in court, are caused by the non-performance of obligations.”

#### *8. Customers’ Feedback and Production of Statistics*

None of the surveyed institutions measure the satisfaction of the users of arbitration services using assessment/feedback questionnaires or other means. However, when asked why customers choose their institution, most interviewees refer to client satisfaction and recommendations from other customers among the reasons (other reasons included resolving the dispute in the shortest time possible, low fees, fairness, and impartiality).

When speaking with arbitration institutions, in a majority of cases, interviewees had only approximate statistical data on cases. Three institutions had more or less precise data. Two of the three have statistical data publically available on their website. One of these provides data about the quantity of the registered arbitration claims, and the other additionally provides statistics on the enforcement of its arbitral awards.

### **IV. Court Practice: Statistics, a Changing Approach, and Existing Challenges in Interpreting and Applying the Law**

#### **1. General Observations**

Cases were requested from Tbilisi, Batumi and Kutaisi City Courts, as well as Tbilisi and Kutaisi Courts of Appeal. Additionally, where possible, court practice was researched through the Court of Appeals<sup>14</sup> and Supreme Court<sup>15</sup> search systems.

General observations from the review of documents are as follows:

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<sup>14</sup> <http://www.tbappeal.court.ge/?category=g>

<sup>15</sup> [www.supremecourt.ge](http://www.supremecourt.ge)

- The most common grounds for refusal of recognition and enforcement or setting aside of the arbitral awards are “public policy” and inappropriate notification of a party of arbitration proceedings;<sup>16</sup>
- Court practice appears to be improving; however, it remains inconsistent with respect to certain issues (examples discussed below);
- When dealing with matters under the Law on Arbitration, judges rely more on the Civil Code of Procedure of Georgia without sufficient appreciation for/reference to the Law on Arbitration;
- Courts find it hard to distinguish between the arbitral tribunal and the institution that administers the dispute;
- The courts often request the submission of documents that are not required under the Law;
- There has been no material change in the satisfaction of applications for the recognition and enforcement or setting aside of arbitral awards.

## 2. Statistics

Statistical information was requested from the Supreme Court of Georgia for the last 5 years, and from Tbilisi and Kutaisi Courts of Appeals from 2013-2016. The information that was provided by the courts is included below.

### 2.1. Supreme Court of Georgia<sup>17</sup>

In 2013-2017, the Chamber of Civil Cases of the Supreme Court of Georgia: considered 37 applications regarding the recognition and enforcement of foreign arbitral awards, of which 22 were granted, 4 were rejected, and 11 were left without consideration.

### 2.2. Tbilisi Court of Appeals<sup>18</sup>

The Chamber of Civil Cases of the Tbilisi Court of Appeals considered the following applications on arbitration cases:

Year	Number of Applications
2013	3 523
2014	3 669
2015	2 532
2016	3 268

More detailed statistics are not processed by the Department of Chancellery and Statistics of the Tbilisi Court of Appeals. Therefore, the data does not enable the identification of how many of these applications related to recognition and enforcement, setting aside of the arbitral award,

<sup>16</sup> This observation is based on the interviews with judges and the conclusions reached as a result of our review of the case law.

<sup>17</sup> Source for statistical information: Letter #p-258-17 from the Supreme Court of Georgia dated October 19, 2017.

<sup>18</sup> Source for statistical information: Letter #01/332(a) from Tbilisi Court of Appeals dated November 9, 2017.

and/or the competence of the arbitral tribunal. Similarly, no information about the statistics of satisfaction and rejection of applications is available.

The only possibility for addressing this missing information is through the information provided by one of the judges in interview. The judge noted that a majority of the applications are related to the recognition and enforcement, while considerably less applications were regarding setting aside of arbitral awards. This dynamic is also confirmed by the statistical data the Kutaisi Court of Appeals provided.

### 2.3. Kutaisi Court of Appeals <sup>19</sup>

The Chamber of Civil Cases of the Kutaisi Court of Appeals considered the following application/complaints related to arbitration in **2013-2014**:

*Table 3: Applications/complaints related to arbitration considered by the Chamber of Civil Cases of the Kutaisi Court of Appeals in 2013-2014*

Issue	Number of Applications	Satisfied	Rejected
Application of recognition and enforcement	69	49	10
Application for set-aside	12	6	2
Application regarding the interim measure in support of the claim submitted to arbitration	11	4	6

\* The data indicated in this table is silent on what happened to the remaining 10 (for recognition and enforcement), 4 (for set-aside) and 1 (for interim measure in support of arbitration) applications. Presumably, those are cases which were found inadmissible.

The Chamber of Civil Cases of the Kutaisi Court of Appeals considered the following application/complaints related to arbitration in **2015-2016**:

*Table 4: Applications/complaints related to arbitration considered by the Chamber of Civil Cases of the Kutaisi Court of Appeals in 2015-2016*

Issue	Number of Applications	Satisfied	Rejected
Application of recognition and enforcement	53	44	3
Application for set-aside	5	2	3
Application regarding the interim measure in support of the claim submitted to arbitration	6	3	3
Competence of arbitral tribunal	0	0	0

<sup>19</sup> Source for statistical information: Letters #551-2/10 and #552-2/10 from Kutaisi Court of Appeal dated October 26, 2017.

\* The data indicated in this table is silent on what happened to the remaining 6 (for recognition and enforcement) and 1 (for interim measure in support of arbitration) applications. Presumably, those are cases which were found inadmissible.

### 3. Specific Examples from the Court Practice

The goal of the analysis of court practice presented below is to explore whether the 2015 amendments to the 2009 Law were reflected in practice and to identify other challenging aspects in existing court practice. Therefore, this section first addresses the case law related to the issues affected by the 2015 amendments and then other problematic issues.

#### 3.1. Court Practice on Issues Affected by the 2015 Amendments

##### **Article 2.2 of the Law of Georgia on Arbitration - *ad hoc* arbitration**

Arbitration may be carried out in two forms: a) institutional arbitration, where the dispute is decided by the arbitral tribunal on the basis of the rules and with administration of the arbitral institution; and b) *ad hoc* arbitration, where the parties agree to conduct the arbitral proceedings themselves (and through the arbitrators chosen by them), without administration of the arbitral institution, according to the rules set by the parties or the law.<sup>20</sup>

The new Law on Arbitration adopted in 2009 is based on the Model Law and is adjusted to *ad hoc* proceedings. Irrespective of this, the court practice towards *ad hoc* arbitration did not change and the courts did not recognize *ad hoc* arbitration clauses. In order to improve the established practice, in 2015 amendments were introduced in Article 2.2 of the 2009 Law. As a result of the amendment, the clause was modified as follows:

*“2. The parties may agree on the rules of arbitration proceedings. In this case an arbitration agreement between the parties includes the rules of arbitration proceedings to which the parties refer in the arbitration agreement. Also, an agreement between the parties on a specific arbitral institution includes an agreement on the rules of that arbitration institution.”*

The wording of this Article may not be sufficiently clear regarding the right of the parties to agree on arbitration that will not be administered by any arbitral institution (the notion of *ad hoc*). However, if we were to interpret the clause broadly, we would conclude that since the parties are authorized to agree on certain arbitration rules (which is one, but not the only possibility), they may not agree on any applicable arbitration rules or on any institution. The will of the legislator is even more clear in the explanatory note prepared with respect to the amendments to the Law. According to the explanatory note, as a result of amending this Article, *“the parties will have an opportunity to address an arbitral tribunal (ad hoc) established for the purposes of resolution of a specific dispute, as provided under the UNCITRAL Model Law.”*<sup>21</sup>

A specific court decision regarding the validity of an *ad hoc* arbitration agreement was not identified during the research. However, the court practice with respect to other aspects of validity of the arbitration clauses was obtained. The practice of the courts on the interpretation

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<sup>20</sup>Gary B. Born, *International Arbitration: Law and Practice*, 2nd edition (Kluwer Law International, 2015), p.17.

<sup>21</sup> Explanatory Note for the Draft Law on the Amendments to the Law of Georgia on Arbitration, registration number 07-2/280/8, date: 10-12-2015, p.1.

of the arbitration clause is established in a way that may create risks for finding *ad hoc* arbitration clauses invalid.

For example, the decisions of the Tbilisi Court of Appeals often include the following explanations: “*The Chamber of Civil Cases interprets that the agreement of the parties to settle the dispute by means of arbitration is an agreement under Article 50 of the Civil Code of Georgia, which should exhaustively establish the terms in order to precisely determine the content of the agreement. Therefore, **the parties are required to include a specific arbitral institution [and/or] arbitrator in the agreement.***”<sup>22</sup> The decisions also include the following analysis: “*The arbitration agreement should specifically refer to the legal relationship, the dispute about which is subject to arbitration and should provide the possibility to **specifically identify the arbitrator, which should consider the dispute***”<sup>23</sup> (Emphasis added).

Notably, *ad hoc* arbitration implies that at the time of agreement conclusion, the parties do not know who will be an arbitrator considering their case. Furthermore, they are not selecting one of the arbitral institutions that would administer the dispute between them; the parties appoint arbitrators themselves or with an assistance of courts (or other body) and the arbitral tribunal constituted in this manner manages the proceedings according to the procedure agreed between the parties or as established by the arbitral tribunal itself. Therefore, the *ad hoc* arbitration clause cannot refer to a “*specific arbitral institution*” and “*specifically identif[ied] arbitrator*”. For this reason, we may conclude that the aforementioned interpretations pose risks to the existence of *ad hoc* arbitration in Georgia.

Fortunately, these decisions do not relate to *ad hoc* arbitration clauses specifically and therefore, it is possible that they will not be directly applied when the validity of an *ad hoc* arbitration clause will be addressed.

***Article 9 of the Law – Referring the parties to arbitration, when the court receives the statement of claim on the matter subject to arbitration agreement***

According to the wording existing before 2015, when the statement of claim was submitted to the court about the dispute subject to arbitration agreement, the court could refuse to accept the statement of claim and terminate the proceedings only if the party had submitted the notice of commencement of arbitration proceedings to the court. This meant that the agreement of the parties, as such, was not sufficient for the court to refer the parties to arbitration. Additionally, one of the parties to the arbitration clause was required to submit the statement of claim to arbitration. This wording contradicted Article 2 of the New York Convention. It put the respondent in arbitration proceedings into a confusing situation as the latter would have to submit statement of claim to arbitration in order to enforce the arbitration clause. The 2015 amendments corrected this flaw. It was established that the existence of the arbitration clause between the parties is sufficient. It was also specified that the court should refer parties to arbitration upon termination of the proceedings.

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<sup>22</sup> Decision of Tbilisi Court of Appeals dated March 30, 2016, Case No.2b/3594-15 and Case No.2b/3306-15.

<sup>23</sup> This wording is repeated in the decisions adopted before, as well as after 2015. For example, decision of Tbilisi Court of Appeals dated February 21, 2012, Case No.2b/3117-11, decision of Tbilisi Court of Appeals dated November 24, 2016, Case N2b/4905-16.

The studied court practice on this matter dated after 2015 fully corresponds to the statutory requirements. For example, under the resolutions of the Kutaisi Court of Appeals and Tbilisi City Court dated November 30, 2016 and August 2, 2016, respectively,<sup>24</sup> the proceedings were terminated and in both cases, the parties were informed that the dispute was subject to arbitration, as provided under the relevant agreements. The resolution dated November 30, 2016 referred to foreign arbitration (International Court of Arbitration of International Chamber of Commerce), and the resolution dated August 2, 2016 referred to arbitration in Georgia.

