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GAA GEORGIAN ASSOCIATION OF ARBITRATORS
საქართველოს არბიტრთა ასოციაცია

QUALITATIVE STUDY IN ARBITRATION IN GEORGIA

GEORGIAN ASSOCIATION OF ARBITRATORS THE USAID ECONOMIC GOVERNANCE PROGRAM GRANT: DIVERSIFYING TRAINING PORTFOLIO OF GEORGIAN ASSOCIATION OF ARBITRATORS

2023

ACRONYMS	
AA	Association Agreement with the European Union and European Atomic Energy Community and their Member States
AAA	American Arbitration Association
AAA Protocol	Due Process Protocol for Mediation and Arbitration of Consumer Disputes
ADR	Alternative Dispute Resolution
ADR Directive	Directive on Alternative Dispute Resolution for Consumer Disputes
CCIARA	Arbitration Centre of the Chamber of Commerce and Industry of the Autonomous Republic of Adjara
Consumer Law	Law on the Protection of Consumer Rights
CRRC	Caucasus Research Resource Center
DRC	Dispute Resolution Centre
Directive on Unfair Contract Terms	Directive on Unfair Terms in Consumer Disputes
EBA Arbitration Rules	Arbitration Rules of the EBA Arbitration and Mediation Centre
EU	European Union
GAA	Georgian Association of Arbitrators
GIAC	Georgian International Arbitration Centre
JAMS	Judicial Arbitration and Mediation Services
NBG	National Bank of Georgia
ODR Regulation	Regulation on Consumer Online Dispute Resolution
TAI	Tbilisi Arbitration Institute
UK	The United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
US	United States of America
USAID	United States Agency for International Development

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This Report is not intended to produce a comprehensive analysis of commercial arbitration in Georgia and should not be relied upon as such. The study is intended to provide general information and does not constitute legal advice or a legal opinion. The Report encourages further research and study on the topic of commercial arbitration to better understand its complexities and nuances.

EXECUTIVE SUMMARY

This executive summary provides a concise overview of the Qualitative Study in Consumer Arbitration in Georgia. The study aims to examine the existing legal and regulatory framework and practice of consumer arbitration and provide insights into the consumer arbitration environment in Georgia.

KEY FINDINGS

Georgia is an UNCITRAL Model Law country and a member of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The general legal framework of arbitration in Georgia is robust and does not require major reforms on legislative bases. However, challenges exist in the implementation of legal provisions and the practice of commercial arbitration in Georgia.

The Law on Arbitration does not differentiate between commercial arbitration and consumer arbitration. Consumer dispute resolution is not regulated in Georgia. Therefore, the general provisions applicable to commercial arbitration, including requirements for an arbitration clause, arbitration procedure, and recognition and enforcement of arbitral awards apply equally to consumer arbitration. The Consumer Law provides a detailed regulation for consumer rights protection but overlooks formal dispute settlement, including consumer arbitration. The application of the Consumer Law is limited to challenging unfair contract terms, including consumer arbitration clauses.

Despite a robust legal framework, awareness of arbitration in the population and business sector in Georgia is considerably low. Among businesses, the majority have never heard of arbitration, with the lowest level of awareness reported in the service sector. The role of legal and professional advice in raising awareness on arbitration and ADR is very low. However, those who are familiar with arbitration, express high level of satisfaction and preference for this dispute resolution mechanism.

Analyses of the latest trends in consumer arbitration has shown that some financial institutions abandoned arbitration in their dispute settlement clauses due to reasons such as: delays at the stage of recognition and enforcement of awards in courts, consumers' lack of trust to arbitration, courts' competing jurisdictions on statutory disputes that lead to concurrent arbitration and court proceedings on the same dispute. Likewise, some businesses have moved to court litigation. Other businesses favor arbitration in business-to-business contracts while providing a hybrid mechanism in consumer contracts, where only a trader can choose between national courts or arbitration. Despite such trends, consumer-related cases, particularly in the fields of financial and insurance services, make up the vast majority of arbitration cases in Georgia, as reported by leading arbitration institutions and stakeholder interviews. Thus, the role of arbitration as dispute resolution mechanism is quite significant in consumer dispute settlement in Georgia.

In practice consumer arbitration proceedings are distinguished by certain specific features. The vast majority of consumer arbitrations are handled by a sole arbitrator. A three-member tribunal is rarely established for consumer disputes. Parties in most cases do not participate in the appointment of arbitrators as the institute appoints arbitrators for them directly. Parties in consumer arbitration cases are often not represented by counsel while traders may have legal representation.

The Study has identified certain challenges that raise concern of accessibility, fairness and sound management of consumer arbitration matters:

- Arbitration clauses in consumer agreements are mostly standard terms prepared by traders and are not negotiated with consumers. Consumers lack information and knowledge about arbitration and its consequences, as traders do not provide any explanation or information about the mechanism. Such practice raises questions as to the genuine and informed consent to arbitration on the part of the consumer.
- Traders, including financial institutions commonly include pre-selected arbitration institutes or arbitrators in their arbitration clauses, often based on prior experience of using the same institute or arbitrator multiple times. Such practice may lead to the establishment of unwritten or unspoken commitments between the institute, arbitrators, and the trader involved or to the perception thereto.
- The number of available professional arbitrators in Georgia is limited, and not all of them are willing to accept appointments for consumer matters. Some arbitral institutes have a short list of arbitrators, and the same arbitrators are repeatedly appointed for similar consumer cases.
- Consumer awareness and access to information about arbitral institutes, procedures, and practices are limited. Websites of some institutes are not user-friendly or lack up-to-date information. On the positive side, however, despite the lack of formal distinction, the institutes apply different approaches and standards in consumer matters, such as providing more assistance and flexibility to consumers in understanding the arbitration process.

