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Rescuing Arbitration in the Developing World: The Extraordinary Case of Georgia[1]

The country of Georgia has a long and interesting history with arbitration. From "telephone justice" to the criminal underworld to legitimacy, Georgian arbitration has survived many iterations. Now, as Georgia begins the EU accession process, it has a new arbitration law that incorporates international norms. This article analyzes the law, explores how arbitration has been implemented thus far, and discusses some of the challenges that remain. Drawing on his U.S. practice experience in arbitration and his work managing legal reform programs in Georgia and other countries, the author recommends some important changes to Georgia's new arbitration regime.A particular area of concern is the use of mandatory consumer arbitration in firms' standard form contracts. With some adjustments, arbitration in Georgia can become a model for other developing countries, balancing the commercial needs of firms with the justice and social needs of Georgian society. The author concludes that with his recommendations, other developing countries can learn from this experience and use arbitration to promote efficiency and investment, while safeguarding individuals' rights.

Key Words: *Arbitration, Mandatory Arbitration, Georgia, Dispute Resolution, Russia, Soviet Union, UNCITRAL, Model Law on International Commercial Arbitration, Arbitral Tribunal, Interim Measures, Appointment, Arbitration Proceedings, Arbitration Award, Recognition and Enforcement of Awards*

I. Introduction

Arbitration has played an important role in dispute resolution in many countries. While it has a long history,[2] it only recently re-emerged in the 20th century as an essential mechanism for modern economies. Most legal professionals in the developed world are aware of its myriad advantages: lower costs, faster resolution, decisional finality, international enforcement, privacy, procedural flexibility, informality, and expert, impartial, party-chosen neutrals. Although arbitration is now ubiquitous in the developed world,[3] many underdeveloped countries are just beginning to incorporate arbitration into their dispute resolution regimes.[4] If implemented well, arbitration can help reduce court caseloads,[5] increase foreign investment[6] and foreign aid[7] in the host country, and promote general economic development.[8]

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2 Steven C. Bennett, Arbitration: Essential Concepts 9 (ALM ed., 2002).

3 Katherine V.W. Stone & Richard A. Bales, Arbitration Law 3 (2nd ed. 2010).

4 *See* Roberto Danino, *The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries*, 17 Eur. Bus. L. Rev. 327, 333 (2006) (noting arbitration growth in developing and transition countries over past decade).

Although much has been written about ADR in the developing world, there is a relative dearth of academic literature on the implementation of arbitration specifically.[9] It is worth exploring whether arbitration is a useful tool for economic and social development or an unwelcome Western transplant that international players have imposed.[10] This article seeks to contribute to the discussion by focusing on an interesting developing world case study: arbitration in Georgia. Georgia is a post-communist, post-war country that has undertaken extensive structural reforms and is now on the doorstep of European Union membership.

Section One provides a brief historical summary. Section Two discusses the country's colorful yet regrettable history of dispute resolution. It explores the effects of almost 200 years of Russian and Soviet domination on the development of arbitration in Georgia. Section Three reviews in detail the new Georgian Arbitration Law that came into effect in 2010 and its implementation thus far. It is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[11] While not without flaws, it delivers significant improvements over Georgia's earlier arbitration efforts. Section Four discusses recommendations for improving the law, focusing on statutory revisions and clarifications. Section Five addresses the most significant shortcomings of the arbitration regime–the use of mandatory consumer

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5 *See* Kiarie Njoroge, *Judiciary Moves to Cut Case Backlog Through Arbitrators*, Bus. Daily (July 28, 2014, 7:48 PM), http://www.businessdailyafrica.com/Judiciary-moves-to-cut-case-backlog/-/539546/2400826/-/av3arqz/-/index. html;. *Arbitration Center in Nairobi to Reduce Case Backlog,* Standard Rep. (Sept. 30, 2014), http:// www. standardmedia.co.ke/article/2000136635/arbitration-centre-in-nairobi-to-reduce-case-backlog? articleID= 200013-6635&story_title=arbitration-centre-in-nairobi-to-reduce-case-backlog&pageNo=1.

6 Felix O. Okpe, *Endangered Elements of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development and Host States*, 13 Rich. J. Global L. & Bus. 217, 249 (2014).

7 Most multilateral lenders, such as the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the Asian Development Bank require arbitration while implementing contracts. *Position Paper on Arbitration in Thailand*, Am. Chamber Com. Thail., Oct. 2009, http://www.amchamthailand.com/ acct/asp/ default. asp (follow "Position Papers" hyperlink under "Resources and Archive" tab).

8 *See* Christian Buhring-Uhle, Lars Kirchhoff & Gabriele Scherer, Arbitration and Mediation in International Business 57-60 (2d ed. 2006).

9 Most of the literature focuses on mediation and its variants. *See* Scott Brown, et al., Alternative Dispute Resolution Practitioner's Guide (Ctr. for Democracy and Governance, USAID 1998), http://www.usaid.gov/ sites/ default/files/documents/1868/200sbe.pdf (last visited Sept. 13, 2015); Emily Stewart Haynes, *Mediation as an Alternative to Emerging Post-Socialist Legal Institutions in Central and Eastern Europe*, 15 Ohio St. J. Disp. Resol. 257 (1999); Nancy Erbe, *The Global Popularity and Promise of Facilitative ADR*, 18 Temp. Int'l & Comp. L.J. 343 (2004); Steven Austermiller, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 Yale Hum. Rts. & Dev. L.J. 132 (2006); Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. Disp. Resol. 327 (2002); Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 Geo. Immigr. L.J. 235 (2001); William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. Disp. Resol. 47 (2011); Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 Harv. Negot. L. Rev. 295 (2006); Eduardo R. C. Capulong, *Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 Ohio St. J. on Disp. Resol. 641 (2012); Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 Harv. Negot. L. Rev. 355 (2006).
There are a small number of articles on implementing arbitration in the developing world. *See* Arnoldo Wald, Patrick Schellenberg & Keith S. Rosenn, *Some Controversial Aspects of the New Brazilian Arbitration Law*, 31 U. Miami Inter-Am. L. Rev. 223 (2000), Julio C. Barbosa, *Arbitration Law in Brazil: An Inevitable Reality*, 9 Sw. J. L. & Trade Am. 131 (2002); Hoda Atia, *Egypt's New Commercial Arbitration Framework: Problems and Prospects for the Future of Foreign Investment,* 5 Int'l. Trade & Bus. L. Ann. 1 (2000); Abudllah Khaled Al-Sofani, *Theoretic Study in Light of the Jordanian Arbitration Law: The Problem of Arbitration Clauses*, 32 Bus. L. Rev. 253 (2011); Rafael T. Boza, *Caveat Arbiter: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories - Has Peru Gone Too Far*, 17 Currents: Int'l Trade L.J. 65 (2009); Tracy S. Work, *India Satisfies its Jones for Arbitration: New Arbitration Law in India,* 10 Transnat'l Law. 217 (1997). There is a plethora of literature on international arbitration award enforcement under the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 330 U.N.T.S. 38; 21 U.S.T. 2517; 7 I.L.M. 1046 (1968), http://www.uncitral.org/ uncitral/en/ uncitral_ texts/arbitration/NYConvention.html (last visited Feb. 23, 2015)) and many articles on investor treaty disputes involving the developing world, but they are largely outside the scope of this article.

10 Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General and Varied Contexts*, 2003 J. Disp. Resol. 319, 341 (2003).

11 *See infra* note105.

arbitration. The article proffers a comprehensive set of recommendations to address these shortcomings. The article concludes in Section Six that it is not too late for arbitration to have a positive impact in Georgia. It can serve the needs of both businesses and consumers, as long as the political will exists to undertake reforms. Although these conclusions are country-specific, Georgia's experience and this analysis will hopefully provide some lessons for other developing countries.

II. Background and Historical Context

Georgia is a small country, roughly the size of South Carolina. It is located at important historical crossroads between Europe, Asia, and the Middle East. It is one of several countries located in the region known as the Caucasus. It lies on the eastern edge of the Black Sea, separating Russia from the Middle East. Georgia has nearly 5,000,000 people.[12] Its larger neighbors–Turkey and Iran/Persia to the south and Russia to the north–have long shaped its culture and history.

Periods of unity and break up have marked Georgian history.[13] In the tenth century, King Bagrat III united several principalities, and created the modern Georgian state, conquering territory and bringing wealth and power.[14] This lasted for a few hundred years before a Mongol invasion destroyed the empire.[15] At the beginning of the nineteenth century, the Russia annexed most Georgian lands.[16] After the February 1917 Russian Revolution, Georgia experienced a brief period of independence[17] until Soviet troops invaded and occupied the country in 1921.[18] For the next 70 years, Georgia remained a part of the Soviet Union and produced two important Soviet leaders, Joseph Stalin (ruled from 1924 to 1953) and Eduard Shevardnadze (1980s Soviet Foreign Minister, who promoted liberal policies under *glasnost* and *perestroika).*[19]

In 1991, when the Soviet Union began to collapse, Georgia declared independence, leading to a period of instability. Opposition forces deposed the first president, Zviad Gamsakhurdia, in early 1992.[20] After constitutional changes, Edward Shevardnadze was elected President. In 2003, he was overthrown in what came to be known as the *Rose Revolution*. The following elections brought Mikheil Saakashvili and his reform-oriented United National Movement (UNM) to power. After winning re-election in 2008, Saakashvili and the UNM lost the 2012 elections to the *Georgia Dream* coalition, which was headed by billionaire Bidzina Ivanishvili. This was the country's first peaceful transfer of power.

Throughout the post-Soviet period, Georgia suffered from instability related to the breakaway regions of Abkhazia and South Ossetia. The upheaval resulted in several wars,[21] including most recently the August 2008 war between Russia and Georgia, which resulted in the *de facto* loss of these regions.[22] Both regions declared independence[23] and currently operate as semi-autonomous states, controlled by Russia.[24]

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12 Central Intelligence Agency, World Factbook: Georgia, 2014, https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html (last modified Sept. 24, 2015) [hereinafter World Factbook].

13 *See generally* Donald Rayfield, Edge of Empires: A History of Georgia (2012).

14 *Id.* at 74.

15 Rayfield, *supra* note 13, at 118-31.

16 Giorgi Intskirveli, *The Constitution of Independent Georgia*, 22 Rev. Cent. & E. Eur. L. 1, 1 (1996).

17 Ferdinand Feldbrugge, *The Law of the Republic of Georgia*, 18 Rev. Cent. & E. Eur. L. 367, 368-69 (1992) [hereinafter Feldbrugge, *Law*].

18 The Georgian Constitution was formally ratified only three days before the Red Army occupied Tbilisi. Ferdinand Feldbrugge, *The New Constitution of Georgia*, 22 Rev. Cent. & E. Eur. L. 9, 9-10 (1996).

19 Russian terms for *openness* and *restructuring*, respectively.

20 Feldbrugge, *Law, supra* note 17, at 371.

21 In South Ossetia, there were three wars, in 1991-1992, 2004 and 2008. Charles King, *The Five-Day War*, 87 Foreign Aff. 4 (Nov.-Dec., 2008) http://www.foreignaffairs.com/articles/64602/charles-king/the-five-day-war. In Abkhazia, wars were fought in 1992-1993 and in 2008. *See generally* David Aphrasidze & David Siroky, *Frozen Transitions and Unfrozen Conflicts, Or What Went Wrong in Georgia?,* 5 Yale J. Int'l Aff. 121 (2010).

22 *Abkhazia Profile*, BBC NEWS, http://www.bbc.com/news/world-europe-18175030 (last modified June 3, 2014); *South Ossetia Profile,* BBC NEWS, http://www.bbc.com/news/world-europe-18269210 (last modified Oct. 17, 2013).

23 *Id.*; Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule,* 19 Minn. J. Int'l L. 137, 167 (2010); Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 Chi. J. Int'l L. 1, 5-6 (2009-10); Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question*

Despite this instability, Georgia made impressive progress. In the 1990s, Georgia suffered from paramilitaries, corruption, deficits and power shortages. By the Rose Revolution in 2003, even President Shevardnadze admitted that Georgia had become a *failed state*.[25] The economy had shrunk 67% from its 1989 level and industry was operating at 20% of capacity.[26] Despite high levels of education, Georgia's national income per capita had sunk below Swaziland's.[27] However, the Rose Revolution ushered in a period economic recovery and stability that has continued to the present day. President Saakashvili[28] and the UNM were able to dramatically reduce corruption and crime.[29] They streamlined government services by creating Public Service Halls in each community to address citizens' needs.[30] They simplified the tax regime,[31] and implemented free-market reforms[32] that helped achieve almost 7% average annual GDP growth over the following decade.[33] By 2013, Georgia ranked 8th in the World Bank's Doing Business rankings.[34] Roughly one billion dollars in U.S. foreign aid assisted in this recovery.[35] In 2014, Georgia completed ratification of its Association Agreement with the EU, effectively consolidating its democratic market orientation.[36]

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of Independence on the Merits and International Law, 32 Fordham Int'l L.J. 1990, 2023 (2008-09). South Ossetian and Abkhazian independence are recognized by only four countries: Russia, Venezuela, Nicaragua, and Nauru. Nauru's recognition likely involved a quid pro quo. *See* Ellen Barry, *Abkhazia is Recognized — by Nauru*, N.Y. Times (Dec. 15, 2009) http://www.nytimes.com/2009/12/16/world/ europe/16georgia.html?_r=0.

24 *See Abkhazia Profile*, *supra* note 22; *South Ossetia Profile*, *supra* note 22.

25 Rayfield, *supra* note 13, at 391.

26 Professor Stephen Jones of Mount Holyoke College provided this statement to the U.S. Congress: Between 1997 and 2000, expenditure on defense decreased from $51.9 million to $13.6 million; education from $35.6 million to $13.9 million . . . The state's inability to fund its social insurance and employment funds; maintain its army, education and transport; or stimulate agriculture and industry has led the majority of the population to view the state as irrelevant, unrepresentative and corrupt. *The Republic of Georgia: Democracy, Human Rights and Security*: *Hearings before the U.S. on Security and Cooperation in Europe* 107th Cong. 2 (2002) (Statement of Stephen Jones, Mount Holyoke College).

27 Charles King, *A Rose Among Thorns*, 83 Foreign Aff. 13, 16 (2004) [hereinafter King, *Rose*].

28 Educated at Columbia Law School in New York.

29 According to the U.S. State Department, overall crime steadily decreased due to the professionalization of the police force and the general rise in living standards. Georgia 2014 Crime and Safety Report, U.S. Dep't of State, Bureau Diplomatic Sec., Overseas Security Advisory Council (OSAC), https://www.osac. gov/pages/ ContentReportDetails.aspx?cid=15207 (last modified Feb. 24, 2014). In Transparency International's Corruption Perceptions Index, Georgia ranked five spots from the bottom, tied with Angola and Cameroon in 2003. Eleven years later, Georgia had risen to fiftieth place out of 174 countries, ahead of seven EU members. Transparency International, *Corruption Perceptions Index 2014,* http://www.transparency.org/cpi2014/results.

30 Public Service Hall, http://psh.gov.ge/?lang_id=ENG (last visited Feb. 23, 2015).

31 Stephen P. Smith, *When More is Not Necessarily Better: A Corporate Governance Tale of Two Countries,* 10 Dartmouth L.J. 64, 83-84 (2012).

32 As part of its dramatic institutional reforms, the government eliminated eighty-four percent of all licensing requirements and created a one stop shop for licenses. 2014 Investment Climate Statement – Georgia, Bureau of. Econ. and Bus. Aff., Dept. State Report, 1, 3 (2014) http://www.state.gov/documents/organization/229020.pdf (last modified June 2014) [hereinafter State Report].

33 *Data: GDP Growth (annual %), Table: Georgia*, The World Bank http://data.worldbank.org/ indicator/ NY.GDP. MKTP.KD.ZG/countries/GE?page=1&display=default (last modified 2015). With the exception of 2009 (in the aftermath of Russian invasion and worldwide financial crisis), Georgian annual GDP growth averaged 6.91% from 2004 – 2013, according to the World Bank. For comparison, the United States averaged 2.27% and the EU averaged 1.68% annual GDP growth in the same years. *Id.*

34 World Bank Group, *Doing Business: Economy Rankings 2014*, The World Bank http://www.doingbusiness.org/ rankings (last modified 2015). Georgia was ranked 100th in 2006 and rose to eighth by 2013. The U.S. State Department reported, "Georgia has made sweeping economic reforms since the *Rose Revolution*, moving from a near-failed state in 2003 to a relatively well-functioning market economy in 2014." State Report, *supra* note 32, at 1.

35 *Georgia: Accomplishments and Lessons Learned from Implementation of the U.S. $1 Billion Aid Package to Georgia Six Years After the Georgia-Russia Conflict*, U.S. Embassy Tbilisi, Georgia (Unclassified Cable, August 5, 2014)(on file with author). According to Charles King, the United States also provided one billion dollars in democracy and development aid to Georgia from 1991 to 2004, constituting "by far Washington's largest per capita investment in any Soviet successor state." King, *Rose*, *supra* note 27, at 14.