***Article 8 of the Law of Georgia on Arbitration – Form of the arbitration clause concluded with natural person***

As a result of the 2015 amendments, the requirements towards the form of the arbitration agreements with natural persons has changed. According to the regulations existing before 2015, if both parties to the arbitration agreement were natural persons, such agreement should have been certified by a notary. If one of the parties to the arbitration agreement was a natural person or an administrative body, then simple written form would be required (which did not include other provisions of the same clause, which extended the notion of written form and for example, provided that electronic communication would amount to a written form).<sup>25</sup> By virtue of the 2015 amendments, the requirement of notary certification was removed, which is correct. It was also established that if one of the parties to the arbitration agreement is a natural person or administrative body, such an agreement *“should be concluded in writing, by means of a document that is signed by both parties.”*<sup>26</sup>

In the dispute considered by the Tbilisi Court of Appeals dated March 30, 2016,<sup>27</sup> the parties have executed the loan agreement, according to which the borrower, who was a natural person, agreed to other terms and conditions of the agreement by completing an electronic application form. One of the terms and conditions was the arbitration clause. The Tbilisi Court of Appeals refused to recognize and enforce the arbitration award rendered on the basis of this arbitration clause because under Article 8 of the Law, an arbitration agreement concluded with the natural person should have been signed by the party. The court noted: *“when the respondent [...] is a natural person, solely familiarizing oneself with the agreement and confirmation of [it] electronically may not be considered as a conclusion of an arbitration agreement according to Article 8 of the Law of Georgia on Arbitration. Therefore, the Chamber opines that the case materials do not include agreement on arbitration concluded in compliance with the Law of Georgia on Arbitration and the Civil Code of Georgia”* (Emphasis added).

***Article 23 of the Law of Georgia on Arbitration – Interim measures for arbitration applied by the court before submission of the statement of claim***

The wording of Article 23 in the Law of 2009 before 2015 included reference to Article 192 of the Civil Code of Procedure of Georgia, which meant that the possibility of the party to address the court with a request on interim measures before commencing arbitration proceedings was

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<sup>24</sup> Resolution of Kutaisi Court of Appeals dated November 30, 2016, Case No.2/b-872. Resolution of Tbilisi City Court dated August 2, 2016, Case No. N2b/4905-16, as referred to in the Resolution of Tbilisi Court of Appeals dated November 24, 2016.

<sup>25</sup> Law of Georgia on Arbitration, Article 8.5.

<sup>26</sup> Law of Georgia on Arbitration, Article 8.8.

<sup>27</sup> Resolution of Tbilisi Court of Appeals dated March 30, 2016, Case No.2b/3594-15.

excluded. In the 2015 amendments, this reference was removed. Consequently, the court practice has changed as well.

By a resolution of the Tbilisi Court of Appeals dated November 11, 2016,<sup>28</sup> a party was prohibited to sell and mortgage real estate, irrespective of the fact that the claimant had not yet submitted request for arbitration on the basis of the arbitration agreement existing between the parties. The judge pointed out that according to the Civil Code of Procedure of Georgia, in case of granting the interim measure, the party is obliged to submit the claim to the court no later than 10 days after receipt of the resolution. The court notes that *“since this case is related to the submission of the request for arbitration, the claimant to arbitration proceedings should inform the court about submitting such a request immediately.”*

#### **Article 27 of the Law of Georgia on Arbitration - Rule on notifying the Respondent**

Based on the 2015 amendments, it has been determined that in the absence of the agreement of the parties, the service of the written notices to parties would be carried out according to the rules on notification and summoning provided under the Civil Code of Procedure of Georgia. Under the previous regulation, if the legal address, place of residence or work was impossible to determine, the written notice would be considered as delivered if sent to the last known legal address, place of residence or work of the addressee by means of insured post or other means. There was no reference to the rules of notifying and summoning under the Civil Code of Procedure, which includes public notification. We were unable to obtain the decision of the court requesting the giving of public notification. However, the arbitral institutions often resort to public notification. There is no evidence suggesting whether the practice provided below existed before the amendments of 2015 or not. However, at present, informing of respondents *via* public notification by the arbitral institutions is a widespread practice.

On the following web-pages one may find public notifications from a numbers of arbitration institutions:

- <http://arbitraji.gweb.ge/sajaro-shetyobineba>
- <http://legia.ge/?p=15840>
- [http://www.baristerixxi.com/?cat=4.](http://www.baristerixxi.com/?cat=4)

Together with these notifications, the arbitral institutions often upload entire case materials, which not only include the personal data of the parties, but also every detail of the case, including, among other information, the agreement existing between the parties.

This method of public notification is problematic for two reasons:

1. It contradicts the confidentiality of arbitration, which is envisaged under Article 32(4) and (5) of the 2009 Law. According to these provisions, the arbitrator and any participant of the arbitration proceedings (which also includes the arbitral institution), is required to retain the confidentiality of the information obtained during the course of arbitration proceedings. Furthermore, the Law explicitly states that unless the parties agree otherwise “the documents, evidence, written or oral statements [submitted to arbitration] should not be published”;

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<sup>28</sup> Resolution of Tbilisi Court of Appeals dated November 11, 2016, Case No.2b/5926-16.

2. The disclosure of these details also raises questions from the viewpoint of personal data protection. The documents downloaded from internet include personal data of the parties, such as personal identification number, home address, mobile number, amount of the loan, loan and mortgage agreements, etc.

**Articles 42 and 45 of the Law of Georgia on Arbitration – Proceedings on Set Aside and Recognition and Enforcement of the Arbitral Award**

The party against which the arbitral award has been rendered has two ways to challenge the award: (1) request its annulment, setting aside; or (2) request refusal of recognition and enforcement of the award.

These two mechanisms have the same grounds, *i.e.*, the reasons for which the arbitral award may be set aside or its recognition and enforcement may be refused.

In order to avoid on one hand parties' bad faith use of these mechanisms and on the other hand, application of these grounds by the courts in a different manner (for example, where one court refused to set aside an arbitral award and the second court considered the same grounds as sufficient for refusing the recognition and enforcement), amendments were made to Articles 42<sup>29</sup> and 45<sup>30</sup> of the Law of Georgia on Arbitration and the respective Articles of the Civil Code of Procedure (Articles 356<sup>21</sup>2<sup>1</sup> and 356<sup>24</sup>1<sup>1</sup>) in 2015. As a result of the changes, it was established that the court will not accept party's application for refusal of recognition and enforcement of an arbitral award rendered in Georgia, if the court has already considered party's application to set aside this arbitral award on the same grounds and rejected it, or if the party did not challenge the arbitral award within a 90-day period established under the Law of Georgia on Arbitration.

The resolution of the Tbilisi Court of Appeals dated April 3, 2015<sup>31</sup> demonstrates that the court misunderstood this article. In this case, the court refused to accept the application regarding the recognition and enforcement of the party (and not the application of the other party regarding the refusal to recognize and enforce an arbitral award as foreseen under Article 356<sup>21</sup>2<sup>1</sup> of the Civil Code of Procedure). The court interpreted the following:

*“For the purposes of recognition and enforcement of the arbitral award, the 90-day period for annulment of the arbitral award should be expired, during which the party has not challenged and appealed this award. Otherwise, when addressing the court with a request to recognize and enforce the arbitral award, the creditor is required to submit the factual addresses of the parties to the arbitration, as well as the application with enclosed materials and the amount of the copies of the same according to the number of the respondents in the case.”*

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<sup>29</sup> Law of Georgia on Arbitration, Article 42: “5. If the court renders a judgement to recognize and enforce the arbitral award, no award shall be set aside on the grounds that a party requested to refuse recognition and enforcement of the award that the court denied while hearing the case on its merits. In this case, the complaint to set aside the arbitral award may not be acceptable; if complaint has been accepted, the proceedings shall be terminated.”

<sup>30</sup> Law of Georgia on Arbitration, Article 45: “2. No party shall make a complaint to the court for the refusal of recognition and enforcement of arbitral award rendered in the territory of Georgia on the same grounds that the party requested setting aside of the award, unless the party did not appeal the arbitration award to the court within the period defined under Article 42 (3) of this Law.”

<sup>31</sup> Resolution of Tbilisi Court of Appeals, Case No. 2b/1101-15, dated April 3, 2015.

Notably, the Law does not establish the expiry of the 90-day period without action for the purposes of requesting the recognition and enforcement, or any other precondition. The only *rationale* behind the Law and the Procedural Code is to ensure that the decision of one court in Georgia on the refusal to set aside the award (or expiry of such request) is final and to exclude the possibility that another chamber of the court may consider the same grounds for refusal to recognize and enforce as satisfactory; *i.e.*, to exclude the possibility of evaluating the same circumstance in a conflicting manner.

### 3.2. Challenges in the Existing Court Practice

#### **Arbitration agreements are interpreted narrowly**

Generally, arbitration agreements are narrowly interpreted in the courts of Georgia. On one hand, there are definitions such as, *“The agreement should directly refer to specific arbitration, which shall be authorized to consider and resolve the dispute. The arbitration agreement that neither explicitly refers to the arbitration nor is drafted in a way to determine which arbitration the parties referred to based on its content, should be considered as invalid.”*<sup>32</sup> As noted above, the requirement to identify “specific arbitration” in the arbitration clause poses risks to the functioning of *ad hoc* arbitration in Georgia.

On the other hand, it is an established practice that alternative provisions, *i.e.*, the provisions that provide that in case of dispute it shall be resolved by a (specific) arbitration or court, are considered invalid.<sup>33</sup> This is not a flaw, *per se*. International practice is not uniform on this matter either. However, the fact that the courts of Georgia have established such a practice puts Georgia in the list of countries that interpret arbitration agreements in a stricter manner and place a higher burden on determining the intent of parties.

The decision of the Supreme Court of Georgia dated August 26, 2016 is another example of a narrow interpretation.<sup>34</sup> In this case, there was a clause titled “Arbitration”, which read as follows:

*“5.1. All disputed matters related to the **performance** of this agreement, shall be settled by means of negotiations between the parties. 5.2. In case of failure, the dispute shall be resolved under the laws of England, the place of jurisdiction: London.”*<sup>35</sup>

The court denied recognition and enforcement of the award rendered by the London Court of Arbitration based on the ground, that: *“[...] sole arbitrator considered the dispute and rendered an award related to the secondary claim of the claimant, by which it exceeded the scope of the arbitration clause”*.

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<sup>32</sup> Decision of the Supreme Court of Georgia, Case No. as-416-389-2010, dated June 28, 2010.

<sup>33</sup> For example: *“the parties did not agree on the essential term of the arbitration agreement – to resolve the dispute by means of arbitration, since the agreement refers to two means of dispute resolution: arbitration and court.”* Decision of the Supreme Court of Georgia, Case No. as-804-858-2011, June 27, 2011.

<sup>34</sup> Case No.a-887-sh-21-2016, dated August 26, 2016.

<sup>35</sup> Notably, the Russian version of this clause was formulated in the following manner: *“5.Арбитраж. 5.1. Все споры связанные с выполнением условий данного Договора Стороны будут решать путем проведения переговоров. 5.2. В случае невозможности решить спор путем проведения переговоров, условия этого Договора регулируются и разъясняются в соответствии с Английским правом, местом юрисдикции является Лондон”*.

The decision of the Federal Supreme Court of Switzerland, in which the court considered the scope of the arbitration clause, which was drafted in the following manner is pertinent: *“If there is a disagreement with respect to **interpretation** of any provision of this agreement, the parties agree that the dispute shall be handed to the Court of Arbitration for Sport in Lausanne, Switzerland, the decision of which should be final and binding for both parties.”*<sup>36</sup> The dispute arose between the parties with respect to termination of the agreement and performance of the monetary obligations (secondary claims, as it was addressed in the decision of the Supreme Court of Georgia). The respondent challenged the jurisdiction of the tribunal on the basis that the arbitration clause was concluded only with respect to disputes related to the interpretation of the agreement. The court of Switzerland stated that the clause could be considered limited at a first glance, however, together with the issues of interpretation it also covered disputes related to the performance of the agreement. According to the court, where the intent of the parties to arbitrate is clear, which was the case at hand, the courts should interpret the scope of the arbitration clause broadly. The broad interpretation of arbitration clauses is coherent with the purpose of procedural efficiency and ensures the economy of the proceedings. As noted by the High Court of England in the case of *Fiona Trust & Holding Corporation v Yuri Privalov*:<sup>37</sup>

*“The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. “*

There are also positive trends regarding the efficient interpretation of the arbitration clauses, based on the intent and purpose of the parties.