The overwhelming majority of domestic arbitral awards, including consumer arbitration cases, have been recognized and enforced by Georgian courts. The high level of endorsement for arbitral awards in Georgia could be due to a low level of challenge to enforcement by losing party or a high degree of court support for arbitration, or both. The situation is different regarding the annulment or set-aside of arbitral awards. The courts have annulled or set aside a majority of the awards presented to them. Delays in deciding applications for recognition and enforcement of awards are a serious concern. In the majority of cases examined by the Expert Group, courts take from 9 months to 3 years to decide on recognition and enforcement applications.

Study of the case law on recognition and enforcement of arbitral awards has revealed several other problematic issues. The courts tend to review arbitral awards on merits - most frequently, with respect to the findings on damages. Another major shortcoming identified in the court practice is the application of substantive and procedural civil law in resolving matters related to the annulment and recognition and enforcement of arbitral awards in lieu of

arbitration law as *lex specialis*. In general, the court does not acknowledge the consumer as a weaker party in relationship with trader and applies the same standards to both the trader and the consumer. It does not consider the challenges that the consumer may face in relation to the arbitration clause, arbitration procedure, or the notice provided, given their limited bargaining power and awareness of arbitration and does not recognize the trader's responsibility to explain the terms of the arbitration clause to the consumer. Finally, in most cases, the decisions of the court lack reasoning.

The Expert Group has analyzed latest studies in arbitration in Georgia. Recent studies conducted on consumer arbitration in Georgia mostly have wide scope of research and suggest conducting further research to devise most suitable solution for Georgia. These studies could thus serve as a useful starting point for policymakers; however, they do not provide sufficient research, specific guidelines and recommendations.

The Association Agreement of Georgia with the European Union and its Member States prioritizes enhancing the use and quality of ADR and promoting increased use of business-to-business arbitration. Consumer protection, including addressing deficiencies in consumer arbitration, is a stand-alone priority in the Economic and Sectoral Cooperation area of the Association agenda of 2021-2027.

The policy and practice with respect to consumer dispute settlement, including consumer arbitration, varies in different jurisdictions. The Study provides general overview of the regulatory framework and practice in European Union, United States, United Kingdom, New Zealand and Canada. While the approach of other countries is interesting and valuable, it is also essential that any reform implemented in Georgia is adapted to the Georgian realities and is in accord with the general principles of law underlying the Georgian legal system.

Based on the desk research, stakeholder interviews, and analyses of previous research, statistics, case-law, and doctrine, the Expert Group made the following main findings and conclusions:

- The awareness of arbitration in Georgia is very low, both among businesses and ordinary citizens. Television and social media serve as the main sources of information, while professional business and legal advice play insignificant roles in choosing arbitration as a dispute settlement mechanism and providing other advise regarding the same.
- Consumers in Georgia are not adequately informed about arbitration, relevant procedure and consequences of its application. As a result, the overwhelming majority of arbitration cases involve traders as claimants. Consumers almost never resort to arbitration to resolve consumer disputes; their participation in matters initiated by traders is also limited.
- Arbitration plays a crucial role in consumer dispute settlement in Georgia, despite numerous challenges. Statistical data and stakeholder interviews indicate that the majority of arbitration cases are consumer related. In the circumstances of an overloaded court system, arbitration can provide a simpler, faster, and cheaper alternative for resolving consumer disputes.
- Regulatory gaps, legislative shortcomings, and inadequate practices create obstacles for arbitration in consumer relationships. Minimum standards of fairness are not observed in

relation to consumer arbitration in Georgia. Consumers' lack of access to information and inability to make informed decisions disrupt the balance between consumers and traders.
- Stakeholders suggest separate regulations for consumer arbitration, including requirements for arbitration agreements, procedures, ethics, and qualifications for arbitrators.

In conclusion, the reform of consumer arbitration in Georgia requires legislative and regulatory intervention, as well as collaborative efforts from stakeholders and institutions. Increased consumer awareness, access to information, and an enabling environment are crucial to ensure fair and just consumer dispute resolution.

METHODOLOGY

The research employed a mixed-method approach, combining desk research, quantitative surveys and qualitative interviews conducted from October 2022 through January 2023. The research involved comparative analysis of statistics, review of legislation and practice, analysis of court case law, and review of previous studies. Qualitative interviews were conducted with all main stakeholders, which included financial and microfinance institutions, arbitral institutes, counsels and arbitrators.

INTRODUCTION

This report (the "**Report**") mainly focuses on consumer arbitration. The findings of the Report shall not be generalized in the context of commercial arbitration in Georgia unless and to the extent otherwise stated in the Report. The Report describes general trends and experiences of the users that became apparent during the qualitative interviews with relevant target groups for the purposes of context or any future work. Among other, the Report provides research and analyses related to the existing legal and regulatory framework and practice of consumer arbitration in Georgia; problems facing businesses due to the concentration of consumer arbitration in Georgian arbitration practice; challenges that stakeholders face while arbitrating consumer disputes; stakeholders' views in relation to the regulatory regime applicable to consumer arbitration; challenges in relation to ethical standards in arbitration with the focus on consumer arbitration and lack of qualification in and knowledge of arbitration. The Report also provides views on certain general issues of commercial arbitration in Georgia. We believe that eliminating challenges in consumer arbitration would positively impact the development of commercial arbitration in Georgia and vice versa.