36 *See* Geor. Int'l. Chamber of Commerce, *Deep and Comprehensive Free Trade Agreement: Threat or Opportunities for Georgian Entrepreneurs?,*ICCOMMERCE 18 (2d ed. 2014), http://www.icc.ge/www/ download/ICCOMMERCE%20edition%202.pdf [hereinafter ICCOMMERCE] (noting that Association Agreement

Georgia has now reached an important historical milestone. It has made the philosophical decision to become part of a community of trading nations centered on the EU. It now must prepare for the consequences. The resulting increased commercial activity, trade and investment[37] will require improved dispute resolution structures. Despite recent progress, the judiciary still has room for improvement.[38] A survey of Georgian business leaders revealed that "ignorance of commercial law" and "slowness of legal procedures" are serious problems.[39] As a result, only 26% of businesses are willing to take a dispute to court.[40] The general public also has low levels of trust in the courts.[41] If individuals and businesses cannot use the courts to enforce their rights, economic and social activity will suffer.[42] Given these concerns, arbitration may be a useful remedy. This paper will analyze the historical record, the current status and the future of arbitration in Georgia.

III. Arbitration History

A. Russian/Communist Arbitration

Arbitration is an old concept in Georgia and has been present in various forms for centuries. Traditionally, local community leaders arbitrated many disputes relating to land or family matters.[43] When the Russian empire incorporated Georgia, arbitration was available under existing imperial laws, where the fora were known as *Treteiskii Courts* (Russian for tertiary or third-party courts).[44]

After the Russian revolution, the short-lived Georgian Republic created a *Wages Council* that was, *inter alia*, empowered to arbitrate wage disputes.[45] Around the time that the U.S.S.R. absorbed Georgia, the Soviets introduced two arbitration initiatives.

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establishes conditions for bilateral free trade agreement with EU). In response to the agreement, Russia cancelled its own free trade agreement with Georgia. *Russia Plans to Suspend its Free Trade Agreement with Georgia*, ITAR-TASS News Agency (July 30, 2014), http://tass.ru/en/economy/742973?utm_medium=rss20.

37 The new free trade pact with the EU will lead to large increases in trade. ICCOMMERCE, *supra* note 35, at 19. From the U.S. strategic perspective, important oil and gas pipelines linking the Caspian fields to Europe (and bypassing Russia and Ukraine) run through Georgia, and include significant U.S. private sector investment. *The Republic of Georgia: Democracy, Human Rights and Security*: *Hearings before the U.S. on Security and Cooperation in Europe* 107th Cong. 2 (2002) (Statement of Christopher H. Smith, Co-Chairman, Comm'n on Security and Cooperation in Europe).

38 The U.S. State Department made this assessment on the judiciary in 2014: It is recommended that contracts between private parties include a provision for international arbitration of disputes because of ongoing judicial reforms in the Georgian court system. Litigation can take excessively long periods of time. Disputes over property rights have at times undermined confidence in the impartiality of the Georgian judicial system and rule of law, and by extension, Georgia's investment climate. State Report, *supra* note 32, at 6.

39 Caucasus Research Resource Centers (CRRC), *Attitudes to the Judiciary in Georgia: Assessment of General Public, Legal Professionals and Business Leaders*, 29 (May 2014), http://www.crrc.ge/uploads/files/research_projects/JILEP_CRRC_
Final_Report_30July2014.pdf (last visited Feb. 23, 2015)[hereinafter CRRC Georgia].

40 *Id.*

41 The public trusts the courts less than any other governmental institution. *Id.* at 4-5, 36.

42 One study of transition democracies found that the courts' ability to protect property rights is more important for investment than modern laws. Katherina Pistor, et al., *Law and Finance in Transition Economies*, 8 Econ. Transition 325, 326 (2000) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=214648 (last visited Feb. 23, 2015). Under these circumstances, businesses may revert to the use *private order* mechanisms. *Cf.* John McMillian & Christopher Woodruff, *Private Order Under Dysfunctional Public Order,* 98 Mich. L. Rev. 2421 (2000) (reviewing firms' substitution of social networks and informal gossip in place of formal legal system in post-communist countries).

43 Sofia Avilova, *Attaining Democracy in Georgia: Using Mediation to Rescue Georgia's Democratic Transformation*, 17 Mich. St. U. Coll. L. J. Int'l L. 465, 478 (2008-2009).

44 For instance, Section 15, Article 5 of the Sobornoe Ulozhenie of 1649 (the general codification of Russian laws by the Land Assembly) provided parties the right to have their disputes decided by private Treteiskii Courts. Ikko Yoshida, *History of International Commercial Arbitration and its Related System in Russia,* 25 Arb. Int'l 365, 368 (2009).

45 Law on Wages Council, International Labour Office, art. 50, 1920 Leg. Ser. 1, at 6 (1920).

The first was the *Arbitrazh Courts*.[46] Starting in 1928, all domestic economic activity was to take place in state enterprises and any resulting disputes would be resolved under this new *Arbitrazh* system.[47] Moreover, the Soviet Union charged the *Arbitrazh* with regulatory authority as well as dispute resolution.[48] Because of their state-sponsored nature and jurisdiction, they were not arbitration fora at all, but more like commercial courts.

These courts developed a mixed reputation. The system was designed to serve the state first, not the disputants. Notably, many began to describe the Soviet system as one of "telephone justice",[49] referring to a judge basing decision-making on grounds external to her assessment of law and facts.[50] As Solzhenitsyn wrote in the Gulag Archipelago, "[I]n his mind's eye the judge can always see the shiny black visage of truth – the telephone in his chambers. This oracle will never fail you, as long as you do what it says".[51] While this characterization may appear facile, telephone justice was present throughout the U.S.S.R. By the 1980s, *Izvestia*, the official newspaper, openly reported telephone justice as a widespread problem.[52]

For international trade disputes, the Soviets created the Foreign Trade Arbitration Commission (FTAC) in 1932.[53] The FTAC had exclusive jurisdiction over international disputes.[54] Its rules had some arbitration-like characteristics, such as party appointment of arbitrators, no appeals, foreign counsel, and wide discretion for arbitrator decision-making.[55] Yet, it functioned under the control of the party system.[56] All arbitrators on the FTAC list were trusted Soviet citizens employed as civil servants by the communist state.[57] There was no affirmative duty for prospective arbitrators to disclose circumstances that might call their partiality or independence into question.[58] Proceedings were in Russian and the forum site was Moscow.[59] For this and other structural reasons, there were obvious doubts as to the system's impartiality.[60]

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46 Yoshida, *supra* note 44, at 377-78.

47 Alexander S. Komarov, *Arbitration in Russia, Features of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation,* International Commercial Arbitration: Different Forms and their Features 299 (Giuditta Cordero-Moss ed., 2013).

48 *Id.* at 300. The state *Arbitrazh* was charged with regulating all economic enterprises and had a right to initiate proceedings itself. Katharina Pistor, *Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement*, 22 Rev. Cent. & E. Eur. L. 55, 68 (1996). The state *Arbitrazh* even had quasi-legislative powers, such as mandating specific contract terms for institutions. *Id.* at 69.

49 Telephone justice' was the defining feature of the Soviet era." Louise I. Shelley*, Corruption in the Post-Yeltsin Era*, 9 E. Eur. Const. Rev. 70, 72 (2000). There are also pre-Soviet examples of governmental influence on judicial decision making. *See, e.g*., Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 Geo. J. Int'l L. 353, 379 (2005-2006) (describing Ministry of Justice pressure on judge presiding in celebrated nineteenth century Russian trial of Vera Zasulich).

50 Randall T. Shepand, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 Fordham Urb. L.J. 811, 812 (2001-2002).

51 Alexander Solzhenitsyn, Gulag Archipelago, Vol. III , 521 (Harper & Row ed., 1974).

52 *See, e.g., Measures to Strengthen Legality*, 25 Soviet Stat. & Dec. 54 (Summer 1989)(citing Izvestiia, May 22, 1987, at 3 ("telephone justice" acknowledged as one of many shortcomings in Soviet judiciary)).

53 Yoshida, *supra* note 44, at 381-83.

54 *Id.* at 383.

55 *Id.* at 384, 388-89.

56 *See* Sandford B. King-Smith, *Communist Foreign Trade Arbitration*, 10 Harv. Int'l L. J. 34, 40 (1969) (arguing FTAC was a *de facto* national court for foreign cases).

57 Yoshida, *supra* note 44, at 383. While there was no exception to this, the requirement was curiously never formalized into a rule. Kaj Hober, *Arbitration in Moscow*, 3 Arb. Int'l 119, 158 (1987). The FTAC President once explained, "foreigners may be included . . . but this would be pointless because [FTAC] performs its functions quite well with the situation as it now is." Jonathon H. Hines, *Dispute Resolution and Choice of Law in United States – Soviet Trade*, 15 Brook. J. Int'l L. 591, 633-34 (1989).

58 Pat K. Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations,* 21 Tex. Int'l L.J. 291, 304 n.73 (1985-1986).

59 *Id.* at 309.

60 *See, e.g*., King-Smith *supra* note 56, at 40; *see also* Hober, *supra* note 57, at 154 (noting many western businesses' concerns and commentators' criticisms); Samuel Pisar*, Soviet Conflict of Laws in International Commercial Transactions,* 70 Harv. L. Rev. 593, 635 (1957)(FTAC rules may have a bias in favor of Soviet substantive law and choice of law rules).

In *Amtorg Trading Corp. v. Camden Fiber Mills, Inc.*,[61] a New York State Court held an arbitration agreement with a Soviet firm void due to partiality concerns.[62] One study analyzed published FTAC cases and concluded that there was statistically significant evidence of partiality in decision-making.[63]

The Soviet Union was one of the first states to accede to the New York Convention.[64] It was also an early party to the European Convention on International Commercial Arbitration (the 1961 Geneva Convention). However, the Soviets did not pass domestic implementing legislation until 1988. As a result, there is no documented case where the Soviet Union enforced a foreign arbitral award–neither before nor after 1988.[65]

B. Private Arbitration

The legacy of telephone justice and partiality has cast a long shadow over post-Soviet countries, including Georgia. The U.S. State Department reported to Congress in 1993 that telephone justice continued to exist in the Georgian judiciary.[66]

In 1997, Georgia abolished its local *Arbitrazh Courts*[67] and passed its first modern arbitration law, the Law on Private Arbitration (LOPA).[68] LOPA authorized the creation of commercial entities[69] that would provide dispute resolution services.[70] LOPA provided for confidentiality but only among members of the arbitral tribunal, not parties or witnesses.[71] In the interests of efficiency, LOPA attempted to mandate short decision periods, but the rules were so draconian that the opposite could result. The tribunal had to render an award within 30 days of commencement of proceedings or else resign, leaving the parties to start over.[72]

The most controversial aspects of the law related to recognition and enforcement. An arbitral award could be directly enforceable without court supervision or review.[73] There was provision made for limited court involvement if a party wished to *change* the award, but the rules were not clear.[74] Courts could also *suspend* awards if they found that enforcement would cause irreparable harm to a party, regardless of the merits.[75] LOPA also suffered from significant omissions. It had no safeguards against conflicts of interest.

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61 Amtorg Trading Corp. v. Camden Fiber Mills, Inc., 197 Misc. 398, 94 N.Y.S.2d 651 (Sup. Ct 1950).

62 *Id.* at 653. The decision was reversed on appeal because the parties accepted the conditions when contracting. The New York Court of Appeals added that its decision "does not preclude Camden from taking appropriate action should the arbitration in fact deprive it of its fundamental right to a fair and impartial determination." *In re* Arbitration Between Amtorg Trading Corp. and Camden Fiber Mills, Inc., 304 N.Y. 519, 521, 109 N.E.2d 606, 607 (1952).

63 Chew, *supra* note 58, at 323-30.

64 New York Convention, *supra* note 9.

65 Komarov *supra* note 47, at 301.

66 U.S. Dep't. of State, Bureau of Democracy, HR, and Lab., Georgia Human Rights Practices, 1993 876, 880 (1994).

67 *See* Salome Japaridze, *Interrelations Between the Annulment of the Arbitral Award and the Refusal of Recognition and Enforcement of the Arbitral Award*, 2013 Alt. Disp. Resol. Y.B. Tbilisi St. U., 229, 230.

68 Law On Private Arbitration [LOPA], *Official Gazette of the Parliament of Georgia* [OGPG], No. 17-18, May 5, 1997 (Georgia)[hereinafter LOPA].

69 Registered under the Entrepreneurship Law. Law on Entrepreneurship [LE], *Official Gazette of the Parliament of Georgia* [OGPG], No. 21-22, Oct. 28, 1994(Georgia)[hereinafter LE].

70 LOPA *supra* note 69, art. 7.

71 *Id.* art. 27.

72 *Id.* art. 31.

73 *Id.* art. 42; *see also* Sophie Tkemaladze, *A New Law–A New Chance for Arbitration in Georgia,* in International Scientific Conference: The Quality of Legal Acts and its Importance in Contemporary Legal Space (U. of Latvia Press 2012) 665, 665-66 (describing enforcement practice under LOPA)[hereinafter Tkemaladze, *New Law*].

74 For instance, changing the award was allowed if the award violated the arbitration agreement or Georgian law. LOPA *supra* note 69, art. 43. Yet, the scope of these violations remained undefined. Tkemaladze, *New Law, supra* note 73, at 666.

75 *Id.* art. 44. Courts had wide discretion to determine this harm, which contributed to inconsistent practices and uncertain enforcement rights.

It had virtually no provisions for interim measures.[76] And finally, it had no provision for international recognition and enforcement of foreign arbitral awards.

As a result of these deficiencies, the implementation of LOPA was disastrous. Providers engaged in arbitrations even after a different provider had rendered an award to the same parties in the same dispute.[77] Another disturbing trend was the use of arbitration to purloin the property of third parties.[78] The scheme worked as follows: two parties would fabricate a dispute over the ownership of property that was actually owned by a third person. The parties would engage an arbitration provider to resolve the contrived dispute. The provider would issue an order awarding the prevailing party the property and the Enforcement Bureau would execute that order, as legally mandated. The third party would then lose the property, without notice.[79] The Georgian courts would, on occasion, have the opportunity to review a domestic arbitration award, but even this was a fraught process. Many criticized the procedures as too cumbersome and time consuming.[80] The courts also struggled because the parameters of their power to *change* an award were unclear.[81]

LOPA also lacked provisions for the enforcement of foreign arbitral awards. This led to confusion and inconsistency when a party attempted to enforce a foreign arbitral award in Georgia. Georgia had ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1994 (New York Convention). But the courts tended to ignore it, relying instead upon the Minsk Convention[82] or the Georgian Law on Private International Law (PIL)[83] as authority for recognition and enforcement rules.[84] This was problematic because both the Minsk Convention and the PIL only regulated recognition and enforcement of foreign *court judgments*, not arbitral awards.[85]

Although LOPA has been criticized,[86] it should be viewed in a wider context. It was passed during a prolific period of law-making that aimed to replace the inherited Soviet laws, and there was not much time for reflection.[87] As well, Georgian professionals were Soviet-trained and had no experience with private property[88] or private dispute resolution.[89] There was also a dearth of Georgian-language materials on arbitration and most professionals only had access to Russian resources.[90] Much of the corruption can also

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76 Interim measures are urgent measures, similar to preliminary injunctive relief in the United States.

77 Giorgi Tsertsvadze, Commentary, *Brief Commentary to the Georgian Arbitration Law 2009,* 18 (Universal ed., 2011) [hereinafter Tsertsvadze, Commentary]. Unfortunately, this "double arbitration" was not rare during the LOPA period. *Id.*

78 *Id.* at 30.

79 *Id.*

80 *Id.* at 18.

81 Tkemaladze, *New Law*, *supra* note 73, at 666. Courts often interpreted this power to change as including the power to set aside an award. Tsertsvadze, Commentary*, supra* note 77, at 17.

82 The Minsk Convention of 1993 is an international agreement to regulate the recognition and enforcement of civil court judgments among member countries of the Commonwealth of Independent States (CIS). Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, Unified Register of Legal Acts and Other Documents of the Commonwealth of Independent States, Jan. 33, 1993 [hereinafter Minsk Convention]. Georgia was a member of the CIS until August 18, 2009. *Georgia's Withdrawal from CIS,* Ministry of Foreign Affairs of Georgia, http://georgiamfa.blogspot.com/2008/08/georgias-withdrawal-from-cis.html (last visited Feb. 23, 2015).

83 Law on Private International Law [PIL]*, Official Gazette of the Parliament of Georgia* [OGPG], No. 19-20, April 29, 1998 (Georgia)[hereinafter PIL].

84 *See* George Tsertsvadze, *Recognition and Enforcement of Foreign Arbitral Awards in Georgia*, at 2-5 (Oct. 2009) (unpublished Ph.D. thesis, Max-Planck-Institut für ausländisches und internationales Privatrecht) (on file with author).

85 *Id.*

86 *See, e.g.,* Japaridze, *supra* note 67, at 231.

87 Laws on entrepreneurs, monopoly and competition, consumer protection, the judiciary, and a comprehensive Civil Code and Commercial Code were all passed during this period.

88 In 1998, one U.S. expert recommended for the judiciary a comprehensive training program on market economics, competition and commercial law jurisprudence. William E. Kovacic & Ben Slay, *Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia*, 43 Antitrust Bull. 15, 36 (1998).