For example, in one of the cases from 2015, the claim was submitted to the Batumi City Court and the respondent submitted an application with a request to refer the case to arbitration. The Batumi City Court refused to satisfy the request of the respondent, finding that the arbitration clause, which was based on the model arbitration clause of ICC, was not valid.<sup>38</sup> The Batumi City Court considered the arbitration agreement that referred to the rules of an arbitration institution (rather than to the institution itself), to be insufficient for determining specifically which arbitration institution was chosen by the parties. This practice was “corrected” by resolutions of the Kutaisi Court of Appeals from November 30, 2016<sup>39</sup> and the Tbilisi Court of Appeals from November 24, 2016.<sup>40</sup> The Tbilisi Court of Appeals reasoned, “by agreeing to the rules and procedures for arbitration, the parties also agreed to resolution of the dispute by means of arbitration and were aware of the outcome of waiver of the litigation.” Both appellate courts found that the clause referring to the rules of the specific arbitral institution demonstrated the

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<sup>36</sup> Federal Supreme Court of Switzerland, Case №4A\_103/201120, dated September 2011.

<sup>37</sup> *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] APP.L.R. January 24, 2007.

<sup>38</sup> Decision of Batumi City Court dated November 25, 2015, Case No. 2-1043/15.

<sup>39</sup> Resolution of Kutaisi Court of Appeals dated November 30, 2016, Case No. 2/b-872.

<sup>40</sup> Decision of Tbilisi Court of Appeals dated November 24, 2016, Case No. 2b-49.

intent of the parties to subject their dispute to the administration of the respective arbitration institution.

***Courts do not properly distinguish between the arbitration (tribunal) considering the dispute and the arbitration institution***

In the decision of Tbilisi City Court dated November 25, 2014, the party appealed the decision of the Arbitration Council of an arbitral institution regarding the continuation of the arbitration proceedings and constitution of the respective arbitral tribunal to hear the case, as there was no *prima facie* case of lack of jurisdiction of this arbitral institution. Notably, the appealed decision was not the decision of the arbitration (tribunal) regarding the competence of the tribunal (subject to Article 16 of the Law), but rather an administrative decision of the internal structural body of the arbitral institution – the Council – deciding that the proceedings, in terms of administration, should have continued in this institution. Generally, following this decision, the arbitration tribunal would be constituted and the party would have been granted an opportunity to pose the issue of competence of the arbitral tribunal in front of the tribunal. Thus, the tribunal would consider the issue of its own competence. Following this, if the tribunal determined its own competence, the party would have the possibility to appeal this decision to the court, based on Article 16 of the Law of Georgia on Arbitration and Article 356<sup>16</sup> of the Civil Code of Procedure.

The court treated the decision of the administrative body of the institution regarding the continuation of the proceedings for the purposes of administering the dispute equally as the decision of the tribunal and discussed the issue of its competence. The tribunal was not given the opportunity to address the issue of its own jurisdiction. This approach contradicts the principle of competence-competence envisaged under Article 16 of the Law on Arbitration.<sup>41</sup>

The same problem is noticed in decisions where a conflict of interest between the arbitral institution and one of the parties (or its representative) rises. In this situation, three resolutions should be considered: the resolutions of the Tbilisi Court of Appeals dated July 20, 2011<sup>42</sup> and April 10, 2017<sup>43</sup>, and the resolution of the Tbilisi City Court dated October 6, 2014<sup>44</sup>. In the first case, the issue arose at the stage of recognition and enforcement of the arbitration award. In the latter two cases, the decision of the arbitral tribunal on establishing its own jurisdiction was appealed. In all three cases, the issue was conflict of interest between the arbitral institution (and not one of the members of the arbitral tribunal) and the party. When evaluating the issue, the courts did not consider the kind of connection between the founder/director of the arbitral institution or member of the other body (the court/council) and the arbitrator hearing the case. The existence of the connection or lack thereof might not have been decisive for courts final determination or quite on contrary, might have been sufficient for setting aside the respective award/decision. However, drawing the distinction between the arbitration (tribunal hearing the dispute) and the arbitral institution and consideration of this issue would have clarified many

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<sup>41</sup>Notably, the wording of 2009 Law, which was in force at the time this decision was made, provided the competence of the city courts regarding the matter foreseen under Article 16 of the Law. Following 2015, the consideration of this issue is subject to the competence of the courts of appeal.

<sup>42</sup> Resolution of Tbilisi Court of Appeals, Case No.2b/2130-11, dated July 20, 2011.

<sup>43</sup> Resolution of Tbilisi Court of Appeals, Case No.2b/79-16, April 10, 2017.

<sup>44</sup> Resolution of Tbilisi City Court, Case No.2/16444-14, October 6, 2014.

questions which currently exist in the legal community and would have made the arbitration and court practice more predictable.

***Courts have an inconsistent approach on the scope of interference by the court and the principle of competence-competence***

Article 6 of the 2009 Law, which is titled “Independence of Arbitration and Instances of Court Interference” stipulates that: “2. *The court is prohibited to interfere with the legal relations prescribed under this Law in any manner, unless specifically provided under this Law.* “

The resolution of the Kutaisi Court of Appeals dated March 14, 2017<sup>45</sup> provides that the claimant submitted the claim to the Batumi Permanent Arbitration on Civil Matters and requested to order the respondent to make a payment. The respondent addressed the Kutaisi Court of Appeals and requested a declaration that arbitration had no competence. The Kutaisi Court of Appeals accepted the complaint, and during its consideration, requested the entire case file of the arbitration proceedings and subsequently, found that arbitration had no jurisdiction.

It is possible that there was no arbitration agreement between the parties and the arbitral tribunal had no jurisdiction over the case; however, there was no legal ground for court’s interference at given stage and in that manner. According to the Law on Arbitration the court interference in this context is only allowed in in cases provided under Articles 9(1) and 16(5). In this case, the claim on the subject matter was not submitted to the court and the arbitral tribunal had not yet decided the issue of its jurisdiction. In light of the limited level of control established under the 2009 Law, the party should have raised the challenge to the jurisdiction of the arbitral tribunal within the arbitral proceedings from the outset. The court should have waited for the decision of the arbitral tribunal regarding its competence and, had the decision been positive, should have then reconsidered this matter based on the party’s appeal.

Contrary to the Kutaisi Court of Appeal, the Tbilisi Court of Appeal in its resolution of March 7, 2017 relied on the abovementioned principle when refusing to accept the application about the competence of the arbitration.<sup>46</sup> The application requesting the preliminary recognition of the jurisdiction of the arbitration was submitted to the court. The court referred to Article 356<sup>12</sup> of the Civil Code of Procedure and Article 16 of the Law on Arbitration and found:

*“The Court of Appeals is not authorized to accept the application of a party regarding the competence of the arbitral tribunal before such an application is decided by the tribunal, competence of which is challenged by one of the parties. Therefore, the party is not authorized to directly address the court on this matter. At the same time, the court has no authority to accept the application of the party regarding the competence of the arbitral tribunal without observing such procedures.”*

These resolutions demonstrate that the existence of uniform practice in the courts of same instance on the same matters remains a challenge.

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<sup>45</sup> Resolution of Kutaisi Court of Appeals, Case No.2b/1176-2016, dated March 14, 2017.

<sup>46</sup> Resolution of Tbilisi Court of Appeals, Case No.2b/1382-17, dated March 7, 2017.

***Courts inconsistent approach to the determination of the standard of “public policy” and substantial reconsideration of the arbitral awards on this ground (refusal to recognize and enforce, or set aside)***

In Georgian practice, as in international practice, public policy is the most common basis for challenging arbitral awards. However, this approach is applied more often and more successfully in Georgia than it is in international context. Furthermore, its current interpretation poses risks to the independence of arbitration and the finality of arbitral awards.

It is clear from the preparatory works of the New York Convention and the Model Law, as well as from international scholarly sources, that the notion of “public policy” implies considerably more than incorrect interpretation of the law. Therefore, only the fact that the court does not agree with the decision of the arbitral tribunal and/or believes that its award is the result of incorrect application of the law, is not sufficient for setting aside arbitral awards. Had it been so, instead of the reference to *public policy*, the following phrasing would have been used - “contradicts the provisions of the law,” or something similar; and the latter would be the mechanism for appeal/review of the arbitral awards.

When adopting the Law on the basis of the Model Law, the intent of the legislator was to share international best practice and establish exhaustive and limited grounds for challenging arbitral awards. Unfortunately, nowadays, the practice is not coherent with respect to this standards. For example, by the resolution of November 28, 2011,<sup>47</sup> the court considered that the part of an arbitral award ordering the respondent to pay USD 14,095, of which USD 2,546 constituted a penalty, was contrary to the public policy. The Tbilisi Court of Appeals referred to Article 420 of the Civil Code, according to which the court may reduce an inadequately high penalty in light of the circumstances of the case and “considered it appropriate” to reduce the amount of the penalty to USD 300. The reduction of the disproportionately high amount of the penalty on the basis of “public policy” (partial recognition and enforcement of the award) is an established practice in the Court of Appeals.<sup>48</sup>

Similarly, by resolution of the Court of Appeals dated November 2, 2011,<sup>49</sup> the recognition and enforcement of an arbitral award was denied since the according to the award the pledged property was to be transferred into the ownership of the creditor in violation of the rules of the Civil Code.

All these decisions might indeed include violation of “public policy”. The problem is that the reasoning of these decisions is so scarce that no application or incorrect interpretation of certain provision of the Civil Code is practically made equal to public policy. The lack of reasoning is what creates confusion as to what may be considered a violation of public policy.

In parallel, the Tbilisi Court of Appeals by its resolution of March 25, 2014<sup>50</sup> refused to satisfy the request of the party to set aside an arbitral award. As a ground for setting aside the award, the party referred to the violation of the Law on Enforcement Proceedings by the other party and

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<sup>47</sup> Tbilisi Court of Appeals, Case No.2b dated November 28, 2011 discussed in the article “Public Policy as a Ground for Setting Aside or Refusal of Recognition and Enforcement of Arbitration Awards – Overview of the Georgian Practice”, available at: [http://nccl.ge/m/u/ck/files/Geo\\_Comm\\_Law\\_Review\\_2013.pdf](http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf), last accessed on December 4, 2017.

<sup>48</sup> For example, see following decisions of Tbilisi Court of Appeals: Case No.2b/2220-11, dated June 30, 2011, Case No.2b/2747-11, September 12, 2011.

<sup>49</sup> Resolution of Tbilisi Court of Appeals, Case No.2b/3283-11, dated November 2, 2011.

<sup>50</sup> Resolution of Tbilisi Court of Appeals, Case No.2b/5858-13, dated March 25, 2014.

the arbitration, which according to the requesting party contradicted public policy. The court refused to set aside the award and provided the following reasoning:

*“As for the public policy, it is an established approach in theory and practice that this does not imply review of the merits of the arbitration award and in that respect, evaluation of the accuracy of reasoning of the arbitral award by the court; such an approach to this matter would directly contradict the above purpose of the law; based on this reasoning, when appealing the arbitral award on the basis of the public policy the interpretation of the contractual clauses as provided in the arbitral award, evaluation of the evidence, qualification of legal relations should not be revised, since public policy does not imply any kind of violation, but rather the violation of the fundamental principles of the law; i.e., to put otherwise, in order to set aside an arbitral award due to violation of the public policy, such award should contradict the values of high importance; otherwise, the public policy will turn into a mechanism of appeal of arbitral awards. Such an approach does not comply with the purpose of the Law of Georgia on Arbitration which is to ensure the finality of arbitral awards.”*

Using this standard of substantiation, even in cases when the court would consider the arbitral award to contradict “public policy,” would advance the practice, making it more predictable and viable to refute existing concerns among practitioners that arbitration awards are susceptible to uncertain risks until they are recognized and enforced.