RESEARCH METHODOLOGY

The research for this study was conducted from October 2022 through January 2023 by combining quantitative and qualitative research methods to identify the main trends and factors hindering the greater use of arbitration in Georgia and suggest effective ways of overcoming obstacles on the path of its development, with the focus on consumer arbitration. In particular, the following research techniques were used: desk research, qualitative interviews, and comparative study of the relevant statistics obtained from appropriate organizations, Georgian and foreign legislation, and practice.

Within the project, the following activities were carried out:

(i) Conducting qualitative interviews

The Expert Group has identified relevant stakeholders in the field of consumer relationships and dispute settlement/arbitration. The group has then prepared interview questionnaires and carried out qualitative interviews with the following stakeholders: arbitration institutes; banks with major portfolios, and three Georgian microfinance organizations; companies operating in consumer markets, lawyers specializing in arbitration, and arbitrators.

(ii) Collecting and analyzing statistical information

The Expert Group identified institutions and sources to collect relevant information. The Group obtained the statistics of national courts from the judiciary (the Tbilisi and Kutaisi Courts of Appeal) in order to analyze the practice and identify recent developments in the court practices with regard to annulment and recognition and enforcement of arbitral awards. Expert Group has also collected relevant information and statistics (number of cases, arbitrator appointments, party representation, *etc.*) from several arbitration institutes to gain insight into the present state of practice of commercial arbitration. Further, Expert Group has gathered publicly available information from the companies providing e-commerce platforms that offer standard contract terms to understand their respective dispute settlement policies.

(iii) Analyses of Georgian court case law, and policy and practice of other countries

Expert Group collected and studied a number of court decisions on the recognition and enforcement, and annulment of arbitral awards dating between 2009 to 2022. Expert group has conducted research on law and practice of other countries in consumer arbitration, including that of the European Union and its member states, the United States of America, Canada, the United Kingdom, etc.

(iv) Review and analyses of a legal framework, international obligations of Georgia and previous research

The Expert Group has reviewed and analyzed the existing legal framework in relation to consumer protection and dispute settlement, with a focus on consumer arbitration. Expert

Group has reviewed and analyzed the obligations of Georgia under the EU-Georgia Association Agreement and the new Association Agenda. The Expert Group has further reviewed and benefited from previous studies conducted in commercial arbitration and consumer arbitration in Georgia.

EXISTING LEGAL FRAMEWORK

GENERAL LEGAL FRAMEWORK

On 19 June 2009, Georgia adopted Law of Georgia on Arbitration (the "**Law on Arbitration**") replacing old, outdated law on Private Arbitration of 17 April 1997. The Law on Arbitration is based on Model Law on International Commercial Arbitration, designed by the United Nations Commission on International Trade Law (UNCITRAL). In March 2015, Georgia introduced a comprehensive package of amendments to the Law on Arbitration, further enhancing arbitration norms regarding important issues such as the enforcement of arbitration clause, court support and assistance to arbitration, recognition and enforcement of arbitral awards, etc. Georgia is a member of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Thus, the general legal framework in arbitration in Georgia is robust and, in our view, does not require any major reforms on legislative bases. This does not, however, exclude the need for legislative reform and regulation in relation to consumer arbitration specifically, which will be addressed in the subsequent Chapters. Regrettably, the situation is not as positive regarding the implementation of legal provisions and hence, the practice of commercial arbitration in Georgia, as one would wish. The challenges encountered in arbitration in Georgia will be discussed in more detail in the relevant Chapters below within the scope of this Report.

CONSUMER ARBITRATION

The Law on Arbitration does not differentiate between commercial arbitration and any specialized arbitrations, including consumer arbitration. Pursuant to Article 1(2)(a) of the Law on Arbitration following can be resolved through arbitration: "*a property dispute of a private nature based on the equality of the parties, which can be resolved by the parties between themselves.*" Thus, arbitration can be used to resolve consumer disputes as long as they are arbitrable under the law. Consequently, all matters concerning consumer arbitration are to be dealt with as in case of any commercial – business-to-business arbitrations, including requirements to an arbitration clause, arbitration procedure and recognition and enforcement of final outcomes of such arbitration.

One notable and important exception that would apply to the majority of consumer arbitration clauses concerns a specific form requirement for arbitration agreements. Article 8 of the Law on Arbitration requires the consent of the parties to the arbitration in writing in order for the arbitration clause to be valid and enforceable. Due to the sensitivity of transactions involving natural persons who might not be sophisticated enough to have sufficient information and knowledge on arbitration, the consent to arbitration shall be embodied in a document signed by such party.[1] There are no other specific requirements in the Law on Arbitration that could apply to consumer arbitration.