89 Tsertsvadze, Commentary, *supra* note 77, at 15.

90 *Id.* at 16.

be traced to the Soviet experience. Most professionals came of age under the Soviet system where *telephone justice* was commonplace and few countervailing norms or examples existed.

The lack of any lawyer licensing regime or regulatory controls also contributed to the problems. In the 1990s, almost anyone could act as a lawyer in court.[91] There was no body to control for qualifications, licensing or discipline.[92] A formal Georgian Bar Association was not established until 2005, eight years after LOPA's passage.[93] Moreover, there were no models of appropriate behavior, such as lawyer or arbitrator codes of ethics.

In addition to its formal shortcomings, LOPA also made it easy for lawyers to establish arbitration centers, and *required* that they be profit-making enterprises.[94] The centers competed for institutional clients that could insert mandatory arbitration clauses into their consumer contracts.[95] This created an environment that was rife with conflicts. Arbitration providers had an incentive to keep their clients happy by conducting proceedings in a manner consistent with their clients' interests. While not all lawyers or arbitration centers were unethical or incompetent, the arbitral environment was a toxic mix of opportunism, lack of education, absent ethical norms, and *laissez faire* oversight.

C. Criminal Arbitration

LOPA also had competition from unlikely quarters: the Georgian criminal underworld. In Georgia's criminal arbitration system, an extensive network of neighborhood underworld members engaged in dispute resolution.[96] These *Thieves-in-Law* (TIL) and their subordinates[97] were respected members of Georgian society and were often called upon to help resolve neighborhood, family, and business disputes.[98] Their dispute resolution services were more efficient and carried the threat of more effective enforcement measures than those of the courts or arbitration institutions.[99]

A July 2014 decision by the European Court of Human Rights analyzed Georgia's criminal arbitration history in connection with a challenge to sections of Georgia's Criminal Code that outlawed the settlement of disputes using the authority of a TIL.[100] The applicant had been convicted of engaging in an illegal dispute resolution mechanism by settling a few neighborhood disputes.[101] As picayune as these matters may have been, they constituted criminal activity because they were evidence of the defendant's membership in a criminal network, and accordingly, he was sentenced to seven years in prison.[102] Upon appeal, ECHR Court upheld the conviction and found that Georgia's laws prohibiting criminal dispute resolution were not in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.[103]

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91 *See* Christopher P.M. Waters, *Who Should Regulate the Baku-Tbilisi-Ceyhan Pipeline*, 16 Geo. Int'l Envt'l. L. Rev. 403, 413 (2004) (citing Christopher P.M. Waters, Counsel In the Caucasus: Professionalization and Law in Georgia (2004)).

92 *Id.*

93 *See* Christopher Waters, *Market Control and Lawyers in the Former Soviet Union*, 8 J. L. Soc'y 1, 7 (2007).

94 LOPA, *supra* note 69, art. 7.

95 Tkemaladze, *New Law*, *supra* note 73, at 665.

96 *See generally* Gavin Slade, Reorganizing Crime: Mafia and Anti-Mafia in Post-Soviet Georgia, (2013)(providing detailed history of the TIL in Georgia). In some cases, they became powerful enough to nominate judges. Avilova, *supra* note 43, at 478 n. 90.

97 Subordinates were referred to as *avtoritet*. Avilova, *supra* note 42,*Id.* at 478.

98 *See, e.g.,* Case of Ashlarba v. Georgia, No. 45554/08, § 4, Eur. Ct. H.R. at 7 (2014).

99 They sometimes charged a high fee for their services. Avilova, *supra* note 43, at 478.

100 *Ashlarba*, *supra* note 98.

101 *Id.* at 3.

102 *Id.* at 2.

103 *Id.* at 10-13. The Court also concluded that Georgia's criminal arbitration was a legacy of the Soviet system. *Id.* at 6-7. The TILs' practices likely affected the way clients expected lawyers to resolve legal disputes and probably impacted the evolution of Georgian arbitration.

IV. Georgia's New Arbitration Law

In 2010, Georgia's new arbitration law, the Law of Georgia on Arbitration (LoA) went into effect.[104] The Georgian LoA largely follows the UNCITRAL Model Law on International Commercial Arbitration[105] (Model Law). As a result, Georgia's arbitration rules are, but for some interesting departures, now harmonized with almost 70 nations, including important trading partners such as Turkey, Ukraine, Armenia, Azerbaijan, Russia and Germany.[106]

The LoA provides the courts with a more useful and constructive role in the arbitration regime. For the first time, Georgian courts now have jurisdiction over enforcement. However, the new law limits court intervention in arbitration proceedings to those instances specifically prescribed in the Model Law.[107] LoA Article 9 states that a court must terminate proceedings and refer the parties to arbitration if the case includes an arbitration agreement and a party makes a timely request.[108] Judicial non-interference is an important arbitration principle that promotes efficiency[109] and the LoA strikes a reasonable balance between those goals and the need to prevent the kind of injustice that occurred under LOPA. The following subsections review the most important parts of the new law.

A. Scope

Under the LoA, not every matter may be arbitrated. The LoA limits arbitral tribunals to hearing "property disputes of a private character which are based on an equal treatment of the parties and that parties [sic] are able to settle between themselves."[110] The Georgian Civil Code defines *property* as "every thing [sic], as well as any intangible property benefit, which may be possessed, used and disposed of by natural and legal persons."[111] The *property* requirement probably constitutes a more expansive scope than the Model Law's requirement of disputes arising from a commercial relationship.[112] Although the Model Law drafters mandated a wide

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104 Law of Georgia on Arbitration [LoA], No. 13, July 2, 2009, *Official Gazette of the Parliament of Georgia,* [hereinafter LoA]. According to Article 48, the law entered into effect on January 1, 2010.

105 U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration with Amendments as Adopted in 2006, U.N. Doc. A/40/17 (2006) [hereinafter Model Law]. All UNCITRAL documents relating to the Model Law are available at http://www.uncitral.org/uncitral/en/index.html.. According to UNCITRAL: the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. *Id.*

106 For the full list of countries adopting the Model Law, *see* UNCITRAL website, *http://www.uncitral. org/ uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html* (last modified 2015). The Explanatory Note to the draft LoA states that it was prepared in order to better harmonize Georgia's arbitration laws with Europe. Explanatory Note to Draft of Law on Arbitration of Georgia, 1 (2009)(in Georgian, on file with author) [hereinafter LoA Explanatory Note].

107 The LoA states, "[i]n matters governed by this law, no court shall intervene in any matter except in cases expressly provided for in this law." LoA, *supra* note 104, art. 6(2).

108 *Id.* art. 9(1); Civ. Proc. Code of Georgia [CPC], *Official Gazette of the Parliament of Georgia,* No. 47-48, Dec. 31, 1997, arts. 186(1)(d), 272(f) (Georgia)[hereinafter Georgia Civ. Proc. C.]. Arbitration occurs unless the court finds that the agreement is null and void. The dismissal requirement is not limited to Georgian arbitrations but rather to arbitration proceedings anywhere. This article was revised in 2015 to harmonize the LoA with the Model Law. Amendments to Law of Georgia on Arbitration, *Official Gazette of the Parliament of Georgia,* No. 3218, art. 1(3), March 26, 2015 (Georgia) [hereinafter LoA Amendments]. *See also* Model Law, *supra* note 105, art. 8(1). In order to refer a case to arbitration, the original LoA provision required the commencement of arbitral proceedings, not the mere presence of a valid arbitration agreement. LoA, *supra* note 104, art. 9(1)-(2).

109 Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings,* 30 U. Pa. J. Int'l L. 999, 999 (2008-2009).

110 LoA, *supra* note 104, art. 1(2).

111 Civil Code of Georgia [CC], *Official Gazette of the Parliament of Georgia* [OGPG], No. 31, July 24, 1997, art. 147 (Georgia)[hereinafter Georgia Civ. C.].

112 Model Law, *supra* note 105, art. 1.

interpretation of the term *commercial*,[113] certain matters might be considered disputes relating to *property* and yet fall outside of the Model Law's scope. One example would be claims for wages under an employment contract.[114] There are no reported Georgian cases defining the boundaries of *property* for purposes of the LoA, but it seems reasonable to conclude that it will be given an expansive interpretation.

A more significant restriction in the LoA's scope is that the dispute must be of a *private character*. This restriction is not found in the Model Law. Neither the LoA nor any reported cases clarify this requirement. One case affirmed the arbitrability of a dispute centered on real estate redemption rights but provided no parameters of the *private character* requirement.[115] Important questions remain. Is a products liability claim a dispute of *private character*? Is an employee's claim of unsafe working conditions a dispute of *private character*?[116] A reference to state agencies' capacity to sign arbitration agreements under this framework may limit the *private character* requirement.[117] If disputes involving a state agency can be considered disputes of a *private character*, then a broad interpretation may be appropriate.

This indeterminate standard may also deter international arbitration in Georgia. Courts usually decide arbitrability questions based upon their own national law, regardless of the parties' agreement.[118] Because the LoA provides an uncertain framework on arbitrability, foreign parties may be concerned that their disputes will end up in Georgian courts. For these reasons, it would be useful to have judicial or legislative clarification here.

B. Form of Arbitration Agreement

The LoA expands upon the succinct LOPA requirement that an arbitration agreement be in writing. It largely follows the Model Law's rules, with an interesting modification. Both the LoA and Model Law allow for the operative writing to be in any form, including electronic.[119] However, the LoA mandates that if one of the parties is a natural person or an administrative agency, then the arbitration agreement must be in writing. Here, the law requires a more restrictive definition of *writing* that must include a specific instrument signed by the parties.[120] This restriction is for the protection of consumers and is a welcome improvement.[121]

During the LOPA period, Georgian courts developed a rather strict interpretation of the writing requirements. If the parties did not clearly agree in writing, following all formal requirements, the courts might find the agreement invalid.[122] The strict interpretation was a logical response to the perceived injustice surrounding the arbitration regime. Under the LoA, the courts continued this restrictive practice.[123] Part of the

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113 The term "should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." *Id.* art. 1 n.2.

114 UNICITRAL's Analytical Commentary states, in connection with the Article 1 scope of *commercial*, "[n]ot covered are, for example, labour [sic] or employment disputes and ordinary consumer claims, despite their relation to business." U.N. Secretary-General, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, 18, U.N. Doc. A/CN. 9/264 (1985) [hereinafter Model Law, Analytical Commentary].

115 Tbilisi Court of Appeal Case No. 2B/---11---2011 (full number and date not available).

116 Recall that employment disputes, while falling outside the scope of the Model Law, might fall inside the LoA's jurisdiction over *property* disputes. Model Law, *Analytical Commentary, supra* note 113.

117 LoA *supra* note 104, art. 8(8).

118 *See* Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?,* 12 Arb. Int'l 391 (1996).

119 Model Law, *supra* note 105, art. 7(4); LoA, *supra* note 104, art. 8(5). The LoA defines "electronic communication" in Article 2(1)(b). The arbitration agreement is considered in writing if its content is recorded in any form, "irrespective of the form of the arbitration agreement or the contract." *Id.* arts. 8(4). Contract formation requirements are subject to the Civil Code of Georgia. Georgia Civ. C., *supra* note 111, arts. 319 – 48.

120 LoA, *supra* note 104, art. 8(8).

121 LoA Explanatory Note, *supra* note 106, 9. The LoA also included a special rule when both parties are natural persons, but the 2015 LoA Amendments struck that rule. LoA Amendments, *supra* note 108, art. 1(2).

122 Tsertsvadze, Commentary, *supra* note 77, at 55-56 (citing Tbilisi City Court Case No. 2/8139-09, April 12, 2010 (finding agreement stating "any dispute that arises out of the contract should be resolved by private arbitration" was invalid)).

123 *Id.* at 56 (citing Tbilisi City Court Case No. 2/1263-11, February 28, 2011 (finding agreement invalid that read: "[an arbitration provider] chosen by the plaintiff should resolve any dispute, arising out or in connection with [the

problem may have been the LoA's requirement that agreements include a specific reference to the arbitration rules of the chosen forum.[124] That requirement was problematic because it allowed a party or reviewing court to claim that a clause was insufficient even if there was a written agreement clearly identifying a particular arbitration provider but no specific reference to its rules. The 2015 LoA Amendments struck this requirement,[125] which should lead to greater judicial acceptance of arbitration agreements.

C. Composition and Jurisdiction of the Arbitral Tribunal

1. Appointment

Arbitrator appointment is one of the most important decisions in arbitration.[126] The appointment rules and process will greatly affect the perception of fairness among the parties and public.[127] Under the LoA, the parties are free to determine the number of arbitrators at the time of contracting. In the absence of agreement, the number is three.[128] The parties are also free to choose any selection method. In practice, parties usually follow the selection method of the chosen arbitration provider.[129] In the event that they do not choose a selection method, the LoA follows the Model Law's default rules and provides that each party shall appoint one arbitrator and the two arbitrators shall appoint the third. If any arbitrator appointments are not made within the required time periods, the Georgian courts will, upon request of one of the parties, make the appointment, which is not appealable.[130]

The LoA also follows the Model Law's prohibition on preclusion of any arbitrator by reason of nationality.[131] This should promote confidence in Georgia as a location for international arbitration because it allows foreigners to serve on panels in international arbitration.[132]

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contract between the parties] including disputes about the validity of the contract."). *See also* Tkemaladze, *New Law, supra* note 73, at 669-70 (discussing Tbilisi Court of Appeals practice of invalidating agreements on lack of clarity grounds). Interestingly, providers are willing to work with parties to re-write the arbitral agreement to improve validity. The Batumi Permanent Court of Arbitration helped parties re-draft their arbitration agreements in seventeen percent of its cases. Tsertsvadze, Commentary, *supra* note 77, at 61 n. 211.

124 The original LoA Article 2(2) stated: "[f]or purposes of this law, the agreement of the parties shall include a reference to the rules of arbitration of the permanent arbitration institution to which the parties have referred to resolve the dispute." LoA, *supra* note 103, art. 2(2).

125 LoA Amendments, *supra* note 108, art. 1(1)(b). The original clause was replaced with language that appears to mandate that any choice of specific arbitral forum necessarily also includes the choice to use that forum's rules. *See* LoA, *supra* note 104, art. 2(2). The amended Article 2(2) also now allows for parties to engage in *ad hoc* arbitration, with their own custom-made rules. *See* Explanatory Letter on the Draft Law of Georgia Amending the Law of Georgia on Arbitration, Working Group on Procedural Law of the Private Law Reform Council, December 15, 2014, http://parliament.ge/en/law/7666/15244 (last visited June 3, 2015) [hereinafter Explanatory Letter]. This change will be useful for business to business disputes.

126 Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 J. Int'l Arb. 247, 247 (2003). Appointment is crucial because, in many cases, the arbitrator is not bound by law or precedent but rather her own sense of justice and equity. *See* David Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. Cin. L. Rev. 623, 625 (1992).

127 The ability of both parties to equally participate in the selection of the decision maker is one of the hallmarks of a fair arbitral forum. *See* 3 Ian Macneil, Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act § 27:3 (1995 & Supp. 1997).

128 LoA, *supra* note 104, art. 10.

129 Tsertsvadze, Commentary, *supra* note 77, at 104. Most Georgian arbitration center rules default to one arbitrator that is chosen by the provider. *See, e.g.*, Rules of Arbitration Proceedings, Dispute Resolution Center, Ltd. (DRC), R. 5.3, http://www.drc-arbitration.ge/index.php?option=com_content&view=category&id=47&Itemid=11&lang=en (last visited Sep. 11, 2015) [hereinafter DRC Arbitration Rules](requiring DRC to make appointment if case has one arbitrator). The DRC is one of Georgia's largest providers, handling 1,334 arbitration cases in 2013. *Id.* (follow "About Us" hyperlink; then follow "Statistics" hyperlink).

130 LoA, *supra* note 104, art. 11. In practice, court appointment is rare. Tsertsvadze, Commentary, *supra* note 77, at 106.

131 Model Law, *supra* note 131, art. 11(1).

132 Model Law, *Analytical Commentary*, *supra* note 114, at 28 1.

2. Challenge

Arbitrator challenge procedures are a necessary evil. Although they function as an "escape valve" to help guarantee the integrity of the arbitral process, they can also be used to sabotage or impede the progress of an arbitration proceeding.[133] When considering the challenge procedures, it is important to recognize that Georgia is a small country and parties and arbitrators are likely to know each other. This provides opportunities for parties to better assess their arbitrator choices, but also entails a greater risk of conflicts or impartiality. The appointment of impartial arbitrators is one of the most important policy issues for Georgian arbitration. During the LOPA period, it was commonly suspected that arbitrators were partial.

The LoA's new challenge procedures may help mitigate this issue. Its challenge rules are similar to the Model Law's rules with one exception. In cases with a single arbitrator, the challenging party may petition the court directly, without need to submit a challenge to the tribunal.[134] This is an important change from the LOPA rules, which did not allow court supervision of the challenge process.[135] The right of appeal should provide parties with an increased measure of confidence that the panel will be impartial.[136] It may also help promote judicial support for arbitration. If judges are allowed to appoint, affirm and reject arbitrators, they will become more invested in the panel's success.