#### ***Courts rely on the Law on Arbitration less and mostly use the Civil Code of Procedure***

Based on the cases reviewed, courts appear to mainly rely on the Civil Code of Procedure and less on the Law on Arbitration. It is undisputed that the Civil Code of Procedure is the main guideline for judges on procedural matters. Part 7 of the Procedural Code addresses court participation in arbitral proceedings and enforcement of arbitral award. This chapter incorporates certain parts of the Law on Arbitration and in certain cases, additional procedural details are provided, which directly relate to the procedural actions carried out by the court (for example, the terms of consideration by the court). However, the Procedural Code includes the issues governed by the Law on Arbitration only partially and by way of extract. Relying solely on the Procedural Code leads to a disregard for the specifics of arbitration and to consideration of the issues outside of the context of arbitration.

This was the case in the resolution of the Kutaisi Court of Appeals dated March 14, 2017. In this case, the court, instead of applying the Law on Arbitration (only Article 8 of the Law was addressed, without taking into account Articles 6, 9 and 16) applied Article 356<sup>16</sup> of the Procedural Code, which only addresses the procedural aspects of rendering the decision on the competence of arbitration by the court. However, it does not envisage the material matter, which determines the circumstances under which the court may address the competence of arbitration.

***Upon consideration of the applications on recognition and enforcement or setting aside of the arbitral awards, as well as when establishing the competence of arbitration, the courts request documents that are not required under the Law***

Reference was made to the resolution of the Kutaisi Court of Appeals dated March 14, 2017,<sup>51</sup> where the court requested the entire arbitration case file to decide on the issue of competence. The same approach may also be observed during the consideration of applications on recognition and enforcement or setting aside of arbitral awards. For example, the Supreme Court of Georgia determined in a number of cases that the application was not complete and requested the party that applied for recognition and enforcement of the foreign arbitral award to submit the certified notice that the enforcement of the arbitration award was not carried out according to the laws of the state where the award was made.<sup>52</sup>

Furthermore, the Courts of Appeal usually request entire case materials from the party or the arbitral institution itself, including the minutes of the arbitration hearing. When interviewing the arbitral institutions, two of them noted that for the purposes of facilitating the communication with the court, they shared the reference code of the respective arbitral award with the court, through which the court acquires access to the electronic system of the respective arbitral institution and the entire package of documents related to the case.

This practice contradicts the provisions of the New York Convention<sup>53</sup>, the 2009 Law<sup>54</sup> and the Civil Code of Procedure<sup>55</sup>, according to which the party requesting recognition and enforcement of the award should submit only two documents to the court: the arbitration agreement and the arbitral award. Any request of additional documents encourages the court to interfere with the arbitral award more than allowed under the Law and/or to allocate the burden of proof differently from what is established under the Law.

## **VI. What's stopping arbitration from gaining ground in Georgia? The views and awareness of actual and potential users of arbitration in Georgia**

Within the purview of the study, the main stakeholders involved in arbitration were interviewed. This includes arbitration institutions, working lawyers/attorneys, businessmen, judges, individuals, state representatives and the representatives of international organizations. The purpose of the interviews was to understand the level of awareness on arbitration, attitudes towards it, as well as the stakeholders' views of the challenges related to arbitration and on the ways to improve it.

The table below, provides the target groups, interview method and the number of interviewees.

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<sup>51</sup> Resolution of Kutaisi Court of Appeals, Case No.28b/1176-2016, dated March 14, 2017.

<sup>52</sup> For example, see decisions of the Supreme Court of Georgia: Case No.a-3568-sh-93-2013, dated March 13, 2014, Case No.a-3573-sh-73-2012, dated November 26, 2012.

<sup>53</sup> New York Convention, Article IV.

<sup>54</sup> Law of Georgia on Arbitration, Article 44.2.

<sup>55</sup> Civil Code of Procedure, Article 356<sup>21</sup>.1.

*Table 5: Respondent types, research method used and number of completed interviews.*

#	Target group / Respondent type	Research method used	Number of respondents
1	Heads of arbitration institutions / Arbitrators	In depth interviews	11
2	Lawyer/attorneys	Semi-structured interviews	20
3	Business company representatives (including microfinance institutions/banks)	Semi-structured interviews	20
4	Judges	In depth interviews	5
5	International organization representatives	In depth interviews	5
6	Government representatives	Semi-structured interviews	5
7	Individuals	Semi-structured interviews	5

The analysis of the results of the interviews is presented below with respect to each target group.

### 1. Arbitration Institutions

With respect to the challenges and problems facing arbitration, including what prevents business from using arbitration for resolving business-to-business disputes, lack of awareness, knowledge and trust were repeatedly mentioned.

The role of attorneys was highlighted as they can advise their clients whether or not to use arbitration. Interviewees mentioned that the link between arbitration and its users (businesses) is the latter's lawyer/attorney, who are in a position to explain the benefits of arbitration to them. As a rule, clients trust their lawyer/attorney. According to one of the respondents, this problem is particularly acute in the regions where there are few legal companies and clients depend on the advice of "singled out" attorneys. As he noted, lawyers are not simply inactive, but have negative attitudes towards arbitration. This is primarily due to a lack of competence and awareness, as well as due to the misconception that arbitration somehow constitutes a threat to them. As the respondent said, lawyers see arbitration as competition and think that it limits attorneys' rights or their role and thus, they prefer to spend months in court proceedings. Consequently, they convince clients that the courts are a better option.

Four institutions named the legislative changes which enabled the notary public to issue writs of execution as one of the reasons for the lack of popularity of and lack of utilization of arbitration. At the same time, abolishing arbitral institutions' authority to issue the writ of execution and giving the authority of enforcement of arbitral awards to the courts of appeal was also noted as an issue in the context of developing arbitration practices.

Views were mixed on the court's enforcement of arbitral awards, with some perceiving the courts interference as positive and some negative. In another arbitration institution representative's opinion, before the court of appeals gained this function, many arbitration institutions were engaged in ill-practices and rendered biased awards.

The damaged reputation of arbitration in the country caused by prior malpractice and the existing practice of so called "pocket arbitrations"<sup>56</sup> were named by four institutions as factors inhibiting the development of arbitration. One institution specifically noted that this leads businesses to refrain from resolving disputes in arbitration.

Two institutions claimed that the existence of arbitration institutions as limited liability companies greatly hinders the field. In their view, whenever an institution operates as an LLC, it is profit-oriented from the outset, which results in conflict of interests and questions the impartiality and fairness of proceedings. This is one of the reasons why many entrepreneurs distrust arbitration. Another interviewee thought that the operation of arbitration within legal /consultancy firms once again indicates the presence of conflict of interests and bias.

Another deterrent to the development of arbitration, according to the institutions interviewed, is judges' lack of competence. In the respondents' opinions, courts should be the first to support the development of arbitration and should not get in the way of referring cases to arbitration.

One respondent noted that the lack of an alternative dispute resolution culture is larger problem than just the issue of trust in arbitration in Georgia. This, again, is mainly caused by the lack of information coupled with its negative reputation. Business representatives have rarely heard of arbitration.

Besides the abovementioned, some of the institutions also noted the prolonged time frames in the Courts of Appeals as a problem. One respondent noted that their arbitration institution tries to resolve the cases as quickly as possible, but cases are dragged out at the stage of enforcement in the Court of Appeals. In the same vein, the head of one arbitration institution recommended shortening the terms provided in the Court of Appeals.

**Respondents also shared their views on possible solutions to the existing problems:**

- ✓ Almost everyone mentioned that it is crucial to raise awareness through informational meetings and trainings, advertisement, and/or PR campaigns. Some suggested that information on arbitration should be regularly broadcasted (two institutions).
- ✓ Five other respondents focused on the role of the state. They thought that support from the state would significantly improve the development of the field. They recommended the state incorporate arbitration clauses in private contracts, promote arbitration, and encourage businesses to use arbitration.
- ✓ Two institutions also emphasized the role of universities and noted that it is essential for the new generation of lawyers to be aware and competent in this field.

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<sup>56</sup> There is no precise definition of this term. It is often used in the context of arbitration to indicate the unreliability and partiality of arbitrators/arbitration institutions.

- ✓ Another two interviewees think that it is necessary to have some kind of control mechanism, for example: some kind of mandatory license/permit for establishing an arbitration institution or exams as a precondition to practice arbitration.
- ✓ One institution said that it would greatly help if legislation introduced the requirement for arbitration institutions to be established as non-profit (non-commercial) associations.
- ✓ Another two respondents suggested shortening the time frame for considering arbitration-related matters in appellate courts.
- ✓ Finally, one interviewee suggested that forming and further developing thematic arbitration institutions would contribute to the strengthening of arbitration in Georgia (e.g. institutions with expertise in maritime disputes, construction disputes, etc.).

## 2. Lawyers/attorneys

Twenty active lawyers were interviewed within the study using semi-structured interview guides that included quantitative and qualitative elements. Lawyers were asked to assess their trust in arbitration on a scale from 1 to 5 with 1 meaning “I do not trust it at all” and 5 meaning “I fully trust it”. The results are presented in Table 6:

*Table 6: Lawyers’ trust in arbitration*

	Level of trust	Number of responses	Percentage
I do not trust it at all	1	1	5%
I somewhat distrusted it	2	5	25%
I am neutral	3	7	35%
I somewhat trust it	4	5	25%
I fully trust it	5	2	10%

The interviews showed that a majority of lawyers have rather neutral attitudes towards arbitration. They based their views on a variety of issues, including past negative experiences. The main reason named for distrust was bias and partiality of institutions (six lawyers). Other reasons included the limited appeal opportunities of the arbitral awards; lack of transparency of the process; unqualified arbitrators; and the fact that any person may become an arbitrator, even without a legal education.

In contrast, reasons for trusting arbitration included positive personal experiences with arbitration, arbitrators’ professionalism, confidentiality, speed, the flexibility of the process, and the existence of a code of ethics. Two lawyers also mentioned that their trust completely depends on each individual case and institution: if they personally trust the person, then they trust the institution as well. One respondent mentioned that notwithstanding the negative experience, he feels that he can still argue a case before an unbiased arbitrator.

As with arbitration institutions, lawyers/attorneys suggested that a lack of trust and information about arbitration were the major challenges inhibiting arbitration in Georgia (11 lawyers). Some

stated that a lack of professionalism and qualifications among arbitrators was an impediment (5 lawyers). One mentioned that the bad reputation of arbitration stems from past practices. Two lawyers mentioned the fact that “pocket arbitrations” exist today. Three lawyers considered the courts unfavorable approach to arbitration as an obstacle. Another noted the need to improve infrastructure and to increase arbitrators’ salaries.

**As to what should change specifically in order for arbitration to become the favored way for dispute resolution, the following answers were given:**

- ✓ Six lawyers/attorneys stated that awareness should be raised by promoting arbitration. Two said that promotion should take place among business people. One suggested that arbitration institutions should carry out a PR campaign, while another suggested arbitration institutions, courts, and government should do so.
- ✓ One potential solution interviewees mentioned was professional trainings for arbitrators.
- ✓ One more respondent suggested increasing the number of arbitrators.
- ✓ Another stated that information on arbitrators should be publicly accessible as it is for judges.
- ✓ Some rather general responses were also provided, with respondents suggesting that increasing professionalism, making arbitration impartial and objective, and making sure that arbitrators delivered fair awards would make arbitration more widely used.