On 29 March 2022, Georgia adopted Law on the Protection of Consumer Rights (the

1 Article 8(8), Law of Georgia on Arbitration, N1280-IՐ, 19 June 2009.

"**Consumer Law**"). Consumer Law provides a clear definition of trader and consumer and commercial relationships covered by the Law. While providing detailed regulation of administrative mechanisms for the protection of consumer rights (the procedure before the Competition Agency), the Consumer Law heavily overlooks the issue of formal dispute settlement, including consumer arbitration. Arbitration is mentioned only twice in Consumer Law: (1) the law recognizes right of the parties to apply to the court of law as well as to arbitration or mediation;[2] (2) the clause that forces consumer to only apply to arbitration that is not regulated by the Georgian legislation or limits consumer's ability to obtain evidence or imposes a burden of proof on the latter when such burden lies on the opposing party under the law, is considered an unfair standard contract term.[3] In addition to the above, Consumer Law deems unfair a standard contract term that binds the consumer with the condition that the consumer did not have a real possibility to familiarize with prior to the conclusion of the contract.[4] Although not designed specifically for arbitration, this provision could be used against at least one case of an improper consumer arbitration clause.

2 Article 28(2), Law of Georgia on the Protection of Consumer Rights, N1455-VIII□□-X□□, 29 March 2022.
3 *Ibid.,* Article 22(3)(s).
4 *Ibid.,* Article 22(3)(k).

PRACTICE AND CURRENT TRENDS

ARBITRATION ENVIRONMENT IN GEORGIA

Despite the robust legal framework, tens of registered and practicing arbitral institutes, strong government support and promotion of arbitration and alternative dispute resolution (**ADR**) in the past years, various events and educational activities, the awareness of arbitration is still considerably low. The situation is equally dire among both the population and the business sector. The recent EU and UNDP-supported surveys corroborate the above statement. According to the 2019 Report of the Survey on "Alternative Dispute Resolution in Georgia: Survey of Population," the vast majority of Respondents (69,7%) have never heard of arbitration.[5] A similar Survey was conducted in 2016. The improvement in terms of awareness in three-year time is no more than 1,3%.[6] Pursuant to the 2019 Report, the main source of information for users on arbitration is television, personal contacts and social media.

The results of the same exercise among businesses also leave more to hope for. According to the 2020 Analytical Report of the Survey on "Alternative Dispute Resolution in Georgia: Survey of Businesses," the majority of Respondents (54,1%) have never heard of arbitration.[7] Among various categories of businesses, the lowest level of awareness is reported among businesses in the services sector.[8] Pursuant to the same Survey results, the main source of information for users is again Television (42,8%) or social media (12,5%); the role of other sources, including most impotently professional business and legal advice, is insignificant.[9]

Based on the latest surveys conducted in Georgia, the users are generally satisfied with arbitration and consider it the most preferred mode of dispute resolution. Pursuant to the 2021 Survey Results, 62,3% of respondents choose arbitration as a dispute resolution mechanism and would recommend arbitration to others.[10] The vast majority of Respondents are fully satisfied (35,8%) or somewhat satisfied (56,3%) with the arbitration, leaving only a fraction of respondents discontent with the mechanism (3,8%).[11] In Respondents' view, the main advantages of arbitration are speed of the process, peaceful ambiance and procedural rules that are well tailored to the needs of disputing parties.[12] Among the disadvantages of arbitration, Respondents have named the delay in recognition and enforcement of arbitral awards and high costs.[13] What is interesting is that 15,7% of Respondents consider it challenging that financial institutions impose arbitration on consumers, thereby depriving them of the choice of dispute settlement mechanism.[14]

5 "Alternative Dispute Resolution in Georgia: Survey of Population," Report, December, 2019, EU, UNDP, p.9.
6 According to the 2016 Survey Report only 29% of Respondents are familiar with arbitration. "Alternative Dispute Resolution in Georgia: Survey of Population," p.9.
7 "Alternative Dispute Resolution in Georgia: Survey of Businesses", Analytical Report, July 2020, p. 24
8 *Ibid.*
9 *Ibid.* p.25.
10 "Satisfaction Research on Arbitration and Mediation Use", Analytical Report, February 2021, EU, UNDP, p.29
11 *Ibid.* p.30
12 *Ibid.* p.27
13 *Ibid.* p.28
14 *Ibid.*

Pursuant to qualitative interviews conducted for the purposes of this Report, the stakeholders - financial institutions and other businesses as well as arbitrators and lawyers practicing as counsel are mostly satisfied with the administration of arbitration matters by arbitral institutes. Certain concerns remain, however. One interviewed counsel expressed concerns regarding the administration of the matters by arbitral institutes and has identified such problems as failure to provide relevant information regarding the notice to the opposing party and examination of procedural requests, difficulty in communicating with the representatives of the institute, delays in receiving a response, unprepared and disorganized hearing rooms and facility, as well as lack of pro-active approach in general. It is our impression that the experience of individual counsel or arbitrator depends on the arbitral institute they had to deal with.

Stakeholders are also generally content with the qualification of arbitrators; some, however, have raised concerns that although generally qualified, arbitrators might not be prepared for the evidentiary hearing on a particular case, might not know the casefile or applicable procedural rules.