In addition, the Georgian Arbitration Association (GAA) ratified its Code of Ethics for Arbitrators in 2014. The GAA Code of Ethics[137] is based on the 2003 ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes.[138] The first nine Canons of the ABA/AAA Code were largely adopted in the GAA Code.[139] These rules are an excellent start to the professionalization of arbitrators in Georgia and may further promote confidence in arbitration.[140]

D. Jurisdiction

The LoA envisions full acceptance of the *competence-competence* doctrine found in the Model Law.[141] The c*ompetence-competence* doctrine holds that an arbitral tribunal has the authority to determine whether it has jurisdiction over the dispute.[142] A tribunal's power to rule on its own jurisdiction is

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133 Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. Int'l Arb. 325, 325 (2003).

134 LoA, *supra* note 104, art. 13(3). All court decisions are final and not appealable. *Id.*; Model Law, *supra* note 105, art. 13(3); Georgia Civ. Proc. C., *supra* note 108, art. 356[15](6).

135 LOPA, *supra* note 68, art. 15. The arbitration provider possessed the final decision on all challenges.

136 LoA Article 6 does mandate that the tribunal shall be *independent* in its activities. LoA, *supra* note 104, art. 6. Although vague, this mandate might provide parties with additional court appeal rights.

137 The GAA does not maintain a website, but it does have a Facebook page, , Georgian Arbitration Association (GAA), facebook, https://www.facebook.com/GAAtbilisi?fref=ts (last visited Sept. 12, 2015) [hereinafter GAA Facebook Page]. The GAA Code of Ethics is available at http://edu.gba.ge/wp-content/uploads/2014/06/Code-of-Ethics-for-Arbitrators.pdf (last visited Sept. 12, 2015).

138 Code of Ethics For arbitrators in Commercial Disputes, American Bar Association and American Arbitration Association (2003), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 (last visited Sept. 12, 2015) [hereinafter 2003 ABA/AAA Code].

139 The final ABA/AAA Cannon governing exemptions for non-neutral arbitration was rejected as inapplicable. Party-appointed arbitrators on a tripartite panel in the United States were sometimes considered "non-neutrals." Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 Fordham Urb. L.J. 1815 *passim* (2002-2003); Code of Ethics For arbitrators in Commercial Disputes, Canon VII A(1) (1977). In contrast, international arbitration ethics norms include all arbitrators acting in a fully independent and impartial manner, with no exceptions. *Id.* at 1815-16, 1825. The 2003 ABA/AAA Code attempted to move U.S. standards closer to international standards by incorporating the international norms as a default presumption, but still allowing for parties to agree to employ non-neutral arbitrators, as set forth in Canon X. Similar to most other counties, Georgia does not allow non-neutral arbitrators. Clear, unequivocal standards are the most sensible approach for Georgia.

140 The GAA is not a licensing body, but rather a voluntary professional organization. Nonetheless, the GAA is committed to publicizing and enforcing these rules. Throughout 2014, the GAA, in cooperation with the Georgian Bar Association, held workshops to inform lawyers and others about the Code. *See* GAA Facebook page, *supra* note 137. At the time of enactment, the Code was advisory in nature. The GAA plans to make it enforceable in the future.

141 LoA, *supra* note 104, art. 16; Model Law, *supra* note 105, art. 16.

142 C. Ryan Reetz, The Limits of the Competence-Competence Doctrine in the United States Courts, 5 Disp. Resol. Int'l 5, 5 (2011).

fundamental to arbitration and is regarded as one of the pillars of the Model Law.[143] Without this, a party could easily thwart an arbitration proceeding by raising jurisdictional questions in the courts.[144]

The LoA also adopts the Model Law's all-important *separability* principle.[145] The *separability* principle holds that the agreement to arbitrate is actually a separate legal agreement from the underlying contract, to which it is attached. So, if the underlying agreement is found invalid, the agreement to arbitrate is not *ipso jure* invalid. The tribunal retains jurisdiction to render that decision.[146] Without *separability*, the arbitrator's ruling of underlying contractual invalidity would also eviscerate her power to make such a decision, resulting in a logically circular impasse.[147] *Separability* works together with *competence-competence* to preserve tribunal autonomy. Similar to *competence-competence*, this principle is now firmly established in international arbitration.[148] Georgian courts have been supportive of both principles.[149]

E. Interim Measures

One of the most significant shortcomings of LOPA was the lack of provision for interim measures.[150] As a result, there was no clear remedy for parties in need of injunctive relief to preserve the status quo, stop an ongoing harm, or prevent asset flight. The courts had interim relief provisions,[151] but LOPA appeared to preclude court jurisdiction unless the parties both agreed to waive the preclusion or the arbitration

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143 Peter Binder, International commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions 214 (3rd ed., 2010). Most international arbitration rules allow for the arbitral tribunal to decide on its own jurisdiction. *See, e.g*., Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures, 13 (2013) https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 [hereinafter AAA Rules]. Eight U.S. states have adopted Article 16, *inter alia*, of the Model Law and the *competence-competence* doctrine is generally accepted in the United States. Reetz, *supra* note 142, at 6.

144 Model Law Article 8(1) and LoA Article 9(1), together with Georgia Civ. Proc. C. Article 356[16], allow the court to make a jurisdictional decision even if it has been notified that the matter is the subject of an arbitration agreement. While the articles mandate court dismissal unless the agreement is invalid, they also tend to contradict the spirit of *competence-competence* by appearing to shift decision-making power from tribunal to court. Georgia Civ. Proc. C., *supra* note 108, arts. 186, 272) The preclusion of courts from the initial jurisdiction decision is referred to as the Negative Effect of Competence-Competence. John J. Barcelo III, Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective, 36 Vand. J. Transnat'l L. 1115, 1124 (2003). French law is the best example of this Negative Effect. *Id.* at 1124-26 (citing*, inter alia,* Article 1458 of the French Code of Civil Procedure). Some jurisdictions go part of the way towards the Negative Effect by interpreting Article 8 as requiring merely *prima facie* judicial confirmation of the existence and validity of an agreement. *Id.* at 1128 n.54, 1129 n.61 (referring to Switzerland, Hong Kong and Ontario). The United States rejected the Negative Effect of Competence-Competence in First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), but continues to recognize the basic or positive *competence-competence* doctrine. Reetz, *supra* note 142, at 6.

145 LoA, *supra* note 104, art. 16(1); Model Law, *supra* note 105, art. 16(1); *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration*, 25 (2006), http://www.uncitral. org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Feb. 23, 2015)[hereinafter Model Law *Explanatory Note*].

146 *See, e.g.,* Arthur Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L. Q. Rev. 609 (1939-1940)(providing an early discussion on separability doctrine).

147 *See* Alan Scott Rau, *The Arbitrability Question Itself*, 10 Am. Rev. Int'l Arb. 287, 341 (1999); Alan Scott Rau, *Everything You Really Needed to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1, 81-82 (2003).

148 Kaj Hober & Annette Magnussen, *The Special Status of Agreements to Arbitrate: The Separability Doctrine; Mandatory Stay of Litigation*, 2 Disp. Resol. Int'l 56, 56 (2008). *But see* Model Law *Explanatory Note, supra* note 145, 25 ("[a]s of 2003 the concepts are not yet generally recognized"). The separability doctrine was upheld in the United States., using different terminology, in Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,* 388 U.S. 395 (1967). The U.S. Supreme Court later doubled down on separability in Rent-A-Center, West, Inc. v. Jackson*,* 561 U.S. 63 (2010). David Horton, *Mass Arbitration and Democratic Legitimacy,* 85 U. Colo. L. Rev. 459, 487 (2014)(reviewing Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013)).

149 Tsertsvadze, Commentary, *supra* note 77, at 96.

150 Notwithstanding this absence of authority, one expert states that Georgian arbitration centers would occasionally issue interim measures prior to the constitution of the arbitration tribunal. *Id.* at 140.

151 Georgia Civ. Proc. C., *supra* note 108, art. 198.

agreement was invalid.[152] The absence of interim relief under LOPA was another disincentive for parties to choose arbitration.

The LoA provides for interim measures, partly in line with the Model Law's 2006 version of Article 17. Interim measures during Georgian arbitration are now allowed: (i) to maintain or restore the status quo, (ii) to prevent damage to a party or the arbitral process itself,[153] (iii) to preserve assets out of which an award may be satisfied, or (iv) to preserve evidence.[154] A party may petition the tribunal at any time prior to the final award for temporary relief. The rules set a high burden on the moving party. The party must show a likelihood of harm "not adequately reparable by an award of damages" if no relief is granted and that the harm will "substantially outweigh" the harm to the counterparty.[155] In addition, there must be a "reasonable possibility" that the moving party will succeed on the merits of the claim.[156] These conditions are in line with the Model Law. The Model Law drafters felt that this high standard was necessary to make the Model Law consistent with many national judicial systems.[157]

The Model Law's 2006 rules also include the availability of an *ex parte* preliminary order designed to prevent the frustration of a requested interim measure.[158] There are sound reasons why a party might need this–such as to prevent asset flight or property destruction. The LoA does not include this rule, but parties do retain the right to obtain interim relief from a Georgian court.[159] Under the Georgian Civil Procedure Code, parties may obtain a variety of interim remedies,[160] and they may even be granted on an emergency *ex parte* basis, prior to filing the formal complaint.[161] Therefore, the omission of *ex parte* preliminary orders from the LoA should not cause significant problems. In fact, the controversial nature of these powers would probably harm the reputation of arbitration in Georgia.[162]

Interestingly, the burden required for interim relief in the Georgian courts is lower than the burden at an arbitral tribunal. The Civil Procedure Code requires that parties prove "reasonable cause" for the court to believe that its decision would be frustrated in the absence of said relief.[163] This is analogous to the first element under the LoA–likelihood of harm not adequately reparable by an award of damages if no relief is granted.[164] However, the Civil Procedure Code, unlike the LoA, has no additional requirements that the harm, if not granted, substantially outweigh the harm to the counterparty or that the moving party show a

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152 LOPA, *supra* note 68, art. 30.

153 The language could be used to justify anti-suit injunctions. Model Law, *supra* note 105, art. 17(2)(b); U.N. Comm'n on Int'l Trade L., Rep. on the Work of its Thirty-Ninth Session,92-95, U.N. Doc. A/61/17 (2006) [hereinafter 2006 UNCITRAL Report].
The language was meant to apply to the range of creative or dilatory tactics used by parties to obstruct the arbitral process. *Id.* 94.

154 LoA, *supra* note 104, art. 17.

155 *Id.* art. 18(1)(a)-(b).

156 *Id.* art. 18(1)(c).

157 2006 UNCITRAL Report, *supra* note 153, 99. This is somewhat similar to the requirements for preliminary injunctive relief in U.S. federal courts. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc. 555 U.S. 7 (2008).

158 Model Law, *supra* note 105, art. 17 B - 17 C.

159 LoA, *supra* note 104, art. 23.

160 Georgia Civ. Proc. C., *supra* note 111, art. 198. Remedies include, *inter alia*, the seizure of property and the enjoining of acts. *Id.* art. 198(i)(2).

161 *Id.* art. 192-193. The U.S. analogy is Fed. R. Civ. P. 65a (Preliminary Injunctions) and Fed. R. Civ. P. 65b (Temporary Restraining Orders without notice). The original LoA appeared to have excluded court emergency *ex parte* relief for international arbitration. LoA, *supra* note 104, art. 23(3). While not ideal, the exclusion might have leveled the playing field in international arbitration, since it is more likely that a domestic party would resort to such *ex parte* relief from a Georgian court. The 2015 LoA Amendments struck this exclusion, thereby allowing emergency *ex parte* claims in Georgian courts. LoA Amendments, *supra* note 108, art. 1(10); Explanatory Letter, *supra* note 125, §(a)(a.c.) (the amendments "authorize the court to apply interim measures, upon a party's request, even before an arbitral lawsuit is lodged").

162 *But cf.* Nikoloz Chomakhidze, *Provisional Measures in International Arbitration*, Alt. Disp. Resol. Y.B. Tbilisi St. U., 108, 128 (2013).

163 Georgia Civ. Proc. C., *supra* note 108, art. 191.

164 LoA, *supra* note 104, art. 18(1)(a).

reasonable possibility of success on the merits of the claim.[165] In addition, Georgian public agencies have been reluctant to enforce tribunals' interim measures.[166] Given this reluctance and the higher burden, there is a strong incentive to circumvent the arbitral tribunal and directly petition the courts for interim relief.[167]

The LoA follows closely the Model Law's rules relating to the recognition and enforcement of interim measures. The most important development for international parties is that the law makes clear that such measures shall have binding force and be enforced by Georgian courts, irrespective of the country in which they were issued.[168] This is an important aspect of the new law and, in time, may have a significant impact.

As is the case with the Model Law, parties may prevent recognition and enforcement of interim awards under only limited circumstances.[169] These rules track the standard rules for recognition and enforcement of final awards with a few changes.[170] Under the Model Law, there is no clear placement of the burden of proof, but for most claims, the LoA clearly places a burden on the party seeking refusal of recognition or enforcement.[171] This is a helpful pro-enforcement signal to the courts.[172]

F. Arbitral Proceedings

1. Equal Treatment and Opportunity to Present One's Case

The LoA follows the Model Law's guarantees of two fundamental arbitration principles, equal treatment of the parties and the opportunity to present one's case.[173] The Model Law drafters labeled these principles the *Magna Carta of Arbitral Procedure* because they regarded them as so essential to arbitration and perhaps the most important in the Model Law.[174] The reasons are self-evident. Equal treatment and the opportunity to present one's case are the essence of fairness.[175] They represent due process and the aspirations of all dispute resolution systems. While neither principle can be unconditional in practice, they are necessary for arbitration to remain viable.[176] Interestingly, the LoA moved the Model Law's equal treatment clause (Model Law Article 18) to the front of the LoA where it is now LoA Article 3. The placement of this near the front of the law emphasizes its importance and its application to the entire arbitration enterprise, and not merely the arbitral proceedings.[177] Given LOPA's weak protections of these principles, this was a sound legislative adjustment.

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165 *Id.* art. 18(1)(b)-(c).

166 Tsertsvadze, Commentary, *supra* note 77, at 141-142.

167 The authority to directly petition the Georgian courts is LoA Article 23.

168 LoA, *supra* note 104, *id.* art. 21.

169 *Id.* art. 22.

170 *Id.* arts. 22(1)(a)-22(1)(b)(b.a.).

171 Model Law, *supra* note 105, art. 17 I (1); LoA, *supra* note 104, art 22(1)(a). The UNCITRAL drafters purposely left this burden question for the applicable domestic law. Binder, *supra* note 143, at 271; U.N. Comm'n on Int'l Trade L. Working Group on Arbitration and Conciliation, Rep. on the Work of Its Forty-Second Session, 73, U.N. Doc. A/CN 9/573 (2005) [hereinafter July 2005 UNCITRAL Report].

172 A few claims have no clear burden, such as those under the public policy exception, which are considered *ex officio* grounds whereby the court must undertake its own independent review. LoA, *supra* note 104, arts. 22(1)(b).

173 LoA, *supra* note 104, art. 3; Model Law, *supra* note 104, arts. 18-19.

174 Model Law, *Analytical Commentary*, *supra* note 114, at 44 1.

175 In the United States, the Federal Arbitration Act has been interpreted as mandating basic procedural fairness. *See, e.g.,* Born, *supra* note 109, at 1021 (citing Federal Arbitration Act, 9 U.S.C. §10 (2006)).

176 Reza Mohtashami, *The Requirement of Equal Treatment with Respect to the Conduct of Hearings and Hearing Preparation in International Arbitration*, 3 Disp. Resol. Int'l 124 (2009). For instance, the "full opportunity to present one's case" does not mean that the party is entitled to use dilatory tactics or advance unlimited objections or new evidence on the eve of award issuance. Model Law, *Analytical Commentary*, *supra* note 105, at 46 8.

177 There was some initial concern among the Model Law drafters that the placement of the equal treatment provision in a sub-section of the Model Law's Chapter V (Conduct of Arbitral Proceedings) might create an inference that the principle was limited to certain parts of the proceedings. Binder, *supra* note 143, at 277; *Summary Records of the 322nd Meeting*, [1985] 16 Y.B. Comm'n Int'l. Trade L. 466, 468 28, U.N. Doc. A/CN.9/SER.322.; Model Law, *Analytical Commentary*, *supra* note 114, at 46 7.