**3. Businesses (excluding banks and microfinance organizations)**

Semi-structured interviews were conducted with 15 representatives of businesses. Answers to the question how much they trust arbitration are presented in Table 7:

*Table 7: Business people’s trust in Arbitration*

	Level of trust	Responses	Percentage
I do not trust it at all	1	1	6.7%
I somewhat distrusted it	2		0%
I am neutral	3	5	33.3%
I somewhat trust it	4	5	33.3%
I fully trust it	5	4	26.7%

Business people provided different reasons for distrust towards arbitration. Four consider the grounds for distrust to be the lack of qualified and competent arbitrators. One of those four emphasized the lack of required standards for arbitrators and another specifically noted the absence of legal education as a mandatory criterion to act as an arbitrator. One mentioned lack of trust in how arbitrators are appointed. Business people also suggested arbitration institutions lacked independence, noting that arbitration institutions represent the interests of private organizations and banks. When discussing distrust, they also noted the potential to appeal the arbitral awards and the courts’ attitudes towards arbitration. As one business person stated, “For some reason, in Georgia, [arbitration] is perceived as a competitor to the court and not its supporter. So that also hinders arbitration.”

Contrary to the above, five businesses named personal experience with arbitration as the basis for their trust in it. They stated that they only use arbitrators/arbitration institutions that they know and trust. One interviewee mentioned highly qualified arbitrators as his/her reason for trusting arbitration. Another noted the possibility to find and choose the arbitrators with specific specialization and knowledge. In addition, according to one business, their trust is based on the existence of the control mechanism from the court, as the arbitral award should be enforced by the court, which is both necessary and pragmatic.

As for the problems and challenges facing arbitration in Georgia today, once again, the majority referred to the lack of trust (7 businesses) together with lack of information and awareness (5 businesses). Three noted the poor reputation and the lack of authority of arbitration as an obstacle, while one named arbitration's lack of credibility and another one - the lack of expertise. One business identified the fact that courts, arbitration, and mediation are perceived as competitors. The affiliation of arbitration institutions with particular businesses or banks was also identified as hindrance by two interviewees. One of the business representatives noted that the problem existed at the stage of the enforcement with court fees and terms. In his words, "this [enforcement] should become faster and cheaper."

As with other groups in the study, most business representatives see the solution in better promotion of information and awareness. They mentioned a variety of ways to disseminate information. For example, one stated that, "a PR campaign should be held, as it was with respect to the institute of Notary Public by The Ministry of Justice." The need for heavy advertising was suggested by two other businesses. One suggested handing out informational brochures. The other noted that often information is scarce even in legal circles, and thus it is crucial to advertise arbitration's efficiency. Business people noted information should be broadcasted to society about successful arbitration cases and arbitrators' qualifications. Three noted that arbitration institutions should be the drivers behind the spread of information. One respondent stated, "Arbitration institutions themselves should provide information about arbitration to business and society, so that the trust is built." Two respondents have also referred to the importance of the role of the State and courts in spreading information. One noted that cooperation between business, the State, the courts, and arbitration institutions and the distribution of their roles is essential for the development of the field.

Apart from the above, respondents identified increasing the level of arbitrators' competence, qualification and professionalism as preconditions for changing the current environment of mistrust (5 respondents). One respondent also mentioned that together with professionalism, a proper infrastructure is important (e.g. offices, where the hearings take place), as it is with notaries. Another also mentioned that arbitration institutions should not be affiliated with any business. One said that the licensing of arbitrators, similar to that of auditors or attorneys, should be introduced. One spoke about making the enforcement procedure quicker, and yet another respondent stated that the rules for appointing arbitrators should change or more information about arbitrators' should be available. Five surveyed business entities thought that the development of arbitration as well as increasing the trust will take time. In the words of one of the interviewees, "All this will take time. It will happen slowly, but in 5-10 years we may have a strong institution."

#### 4. Banks and Micro-finance Institutions

During the study, it became clear that banks and micro-finance institutions (MFIs) are the main users of arbitration in the country. For that reason, semi-structured interviews with 5 financial institutions including three banks and two MFIs took place.

Four of the five organizations stated that arbitration is the best method for commercial dispute resolution. One preferred mediation. Arbitration was favored due to its speed compared with courts. Table 8 shows their attitudes towards arbitration:

*Table 8: Trust in Arbitration among Banks and MFIs*

	Trust in arbitration	Responses
I do not trust it at all	1	0
I somewhat distrusted it	2	0
I am neutral	3	0
I somewhat trust it	4	2
I fully trust it	5	2
I don't know		1

Those who trust arbitration explained that the court enforcement mechanism of the arbitral award increases the level of trust. The company that said "I don't know" noted that they trust only certain arbitration institutions, and the reason for their mistrust for the rest of the institutions is due to incompetent and biased arbitrators.

When asked how often they use arbitration, two said they do not use it, one - that they plan to begin using arbitration for some cases, and one said that they have several cases in arbitration now and plan to resolve more disputes in arbitration (despite the fact of legal nature of the respondent - a natural or legal person). Two noted the issue of costs when deciding between the courts and arbitration, stating that they choose courts because they are cheaper. One stated that for contracts involving GEL 3 000 or less courts are selected, and for larger amounts - arbitration. In general, interviewees stated that while determining the dispute resolution mechanism they look at the disputed amount, procedural costs, flexibility of the proceedings, and the type of dispute.

With the two respondents who stated they have used arbitration before, one named a specific arbitration institution which they had selected, and the other stated that they do not use a specific arbitration institution, but rather address several arbitration institutions. One stated that the deciding factor for choosing an arbitration institution is arbitrators' qualification, the structure of the institution, its operations, and history. The other mentioned the flexibility of the system, electronic database system, and the confidence shown by the arbitration institution that it can resolve the dispute quickly and effectively.

The banks and MFIs spoke about a number of challenges and problems in the field. They mentioned the terms of enforcement of an award in appellate courts as an obstacle. Generally, they noted the requirement that the courts to enforce awards, the fees connected to it, the inconsistent practice with respect to the enforcement of awards, lack of awareness on arbitration, and the lack of human resources. As one respondent noted, “many lawyers are not interested in pursuing this field due to low remuneration or other reasons.”

With respect to ways to improve arbitration, financial organizations provided a number of recommendations including:

- ✓ Reduction of the term required for enforcement of awards in the Courts of Appeal;
- ✓ Training of Georgian arbitrators by representatives of international arbitration institutions;
- ✓ Having more renowned and trustworthy faces in the field;
- ✓ Arbitration PR;
- ✓ One respondent stated that the first step should be the elimination of problems in legislation but did not indicate any concrete flaw;
- ✓ It was also noted that there should only be several highly qualified arbitration institutions.

## 5. Judges

Qualitative interviews were carried out with four judges from the Court of Appeals and one justice of the Supreme Court. Every interviewed judge considers arbitration an important part of the justice system.

One judge noted in the interview that, “arbitration as an alternative dispute resolution method should be developed in our reality not in the direction that it is currently developing, when only loan contract disputes fall under arbitration, but rather it should include large commercial disputes, and this in turn will encourage the establishment of speedy justice, and will also free the courts from the excessive caseload they face today.” However, when assessing the demand for arbitration today, all of the interviewed judges indicated low demand, choosing 2 points on a 5-point scale. Among those five judges, it was a common opinion that today arbitration receives “disputes mainly based on standard term” contracts and it is in demanded only “with respect to financial institutions.”

Judges unanimously noted that the main reason why business does not resort to arbitration is the lack of trust. Two judges explained that mistrust stems from the bad reputation accumulated over the years, when there were bad faith arbitration institutions and when they were often biased in favor of large companies that were party to the dispute. Another judge gave an example of an experiment in which the participants of the experiment spoke with six banks and asked them to incorporate litigation as a dispute resolution method in loan contracts. All six banks refused and demanded an arbitration clause. However, they demanded “not an arbitration institution that we would select, but the one that they chose.” Such an approach has a negative impact on trust and makes people think that some arbitration institutions collude with banks.

Judges positively evaluated the 2009 Law on Arbitration and the amendments made to it in 2015. All of the interviewed judges considered the situation to have significantly improved in recent years. As one pointed out, “We no longer encounter awards with extra commissions, different

types of excessive fines, that were happening before and, on top of that, the competence of an arbitration tribunal can already be seen in its judgments.”

Judges noted obstacles in practice and mentioned the problem of delivering the arbitration notice to a responding party when they cannot be found. They then have to notify them via public means, “which is the least effective way”. This causes the prolongation of the set terms and therefore the 30-day time for the enforcement of the award is also breached.

One of the judges emphasized a flaw in legislation, which relates to the recognition and enforcement of security measures arbitration tribunals use. According to the judge, the fact that the law requires notification of the responding party in order to consider recognition and enforcement of a security measure undermines the main concept of an interim measure as a procedural institute. This is based on the logic that when the court notifies the respondent that his or her finances may be frozen, it is natural to expect that the responding party may dispose of property before the judge freezes it. In turn, this contradicts the general principle of the procedural institute of security.

**According to the views of the judges, following is needed to raise demand on arbitration:**

- ✓ Promotion of arbitration. The State and non-governmental organizations can be involved in promoting arbitration, but at the same time, the role of the arbitrators themselves is significant. “Arbitrators should be highly competent and fair” and “they have to convince large businesses of the advantages they [arbitration] offers”, a judge noted.
- ✓ Systematic training and regular meetings and the involvement of foreign arbitrators in these processes.
- ✓ Some kind of regulation that would eliminate any doubts as regards the bias of arbitral tribunal towards any of the parties.

**6. Government**

Semi-structured interviews were held with 5 representative of government officials. Table 9 shows their responses to how they assess the importance of the role of arbitration in the justice system:

*Table 9: The role of arbitration according to government officials*

	<b>Role of arbitration</b>	<b>Responses</b>
Very insignificant role	1	1
Somewhat insignificant role	2	0
Neutral role	3	0
Somewhat significant role	4	3
Very significant role	5	1

Four of the interviewees think arbitration should be used in purely commercial (business-to-business) disputes. In their view, greater use of arbitration would solve the courts’ heavy

caseload problem. They also noted that it would increase the demand for legal services. With the provision international arbitration services, they noted it would make Georgia a hub for dispute resolution in the region. Likewise, it would support entrepreneurship through reducing the time it takes to resolve commercial disputes.

*Table 10: Government officials’ trust in arbitration*

	Trust in arbitration	Responses
I don’t trust it at all	1	1
I somewhat distrusted it	2	2
I am neutral	3	1
I somewhat trust it	4	1
I fully trust it	5	0

The reasons for mistrust included a lack of transparency, lack of arbitrators’ qualifications and their own experience. Respondents considered the major challenges to be the lack of information, ensuring the independence and impartiality of arbitration, arbitrators’ trustworthiness and qualifications, and courts’ attitudes towards arbitration. Interviewees did not note the use of arbitration by governmental bodies, stating that the government’s participation in arbitration was limited to investment disputes. None of the interviewed governmental bodies plan any kind of initiatives with respect to arbitration.

**7. International Organizations**

Qualitative interviews were conducted with five international organization representatives. They generally linked the judicial reforms to the development of arbitration, albeit indirectly. Every organization underlined the excessive caseload in the judiciary and noted that the development of arbitration will help to solve this problem and increase the effectiveness of the justice system. They also noted a number of drawbacks to arbitration including the lack of trust, the necessity of court involvement in the process of recognition and enforcement, and lack of awareness of arbitration.

**To improve arbitration, they recommended the following:**

- ✓ Introducing certification for arbitrators. One representative said that this should take place by way of legislative amendments, but another suggested that certification should take place through self-regulation.
- ✓ Introducing regulation with respect to consumer and employment disputes in order to protect the weaker parties and avoid the misuse of arbitration proceedings by the party with more bargaining power. It was noted that beyond that, the field does not require strict regulations and it should be as deregulated as possible.