CONSUMER ARBITRATION IN GEORGIA

CASELOAD AND STATISTICS

The vast majority of cases resolved through arbitration in Georgia pertain to consumer relations. The statistics of the leading Georgian arbitration institutions are telling. Thus, in 2018-2022,[15] Dispute Resolution Centre (**DRC**) administered a total of 1521 cases, out of which 1188 i.e.78 % were consumer related.[16] In the same four-year period, Tbilisi Arbitration Institute (**TAI**) reported a total of 600 cases, 92% of which were consumer related.[17] The matters administered by TAI relate to various sectors, including the sale of goods, financial services, insurance, the performance of works, etc.[18] In the same period, all 65 cases administered by the Arbitration Centre of the Chamber of Commerce and Industry of the Autonomous Republic of Adjara (**CCIARA**) (the **Adjara Arbitration Centre**) were consumer related.[19] All matters before the Adjara Arbitration Centre relate to the financial sector arising out of either the loan or mortgage agreements.[20] The value of cases ranges between GEL 1,000 to GEL 100,000 (50 cases); only 15 cases fall within the range of GEL 100,000 to GEL 1 million.[21] Unlike these three arbitration institutes, the matters administered by the Georgian International Arbitration Centre (**GIAC**) are entirely business-to-business;[22] All 37 cases under GIAC Rules were commercial arbitrations with the disputed amount in the range of GEL 50,000 to GEL 1 million and six matters over GEL 1 million.[23] Unfortunately, the DRC does not process statistics on

15 The time-frame covers period from 2018 through 31 October 2022.
16 Statistics provided by Dispute Resolution Centre (DRC), 23 December 2022, p. 1.
17 Statistics provided by Tbilisi Arbitration Institute (TAI), 16 November 2022, p. 1.
18 *ibid*, 2.
19 Statistics provided by Chamber of Commerce and Industry of the Autonomous Republic of Adjara (Adjara Arbitration Centre), 15 November 2022. Certain mechanical errors in the statistics have later been clarified in stakeholder interview with the representative of the Institute.
20 *ibid*.
21 *ibid*.
22 Statistics provided by the Georgian International Arbitration Centre (GIAC), 3 November, p. 1.
23 *ibid*, p. 2.

subject-matter and value of the disputes[24] , and TAI does not keep statistics based on the value of the disputes. There are other arbitral institutes that predominantly administer consumer arbitration cases.[25]

The statistical information of the major arbitral institutes has been confirmed in the stakeholder interviews. The majority of interviewed arbitral institutes as well as external counsel, reported that the majority of cases under their respective portfolios are consumer related arising mostly out of financial transactions (loan disputes). Likewise, interviewed financial institutions confirmed that a major part of their caseload is consumer related. In almost all cases dealt with by the interviewed arbitral institutes, arbitrators, practicing lawyers or involving interviewed financial institutions, the claimant is a trader; the consumer rarely or almost never initiates to arbitration; although interviewed arbitral institutes and arbitrators have reported on several matters brought by consumers, which yielded important decisions for the protection of consumer rights, for example, in the fields of financial or insurance services.

LATEST TRENDS IN THE USE OF CONSUMER ARBITRATION IN GEORGIA

As part of the present study, Expert Group has interviewed financial institutions, which included several major banks and micro-finance organizations. The interviews have revealed certain interesting circumstances that reflect current trends in consumer arbitration. In terms of the use of arbitration as a dispute settlement mechanism practice is varied among the institutions. Two major banks changed their policy some 7-8 years ago and refused to put arbitration in their dispute settlement clauses. The reasons for this approach is multiple: (a) small financial disputes, are resolved much faster and with less costs in courts of first appearance than in arbitration,[26] wherries arbitration is becoming slower (delays in relation to arbitration come on the part of recognition and enforcement of awards in courts (for this topic see further discussion in Chapter IV.C. below)); (b) consumers prefer litigation due to lack of trust to arbitration since the latter is still perceived as an institute affiliated to financial institutions and thus, favoring them in disputes; (c) the issue of provisional measures is problematic in arbitration in Georgia (based on the existing poor practices, when provisional measures are requested/applied in arbitration, the party still has to apply to courts for their enforcement; courts are very slow in dealing with provisional measures coming from pending arbitrations); (d) according to the practice of Georgian courts, the latter still retain jurisdiction on certain type of statutory claims such as, for example, unjust enrichment, and decide case on merits in parallel with arbitration, which makes use of arbitration ineffective; (e) arbitration excludes use of such mechanisms as summary proceedings before the National

24 DRC Statistics, p. 2(n. 15).

25 See, for example, Legia Arbitration Court; almost all cases administered by Legia Arbitration Court are consumer related (arising out of the loan agreements). <http://legia.ge/?cat=1> accessed 15.02.2023.

26 Such disputes end in the courts of first appearance since they are mostly not appealed by losing consumer.

Bureau of Enforcement, which is a very effective tool to deal with the small disputes;[27] etc. These banks have clarified that they would prefer arbitration if it was not for these established poor practices that make arbitration ineffective. Other banks and micro-finance organizations continue to use arbitration. To address the abovementioned concerns, one micro-finance organization has established a financial threshold for arbitration matters, whereby only disputes over GEL 15,000 are subject to arbitration; matters below that threshold would go to Georgian courts.

Expert Group has also conducted research and interviews among other businesses providing goods and services to consumers. As it appears none of the major online stores provides for arbitration in their contracts.[28] This might be because the Law on Arbitration establishes a special form requirement for arbitration agreements with natural persons – a document signed by both parties. This is a strong safeguard against imposing arbitration clauses on consumers without their genuine and informed consent. In the real estate business, the majority seem to be fencing national courts over arbitration.[29] One major business operating in development, real estate and hospitality has reported that they strongly favor arbitration in business-to-business contracts, whereas in consumer contracts they provide for a hybrid mechanism whereby only the trader has a choice to go to arbitration. Thus, the trader can choose between national courts or arbitration depending on their interest in particular case, while consumers' choice is limited to national courts only.