2. Determination of Rules of Procedure

Both the Model Law and LoA provide for party autonomy in determining the rules of procedure.[178] This freedom of parties to select their own procedural rules is another important arbitration principle.[179] One of the main reasons for arbitration's success has been the ability of parties, in contrast to court litigation, to craft procedures most appropriate for their needs.[180] This autonomy is subject to certain limitations.[181] For instance, parties cannot contract away the protections concerning equal treatment among parties.[182]

The LoA provides that in the event there is no party agreement on procedures the "dispute shall be resolved in accordance with the rules determined by the arbitral tribunal".[183] The LoA omits the Model Law's reference to the tribunal's nearly unfettered discretion to craft appropriate rules.[184] This is unfortunate given the practical importance of arbitrators' procedural discretion.[185]

3. Place of Arbitration

The place of arbitration under the LoA follows the provisions in the Model Law. Parties have the freedom to choose where to hold the arbitration and the tribunal may exercise its own discretion for convenience reasons, where appropriate.[186] In international arbitration, this can be especially important since the location determines the type of court supervision and conflicts rules.[187]

4. Representation

The LoA provides parties the right to representation at any stage of proceedings by anyone.[188] The law refers to "an attorney or other representation," which presumably opens the door to any individual that the party desires. This is important from an access to justice perspective. Many individuals in Georgia cannot afford to retain an attorney and will thus benefit from having a family member or friend, for instance, as a lay representative.[189]

5. Language and Statements of Claim and Defense

The LoA and Model Law offer the parties a choice of language, consistent with the party autonomy principle. Note that the LoA does not include a default Georgian language provision, even for domestic

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178 Model Law, *supra* note 105, art. 19; LoA, *supra* note 104, arts. 24, 2(2).

179 Binder, *supra* note 143, at 281.

180 Born, *supra* note 109, at 1003.

181 *See, e.g.*, Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. Int'l Arb. 327 (2007).

182 Model Law, *Analytical Commentary*, *supra* note 114, at 45 3.

183 LoA *supra* note 104, art. 24 (2).

184 Model Law, *supra* note 105, art 19(2).

185 Born, *supra* note 109, at 1010-15. Most international conventions and national legal systems, including the United States, provide for substantial tribunal discretion over procedures in the absence of party agreement. *Id.*

186 LoA, *supra* note 104, art. 25; Model Law, *supra* note 105, art. 20.

187 While it is generally understood that the law of the host country is important in international commercial arbitration (*see also* Noah Rubins, *The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, The Place of Arbitration in International Arbitration-Its Fictitious Nature and Lex Arbitri*, 16 Mealey's Int. Arb. Rep. 12 (2001)), some scholars have advanced a theory called "delocalization" that considers international arbitration as its own delocalized normative regime, not subject to national laws. *See* Tetsuya Nakamura, *The Place of Arbitration in International Arbitration-Its Fictitious Nature and Lex Arbitri*, 15 Mealey's Int. Arb. Rep. 11 (2000); Jan Paulson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 Int'l & Comp. L.Q. 53 (1983).

188 Model Law, *supra* note 105, art. 28.

189 A complication can arise if the dispute is moved to the Georgian courts for any reason. Any "capable representative," not necessarily a lawyer, can appear in the Courts of First Instance, Georgia Civ. Proc. C., *supra* note 108, art. 94(d), however only licensed attorneys (*advocates*) can appear in at the appellate levels. *Id.* arts. 93–101.

arbitration.[190] This is encouraging given that there are some domestic communities where Georgian is not the dominant language.[191]

If the parties have chosen a local arbitration forum, then that forum's rules regarding statement of claim and defense will apply. In the absence of agreed rules, the LoA follows the Model Law's reasonable rules.[192]

6. Form of Proceedings and the Taking of Evidence

The international commercial arbitration process often, but not always, involves an oral hearing that resembles the trial in a common law court.[193] However, some international tribunals proceed with only documentary and other material records.[194] The LoA follows the Model Law's efforts to steer a middle ground between these common law and civil law traditions by allowing the tribunal to decide whether an oral hearing is necessary in the absence of a specific request for one.[195] In the event of a request, the rules mandate that an oral hearing take place.[196]

The LoA, like the Model Law, does not go into extensive detail on how the tribunal shall conduct hearings.[197] However, the LoA does go further than the Model Law in specifically authorizing some of the tribunal actions that might take place. The LoA specifically provides that the tribunal may require a party to produce evidence to another party or the tribunal.[198] The tribunal may also summon witnesses and require their questioning,[199] although this is rare in Georgia.[200] Most of these procedures will be left to the parties or tribunal to determine.[201] Parties' adoption of the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) would be allowed.[202]

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190 LoA, *supra* note 104, art. 29; Model Law, *supra* note 105, art. 22.

191 Georgia has small minority communities where Armenian or Azeri are spoken at home and Russian is often preferred outside of the home. According to the 2002 census, the following were the largest groups in Georgia: Azeri 6.5%, Armenian 5.7%, Russian 1.5%. World Facebook, *supra* note 12.

192 Model Law, *supra* note 105, arts. 23, 25; LoA, *supra* note 104, arts. 30-31, 33.

193 In the vast majority of international commercial arbitrations, parties request an oral hearing. Mohtashami, *supra* note 176, at 128. Although the trend is moving towards more extensive written submissions and shorter hearings. *Id.*

194 In most civil law systems, documentary evidence is preferred over witness testimony. Documentary evidence is also considered paramount in international arbitration. *See* Nathan D. O'Malley, *The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration – As Applied in Practice*, 8 Law & Prac. Int'l Cts. & Tribunals 27, 27 (2009).

195 LoA, *supra* note 104, art. 32(1).

196 *Id.*

197 As a practical matter, most arbitration forums will have their own set of applicable procedural rules.

198 *Id.* arts. 35(2)(a), (c).

199 *Id.* art. 35(2)(b). This tribunal-centered approach is more consistent with the civil law tradition (Georgia included) of the court taking primary responsibility for the calling and examining witnesses. For a more detailed discussion of the general differences between the common law and civil law traditions with respect to the taking of evidence and the emergence of a common middle road in international arbitration practice, see Mohtashami, *supra* note 176; Rolf Trittman and Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings*, 31 U.N.S.W.L.J. 330, 333 (2008).

200 Tsertsvadze, Commentary, *supra* note 84, at 131.

201 UNCITRAL indicates that most international arbitration rules do not specify the details of hearings, such as the witness order, examination procedures, or the availability of opening and closing statements. The UNCITRAL Notes recommend that the tribunal decide these rules in coordination with the parties early in the process. UNCITRAL, Notes on Organizing Arbitral Proceedings (2012), http://www.uncitral.org/pdf/ english/texts/ arbitration/arb-notes/arb-notes-e.pdf (last modified 2012).

202 IBA Rules on the Taking of Evidence in International Arbitration*,* International Bar Association (2010), http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC (last visited Feb. 23, 2015). The IBA Rules are non-binding but widely accepted. Georg von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised Version, adopted by the International Bar Association on 29 May 2010,* 28 ASA Bulletin 735 (2010); *see also* Trittman & Kasolowsky, *supra* note 199, at 333 ("The IBA Rules are, in our experience, referred to in almost all international arbitration proceedings").

Under the LoA, proceedings are closed, and the arbitrator and other participants must keep all information confidential.[203] The law further provides that, unless otherwise agreed or provided for in law, all documents, evidence and written or oral statements shall not be published or used in other proceedings.[204] This is not found in the Model Law[205] or in the United States[206] Confidentiality protections may help promote settlement among the parties, foster more efficient practice, encourage more honest and comprehensive discovery production, and protect participants from the harm that may arise from public disclosure of information. Although a blanket confidentiality provision does carry some costs, such as the public's diminished access to information, these protections are, on balance, justified in Georgia.

G. The Award

1. Substantive Rules

In contrast to LOPA, which provided no guidance on the rules applicable to the substance of the dispute, the LoA follows the Model Law in providing for party freedom to choose, with tribunal discretion as a default.[207] In the event there is no choice of law, the LoA states that the tribunal shall determine the law. Unfortunately, the LoA, in contrast to the Model Law, does not contain provision for the tribunal to decide *ex aequo et bono* or as *amiable compositeur.*[208] However, it does follow the Model Law's guidance that the tribunal always takes into consideration the terms of the contract and the applicable usages and practices of the trade,[209] even if the parties' chosen substantive law does not consider industry trade and customs.[210]

2. Decision Making and Contents of the Award

In the areas of decision-making, form, and correction of the award, the LoA largely follows the Model Law standards.[211] The award must be in writing, signed by the majority, stating the date and place,

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[203] LoA, *supra* note 104, art. 32(4).

[204] *Id.* art. 32(5). *Contra* LOPA, *supra* note 68, arts. 24, 27. It has been argued that the qualifying language in this article provides courts an opening to pierce the confidentiality protections when in the public interest. Tsertsvadze, Commentary, *supra* note 84, at 126.

[205] Although UNCITRAL did include confidentiality protections in its model law on conciliation. UNCITRAL, Model Law on International Commercial Conciliation, art. 9 (2004), http://www.uncitral.org/pdf/ english/ texts/ arbitration/ml-conc/03-90953_Ebook.pdf (last visited Feb. 23, 2015)[hereinafter Conciliation].

[206] Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1211 (2005-2006) [hereinafter Schmitz, *Privacy*].

[207] LoA, *supra* note 104, art. 36; Model Law, *supra* note 105, art. 28. The Model Law uses the words *rules of law* to emphasize that parties might wish to choose rules from more than one legal system. Model Law, *Analytical Commentary*, *supra* note 114, at 61-62 4. The original LoA used the more restrictive term *law* but the 2015 LoA Amendments brought the language into conformity with the Model Law. LoA Amendments, *supra* note 108, art. 1(13); LoA, *supra* note 104, art. 36(1).

[208] Model Law, *supra* note 105, art. 28(3). Arbitration decisions made *ex aequo et bono* or as *amiable compositeur* are based upon general principles of equity and justice, without reference to any specific national or international legal provisions. Model Law *Explanatory Note*, *supra* note 145, 40; Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept,* 14 Chi. J. Int'l L. 621 (2007-2008)(analyzing *ex aequo et bono* concept); Hong-lin Yu, *Amiable Composition–A Learning Curve*, 17 J. Int'l Arb. 79 (2000) (analyzing *amiable compositeur* concept).

[209] Although, in LoA arbitration, there might not be any trade practice. Recall that the jurisdiction of the LoA is more expansive than the Model Law and includes any property dispute that is private. LoA, *supra* note 104, art. 1(1).

[210] This is a potential area of uncertainty–there could be a conflict between the chosen substantive law and trade practice. The Model Law contains this language because it seeks to promote international commercial business. The LoA governs a wider range of cases.

[211] Majority rule is generally required for decisions. LoA, *supra* note 104, art. 37(1); Model Law, *supra* note 105, art. 29. Unlike the Model law, arbitrator abstentions are prohibited. *Id.* art. 37(2). This is similar to the LOPA. LOPA *supra* note 68, art. 34. Georgian judges are also not allowed to abstain. Georgia Civ. Proc. C., *supra* note 108, art. 243.

and including the reasons on which it is based, unless otherwise agreed.[212] Interestingly, the LoA also expressly allows for dissenting opinions.[213] This represents a useful nudge in the direction of reasoned decision-making and improved transparency.

3. Settlement

The LoA provides for the possibility of a negotiated settlement.[214] The LoA allows parties to settle their dispute, inform the tribunal and, at their request, convert their settlement agreement into an award.[215] The 2015 LoA Amendments changed this conversion procedure from a party right to an option, requiring tribunal approval.[216] Parties may settle at any time during the proceedings and the law ensures that the resulting award has the same force and effect as any other arbitral award.[217] This places a settlement on the same level as a court judgment, which the Georgian courts can enforce. Ordinarily, a negotiated or mediated settlement between two parties in Georgia constitutes nothing more than a contract, which requires a full-fledged lawsuit to enforce.[218]

H. Recourse Against Awards, Recognition and Enforcement of Awards

The Model Law's specific approach to recourse against awards, and recognition and enforcement of awards is preserved in the LoA. These rules attempt to balance the judicial interest in supervision against the arbitral interest in limited court intervention.[219] The first section is on recourse against the award (better known as "setting aside the award" or "annulment of the award") and the next section is on recognition and enforcement of awards.

1. Recourse against Award

Under the LoA, the arbitration award is not appealable except in limited circumstances. Allowing a party to easily appeal an arbitration award would take away one of the main advantages of arbitration, *i.e.*, its ability to deliver fast, cost-effective dispute resolution. Consistent with this interest, the LoA provides only limited grounds for the setting aside of an arbitral award.[220] Most importantly, none of these grounds involve a substantive review of the merits.[221] The LoA provisions are a copy of the Model Law, with one interesting exception. The LoA does not declare, as the Model Law does, that this provision represents the exclusive manner in which a setting aside may be achieved.[222] As a result, Georgian courts are not as restrained in the setting aside of an award as they would be under the Model Law.

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212 Model Law, *supra* note 105, art. 31; LoA, *supra* note 104, art. 39.

213 *Id.* This is consistent with the rules for Georgian courts. Georgia Civ. Proc. C., *supra* note 108, arts. 27, 243, 247

214 This is similar to the Model Law. Model Law, *supra* note 105, art. 30.

215 LoA, *supra* note 104, art. 38.

216 Explanatory Letter, *supra* note 125, § (a)(a.c.). This brings the LoA into better conformity with Model Law Article 30.

217 *Id.* art. 38(3).

218 There is an asymmetry between settlements achieved through mediation and negotiation on the one hand, and arbitration on the other hand. Because parties settling their case after the initiation of arbitration proceedings benefit from this expedited enforcement regime, there is an incentive to engage in arbitration. The passage of a mediation law based on the UNICTRAL Model Law on International Commercial Conciliation would eliminate the incentive because that law also includes the possibility for expedited enforcement features for mediated settlements. Conciliation, *supra* note 205, art. 14 and Guide to Enactment and Use of the UNCITRAL Model Law, 55, 87 (noting reasons for expedited enforcement).

219 *See* Binder, *supra* note 143, at 377-78.

220 However, it is unclear what happens to a case when an award is set aside. Japaridze, *supra* note 67, at 240-41. Does the tribunal divest itself of jurisdiction?

221 LoA, *supra* note 104, art. 42.

222 Model Law, *supra* note 105, art. 34. The 2015 LoA Amendments did attempt to rectify this shortcoming by adding the following language to Article 42(1), "[w]ithin the framework of this Law, the only procedural remedy against an arbitral award is setting aside an award, which can take place in accordance with paragraphs 2 – 5 of this Article." LoA Amendments, *supra* note 108, art. 1(17)(1). The Explanatory Letter to the Amendments expresses

2. Recognition and Enforcement[223] of Awards

One of the most salient changes in the Georgian arbitration system is in the area of recognition and enforcement of awards. The old LOPA regime provided only limited guidance for courts reviewing a challenge to award enforcement.[224] Courts could only suspend enforcement to prevent irreparable harm, and there was no public policy empowering courts to protect the public. Moreover, there was no provision for the enforcement of foreign arbitral awards.[225]

The LoA brings Georgia into consonance with current international norms. It follows the Model Law almost word for word on the rules of recognition and enforcement of awards.[226] There are two types of grounds under which a court may refuse recognition or enforcement, those that a party must raise and those that a party or court can raise, *ex officio*. These grounds are, with one exception, the same as those found in the rules on recourse against the award. The party-dependent grounds for refusal are:

- A party to the arbitration agreement lacked legal capacity;[227]
- The agreement is not valid under the governing law;[228]
- A party was not given proper notice of the appointment of an arbitrator or of the proceedings, or for other good reason, was unable to participate;[229]

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an intention to harmonize with the Model Law but then repeats the qualifying language that this article represents the exclusive remedy *within the framework of the Law on Arbitration*. Explanatory Letter, *supra* note 125, § (a)(a.c.). Although there is no obvious remedy outside the LoA, this language does not preclude an alternative. It is also noteworthy that the Model Law's applicable title states "Application for setting aside *as exclusive recourse* against arbitral award (emphasis added)," while the LoA's newly renamed Article 42 is merely entitled "Setting aside an arbitral award." Model Law, *supra* note 105, art. 34; LoA, *supra* note 104, art. 42.

223 In Georgia, no distinction is made between recognition and enforcement. Tsertsvadze, Commentary, *supra* note 84, at 175. The Model Law drafters believed that the distinction was important for theoretical and practical purposes. In theory, the recognition of an award has an abstract legal effect, manifesting automatically, without a party's request. *See* U.N. Comm'n on Int'l Trade Law Working Group on Int'l Contract Pracs., Rep. on the Work of its Seventh Session*,* 146, U.N. Doc A/CN.9/246 (1984).. In practice, the recognition of an award might be useful for *res judicata* purposes in another forum, unrelated to enforcement. Model Law, *Analytical Commentary*, *supra* note 114, at 76 4. Recognition is a declarative act, while enforcement requires an executory function.

224 Japaridze, *supra* note 67, at 232.

225 *Id.* The Georgian Supreme Court was reluctant to apply the New York Convention prior to the passage of the LoA. From 2000 – 2007, the Court rarely referred to the Convention. Tsertsvadze, Commentary, *supra* note 84, at 181.

226 Model Law, *supra* note 105, arts. 35-36.

227 Full personal legal capacity is reached at 18 years or whenever a person marries. Georgia Civ. C., *supra* note 108, art. 12. In 2004, the Georgian Supreme Court considered an institutional capacity question under the similar rules of the New York Convention, Article V(1)(a). The Court allowed recognition and enforcement of a London award holding that a Georgian company agent had valid authority to enter into the agreement despite the fact that the Georgian government had a controlling interest in the company and had not signed the agreement. R.L., Ltd. v. JSC Z. Factory, case a-204-sh-43-03 (2004), www.supremecourt.ge (unofficial translation available at http://www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Feb. 23, 2015).