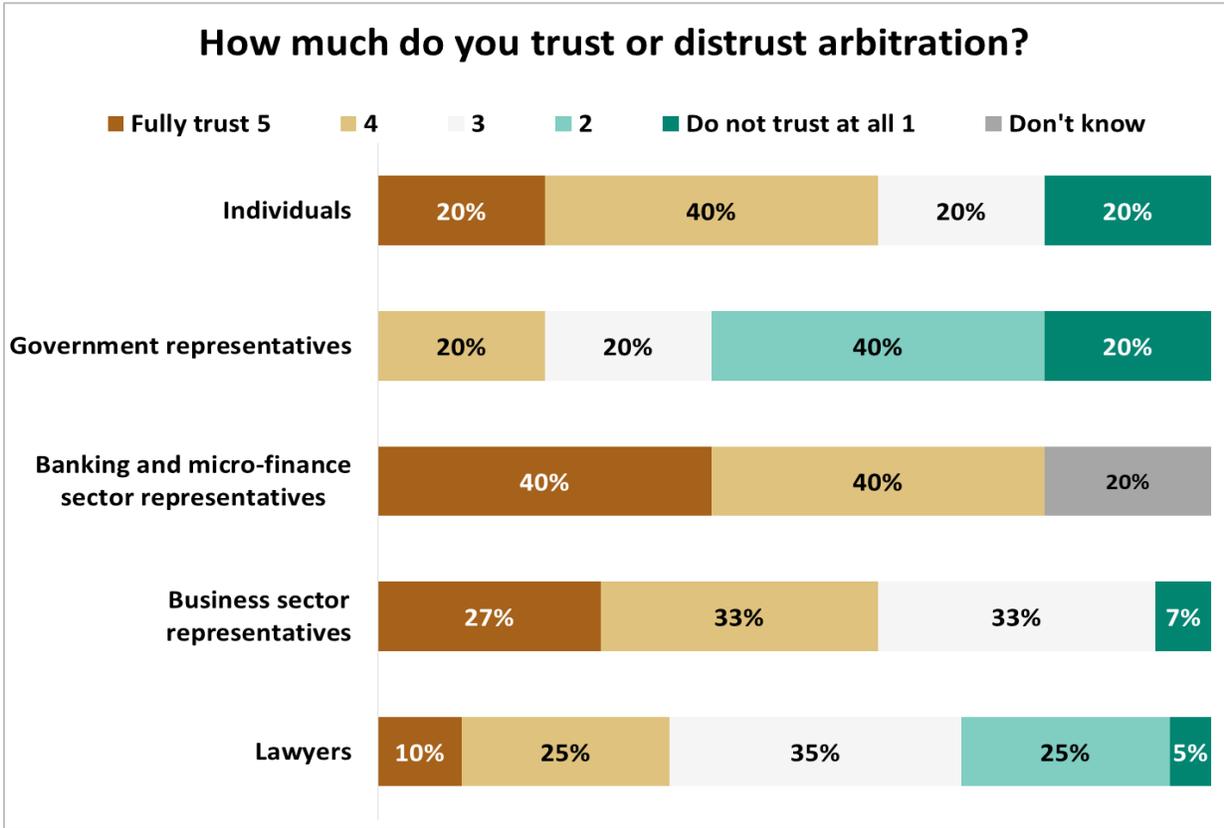
Currently, none of the organizations carry out any programs aimed at arbitration development. One, however, mentioned that they support the advancement of mediation.

### 8. Natural Persons

Natural i.e. private persons were the most difficult target group to contact for this study. It was difficult to identify and obtain their contact information, and often, the information arbitration institutions and lawyers provided along with information from public notices had often been changed. Moreover, many private persons did not want to participate. As a result, there were only five interviews conducted with private persons. One of those five was not a party in the arbitration proceedings, but the guarantor of the debtor who was involved.

The diagram below shows level of trust in arbitration of all types of respondents who assessed their trust on a quantitative scale. Note: the total number of respondents in each respondent type is different and percentages largely depend on the total number. See the distribution of responses in absolute numbers in respective tables.

*Table 11: Trust among respondents (The table below shows level of trust towards arbitration among all types of respondents who answered the question on a quantitative scale)*



*\*Note: Total number of different types of respondents varied.*

They suggested that the lack of trust in arbitration stems from the general lack of trust in system. When trust was identified, it was due to having a positive experience with an impartial arbitrator,

also from the award rendered in favor of that party, or based on trust in people in general. More information about arbitration for society was identified as a mechanism to increase trust and so was ensuring the impartiality of arbitration.

The majority of the private persons (4 of 5) considered mediation the best method for resolving property disputes (after being told what mediation is), and one could not indicate any answer. Most of citizens stated that they are satisfied by the arbitration proceedings and think that the tribunal rendered a fair award. Four stated that the award was in their favor, and one said the deliberations are still ongoing.

Four of five private individuals noted that both the use of arbitration and the specific arbitration institution was determined by the other party. To a question about whether they would change the arbitration clause if they had the opportunity, three of the four respondents answered positively and only one gave a negative answer. One person said that he made the decision to use arbitration based on his lawyer’s advice.

Notably, one respondent thought that the choice of arbitration was in the other party’s “personal interests”, and another said that, “At that time, he considered that it [the arbitration institution] was the bank’s institution and that they were colluding with each other.” Three of the private persons did not know of ways to “challenge/appeal” the award, and two did. However, they did not appeal, as the award was in their favor. Responses to a question about what method of dispute resolution they would choose in the future are presented in Table 12.

*Table 12: Intended future dispute resolution mechanism*

Court	2
Arbitration	1
Other – negotiation	1
I do not know	1

When asked whether they would recommend it to others, three responded negatively and two positively. The reasons for the negative response included, “It was a waste of time, health and finances. I would not advise it to anyone.”; “I did not recommend it to my colleagues, because it does not make any sense to use arbitration anyway.”; and “Even though in my case my lawyer defended me well, I would still recommend others to go to court as I think that court is more impartial and less superficial.” Reasons for positive responses were vague; in one case (“I don’t know”), and in the other, the individual cited his positive experience.

## VII. Conclusions and Recommendations

### 1. Factors which positively affect the arbitration environment in Georgia

- ✓ **Law of Georgia on Arbitration, 2009.** The primary reason why arbitration has survived and got a second chance was the Law of Georgia on Arbitration adopted in 2009. The Law has made a shift in an essential aspect – it established the courts’ control over the arbitration awards which has led not only to the lawfulness of the awards, but also to minimal standards of trust towards arbitration.
- ✓ **The amendments to the 2009 Law adopted in 2015** also had a positive impact. As a result of which, the filing fees for recognition and enforcement of the arbitration awards were significantly reduced, which contributed to making arbitration a more attractive option. A number of other flaws in the law were also remedied.
- ✓ **The accumulation of experienced arbitrators** has resulted in improved practices, and that the decisions sent for review and enforcement in court are better drafted and substantiated than they were before.
- ✓ **Increase in the expertise of judges.** Cooperation of judges for the purposes of experience-sharing with practitioners and foreign experts on matters related to arbitration has resulted in the advancement of the practice.<sup>57</sup>

### 2. Factors which hinder the development of arbitration in Georgia

A number of factors hinder the development of arbitration in Georgia. They are generally related to arbitration users, arbitration service providers (institutions), as well as external factors, and actors who have an impact on arbitration.

- ✓ **The main factor hindering development of arbitration is lack of trust towards the system, which is due to the following circumstances:**
  - 1997 law on Private Arbitration

Despite the fact that the 2009 Law has been in force for seven years, the impact of the 1997 Law is still visible. For the first 12 years of its existence, arbitration was a mechanism for frivolous and manipulative conduct, which was not subject to control. Restoration of trust, as well as establishment of arbitration as a trustworthy mechanism of dispute resolution, requires more than seven years. How long will depend on the measures that are taken to restore trust.

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<sup>57</sup> For example, within the framework of the study, the decisions of the Kutaisi Court of Appeals dated November 2016 (case #2/b 1037 dated 16.03.2016), which related to one aspect of arbitration, as well as the decision of the same court on the same matter dated October 2017 (case #2/b 985 dated 09.10.2017) were examined. The 2016 decision is fully based on the Law on Private International Law and the Civil Procedure Code of Georgia. The 2017 decision, on the very same issue, discusses the legal framework of arbitration including references to the Model Law and the New York Convention and application of the Law on Arbitration.

- Close affiliation of arbitration with financial institutions

A barrier to building trust is the reality that today arbitration is, and is perceived as, a mechanism for banks and MFIs to resolve their disputes with consumers in a manner suitable to them.<sup>58</sup> In every group of respondents, there was a remark about the partiality of arbitration institutions, with them being perceived as “banking arbitrations” or “pocket arbitrations”. In a number of cases, reference was made to the relationship of specific arbitration institutions with specific financial institutions. Even the arbitration institutions themselves often referred to finance institutions as their “clients” and talked about their “cooperation”.

- Natural persons’ uninformed engagement in arbitration

The perception that arbitration institutions are related to financial institutions is further strengthened by the fact that natural persons, borrowers, end up in arbitration as a result of standard form contracts (“contracts of adhesion”). In the majority of cases, consumers do not even know that their contract provides for arbitration and even if they know, they do not have the bargaining power to amend it.<sup>59</sup> This has an impact on the perception of arbitration institutions as biased. Looking at interviews of natural persons shows that despite the fact that in four of five cases the arbitration award was in their favor, three stated if they had the choice, they would have used an alternative to arbitration. Only one respondent said in the future he/she would resort to arbitration again and only two stated that they would advise others to use arbitration. Importantly, these individuals were only the ones the research team managed interview, having done so only after great efforts, and who largely had positive experiences with arbitration. This suggests how important the perceptions of consumers’ and potential consumers’ of arbitration are. As Lord Chief Justice Heward noted, “[...] justice should not only be done, but should manifestly and undoubtedly be seen to be done...”<sup>60</sup>

- Lack of ethical standards in arbitration and lack of transparency with respect to the information related to arbitration institutions and arbitrators

The fact that arbitration institutions, in most cases, have no ethical standards, have rules that are frequently hard to access, do not track and publish statistical information, and do not provide information in a transparent manner aggravates the doubts that exist towards them. This is particularly relevant with respect to the repeated participation of a single arbitrator in disputes involving the same party. Such information must at least be disclosed in advance by an arbitrator, so that no doubts arise with respect to his/her independence or impartiality.

- Limited Liability form of arbitration institutions

Trust in arbitration is also hindered by the legal and organizational form of arbitration institutions. Non-commercial legal entities are created to achieve a specific purpose, which in the case of arbitration may be executing private justice or ensuring procedural fairness. In most

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<sup>58</sup> 80% of the interviewed arbitration institution noted that 90% of their cases are disputes between financial institutions and physical persons.

<sup>59</sup> It is confirmed in interviews with judges and private individuals.

<sup>60</sup> Lord Chief Justice Heward in the case *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.

countries where arbitration is developed, institutions are formed as non-commercial entities. In contrast, the main purpose of a limited liability company is to make profit. In many cases arbitration institutions consider their activity as a small business, in which they ensure a stable income by having “permanent clients”. This not only creates conflicts of interest, which by its nature is not easy to regulate, and raises questions with respect to their independence and impartiality, but also diminishes the quasi-judicial role of arbitration.

- Low awareness on arbitration with respect to resolution of purely commercial (Business2Business) disputes

Besides the above, awareness about arbitration in terms of resolution of purely commercial (business-to-business) disputes is low. Businesses have little information about arbitration as a means to resolve commercial disputes, about its advantages, arbitrators, etc. It has also been noted that when one party has information about arbitration and proposes a specific arbitration institution to the other party of the deal, the other party questions the intention of the first party to arbitrate at that institution. This supports general distrust towards arbitration as an overarching issue. Consequently, given the low awareness of and low trust towards arbitration, litigation at courts remains to be the means for dispute resolution for businesses.