27 The Law of Georgia on Enforcement Procedures (the "**Law on Enforcement**") provides for a "summary proceedings for claims for recovery of monetary debts" (the "**Summary Proceedings**"). Through this procedure a creditor that has a "documented matured monetary claim" may apply to the National Bureau of Enforcement (**NBE**) to recover its debt thereby avoiding litigation in courts. Summary Proceeding shall not be allowed, however, if the raising of a claim depends on an outstanding counter obligation of the applicant. Pursuant to Law on Enforcement, the Summary Proceeding before the NBE is allowed even if the contract between the parties provides for different rules for hearing and resolving disputes. What is interesting, however, is that the rule above does not apply in cases where the contract provides for resolution of disputes through arbitration. See, Chapter XVI[1], Law of Georgia on Enforcement Procedures, No 1908-II□, 16 April 1999.

28 Online store VENDOO.GE operated by "TNet" LLC provides for the two-tiered dispute resolution mechanism whereby parties should first try to resolve disputes through negotiations; if negotiations are unsuccessful, the dispute shall be adjudicated by Tbilisi City Court (national courts of Georgia). For more information visit <https://vendoo.ge/terms-conditions> accessed 20.01.2023. Online store VELI.STORE operated by Saturnis LLC provides for exactly the same dispute settlement mechanism in their online contracts. For more information visit <https://veli.store/info/terms-and-conditions/> accessed 20.01.2023. Online store DOMINO operated by termina West Trading LLC provides for the similar dispute settlement clause as the two online stores described above. The dispute arising out of the online contract concluded between DOMINO and their clients shall be resolved amicably through negotiations; if parties fail to resolve dispute in this manner within 30 days, they are free to resort to any remedies provided by Georgian legislation (which includes national courts of Georgia). For more information visit <https://www.domino.com.ge/%E1%83%AC%E1%83%94%E1%83%A1%E1%83%94%E1%83%91%E1%83%98-%E1%83%93%E1%83%90-%E1%83%9E%E1%83%98%E1%83%A0%E1%83%9D%E1%83%91%E1%83%94%E1%83%91%E1%83%98/> accessed 20.01.2023. Online store EXTRA.GE operated by JSC Extra Area does not provide for any regulation in case of dispute with the consumer. For more information visit <https://extra.ge/static/terms-and-conditions> accessed 20.01.2023.

29 The Expert Group spoke with the representative of real estate developer company - Domus Development; the company has confirmed that in consumer contracts they are using only national courts of Georgia as a dispute settlement mechanism.

CONDUCT OF CONSUMER ARBITRATION PROCEEDINGS

The majority of consumer arbitration cases administered by DRC, TAI and Adjara Arbitration Centre is handled by a sole arbitrator.[30] We believe that this is a good trend and approach in terms of cost-effectiveness of consumer arbitration proceedings. These statistics are further corroborated by stakeholder interviews that confirmed that a three-member tribunal is almost never established on consumer disputes. It is also interesting that in the vast majority of matters, parties do not participate in the appointment of arbitrators. The majority of institutes administering consumer arbitrations recognize party agreement on the appointment of an arbitrator; however, in the absence of relevant agreement of the parties in the arbitration clause, institutional bodies will directly choose the sole arbitrator for the parties.[31] As for the statistical data, in cases handled by Adjara Arbitration Centre, the parties did not appoint the arbitrators; parties have participated in the appointment process only on 3 cases of a three-member tribunal.[32] The situation is similar in the case of TAI; as the institute has reported, in most cases arbitrator is appointed by the institute. Financial institutions have confirmed the statistical data of arbitral institutes. As it has been established through stakeholder interviews with financial institutions, arbitral institutes automatically appoint arbitrators on disputes of a certain amount as per the rules of such institutions. Thus, the participation of the parties, including that of the consumer, in the appointment of an arbitrator is very limited. The DRC does not process statistics regarding the appointment of arbitrators.[33]

In the majority of cases, the parties are not represented by counsel. In the case of Adjara Arbitration Centre, parties did not retain counsel on 38 out of 65 cases. In case of TAI, parties used legal representation only on 50 cases out of total 550 consumer arbitration matters handled by the institute.[34] The DRC does not process statistics on the legal representation of parties in disputes.[35] The same has been confirmed by the interviews with arbitrators, arbitral institutes, counsel and financial institutions. Counsel would appear on behalf of the trader, while the consumer would not be represented by counsel or other representation in most cases.

Arbitral Institutes dealing predominantly with consumer arbitration cases are mostly profit-making legal entities. These institutes do not differentiate between consumer arbitration and business-to-business disputes and administer consumer arbitration matters under the same

30 Out of 1188 Cases administered by DRC in 2018-2022, the overwhelming majority (1173 cases) were handled by the sole arbitrator; three-member tribunal has been appointed only on 15 cases. See, DRC Statistics (n. 15) 2. All 550 cases administered by TAI in the same period have been resolved by a sole arbitrator. See, TAI Statistics (n. 18) 2. Likewise, in case of Adjara Arbitration Centre, in 2018-2022, most of the cases (62 cases) were handled by the sole arbitrator; three-member tribunal has been appointed only on 3 cases. See, Statistics of Adjara Arbitration Centre, p. 3,(n.16).