228 This clause preserves the court's right as the final arbiter of agreement validity, notwithstanding the *competence-competence* doctrine in the LoA. In 2009, the Georgian Supreme Court allowed recognition and enforcement of a Russian award, rejecting the Georgian respondent's claim that the agreement was invalid under the governing, Russian law. S.F.M., LLC v. Batumi City Hall, case a-471-sh-21-09 (2009), www.supremecourt.ge, (unofficial translation available at http://www.newyorkconvention1958.org/index. php?lvl=more_results&look_ ALL=1& user_query=*&autolevel1=1&jurisdiction=92) (last visited Feb. 23, 2015).

229 In a Supreme Court case under the LoA, the Court held against a Georgian respondent that claimed lack of notice of a Latvian arbitration. JSC "P" v "L" LLC*,* case a-492-sh-11-2012 (2012), www.supremecourt.ge, (unofficial translation available at http://www.newyorkconvention1958.org/ index.php?lvl=more_results&look_ ALL=1 &user_query=*&autolevel1=1&jurisdiction=92) (last visited Feb. 23, 2015). *See also* S.F.M., LLC v. Batumi City Hall*, supra* note 228 (finding that the tribunal took all possible measures to ensure respondent's participation). In 2003, the Court rejected recognition and enforcement of a Ukrainian award on the basis of lack of notice and referenced the New York Convention Article V(1)(b), which uses the same language as the LoA. The Kiev […] Institute v "M," Scientific-Industrial Technological Institute of Tbilisi, case 3a-17-02 (2003), official text available at www.supremecourt.ge (unofficial translation available at http://www.newyorkconvention 1958.org/index. php?

• The award deals with a dispute not falling within the terms or scope of the arbitration agreement;[230]

• The composition of the tribunal or the procedure was not in accordance with the arbitration agreement or, if no agreement, the LoA;[231] or

• The award has not entered into force or was set aside or was suspended by the courts of the country where the award was rendered.[232]

The party challenging recognition or enforcement must raise and prove these arguments.

A party or the court, *ex officio*, can raise any of the second set of grounds for refusal. There is no clear burden of proof, but if the court finds the existence of either of these conditions, the award is fatally deficient. These grounds are of fundamental importance to the institution of arbitration and the state:[233] the subject matter of the dispute is not capable of settlement by arbitration under the law of Georgia,[234] or the award is contrary to public policy.[235]

As with the setting aside procedure, the LoA omits the exclusivity language of the Model Law for recognition and enforcement. Again, it appears that the drafters wished to provide wider court discretion in reviewing these applications. This is understandable given Georgia's problematic arbitration history, as long as the courts do not abuse their discretion.

3. Confusion Between the Two Sections

The two sections above have nearly identical grounds for setting aside or refusing recognition and enforcement of awards. As a result, the setting aside section might appear superfluous.[236] However, an application for setting aside may only be made in the country where the award was rendered.[237] Setting aside allows parties to challenge the award under the law of the country in which it was rendered, regardless of where enforcement is sought.[238] On the other hand, an application for enforcement can be made in any country.[239] The Model Law was drafted specifically for international arbitration and in this context, it is logical to provide for the two separate provisions since they often take place in different countries.

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lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=92) (last visited Feb. 23, 2015) (finding no documents confirming respondent was aware of proceedings).

230 *See* JSC "P" v "L" LLC*,* case a-492-sh-11-2012 (2012)*,* (holding Latvian award was enforceable and did not include any disputes beyond the scope of the arbitral agreement).

231 *See* R.L., Ltd. v. JSC Z. Factory, case a-204-sh-43-03 (2004), (finding respondent waived right to appoint arbitrator and thus could not complain about tribunal composition).

232 LoA, *supra* note 104, art. 45(a). The LoA leaves open the possibility of court discretion in enforcement proceedings where the award was set aside in the country of arbitration. The LoA language states that *if* a party proves this, then the court *may* refuse recognition and enforcement.

233 Binder, *supra* note 143, at 383.

234 Recall here the potential problem caused by the unclear standards for arbitrability under the LoA: is the dispute of a *private character*? LoA, *supra* note 104, art. 1(2).

235 *Id.* art. 45(1)(b).

236 Having both present for domestic arbitration may also lead to the *double control* problem–two opportunities for judicial review under the same grounds. *See* Renaud Sorieul, *The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration*, 2 Disp. Resol. Int'l 2735 (2008). For concerns about the setting aside procedure generally, see Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID Review 263 (2014).

237 Model Law *Explanatory Note*, *supra* note 145, 48.

238 U.N. Secretary-General, *Possible Features of a Model Law on International Commercial Arbitration*, 111 (1981) U.N. Doc. A/CN.9/207 (1981) [hereinafter 1981 UNCITRAL Report].

239 *Id.*; UNCITRAL Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards, Rep. of the U.N. Comm'n on Int'l Trade L. on Its Forty-Seventh Session, 15 (Oct. 2014), U.N. Doc. A/CN.9/814.
This has also been confirmed in the United States. See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*,* 126 F.3d 15 (2d Cir. 1997).

In contrast, the LoA applies to both international and domestic arbitration[240] and there has been some confusion as to how these two provisions relate to each other in the domestic context. There was a case in the Tbilisi Court of Appeals where the court did not find any public policy violations and enforced the award.[241] After enforcement, the defendants submitted an application to the same court to set aside the award. The court, in considering the set-aside application, held that the award's penalty provisions were in violation of public policy and were partially stricken.[242] The defendant was effectively allowed a second bite at the apple, despite the fact that the Court's first decision on recognition and enforcement was final and not appealable.[243] This clearly undermines the finality principle.

In response to this case and others, the 2015 LoA Amendments added a special sub-section to the setting aside provisions that instructs courts to dismiss any complaints if the requested grounds for setting aside were the same grounds rejected in an earlier claim for refusal of recognition and enforcement.[244] A parallel sub-section was also added to the recognition and enforcement provisions precluding unsuccessful claims made in prior setting aside proceedings.[245] While the *res judicata* doctrine in Georgia is beyond the scope of this article, it is perhaps indicative of the level of judicial confusion that the LoA needed to be amended to provide specific issue preclusion instructions to the courts.

4. International Awards

In connection with international arbitration, the passage of the LoA has brought Georgia into full compliance with the requirements of the New York Convention.[246] The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. In Georgia, it entered into force on August 31, 1994.[247] Over 140 countries have ratified the agreement, including all of Georgia's main trading partners.

Under the New York Convention, Georgia must enforce foreign arbitral awards. However, until the new LoA was passed, there was no clear method of enforcement. Now that the LoA is entered into law, there is a clear legal framework for the enforcement process. As Article 44 states, "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and... shall be enforced"...[248] This convention and its related international enforcement regime is one of the primary reasons why international businesses prefer arbitration to litigation.[249] In the event of a dispute, they can be assured that the award will be

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240 Almost half of the states that adopted the Model Law adopted it for both domestic and international arbitration. Binder, *supra* note 143, at 27.

241 Tbilisi Court of Appeal Case No. 2B/1262-11 (May 4, 2011).

242 Tbilisi Court of Appeal Case No. 2B/1638-11 (July 12, 2011).

243 Georgia Civ. Proc. C., *supra* note 108, art. 356^{21}(6); s*ee also* Japaridze, *supra* note 67, at 241-42 (discussing Georgian Supreme Court decision supporting the finality of a lower court decision on setting aside).

244 LoA Amendments, *supra* note 108, art. 1(17); LoA *supra* note 104, art. 42(5). The Explanatory Letter indicates that the drafters sought to prevent the Court of Appeals from continuing to issue "mutually contradictory decisions on one and the same ground [sic]." Explanatory Letter, *supra* note 125, § (a)(a.c.).

245 LoA Amendments, *supra* note 108, art. 1(20); LoA *supra* note 104, art. 45(2).

246 New York Convention, *supra* note 9.

247 *Id.*; Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www. uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 23, 2015).

248 LoA, *supra* note 104, art. 44.

249 *See* Loukas Mistelis, *International Arbitration–Corporate Attitudes and Practices–12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 Am. Rev. Int'l Arb. 525, 538 (2004). In contrast, litigation awards remain very difficult to enforce internationally. The new Convention on Choice of Court Agreements does allow for the recognition and enforcement of choice of forum clauses and resulting judgments in commercial disputes among signatory countries. The Hague Convention on Choice of Court Agreements, Hague Conference on Private International Law, June 30, 2005, 44 I.L.M. 1294, http://www.hcch.net/index_en. php?act= conventions. text& cid=98 (last visited Oct. 19, 2015). However, the Convention's geographic reach is limited–only Mexico and recently the EU (including EU Member States except Denmark) have ratified it, and the treaty entered into force on October 1,

enforceable almost anywhere in the world. Now that Georgia is part of this enforcement regime, international businesses should be more willing to invest in Georgia. It appears that the Georgia Supreme Court is willing to enforce foreign arbitral awards under the LoA and New York Convention, although it has added a requirement (contrary to those laws) that the moving party show proof that the award was not previously enforced in the country of arbitration.[250]

5. Public Policy

A Georgian court may set aside or refuse recognition and enforcement of an award if it is contrary to public policy,[251] although that term is not defined. The Model Law drafters stated that public policy covers "fundamental principles of law and justice in substantive and procedural respects".[252] There is also consensus that the exception is to be employed sparingly in only the most egregious cases.[253]

Before the LoA, there was limited judicial experience in Georgia with public policy issues in relation to arbitration.[254] Today, this exception has become an important part of the Georgian arbitration landscape. Georgian courts frequently set aside or alter awards on public policy grounds. The most common public policy question in Georgia arises from contractual penalties in the form of high interest rates.[255] In one case, the Tbilisi Court of Appeals held that an award was contrary to public policy where it contained penalties in excess of 5-6% annually.[256] Instead of refusing recognition and enforcement, the court recognized and enforced part of the award, effectively reducing the penalty portion of the award by over 40%.[257]

2015. *See* Press Release European Union Press Release, 432/15, Council of the European Union, Justice and Home Affairs (June 11, 2015), http://www.consilium.europa.eu/en/press/press-releases/2015/06/11-hague-convention/(last reviewed July 8, 2015) .

250 *See* Sophie Tkemaladze & Inga Kacevska, *Procedure and Documents Under Articles III and IV of New York Convention on Recognition and Enforcement of Arbitral Awards: Comparative Practice of Latvia and Georgia*, 1 Eurasian Multidisciplinary Forum 7 (October 24-26, 2013)(citing Case No. a-548-sh-10-11 and Case No. a-3573-sh-73-2012, both available at www.supremecourt.ge) [hereinafter Tkemaladze, Procedure]. This extra proof or double exequatur was abolished under the New York Convention. Albert Jan van den Berg, The New York Convention of 1958: An Overview, International Council for Commercial Arbitration 17, http://www. arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited Feb. 23, 2015). Tkemaladze believes that this practice will harm Georgia's international reputation. Id. at 8.

251 LoA, *supra* note 104, arts. 42(1)(b)(b.b.); 45(1)(b)(b.b.).

252 U.N. Comm'n on Int'l Trade L., Rep. on the Work of its Eighteenth Session, 297, U.N. Doc. A/40/17 (1985) [hereinafter 1985 UN Report] There appears to be consensus that the public policy exception generally covers both procedural and substantive justice, following the broad civil law *ordre public* concept, rather than the narrower common law construct. *Id.* 296-97; Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 Arb. Int'l 333, 334 (2004).

253 The most-quoted explanation is from Parsons & Whittmore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier RAKTA and Bank of America, where the court held that enforcement of a foreign arbitral award may be denied due to public policy under the New York Convention "only where enforcement would violate the forum state's most basic notions of morality and justice." 508 F. 2d 969, 974 (2d Cir., 1974).*Id.*

254 LOPA, *supra* note 68, contained no public policy exception for judicial review of arbitral awards. The Soviet system also had no real experience with judicial enforcement of arbitral awards since the Soviet enterprises voluntarily complied with most awards. *See* Vesselina Shaleva, *The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia*, 19 Arb. Int'l 67, 79-85 (2003).

255 Tkemaladze, *New Law*, *supra* note 73, at 669.

256 Tsertsvadze, Commentary, *supra* note 77, at 205 (citing Tbilisi Court of Appeals materials and Tbilisi Court of Appeals Case No. 2B/1452-11(June 22, 2011)).

257 *Id. See also* Tkemaladze, *New Law*, *supra* note 73, at 669 (citing Basis Bank v. Kapanadze, Tbilisi Court of Appeals Case No. 2B/1604-11 (May 31, 2011)(court found penalty rate of 0.1% per day excessive and reduced award to 2% per month)). *Contra* Inter Maritime Management SA v. Russin & Vecchi, Bundesgericht [BGer] [Federal Supreme Court] Jan. 8, 1995, XXII Y.B. Comm. Arb. 789 (1997) (Switz.)(concluding arbitral award containing violation of Swiss law prohibiting compound interest did not necessarily constitute *public policy* violation).

In another lender penalty interest case, the Tbilisi Court of Appeals declared a high penalty contrary to public policy and proceeded to re-allocate the award among three different defendants.[258]

There are two problems with the above practice. The first is the failure to define Georgian public policy in connection with arbitration. The courts appear to assume, without any explanation, that any violation of Georgian law on penalty interest constitutes a public policy violation under the LoA. The second is the unauthorized remedies for a violation of that public policy. The authority for the current judicial practice of altering awards is, at best, unclear.[259] Under the LoA, courts are authorized to *refuse* recognition and enforcement if the award violates public policy, but not *alter* the award. One legal body has argued in favor of this kind of judicial flexibility in connection with the public policy exception.[260] However, there is no clear authority for this under the Model Law or the LoA.[261]

In the international context, the Georgian Supreme Court considered the public policy exception in connection with a petition to enforce a Latvian arbitral award. The court stated that "public policy is a fundamental principle in relations governed by the Civil Code".[262] The court analyzed whether a Civil Code provision, limiting a secured creditor's recovery to the amount realized in a sale of the debtor's property, was violated by the Latvian award. It determined that the award did not contradict the debtor protections in the Georgian Civil Code and thus allowed recognition and enforcement.[263] Although the court's dictum *was* limited, it appeared willing to accept that a violation of the Civil Code would automatically constitute a violation of Georgian public policy.

Such a stance would be contrary to international consensus that an award's effect might be in violation of national laws of the enforcement country but *not necessarily* in violation of that country's public policy under the New York Convention and Model Law.[264] Under these international norms, the court must undertake a second-level analysis to determine whether the violation of national law rose to the level of a violation of basic morality and justice.[265] For example, a Swiss court found that a foreign award containing a violation of Swiss law prohibiting compound interest did not necessarily constitute a public policy violation.[266] The Georgian Supreme Court found no violation of Georgian law in the award so it did not have to make this second-level analysis. It is possible that that particular debtor protection provision implicates Georgian public policy but that would need to be analyzed and explained. It is important that the court understand the limits of the public policy exception and use the appropriate methodology to reach the right results.

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258 Tsertsvadze, Commentary, *supra* note 77, at 206 (citing Tbilisi Court of Appeals Case No. 2B/2828-10 (Nov. 26, 2010)).

259 Georgian law allows courts to reduce excess penalty interest in civil cases, but not necessarily when reviewing arbitration awards. Georgia Civ. C., *supra* note 10810, art. 420. 356.

260 New Delhi Conference, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, Int'l Law Assoc. Rec. 1(h) (2002).

261 Under LOPA, courts were allowed to change awards and this may be where the practice originates. LOPA, *supra* note 68, art. 43.

262 JSC "P" v "L" LLC*,* case a-492-sh-11-2012, at 4, Supreme Court of Georgia (2012).

263 *Id.*

264 Giuditta Cordero-Moss, *International Arbitration is Not Only International*, *in* International Commercial Arbitration: Different Forms and their Features 7, 21 (Giuditta Cordero-Moss ed., 2013). In Scherk v. Alberto-Culver Co., the U.S. Supreme Court recognized that there was a narrower public policy construct under the New York Convention, and enforced an international arbitral agreement acknowledging that the same such agreement, had it been domestic, would have been against the law. 417 U.S. 506 (1974). The public policy exception does not exist to ensure full compliance with the court's legal system. Cordero-Moss at 21-22.

265 *See* Alan Redfern, Martin Hunter, Nigel Blackby & Constantine Partasides, Redfern and Hunter on International Arbitration 11.109, 11.111-112 (2009); Dirk Otto and Omala Elwan, *Article V(2), in* Recognition and Enforcement of Foreign Arbitral Awards: A Global commentary on the New York Convention 365 (Herbert Kronke & Patricia Nacimiento eds., 2010).

266 Inter Maritime Management SA v. Russin & Vecchi, [BGer][Federal Supreme Court] Jan. 8, 1995, XXII Y.B. Comm. Arb. 789 (1997)(Switz.).

V. Statutory Recomendations

A. Better Clarity on Scope

The LoA states that it applies to *property disputes of a private character.*[267] More clarity on these terms would improve predictability. Parties may be reluctant to engage in arbitration if there is the threat that a court will set aside or refuse to enforce an award on the basis of arbitrability. Even if these terms are clear to Georgian professionals, foreign parties may have reservations about engaging in arbitration in Georgia if the subject is not clearly a property dispute of a private character.

