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GEORGIAN ARBITRATION UPDATE: unhelpful court practice continues

I am writing this article on my way to Vienna for the 31st annual Willem C. Vis International Commercial Arbitration Moot – a truly international student competition that has been inspiring arbitration community for several decades now. I am going there from Paris, where I attended Paris Arbitration Week - a yearly week of events aimed at connecting the worldwide community of arbitration practitioners and promoting Paris as the "eternal home of international arbitration." Both of these events have returned my attention to Tbilisi and its potential to develop as a regional hub in arbitration.

Two years ago, I published an article titled TBILISI - it takes more than great wine to create an arbitration hub. I argued the economic benefits of making Tbilisi an arbitration center and what it takes to achieve this. I also discussed an erroneous decision of the Tbilisi Court of Appeals that invalidated the arbitration clause in the construction contract that required parties to refer their dispute to a Dispute Adjudication Board (DAB) first. I compared this decision to the decision of the Paris Court of Appeals in which the court ruled against the annulment of an award which was sought by the respondent on the basis of the claimant's failure to submit a dispute first to the DAB.

I then concluded that an arbitration-friendly approach from the local courts is one of the major determinants of having a successful seat of arbitration. I stand by this conclusion today and I am saddened to see the lack of progress in this direction over the last two years. In particular, two recent decisions by the Tbilisi Court of Appeals have further pushed Georgia into a grey zone for arbitration.

It is standard practice that arbitration institutions, both in Georgia and all around the world, maintain lists of potential arbitrators; these are highly regarded professionals who hold requisite credentials and are capable of acting as arbitrators on a case, if appointed by the parties or an institution. Maintaining such a list helps the parties select an arbitrator for their particular case. It also increases transparency as parties are able to see who may potentially be appointed as an arbitrator by the institution in case of failure of the parties to select the arbitrators. Usually such lists are open, meaning that parties are free to appoint an arbitrator outside of such list. Notably, having an individual on the list does not in any way remove the requirements for impartiality and independence of an arbitrator. In other words, an individual is selected from the list to act as an arbitrator on the case only if they are impartial and independent of the parties to the case. This basic principle of exclusion of conflict of interests must be preserved at all times.

Against this backdrop, in its two recent decisions, the Tbilisi Court of Appeals has taken the view that the mere registration of a representative of one of the parties in the list of arbitrators of an arbitration institution automatically creates a conflict of interest. As a result, the court has deemed the arbitration institution incompetent to consider the dispute and has denied to give effect to the arbitration agreement on that ground.

This argument does not hold water. It is important to remember that a dispute is heard by an arbitral tribunal consisting of a particular arbitrator(s) and not by an arbitral institution. An arbitrator listed with an arbitral institution has no leverage to influence the decision in a dispute where he/she is acting solely as a party representative, not as an arbitrator. The mere inclusion of a party's representative on the list of arbitrators with a specific arbitration center should not give rise to doubt regarding the impartiality and independence of the arbitral tribunal.

These decisions are extremely problematic for several reasons, including for the following:

- They discourage reputable legal practitioners (i.e., partners of law firms, senior associates, and other practitioners) to act as arbitrators, while maintaining their primary practice of party representation. This will affect the quality of the arbitration proceedings and that of the award.
- They contradict the earlier decision of the Supreme Court of Georgia on a similar matter. It is very important to establish a uniform court practice in arbitration to ensure predictability and the development of this field.
- They position Georgia on the arbitration map as an unfriendly jurisdiction; this will ultimately affect the investment climate in Georgia and prejudice Georgia's aspiration of becoming a regional arbitration hub.

Overall, the inconsistent and legally erroneous practices of Georgian courts with respect to arbitration cases affect all stakeholders of arbitration, including, and perhaps most of all, Georgia. It drives away significant benefits to the country's economy that would have been otherwise received from dispute resolution and related services.

Despite these developments, there are some positive developments in the field of arbitration that are worth noting. Georgian universities have been participating in Willem C. Vis International Commercial Arbitration Moot for more than 15 years now. Georgia has reputable arbitration institutions and has hosted a highly regarded annual arbitration event in Tbilisi for over 10 years now. Established in 2013, the Georgian Association of Arbitrators has grown into a strong and reputable organization that works very hard to increase arbitration awareness among businesses, enhance the knowledge and skills of arbitrators, and improve legislation and arbitration practices in Georgia. International donors finance these endeavors, further enhancing the sustainability of these institutions. I am a strong believer in team efforts and hope that with the support of Georgian courts and other state stakeholders, we can all make Tbilisi a "[new] home of international arbitration."

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