31 In accordance with the Arbitration Rules of the Tbilisi Arbitration Institute, unless parties have agreed otherwise, the dispute will be resolved "by the Chairman himself or a sole arbitrator appointed by the Chairman". See, Article 10, Arbitration rule of the Tbilisi Arbitration Institute, as amended 1 July 2016. See also, Article 11 of the Arbitration Rules of the EBA Arbitration and Mediation Centre (EBA Arbitration Rules), as amended 26 November 2019; Article 4 of the Arbitration Rules of the House of Arbitration; Article 27.1, Statute of Adjara Arbitration Centre.

32 Statistics of Adjara Arbitration Centre, p. 3, (n.16).

33 DRC Statistics p. 2, (n. 15).

34 See, TAI Statistics, p. 2, (n. 18).

35 DRC Statistics, p. 2, (n. 15).

rules and procedure as for any other commercial case. Although, it should be mentioned that some institutes do have different regulations for small disputes, which would encompass most consumer-related matters. For example, DRC offers an expedited procedure for matters on which the amount of claim does not exceed GEL 100,000.00 as well as for any matter arising out of guarantee, loan agreement and any legal arrangement related thereto (lease, mortgage, personal guarantee, etc.).[36]

Based on the desk research, including the study of case-law of Georgian courts (Please see Chapter IV.C. below), and the stakeholder interviews, it seems that the awareness and access to information about these institutes, their procedure and practice is limited among consumers. While most of these institutes run a website and display their arbitration rules therein, they do not provide for separate rules of procedure or guidelines or other explanatory documents providing additional information on consumer arbitration in an easily comprehensible manner for consumers, who are not trained lawyers. This situation has been confirmed by the stakeholder interviews with counsel, one of whom noted that some arbitral institutes' websites are not "user-friendly" for consumers. One interviewed counsel noted that in the case of some arbitral institutes, even the standard information regarding institute, their rules and practice is not available as either their websites are unavailable or not operational or the rules and other information provided on the website is outdated. The same has been confirmed in the interviews with the financial institutions.

The representatives of Arbitral institutes have explained in their interviews that they do not distinguish consumer arbitration form commercial matters and do not provide any separate information regarding the procedure and administration of consumer disputes; however, they all confirmed that they are available and do in fact provide relevant information or explanation in case of request. Interestingly, institutes see the increased trend of requesting information or explanation from consumer parties to the disputes, which might dictate a positive trend of increasing awareness and sophistication of the consumer parties. Institutes have also explained that while not formally differentiating between consumer and ordinary commercial disputes, they do administer different approaches and standards in consumer matters in practice. For example, the representative of one of the arbitral institutes has reported that they are more thorough and vigilant in terms of sending notices to consumers, explaining the procedure or otherwise assisting the consumer party in understanding the peculiarities of arbitration and relevant procedure, exercising more flexibility in terms of providing time extensions, etc.

36 On matters subject to the expedited procedure, the case is handled by a sole arbitrator appointed by the Chairmen of the Institute directly from the Institute's list of arbitrators. Where the value of claim does not exceed GEL 50,000.00, arbitrator may decide the case without oral hearing - based on documents only, unless otherwise agreed by the parties. The entire procedure on expedited cases shall be completed and the final award issues in 90 days. See, Article 33, Rules of Arbitration of DRC. Arbitration Rules of the EBA Arbitration and Mediation Centre provides for so called "Documents Only Arbitration" i.e. a procedure whereby the arbitrator decides the case without an horal hearing. Such procedure can be used only incase both parties agree to it in a separate document. See, Article 36, EBA Arbitration Rules, (n. 31).

CONSUMER ARBITRATION CLAUSES

The desk research as well as stakeholder interviews, have demonstrated that in Georgia, an arbitration clause provided in a consumer agreement is a standard contract term prepared in advance by the trader, which is not negotiated with consumers. During stakeholder interviews, the external counsels have underlined that consumers mostly do not have any information and knowledge about arbitration – "they do not know what they are singing up for" and the trader does not provide any information or explanation about arbitration, the procedure and the consequences of consent to arbitration. The other interviewed counsel has shared an example from their practice when they attempted to negotiate a standard arbitration clause on behalf of the consumer client, but the trader refused to make any changes to the standard clause. Both counsel and arbitrators explained that in such circumstances and given that the arbitration clause is a standard term of the contract, consumers practically have no choice in the matter. Financial institutions and other businesses have reported the same situations in terms of low or no awareness regarding consumer arbitration. They have further confirmed that they do not explain terms of the arbitration clause or provide information on arbitration to consumers whatsoever. Financial institutions have explained this approach by the fact that either regulation of the National Bank of Georgia (**NBG**) does not oblige them to provide such information, or that the bank does not have resources to provide this information (in addition to the information and explanations required to be provided under NBG's regulations) or that consumes themselves are not interested in the arbitration clause or any clause in the contract for that matter, as long as they get the loan.

Based on the stakeholder interviews, the Expert Group has also established that the traders would include pre-selected arbitration institutes or even arbitrators in arbitration clauses. Various stakeholders have explained this situation by the fact that either there is some kind of affiliation or understanding between traders and institute/arbitrator or simply that traders have used the same institute/arbitrator numerous times before. One interviewed arbitrator, who has over 200 consumer arbitration cases under their belt, has noted with regret that there are still a number of arbitral institutes that practically operate as a branch of a financial institution and do not care for the interests of the consumers.