B. Consider Ex Aequo Et Bono and Amiable Compositeur

The LoA omits the Model Law's section allowing for the parties to decide a case on the principles of *ex aequo et bono* ("according to the right and good"), or as *amiable compositeur*. Both concepts provide for decisions based upon general principles of equity and justice, without reference to any specific national or international legal provisions.[268] They allow for flexible and fair results that might be difficult under governing law.[269] For instance, *amiable compositeurs* can limit the effects of a contractual penalty clause and balance the financial interests of the parties.[270] Both concepts have gained acceptance internationally[271] and might be a useful tool for certain disputes where the parties have unequal bargaining power, such as employer-employee disputes,[272] or where the parties seek to preserve a relationship.[273] While these concepts may be foreign to Georgian practitioners, the idea of designing awards based on equity and fairness are not. The parties should have this as an option.

C. Alter the Requirement to Consider Industry Practices in Awards

The LoA follows the Model Law in requiring the tribunal to take into account usages and practices of trade. There are obviously sound reasons for this.[274] It is particularly relevant for international arbitration.[275] However, there may be domestic cases of unequal bargaining power where usages and practices of the trade are stacked against the individual. For instance, it may be normal practice to provide limited redemption rights or impose penalty interest on borrowers. If the tribunal is not forced to consider industry practice, it may be able to provide a more equitable result for the individual.[276] The LoA should be amended to remove this requirement for consumer arbitration.

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267 LoA, *supra* note 104, art. 1(2).

268 *See* Trakman, *supra* note 208; Yu, *supra* note 208; *see also* Laurence Kiffer, *Nature and Content of* Amiable Composition, 5 Int'l. Bus. L.J. 625 (2008).

269 Kiffer, *supra* note 268, at 630-33.

270 *Id.* at 631-32.

271 The concept of *ex aequo et bono* has spread all over the world. *See* Trakman, *supra* note 208, at 631-32; Mark Hilgard & Ana Elisa Bruder, *Unauthorised Amiable Compositeur,?* 8 Disp. Res. Int'l 51 (2014).

272 Trakman, *supra* note 208, at 623 n.8.

273 *Id.* at 624.

274 *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 Vand.J.Transnat'l L. 79 (2000).

275 *Id.* at 110-32; Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage Into Domestic versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages Under the CISG*, 5 Chi. J. Int'l L. 181, 181 (2004).

276 There is a school of thought that questions the appropriateness, in general, of incorporating commercial norms into commercial law. *See, e.g.,* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1995)(arguing commercial norms for relationship preservation are inappropriate for end-game adjudication).

D. Promote the Remission Process

Georgian courts appear to be modifying and then enforcing awards under the public policy exception. This has a dubious legal foundation and encourages tribunals to be somewhat improvident in their award construction. If the court can simply modify the award to comply with any legal infirmities, there is no real consequence for the tribunal or the arbitration provider. It would be better if the tribunal were allowed to remedy its own mistakes. A more robust remission process would improve matters because it is better to remit than to have the courts modify the offending awards themselves.

The original LoA Article 44(3) allowed for the enforcement court to suspend proceedings for up to 30 days,[277] but was stricken in the 2015 LoA Amendments.[278] This could be brought back in an expanded form that includes remission powers. Under the old Article 44(3), Georgian courts occasionally acted as though this power existed.[279] This proposed change would place the courts' remission practice on firmer statutory grounds. It would promote the rule of law and respect for the tribunals, lead to improved arbitral awards and preserve arbitration autonomy.

E. Streamline Enforcement for Foreign Awards

The Georgian Supreme Court appears to have added, in practice, an extra requirement for parties seeking to enforce a foreign arbitral award. The party must show that the award was not previously enforced in the host country.[280] This is contrary to the intentions of the Model Law and Georgia's commitments under the New York Convention. Even the LoA has no such requirement.[281] Unfortunately, there is no easy remedy–one cannot lecture the Supreme Court. But an amendment to the LoA could make clear that the technical requirements for recognition and enforcement in Article 44 are exclusive and cannot be expanded.

F. Clarify Public Policy

An effort should be made to clarify the parameters of Georgian public policy in connection with arbitration. This could be accomplished through legislative action or a special judicial task force. Although this is not easy, more clarity on public policy would promote predictability and limit judicial incursions into the arbitration regime.

VI. Solutions to the mandatory arbitration problem

Mandatory arbitration is a large part of the Georgian arbitration system. While mandatory arbitration offers potential benefits for firms, such as faster and cheaper dispute resolution,[282] it also has significant drawbacks. When a consumer waives her rights to court, she may lose important procedural safeguards, such as discovery or publicly-financed legal assistance. Moreover, the individual loses the opportunity for public vindication or retribution.[283] In addition, arbitration privacy prevents the public from learning about

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277 LoA, *supra* note 104, art. 44(3). This is not found in the Model Law.

278 LoA Amendments, *supra* note 108, art. 1(19) ("article 44(3) is deleted").

279 *See* Tsertsvadze, Commentary, *supra* note 77, at 113, n.407.

280 *See* Tkemaladze, *Procedure*, *supra* note 250, at 7-8.

281 Article 44(2) sets forth the technical filing requirements. LoA *supra* note 104, art. 44(2).

282 Mandatory arbitration has its defenders. *See, e.g.,* Jason Scott Johnson, *The Return of Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857 (2006); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (2001); Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 Me L. Rev. 531 (2010).

283 George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 Tex. L. Rev. 665, 685 n.131 (2013).

a party's bad actions[284] and reduces the likelihood of remedial regulatory action.[285] Arbitration privacy can limit public awareness of important social issues[286] and remove the deterrent effect of a public judgment on other entities.[287] Arbitrators themselves have limited accountability, due to the private nature of their work, immunity from judgment,[288] and limited court involvement.

One notable issue is the *repeat player* problem. The premise is that for-profit arbitral centers[289] compete with one another for the companies' repeat dispute resolution business.[290] Because these companies are drafting the agreements, the providers have an incentive to offer products more favorable to them.[291]

The products that these providers offer to their clients may intentionally or unintentionally provide an advantage to their clients. An example of intentional bias would be the marketing of arbitral providers to businesses promising a pro-business product,[292] and the removal of individual arbitrators from the provider's list for failure to issue business-friendly awards.[293] An example of unintentional bias is the natural business and social friendships that come with a long-term, ongoing business relationship between the provider and its corporate clients.[294] Another example is the repeated use of industry insiders as arbitrators. Although neutrals' expertise is viewed as one of arbitration's advantages, the insider may have a general bias in favor of the industry.[295] Moreover, the expert will want to continue to receive arbitrator appointments (from the arbitration provider or the corporate party), and may consider this in her decision making.[296]

The Model Law and LoA assume that parties enter into an arbitration agreement as a product of their free will.[297] Yet, this consent is problematic when a consumer is forced to agree to arbitration as part of a standard form contract.[298] The consumer has no bargaining power when a business presents the pre-dispute arbitration clause on a take-it-or-leave-it basis.[299] The consumer may not even be aware that she has waived her rights of access to the judicial system.[300] Moreover, most consumers do not think about future disputes when purchasing products. Even if they did, they would not fully understand the risks.[301]

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284 Schmitz, *Privacy, supra* note 206, at 1232.

285 Michael A. Satz, *How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 Temp. Pol. & Civ. Rts. L. Rev. 123, 145 (2010).

286 *Id.* at 146.

287 Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395, 431 (1999).

288 Although, in Georgia, arbitrators are not immune from criminal liability for willful behavior. *See* Tsertsvadze, Commentary, *supra* note 77, at 115 (citing Article 332 of the Georgian Criminal Code).

289 Miles B. Farmer, Mandatory and Fair? A Better System of Mandatory Arbitration, 121 YALE L. J. 2346, 2356 (2012); Jeff Guarrera, *Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability*, 40 W. St. U. L. Rev. 89, 93 (2012).

290 See Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 Stan. L. Rev. 1631, 1650 (2005).

291 *Id.*

292 Farmer, *supra* note 289, at 2359.

293 *Id.*

294 *See e.g.*, Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 Nev. L.J. 214, 217 (2007).

295 *See* Guarrera, *supra* note 289, at 93-94 ("Prosecutors do not get to choose judges who worked as prosecutors.").

296 *See* Farmer, *supra* note 289, at 2357; Guarrera, *supra* note 289, at 93-94; Satz, *supra* note 285, at 143. *See also* Alexander O. Rodriguez, *The Arbitrary Arbitrator: The Seventh Circuit Offers a Lending Hand* [Green v. U.S. Cash Advance Ill. LLC, 724 F.3d 787 (7th Cir. 2013)], 53 Washburn L.J. 617, 636 (2014) ("Because arbitrators compete for clients, it is imperative that they develop a strong brand and reputation in certain industries").

297 *See* 1981 UNCITRAL *Report*, *supra* note 238, at 78, 18.

298 *See* Friedrich Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contract,* 43 Colum. L. Rev. 629 (1943); Padis, *supra* note 283, at 684. *See generally* Alan Scott Rau, *Arbitral Jurisdiction and Dimensions of 'Consent,'* 24 Arb. Int'l 199 (2008)(discussing consent in commercial arbitration).

299 Padis, *supra* note 283, at 684; Farmer, *supra* note 289, at 2359 (2012); David S. Swartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 57-59. *But see* Steven J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington and Haagen),* 29 McGeorge L. Rev. 195 (1998).

300 *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 Stan. L. Rev. 1631, 1648 (2005). Behavioral science studies have found that consumers are "boundedly rational" and can only take a few product attributes

The parties are also in unequal positions during the arbitration process. The repeat corporate client, unlike the one-time individual, can evaluate the relative favorability of its past arbitrators and choose accordingly.[302] This informational asymmetry is compounded by an experiential asymmetry. The corporation's attorneys, unlike the individual, choose the forum and rules, and gain practical experience, learning from mistakes.

These repeat player abuses were heavily publicized in July, 2009 when the National Arbitration Forum (NAF), one of the largest providers in the United States, was forced to exit the consumer arbitration business.[303] Three days later, the American Arbitration Association voluntarily suspended all consumer debt arbitration.[304] These events help promote legislative efforts to limit mandatory consumer arbitration in the United States, similar to limitations in the European Union.[305] Despite this, the incidence of mandatory arbitration for U.S. consumers is increasing,[306] and it remains prevalent in many consumer areas.[307] Thus far, empirical studies on mandatory arbitration for U.S. consumers have yielded mixed results.[308]

In Georgia, the use of mandatory arbitration in consumer contracts appears to be widespread.[309] Georgian consumers are no more likely to consider or understand arbitration clauses or bargain them away than

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into account when making a decision. Since arbitration is usually not among these considered attributes, corporate drafters have an incentive to include them in their standard terms. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003).

301 Consumers will usually assume that events of remote likelihood will not happen to them and will thus underestimate the associated risks. Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 Rev. Econ. Stud. 561 (1977). This has been called hyperbolic discounting. Benjamin A. Malin, *Hyperbolic Discounting and Uniform Savings Floors,* 92 J. Pub. Econ. 1986 (2008).

302 Schmitz, *Privacy, supra* note 206, at 1232; Satz, *supra* note 285, at 143.

303 Rob Gordon, *Binding Pre-Dispute Agreements: Arbitration's Gordian Knot*, 43 Ariz. St. L.J. 263, 263 (2011).

304 Press Release, American Arbitration Association, *The American Arbitration Association® Calls For Reform of Debt Collection Arbitration: Largest Arbitration Services Provider Will Decline to Administer Consumer Debt Arbitrations until Fairness Standards are Established* (July 23, 2009) https://www.nclc.org/ images/pdf/ arbitration/testimonysept09-exhibit3.pdf (last visited Oct. 7, 2015).

305 U.S. efforts from 2007-2015 have centered on an Arbitration Fairness Act (AFA), which has yet to pass into law. For comparisons of current U.S. and EU consumer protections in this area, see Jon Fischer, C*onsumer Protection in the United States and European Union: Are Protections Most Effective Before or After a Sale?,* 32 Wis. Int'l L.J. 308 (2014); Amy Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 Loy. U. Chi. Int'l L. Rev. 81 (2013)[hereinafter Schmitz, *Exceptionalism*]; Tilman Niedermaier, *Arbitration Agreements Between Parties of Unequal Bargaining Power – Balancing Exercises on Either Side of the Atlantic*, 39 ZDAR 12 (2014). Some European scholars have discussed whether these arbitration provisions implicate Article 6(1) of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial by an independent and impartial tribunal. William Robinson & Boris Kasolowsky, *Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?,* 18 Arb. Int'l 453 (2002); *but see* Neil McDonald, *More Harm than Good? Human rights Considerations in International Commercial Arbitration*, 20 J. Int'l Arb. 523, 537 (2003). Georgia ratified the ECHR in 1999. *See* Georgia, Press Country Profile, European Court of Human Rights (Jan. 2015), http://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf (last modified Jan. 2015).

306 *Arbitration Study–Report to Congress, Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act §1028(a)*, Consumer Financial Protection Bureau (March 2015), Section 2, 11-13, 15-17, 20), http:// files. consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (last visited Oct. 19, 2015) [hereinafter *Arbitration Study*]. The Consumer Financial Protection Bureau (CFPB) conducted the *Arbitration Study* pursuant to § 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010)[hereinafter Dodd-Frank].

307 *Arbitration Study*, *supra* note 306, at Section 1, 9-10.

308 For examples of studies showing repeat player and other bias in mandatory consumer arbitration, see Gordon, *supra* note 303, at 273; John O'Donnell, Public Citizen*, The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 15 (2007) http://www.citizen.org/documents/Arbitration Trap.pdf (last visited Sept. 13, 2015). For examples tending to disprove bias or argue that arbitration results are no better than litigation for consumers, *see* Jacobs, *supra* note 282, at 538-40 (reviewing empirical studies to date); Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association* 109-13 (2009), https://www.adr.org/aaa/ ShowPDF?doc=ADRSTG_010205 (last visited Sep. 13, 2015) [hereinafter Searle Study]. *See also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study on AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010) (finding evidence of repeat player effect from better case screening of repeat players not from bias).

309 For many of the providers, mandatory consumer arbitration represents the majority of their cases. Tkemaladze, *New Law*, *supra* note 73, at 668-69.

American consumers. Many of the repeat player effects may also be present. The Georgian arbitration providers are for-profit entities, competing for repeat business from corporate clients.[310] Some providers even offer discounted fees for corporate clients.[311] Most providers administer consumer arbitration with a single arbitrator, chosen by the center.[312] There is a limited pool of qualified Georgian arbitrators, which increases the likelihood of repeat player issues.[313] Most troubling, the largest numbers of cases are related to financial or insurance companies collecting debts against consumers,[314] the area of greatest abuse in the United States While there is no evidence to suggest that Georgian arbitration providers or arbitrators are engaging in anything illegal, the incentives appear to be stacked against the consumer. One of the largest Georgian providers admitted to having a 100% win rate for its bank clients.[315] Georgian law does not provide for personal bankruptcy protection, so many of these collection awards can stay with borrowers for life.[316]

A. Arbitrability

To protect weaker parties, Georgia could limit arbitrability by legislating to exclude certain groups or types of disputes from arbitration.[317] For instance, the legislation could exclude any disputes relating to the collection of a consumer debt in connection with a credit card or bank loan. The advantage of this approach is simplicity–the public would understand that these disputes are not arbitrable. The United States took this approach in the Dodd-Frank Act, which excludes mandatory arbitration clauses in consumer mortgage contracts,[318] and the Arbitration Fairness Acts, which ban pre-dispute arbitration agreements in employment, consumer, antitrust, and civil rights disputes.[319] France bars pre-dispute mandatory arbitration clauses in consumer contracts.[320] Germany prohibits disputes relating to a residential lease and employment matters.[321] And England bans arbitration if the amount in controversy is less than £5,000.[322]

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310 *Id.* at 668 (noting all providers are commercial entities).

311 A highly-regarded Georgian arbitration center has this provision in its rules (its own English translation): On the base of contract concluded between DRC and corporative client (client which considers arbitration clause in contracts concluded in the range of his business and indicates DRC as line item actual arbitration), *for disputes related to corporative client may be determined different amounts of arbitration charge and different terms of their payment other than those stipulated under these Regulations.* DRC Arbitration Rules, *supra* note 129, art. 29.20 (emphasis added).

312 Tsertsvadze, Commentary, *supra* note 77, at 104.

313 *See* Satz, *supra* note 285, at 147-48 ("The limited obtainability of arbitrators makes it more likely that the available arbitrators have heard multiple cases within a given industry and also more likely that the arbitrators have heard multiple cases from the same company").

314 Michael D. Blechman, *Assessment of ADR in Georgia*, East West Management Institute at 4-6 (Oct. 2011), http://www.ewmi-jilep.org/images/stories/books/assessment-of-adr-in-georgia.pdf, (last visited Sept. 13, 2015).

315 *Id.* at 4.

316 *Id.*

317 One Georgian scholar has recommended an arbitration ban for Georgian consumers. Tkemaladze, *New Law*, *supra* note 73, at 671.

318 Dodd-Frank, *supra* note 306, 15 U.S.C. §1639c(e) (2010). *See also* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?,* 81 Geo. Wash. L. Rev. 856, 907 (2013)("Dodd-Frank bans mandatory arbitration provisions in mortgage and home equity loan contracts.").