- Low qualification of arbitrators

The low qualification of arbitrators has often been mentioned as a factor hindering arbitration. There is no professional education system or courses based on which arbitrators could enhance their professional knowledge and skills, learn about international trends, and share their experience. This is an important factor, as people who have experienced a qualified and professional arbitrator will be more likely to choose this method of dispute resolution again and/or advise it to others.

- Incontinency of judicial practice

The fact that the judiciary is not consistent with its approaches leaves uncertain the standards under which an arbitration agreement may be scrutinized at the recognition and enforcement (or setting aside) stage, how the validity of an arbitration agreement is to be interpreted particularly with the recognition of *ad hoc* arbitration, or in which cases the courts will intervene in the competence of arbitrators. Unpredictability on these issues may become a significant hindrance for parties and lawyers when they make the decision to take their disputes to arbitration or not. This factor also negatively affects the perceptions of Georgia, as it works to establish itself as a center for international and regional arbitrations. For foreign businesses and lawyers, a decisive factor in choosing the seat of arbitration is the practice of local courts and the attitude of courts towards arbitration.

- Non-observance of time-frames for recognition and enforcement of awards

Difficulty with time frames for recognition and enforcement has been mentioned both by practitioners and judges themselves. Any breach of these terms contradicts the parties' expectation that arbitral awards shall be enforced in short time frames.

### 3. Recommendations to address challenges and promote the use of arbitration in Georgia

The recommendations below respond to the challenges noted above. Most aim at increasing trust in and awareness of arbitration as well as improving judicial decisions on arbitration.

1. Introduce some sort of regulation (at the legislative, secondary or self-regulatory level) so that minimal standards of fairness and transparency of consumer arbitrations are ensured.

Arbitration today is mainly used for the resolution of small claims where one party is a consumer.<sup>61</sup> Although this is not what arbitration was originally developed for and the government and donors may wish to see arbitration gain ground for the resolution of purely commercial disputes, the reality is different. It is important to take this reality into account so that the current arbitration system gains trust in society, which will contribute to promotion of arbitration in other types of cases (including business-to-business) disputes. This leads to the recommendation that some sort of regulation must be introduced in order to guarantee minimal standards of fairness and transparency with regard to consumer arbitrations.

The extent, magnitude and form of the regulation should be subject to discussions and thoughtful deliberation. In a majority of EU countries, pre-dispute arbitration clauses with consumers are considered invalid or such disputes are deemed non-arbitral.<sup>62</sup> The plausibility of such a strict approach is questionable and may not be reasonable in Georgia. If the process is conducted duly and fairly, arbitration may be a better alternative for companies as well as for consumers.

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<sup>61</sup> 80% of respondent arbitration institutions said that 90% of their cases represented consumer arbitration disputes.

<sup>62</sup> For example, Sweden's act on arbitration, Article 6, with certain exceptions prohibits arbitration agreements with consumers before the disputes arise: "When a dispute between an enterprise and a consumer concerns property, service or any other property, which is provided by the primary consumption purpose, cannot be indicative to the arbitration agreement, if it is made before the dispute arises"; (Source: <http://swedisharbitration.se/wp-content/uploads/2011/09/The-Swedish-Arbitration-Act.pdf>); Civil Procedural Code of Austria, Article 617: Arbitration agreement between an entrepreneur and a consumer is valid only if the dispute is already in place at the moment of making the agreement. (Source: <https://www.international-arbitration-attorney.com/wp-content/uploads/2016/10/Austria-Arbitration-Law.pdf>); Denmark's law on arbitration, Article 7.2, "In case of an agreement with the consumer, if the arbitration agreement is made before the dispute, it is not binding for the consumer". (Source: [http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish\\_arbitration\\_act\\_2005.pdf](http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf)); A similar statement can be found in Norway's law on arbitration, Article 11: "Arbitration agreement, where a consumer is a side, is not binding to the consumer if it is signed before the dispute arises" (Source: [https://www.chamber.no/wp-content/uploads/2014/02/Norwegian\\_Arbitration\\_Act.pdf](https://www.chamber.no/wp-content/uploads/2014/02/Norwegian_Arbitration_Act.pdf)); Lithuania's law on commercial arbitration, Article 12: "Disputes that arise from labor or consumer agreements cannot be transferred to arbitration except for the cases when the arbitration agreement was signed after the dispute had arisen" (Source: <file:///C:/Users/Acer/Downloads/The%20Republic%20of%20Lithuania%20Law%20on%20Commercial%20Arbitration%202012.pdf>). All the sources are viewed on November 25 2017.

Besides, when the courts are overloaded with cases, the prohibition of consumer arbitration could lead to further increase in the backlog, which would be unjustified. Hence, a model of regulation or self-regulation, which would ensure minimum standards of fairness, professionalism, and transparency of consumer arbitrations, should be employed. It should not prohibit the arbitration of consumer disputes and should not lead to the over-regulation of arbitration by the legislature. The experience of other countries should be studied and the model most relevant for Georgia should be developed.

## 2. Raise awareness on arbitration in the society.

As one of the judges noted, “We must bring those advantages and added value that arbitration has to the society.” Arbitration institutions and/or professional associations should do more work on raising awareness of arbitration among businesses. Targeted meetings with businesses, in particular with in-house lawyers of large corporations, should be held. Cooperation with business associations, including the Georgian, American, and International chambers of commerce should increase, and may allow for better access to the target business audience. A strategic PR campaign may be planned, so that professional, trustworthy arbitrators appear in TV or newspapers. Intensive work should be carried out with lawyers so that they pass information about the process and advantages of arbitration to their clients. In this respect cooperation with the Georgian Bar Association and Association of Law Firms of Georgia is essential.

## 3. Strengthen the capacity of professional association of arbitrators – Georgian Association of Arbitrators.

It is important that the ethical standards and professionalism of arbitrators are enhanced. The Georgian Association of Arbitrators (GAA) may have a significant role to play in this regard.<sup>63</sup> Awareness of the GAA is very low today. Eighty per cent of the arbitration institutions interviewed have noted that they had never heard of the professional association of arbitrators in Georgia. Therefore, the GAA should be strengthened. It should reach out to more arbitrators in Georgia. It should develop a program of accreditation and enhancement of qualifications, which would ensure an increase in awareness and professionalism of Georgian arbitrators and their familiarity with international best practices. Along with qualifications, awareness of ethical standards should be spread and a mechanism for enforcement of those standards should be put in place. If arbitrators do not decide that they wish to improve their opportunities, standards of conduct, and consequently, the system arbitration is unlikely to change.

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<sup>63</sup> The reader should be aware that in the course of preparation of this report its author has been elected as a Chair of the GAA. This information is being disclosed so that the reader itself considers whether this may have any relevance to the reliability of the present report.

#### 4. Continue the cooperation with judges on advancement of their awareness on arbitration

Judges play an integral and essential part in the success of arbitration. For the judicial practice to become more coherent and arbitration-friendly, cooperation with them should continue. Often, the “unfriendly” attitude of judges towards arbitration is caused by their distrust of the system and by their desire to protect weaker parties. Therefore, it is important that judges stay informed about changes in the arbitration practice and progress made in this respect. Besides, more Georgian language literature and publications on arbitration should be available so that judges have access to new developments and trends from international experience. It is also recommended that trainings be conducted for “judges in training” at the High School of Justice, as well as for court clerks who may have an important role in researching and drafting memos for judges.

#### 5. Fix the legislative flaws.

There are no such major flaws in the 2009 Law that would require drastic reform. One significant point is clarification with respect to *ad hoc* arbitration, so that the language of the Law is clear about its intent of the legislator, which we can clearly read only in the Explanatory Note. Apart from this, there are primarily stylistic, technical and translation flaws in the Law and it is recommended that they are fixed. The list of the flaws and the suggested amendments are provided in Annex 1.

#### 6. Enhance the regulations to eliminate conflicts of interest in the context of organizational structure of arbitral institutions

As regards the legal-organizational structure of arbitration institutions, it is difficult to give a straightforward recommendation. Although the existence of arbitration institutions in the form of limited liability companies is discrediting arbitration, setting a requirement for them to change their legal form would not necessarily have an impact on practice and/or solve the problem. The problem of trust is more complex than the issue of organizational form. It could be that institutions formed as non-commercial entities find a way to work within the current situation by, for example, having non-commercial entities established by limited liability companies, and therefore be led by the same people who own and manage arbitration institutions today. Thus, we believe that requiring the amendment of the organizational form of arbitration institutions would be a technical solution and would not necessarily lead to the improvement of the situation. Thus, further thought should be given to this along with overcoming other challenges and implementing the above-mentioned recommendations.

## Annex 1 – Legislative Defects

### **Article 2.2., Law of Georgia on Arbitration**

As noted in section IV.3.1. with respect to Article 2.2., currently existing court practice prejudices the recognition of the existence of *ad hoc* arbitration in Georgia. This could in some part be the result of legislative defect. In any case, it could be fixed either by the changed practice of the courts or by the corresponding amendment in the law.

For example, in case of legislative amendments, it is recommended to add Article 2<sup>1</sup> with the following formulation to the 2009 Law:

*“2<sup>1</sup> The parties may agree on arbitration proceedings that will not be administered by a specific arbitral institution (so called ad hoc arbitration). “*

### **Article 8.1., Law of Georgia on Arbitration**

Article 8.1 of the law provides definition of the arbitration agreement and states that “An arbitration agreement is an agreement in which the parties agree to submit to arbitration all, or certain, disputes that have arisen or which may arise between them based on various contractual or legal relations.”

Article II of the New York Convention and Article 7 of the UNCITRAL Model Law state that the parties may refer to arbitration a dispute which derives from “a defined legal relationship”, whether contractual or not. The requirement that the dispute stem from a “defined” legal relationship aims to protect the parties from situations when, for example, they in advance agree that all disputes arisen between them in the future shall be resolved in arbitration. Since by agreeing on arbitration a party loses its right to go to court, it is considered that one may exercise this right (and thus waive its right to access to state courts) when he/she is more or less aware of the nature of the relationships that it wishes to subject to arbitration. The parties should have certain understanding of which disputes (arisen from which relationships) are they subjecting to arbitration (so that one may not subject all disputes of whatsoever nature that will arise in the future to arbitration). It is therefore recommended that article 8.1. of the Law of Georgia comes into coherence with New York Convention and the Model Law.

For example, Article 8.1. may be formulated as follows:

*„An arbitration agreement is an agreement in which the parties agree to submit to arbitration all, or certain, disputes that have arisen or which may arise between them based on various contractual or other defined legal relationship.”*

### **Article 27, Law of Georgia on Arbitration**

As noted in section IV.3 with respect to Article 27, carrying of the public notification in the context of arbitration raises a number of issues. Furthermore, as noted by one of the judges, public

notification is a formality, which, in reality, rarely serves its purpose. It is recommended to remove the rule on public notification from Article 27.

For example, Article 27 could be drafted in the following way:

*“27. Unless otherwise provided under this law or the agreement of the parties, the written notice shall be serviced to the parties according to the rules established for court notice and summoning under the Code of Civil Procedure of Georgia, except for Article 78 of the Code of Civil Procedure.”*

**Article 9.1., Law of Georgia on Arbitration and Article 272<sup>1</sup>, Code of Civil Procedure of Georgia**

Article 9 of the 2009 Law establishes the following: *“1. A court before which an action is brought in a matter that is the subject of an arbitration agreement, based on a request of a party that is made before the expiration of the time for submitting a statement of defense, is obliged to terminate the proceedings and refer the parties to arbitration, unless it finds that the agreement is void, invalid or incapable of being performed.* The similar provision is included in Article 272<sup>1</sup> of the Civil Code of Procedure. The purpose of this Article is for a party that wishes to rely on the arbitration clause to declare this matter to the court at the very first opportunity. It will otherwise be considered that the party waived its right to rely on arbitration clause and agreed to the jurisdiction of the court. Existing wordings of 2009 Law and the Civil Code of Procedure may be interpreted in a way that for example, if the party was granted 14-day period for submitting the statement of defense and the party submitted such defense on the 8th day, however, did not refer to the arbitration clause, it could still submit an application on 13th day and refer to arbitration clause, since the period of 14 day granted by the court for submission of the statement of defense has not yet expired... Such an interpretation, would contradict with the purpose of this provision.