319 Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013-2014), C.R.S., *available at* https://www. congress.gov/bill/113th-congress/senate-bill/878 (last visited Oct. 7, 2015). *See generally* Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Ac*t, 9 Cardozo J. Conflict. Resol. 267 (2008); Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?,* 94 Iowa L. Rev. 1075 (2008); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 Hous. L. Rev. 457 (2011).

320 Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response,* 47 Am. Bus. L.J. 361, 391 (2010)(citing French laws); Peter B. Rutledge & Anna W. Howard, *Arbitrating Disputes Between Companies And Individuals: Lessons From Abroad,* 65 Disp. Resol. J., 30, 34 (2010)(citing French laws).

321 Niedermaier, *supra* note 305, at 17 (citing Zivilproziessordnung [ZPO] [Code of Civil Procedure] Jan. 30, 1877, Reichsgesetzblatt [RGBt] 97, as amended, §§1025 *et seq.,* http://www.gesetze-im-internet.de/englisch_zpo/ englisch_zpo.html (last visited Sept. 13, 2015).

Yet, under this approach a state loses the benefits of arbitration. Businesses will likely incur increased costs, which either reduces their profitability or is passed on to consumers in the form of higher prices.[323] It also foists all these disputes back on the court system, increasing case congestion and resolution time.[324] Instead of knowledgeable experts, generalist judges would try the disputes. Moreover, as some studies indicate, it is not clear that consumer outcomes improve in litigation.[325] Collection matters constitute the majority of the cases and success rates for these types of cases are generally high in courts, too.[326] Finally, it might deal a crippling blow to Georgian arbitration generally. It could irrevocably harm the reputation of arbitration, putting many of the providers out of business and reducing arbitration's availability in other legal matters.

B. Form Requirements and Judicial Review

Another possible solution is to introduce form requirements in consumer contracts and allow for expanded judicial review and increased consumer awareness. For instance, German consumer arbitration agreements must be isolated in a separate document that is signed by both parties.[327] In the United States, this kind of requirement is not permissible in most contracts.[328] However, the CFPB is empowered to study consumer arbitration in financial agreements and may issue form requirements, among other regulations, in the future.[329] Among the clauses the CFPB is reviewing are opt-outs,[330] carve outs,[331] fees and costs allocations,[332] and disclosures.[333]

Judicial review is the natural extension of form requirements. EU Council Directive 93/13/EEC (Council Directive 93)[334] has played an important role in this regard. Council Directive 93 declares any mandatory arbitration clause in a consumer contract presumptively unfair.[335] While these clauses are not formally excluded, subsequent European Court of Justice decisions have held this to be part of public policy and must be reviewed by the EU national courts *sua sponte*, for fairness and compliance with Council Directive 93.[336]

One problem with form requirements, and its attendant expansion of judicial review, is increased costs. Allowing expanded judicial review in each individual case would lead to longer resolution times and undermine the important arbitration principle of finality.[337] Furthermore, without the common law device

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322 Schmitz, *Exceptionalism, supra* note 305, at 98 (English Arbitration Act of 1996 bars pre and post-dispute arbitration clauses to protect individuals' access to small claims courts).

323 *See* Ware, *supra* note 282 (arbitration lowers business costs and competition forces businesses to pass on savings to consumers). *But see*, Arbitration Study, *supra* note 305, at section 10, 16-17 ("we did not find statistically significant evidence to support the hypothesis that companies realize and pass cost savings relating to their use of predispute arbitration clauses to consumers in the form of lower prices").

324 Georgian arbitration proceedings averaged one to three months compared to one year in the courts. Blechman, *supra* note 314, at 4.

325 *See, e.g.,* Searle Study, *supra* note 308. Litigation may also have some of the same repeat player biases that are found in mandatory arbitration. Marc Galanter, *Why the Haves Still Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974) (arguing litigation system benefits repeat players). *See also* Gordon, *supra* note 303, at 274-5 (arguing litigation has tilted playing field against consumers).

326 *See* Gordon, *supra* note 303, at 282 (citing various empirical studies in the United States).

327 Niedermaier, *supra* note 305, at 18; ZPO, *supra* note 321, §1031(5).

328 *See* Margaret L. Moses, *Privatized "Justice,"* 36 Loy. U. Chi. L.J. 535, 545-47 (2005).

329 *See Arbitration Study*, *supra* note 306.

330 *Id.* at Section 2, 31 (consumer is given limited time to submit notice of opting out of arbitration agreement).

331 *Id.* at Section 2, 32 (certain types of claims are 'carved out,' from, or not subject to, arbitration agreement).

332 *Id.* at Section 2, 57 (attorney's fees and costs contractually allocated among parties).

333 *Id.* at Section 2, 51 (contract discloses risks of arbitration such as limited appeals).

334 Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29-34, http://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri =CELEX:31993L0013:en:HTML.

335 *Id.* art. 3(1), Annex.

336 Niedermaier, *supra* note 305, at 18.

337 Farmer, *supra* note 289, at 2363-64.

of *stare decisis*, there may be inconsistent results from different Georgian judges. This would lead to uncertainty and make it difficult for drafters to craft valid agreements. The Georgian judiciary is still adjusting to the LoA and its limited court intervention norms. Expanded judicial review would reverse that trend and cause confusion.

C. The "DAL" solution

The best solution involves a combination of measures designed to improve arbitration without excluding consumers. The solution focuses on three areas: disclosure, appointment and licensing (D.A.L.).

1. Disclosure

Arbitration providers should be required to disclose a limited amount of basic data regarding mandatory arbitration. Information could include: (i) the identity of the non-consumer party; (ii) the type of dispute; (iii) the identity of arbitrator(s); and (iv) the result. Ideally, providers would make this information public on websites or upon request. At a minimum, it would be submitted to the appropriate public agencies, including an Independent Appointing Authority (IAA, below). California recently enacted a similar disclosure regime[338] to positive effect.[339] Although disclosure alone will not change consumer behavior, it would promote transparency and improve tribunal behavior.[340] It would allow the public to assess whether there is a systemic problem with a particular provider. It might even shame some companies into avoiding a suspect provider. It would also provide information to the IAA (below) about possible impartiality and help arm individuals with better information during the appointment process.

2. Appointment

The LoA follows the Model Law rules on arbitrator appointment. They are appropriate for international arbitration and domestic arbitration between commercial actors.[341] However, the appointment process needs to be modified for mandatory consumer arbitration where the sole arbitrator is appointed by the provider. Fairness demands that the sole arbitrator be truly neutral and impartial. The law should improve arbitrator impartiality by removing the provider from the appointment process. The LoA already provides a partial solution: when there is one arbitrator, the parties must try to agree on the appointment, and if they fail to agree, a party may request court appointment.[342] This is in effect unless the parties have agreed to a different process. One solution is to remove the option for parties to agree otherwise and make this the required appointment rule for consumer arbitration.[343] Court appointment does have drawbacks. Courts are not involved with arbitration on a regular basis and may not have the ability to choose the most suitable arbitrator.[344] Courts are also busy, and the wheels of justice may take a long time to effect the appointment.[345] Finally, according to one expert, Georgian courts have been reluctant to engage in the appointment process.[346]

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338 *See* Cal. Civ. Proc. Code §1281.96(a) (West 2015).

339 It allowed for the public to better study how arbitration was working. *See, e.g.,* Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Metro. Corp. Couns. 32 (July 2006), http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf (analyzing results of arbitration data made available due to disclosure rules).

340 On the other hand, some may continue to proudly market their services as business-friendly.

341 One local expert has recommended moving to joint-selection of Georgian arbitrators. Giorgi Narmania*, Party-Appointed Arbitrators: Past, Present and Future*, 2014 Alt. Disp. Resol. Y.B. Tbilisi St. U., 106, 120-21.

342 LoA, *supra* note 104, art. 11(3)(b).

343 Gordon*, supra* note 303, at 285 (recommending court and joint approval appointment for consumer arbitration).

344 Akseli, *supra* note 126, at 252.

345 *Id.*

346 *See* Tsertsvadze, Commentary, *supra* note 77, at 105-06.

A better default solution, if the parties cannot agree, is to direct the appointment burden to an Independent Appointing Authority (IAA). The IAA could be a person or an institution, such as the President of the Georgian Bar Association or the GBA itself.[347] It could be the Georgian Arbitration Association or an outside organization. Or, it could be a specially trained and designated authority appointed by the Ministry of Justice. The main point is to remove the appointment authority from the compromised institutions. The 2015 LoA Amendments expanded the appointment authorities to include not only courts but also "any institution" so the law is already moving on this direction.[348]

In order to preserve the party autonomy principle, the list system of appointment should be employed. The American Arbitration Association and other fora use the list system.[349] Under the UNCITRAL Model Arbitration Rules, for instance, if the parties cannot agree on a sole arbitrator, the appointing authority provides each party with an identical list of potential arbitrators.[350] Each party has a limited period of time to return the list with the names it has deleted (without cause),[351] ranking in preference the remaining names.[352] The authority then makes the appointment based on the parties' preferences.[353] If there are no common names from the two sides' returned lists, the authority makes the appointment at her discretion.[354] Although the list system is slower than direct provider appointment, it gives the parties an opportunity to express their choice and feel part of the process–an important principle that is missing from Georgian consumer arbitration.[355] The list system also guards against the actual or perceived impartiality of the IAA. It mitigates the repeat player problems because providers do not control the arbitrator list and arbitrators do not have an incentive to assist the institutional parties. It will also improve public perceptions of arbitration.

There are two disadvantages to empowering an IAA. First, it will slow down the process when compared to direct provider appointment, especially if a list system is employed.[356] But the gains in fairness, and perceptions thereof, might be worth the increased time spent on appointment. Second, it will not be popular with the providers as they will lose control of arbitrator appointment.[357] On the other hand, if these institutions want to continue to receive high-volume consumer cases, this might be the only feasible way for them to continue. The alternative may be a blanket consumer arbitration prohibition. Finally, an IAA might help improve these institutions' reputation, promoting further demand for arbitration in the future.

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347 *See* Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 200 (3rd ed. 1999).

348 *See* Explanatory Letter, *supra* note 125, §(a)(a.c.) ("another change related to rules of appointment of an arbitrator(s) specifies that arbitrators may be appointed not only by a court but also by any institution (if the parties have agreed so)").

349 *See, e.g.,* AAA Rules, *supra* note 143, at R. 12 (2013).

350 G.A. Res. 65/22, UNCITRAL Arbitration Rules, art. 8 (2010), http://www.uncitral.org/pdf/english/ texts/ arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Oct. 7, 2015)[hereinafter UNCITRAL Arb. Rules].

351 In the United States, the striking of a name (without cause) is sometimes called a *peremptory challenge*.

352 UNCITRAL Arb. Rules, *supra* note 350, art. 8(2). The number of peremptory challenges (not challenges for cause) could be limited so that there is a higher likelihood of at least one mutual name, thus reducing the chances of having the appointing authority step in to make the appointment. *See, e.g*., AAA *Securities Arbitration Supplementary Procedures*, R. 3(a) (2009), https://www.adr.org/cs/groups/commercial/documents/document/dgdf/ mda0/ "edisp/adrstg_004107"1.pdf. (last visited Feb. 23, 2015).

353 UNCITRAL Arb. Rules, *supra* note 350, art. 8(2).

354 *Id.* art. 8(2)(d).

355 MacNeil, *supra* note 127, at §27:3:6:1 (noting importance of parties' equal participation in selection process).

356 Douglas Earl McLaren, *Party-Appointed vs. List-Appointed Arbitrators: A Comparison*, 20 J. Int'l Arb. 233, 236 (2003).

357 One alternative is to allow providers to manage the appointment process but mandate a list procedure, open to all licensed arbitrators, and provide a publicly-funded "consumer advocate," who would be empowered to assist consumers with navigating the procedure. This might be more palatable to the providers, although less ideal for consumers.

3. Licensing

Georgia should establish an arbitrator-licensing regime. The Georgian Arbitration Association would be a natural party to administer this program, but it could be handled by the Georgian Bar Association, the National Center for Alternative Dispute Resolution (NCADR)[358] or another well-regarded institution. The main components of this regime would be an entrance test on skills and ethics, continuing education, adherence to strict guidelines on ethics and competence, and a disciplinary procedure. A licensing regime would promote competence and professionalism as well as public confidence.[359] By educating arbitrators on basic mediation skills, the LoA's settlement provision[360] would receive more attention and parties would have better opportunities to restructure their financial relationship in mutually beneficial fashion.[361]

All three components of DAL will work in synergistic fashion. For instance, access to the disclosure information would be important for the IAA to provide parties an arbitration list that is neutral. And, licensing would be an essential quality control device for the IAA arbitrator list.

DAL is designed to improve arbitration, rather than restrict it. This is consistent with the new EU Directive on Alternative Dispute Resolution for Consumer Disputes.[362] DAL promotes public confidence in arbitration, protects consumers from bias, and maintains arbitration's important advantages: efficiency, cost, flexibility, and finality. The solution is less disruptive than a blanket ban or complicated form requirements with unpredictable judicial review.

But DAL is not perfect. Data disclosure entails new recordkeeping costs, although they should be minimal. Disclosure will reduce confidentiality protections, although those protections mainly serve the repeating party. Data disclosure could to be coupled with supervisory powers to review and punish cases of systemic bias,[363] however, that would add a layer of complexity to the issue and might not be worth the gains. With disclosure, arbitrators and providers will alter their behavior (to the extent necessary) to avoid the perception of bias or impartiality. Shining a light on the process will have its own tangible benefits.

Taking the appointment process out of the hands of the providers will be tough medicine, but the solution is workable and should not cause significant economic harm to the providers or arbitrators. To the extent that this solution allows mandatory consumer arbitration to survive, it is a benefit to providers when compared to the draconian alternatives.[364] Licensing will also entail some additional costs to administer a gatekeeping process and disciplinary regime. These costs will mostly be paid among the arbitrators so the net effect to them should be minimal. There will be some administrative costs, but they will be worth the price in better, more just arbitration.

VII. Conclusion

Despite the country's problematic arbitration history, Georgians continue to look to arbitration to settle their disputes. This is a positive sign. With the recommended changes, the LoA should encourage inter-

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358 The NCADR is located at Tbilisi State University. Its website is available at http://ncadr.tsu.ge/eng/2/news/52-ncadr-initiatives-for-business-law-reform (last visited Feb. 23, 2015).

359 *See* Blechman, *supra* note 314, at 13.

360 LoA, *supra* note 104, art. 38.

361 *Cf*. Teo Kvirikashvili, *Med-Arb / Arb-Med and Prospects of Their Development in Georgia*, 2014 Alt. Disp. Resol. Y.B. Tbilisi St. U. 51 (recommending mediation with arbitration); Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, 21 Arb. Int'l 523 (2005)(discussing windows of settlement opportunity during arbitration).

362 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes, No. 2006/2004 and Directive 209/22 EC, 2013 O.J. (L 165) 63 (requiring Member States to develop ADR mechanisms for consumer disputes).

363 *See* Farmer, *supra* note 299, at 2369-93(recommending provider liability for systemic bias). However, systemic bias would be difficult to define and penalize. Civil liability would also achieve little for Georgian consumers. Georgian law already provides for criminal liability for arbitrators. *See* Tsertsvadze, Commentary, *supra* note 77, at 115.

364 *See* Blechman, *supra* note 314, at 14-15 (recommending a ban on *for-profit* providers); Tkemaladze, *New Law, supra* note 73, at 671 (recommending restrictions on consumer arbitration).

national investment, promote domestic economic activity and help relieve crowded court dockets. The law represents a substantial improvement when compared to the previous arbitration regimes that Georgians endured but it remains a work in progress. The law's similarities to the UNCITRAL Model Law provide a familiar framework for many actors.

Most of the law's shortcomings can be addressed through statutory revisions. If the law provides more clarity, there will be less misunderstanding, inconsistency and abuse. Significant issues relate to the role of the courts. Because of the history, Georgian courts are suspicious of arbitral awards, especially those related to consumers. Some additional adjustments, such as aiding the remission process and clarifying public policy, will help the courts protect parties from abuse without damaging the development of arbitration. The Georgian Supreme Court has proven willing to enforce foreign arbitral awards against domestic firms. With further clarity on public policy, the court's practice could become an excellent example for other developing countries.

The primary threat to arbitration in Georgia and elsewhere is the use of mandatory consumer arbitration. While drastic solutions exist, such as banning the practice or forcing out for-profit providers, a more nuanced approach might make more sense. A solution that balances all stakeholder considerations, and attempts to address the root causes (repeat player and arbitrator appointment problems) is the most likely to be successful.

Other developing countries can learn from Georgia's experience. Arbitration can be a powerful tool that promotes efficiency and economic activity. It can also become a tool that denies individuals' fundamental rights. As Georgia is learning, important consumer safeguards need to be in place for domestic arbitration to meet social needs. Repeat player problems must be addressed at the design stage. The specific roles of courts must be clarified and monitored. Ethics rules should be promoted and enforced at the beginning. Widespread professional education and continuing training appears to be an essential ingredient. With some adjustments, Georgian arbitration can become a model for the developing world.