By way of comparison, Article 8 of the Model Law, which is the basis for Article 9 of the 2009 Law, includes the provision and provides that, *“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”*<sup>64</sup> In order to avoid the interpretation that would allow the party not to declare the arbitration agreement upon its first possibility and request transfer of the case to arbitration later, it is recommended to cure this defect.

For example, Article 9.1. Could be formulated as follows:

*“1. A court before which an action is brought in a matter that is the subject of an arbitration agreement, based on a request of a party that is made before or at the same time as its statement of defense, is obliged to terminate the proceedings and refer the parties to arbitration, unless it finds that the agreement is void, invalid or incapable of being performed.*

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<sup>64</sup> Model Law, Article 8.1, English version: *“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”*

Respective provisions should also be amended in the Code of Civil Procedure so that it is clear that the party should make a statement about arbitration agreement (and respectively about the competence of the arbitration) no later than making its first statement about the substance of the dispute, or no later than submitting the statement of defense (and not before the expiry of the term of submitting the statement of defense).

#### **Article 16, Law of Georgia on Arbitration**

According to Article 16 of the 2009 Law, “2. A plea that the arbitral tribunal does not have jurisdiction shall be raised before the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.” Such a provision may be interpreted in a way that the statement about the lack of jurisdiction of the arbitral tribunal raised together with the statement of defense may be considered as delayed, since according to the provision, such a statement should be made before submission of the statement of defense. Such interpretation would contradict the purpose of the law, which is that the statement on lack of jurisdiction of the tribunal should be made no later than submitting the statement of defense, i.e., before or together with submission of the statement of defense. The same provision is included in Article 16 of the Model Law, which is the basis for Article 16 of the 2009 Law: “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense.”<sup>65</sup> It would be recommended to amend the wording of Article 16(2) so as to set the period for submitting the application as “no later than submitting the statement of defense”, instead of “before submitting the statement of defense.”

For example, Article. 16.2 may be formulated as follows:

*“2. A plea that the arbitral tribunal does not have jurisdiction shall be raised before the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.”*

#### **Article 35.3., Law of Georgia on Arbitration and Article 356<sup>19</sup>.1., Code of Civil Procedure of Georgia**

According to Article 35 of the Law of Georgia on Arbitration, the request for assistance in collecting the evidence may be submitted to the court by the arbitration institution or the party, subject to consent of arbitration.<sup>66</sup> Therefore, if the party needs assistance in collecting the evidence, it may itself address the court on this matter, however, should obtain the consent of the arbitration institution. This matter is regulated differently under the Code of Civil Procedure of Georgia, “If an arbitral tribunal, on its own initiative or at the request of parties, requests assistance from a court in taking evidence, procedures laid down under Chapter XIV of this Code shall apply.”<sup>67</sup> This provision of the Code may be interpreted in a manner that the party should firstly address the arbitration; in case of consent of arbitration, the arbitral tribunal itself (and not the party) is authorized to address the court with a request to assist in collecting the evidence.

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<sup>65</sup> Model Law, Article 16.2, English version: “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense.”

<sup>66</sup>Law of Georgia on Arbitration, Article 35.3. and Code of Civil Procedure of Georgia, Article 356<sup>19</sup>.1.

<sup>67</sup>Code of Civil Procedure of Georgia, Article 356<sup>19</sup>.1.

For the purposes of procedural precision, it would be recommended to remove this defect by means of legislative changes. In particular, the Procedural Code should be compliant with the Law on Arbitration. As a result, the party should have the opportunity to address the arbitration tribunal and request it to resort to court for obtaining assistance in collecting the evidence, or obtain consent of the arbitration tribunal and submit the application about assistance in collecting the evidence to the court itself. This right is foreseen under the Model Law as well as the Law of Georgia on Arbitration which is based on the former.<sup>68</sup>

For example, Article 356<sup>19</sup>.1., Code of Civil Procedure of Georgia may be formulated as follows:

*“If an arbitral tribunal, on its own initiative, or if a party, with the consent of the arbitral tribunal, requests assistance from a court in taking evidence, procedures laid down under Chapter XIV of this Code shall apply.”*

#### ***Article 356<sup>13</sup>, Code of Civil Procedure of Georgia***

This Article determines the scope of consideration of the cases related to arbitration by the court. The list, *inter alia*, includes the authority of the court to consider the issue of enforcement writ (sub point “f”) according to “this” part (relating to arbitration). The issuance of the enforcement writ is not a matter related to arbitration. Furthermore, the list does not include reference to consideration of the recognition and enforcement of the arbitration awards rendered in Georgia.

It is recommended, for sub point “f” to refer to “consideration of the issue of recognition and enforcement of the arbitral award rendered in Georgia” instead of “issuance of the enforcement writ”.

For example, Article 356<sup>13</sup>, Code of Civil Procedure of Georgia may be formulated as follows:

*“F. recognition and enforcement of the arbitration awards rendered in Georgia.”*

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<sup>68</sup>Model Law, Article 27; the same is included, for example, in Article 1050 of the Code of Civil Procedure of Germany.

## Annex 2 - Research design and fieldwork notes

In order to study the current state and challenges of arbitration in Georgia, CRRC-Georgia used a mixed-method research design with survey and qualitative interviews with a number of professional groups. The semi-structured interviews were conducted between August 17 and November 3, 2017. The majority of interviews were conducted in the second half of September and the first half of October.

Several target groups were identified and studied using qualitative methods and close-ended questionnaires. The target groups included representatives of arbitration institutions, judges, lawyers, businesses, and private individuals, representatives of government and international organizations which work on issues related to the judiciary, arbitration, and/or fund programs on these topics.

Target groups, research methods used, target number of respondents and number of completed interviews are provided in the table below.

#	Target group / Respondent type	Research method used	Number of respondents	Target number of respondents
1	Heads of arbitration institutions / Arbitrators	In depth interviews	11	10
2	Government representatives	In depth interviews	5	5
3	International organization representatives	In depth interviews	5	5
4	Judges	In depth interviews	5	5
5	Lawyers	Semi-structured interviews	20	20
6	Business company representatives (including microfinance institutions/banks)	Semi-structured interviews	20	20
7	Private individuals	Semi-structured interviews	5	10

The course of fieldwork and difficulties regarding target groups/respondent types are discussed separately below.

## *1. Arbitration institutions*

In order to select arbitration institutions, the public registry and other online sources were used. However, it was not possible to contact all of the registered arbitration institutions, as the contact information placed online was incomplete or inaccurate. Overall, researchers attempted to contact 19 institutions and 11 interviews were conducted. Reasons for not being able to carry out interviews with arbitration institutions were mainly the difficulty of contacting them, lack of availability, and/or a lack of interest in the research.

Qualitative interviews were conducted with representatives of the following arbitration institutions:

- N(N)LP Georgian International Arbitration Center (GIAC);
- LLC "Dispute Resolution Center";
- Arbitration institution with LLC "Salakaia and Kobaladze" (former Mediator-L);
- LLC "Permanent Arbitration-Mediator"
- LLC "A/R Adjarian International Arbitration at the Chamber of Commerce and Industry";<sup>69</sup>
- LLC "Tbilisi Arbitration Institute";
- LLC "Permanent Sport Arbitration";
- LLC "Georgian Permanent Arbitration Athena-Pallada" LLC "Athena-Pallada";
- ARGGroup/LLC Permanent Arbitration;
- LLC "Tbilisi Arbitration Chamber"
- LLC "Permanent Arbitration Temida K.T."

Respondents were generally interested in the research and openly talked about the main challenges of arbitration.

## *2. Representatives of government entities*

Government entities were selected based on recommendations from the research consultant on which government institution would be more relevant and well informed about arbitration. Qualitative interviews were conducted with representatives of the following ministries:

- Ministry of Justice;
- Ministry of Economy and Sustainable Development;
- Ministry of Regional Development and Infrastructure of Georgia;
- Ministry of Foreign Affairs;
- The Academy of the Ministry of Finance.

Arranging interviews with ministry representatives was quite difficult. The representatives either did not have time for interviews or were redirecting us to other respondents. The respondents were pretty open and almost all had experience with arbitration.

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<sup>69</sup> This interview was conducted in Batumi. All other interviews were conducted in Tbilisi.

### *3. Representatives of international organizations*

The main purpose of interviewing international organization representatives was to find out what they view as the main problems related to arbitration institutions in Georgia and to understand their views on arbitration development in Georgia. A large part of the interviewed international organizations work on or fund projects about judiciary-related issues.

Interviews were conducted with representatives of the following international organizations:

- United States Agency for International Development (USAID);
- Governing for Growth in Georgia (G4G);
- East-West Management Institute - Promoting Rule of Law in Georgia Activity (EWMI – PROLoG);
- Delegation of the European Union to Georgia;
- Council of Europe.

### *4. Judges*

The majority of interviewed judges represented the Tbilisi Court of Appeals. One respondent was from the Supreme Court of Georgia. Arranging interviews with judges is usually problematic. Some could not be contacted, while others refused to be interviewed because of a lack of time or willingness. In total, 17 judges were contacted and 5 interviewed. Judges who agreed to be interviewed were quite interested in arbitration issues and discussed them openly.

### *5. Lawyers*

CRRC-Georgia used several methods to select lawyers. In 2012, the organization conducted a survey on judiciary issues, which to some extent was related to alternative dispute resolution methods and arbitration. Some lawyers who participated in that study were interviewed again. Other respondents were selected based on online information obtained by the consultant and researchers. 31 lawyers were contacted and 20 interviews conducted. The main reason for non-response was lawyers did not have time for interviews. The respondents were pretty interested in the research topic and frankly shared their opinions about problems and ways to improve arbitration institutions.

### *6. Businesses*

The target group of businesses consisted of several subgroups, including companies that had experience in arbitration and companies with no such experience. During fieldwork, based on the information provided by respondents and the recommendation of the consultant, microfinance companies and banks were identified as an important subgroup, since the majority of disputes in arbitration institutions were over loans and microfinance institutions.

Interviews with representatives of microfinance organizations and banks were conducted with a slightly different questionnaire. Overall, CRRC-Georgia contacted 33 businesses and six

microfinance organizations. Twenty interviews were conducted, and nine respondents had experience in arbitration and eleven did not. Five interviews were conducted with microfinance institutions and two had experience in arbitration. Most of the surveyed companies represent a large business.

### *7. Natural Persons*

Identifying natural persons for the study was the most problematic. According to the research design, ten interviews were to be conducted with private individuals who had experience in arbitration. CRRC-Georgia used several ways to find respondents. Researchers asked lawyers and arbitration institutions to ask natural persons that they had worked with to participate in the study and to give their contact details to the organization. With the help of one arbitration institution, interviews were conducted with several private individuals. Information about private individuals who had experience in arbitration was obtained from arbitral decisions placed on the internet as well.

In order to find more respondents, CRRC-Georgia sent one interviewer to TBC Bank's and Bank of Georgia's offices (these two banks often use arbitration institutions) to find people who had experience in arbitration. The interviewer contacted 200 clients of these banks but none had experience in arbitration or did not want to disclose this information.

In many cases, information about people who definitely had experience in arbitration available online was available, however, these individuals suggested they had not been engaged in an arbitration. Overall, the organization contacted 233 private individuals but could conduct only 5 interviews.