Based on the interviews with financial institutions, a positive trend of using independent and neutral arbitral institutes has been observed. The major banks or micro-finance organizations refuse to enter into special arrangements with arbitral institutes. However, it is somewhat worrisome that there still appear to be certain arbitral institutes that approach financial institutions with the proposal of entering in certain arrangements (e.g. exclusive service agreements, fixed arbitration or administrative fee arrangement) to resolve disputes of such institutions. It should also be observed that even in the absence of any affiliation or improper arrangement, these financial institutions use the same arbitral institutes with same arbitrators deciding the case, which might create some kind of unwritten or unspoken commitment on the part of the arbitral institute and their arbitrators or as one of the interviewed arbitrators has qualified it – "a partner-friendly relationships". In some arbitral institutes pre-selected by financial institutions or other traders, only one arbitrator decides all the disputes involving the former. Among arbitral institutes administering consumer arbitration matters in Georgia,

some have an extensive list of arbitrators, while in the case of others the list of arbitrators is as short as up to 10 names.[37] The situation is worse in case of other arbitral institutes operating in Georgia that have been studied based on the desk research conducted for the purposes of this Study. These institutes either have one arbitrator deciding all matters or their list of arbitrators is as short as just three names.[38] Even in institutes with lists of arbitrators, the same person/persons from the list would be appointed to deal with similar consumer cases or cases of the same institution/trader. Hence, mostly the same arbitrator/s decide all consumer matters or category of consumer matters in that institute. The stakeholder interviews with individuals acting as counsels and arbitrators have confirmed the same. Several interviewed arbitrators while expressing discontent with this situation, have noted with regret that pull of professional arbitrators in Georgia is short and even among the ones that are competent and available, not all of them are willing to accept appointments on consumer matters for financial, legal or other reasons. Some financial institutions expressed discontent towards this situation and have noted that they would not wish to deal with institutes with one arbitrator; it was also noted that list of arbitrators of the other institutes are ineffective as only a couple of arbitrators are appointed by rotation from the list while rest of the names are included formally for the sake of the image of the institute.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN GEORGIA

Georgian courts demonstrate utmost friendly attitude towards arbitration when it comes to the recognition and enforcement of arbitral awards. Based on the available court statistics, the overwhelming majority of awards have been recognized and enforced by Georgian courts. Since our study revolves around consumer arbitration in Georgia, we will look at the statistics of recognition and enforcement of domestic arbitral awards only. It should be underlined, however, that the statistics that we have looked at cover all arbitrations, including business-to-business and consumer arbitrations; the separate court statistics on consumer arbitration is not available.

In 2020-2022[39] Tbilisi Court of Appeals has received total of 6586 applications for the recognition and enforcement of domestic arbitral awards; the Court has recognized and

37 The DRC offers a list of 54 arbitrators to their users. <https://giac.ge/arbitrators/> and <http://drc.ge/page/arbitres> accessed 20.01.2023. List of arbitrators of Tbilisi Arbitration Institute provides for 12 names. <https://taiarbitration.com/arbitrators> accessed 20.01.2023. Adjara Arbitration Centre runs a list of arbitrators containing up to 10 names. The information has been collected during stakeholder interviews. The list of arbitrators could not be accessed on the website of the institute as the website is not operational.

38 List of arbitrators of arbitral institutes Legia and Arbitration Chamber of Georgia counts only 3 names, while all matters before such institutions as Legia and BONAFIDE are considered by only 1 arbitrator. <https://moravi.ge/ge>, <http://acg.org.ge/#about>, <http://legia.ge/?page_id=19> and <https://bonafide.ge/%e1%83%90%e1%83%a0%e1%83%91%e1%83%98%e1%83%a2%e1%83%a0%e1%83%94%e1%83%91%e1%83%98/> accessed 20.01.2023.

39 The time-frame covers the period from 2020 through 31 July 2022.

enforced 6550 awards.[40] In this period, the refusal of recognition and enforcement of domestic arbitral awards varies between 0,3% to 0,8% year to year.[41] Likewise, in the same period,[42] Kutaisi Court of Appeals has recognized and enforced 17 awards out of 20 awards presented to it i.e. refusing enforcement of only 15% of awards.[43] This situation could be explained by either a very low level of challenge to enforcement by losing party or by high degree of support to arbitration by the courts, or both. Either way, the statistics discussed above speak to a strikingly high level of endorsement for arbitral awards in Georgia. It should also be noted, however, that a number of recognized and enforced awards are only partially enforced with respect to the penalties imposed based on loan and credit line agreements, which we discuss in more details below.

The situation is different with respect to the annulment/set aside of arbitral awards. The courts have annulled/set aside most of the awards presented to them. Thus, in 2020-2021 Tbilisi Court of Appeals annulled 58 awards out of 84 awards i.e. 69% of the awards.[44] The trend is significantly declining in 2022 – when the court annulled only one award out of 14 awards presented.[45] In case of Kutaisi court of Appeals, 4 out of 4 awards have been annulled/set aside by the Court in 2020-2021, with zero applications for annulment/set aside submitted in 2022.[46]

As part of the present analyses, the Expert Group has also examined actual decisions of Tbilisi and Kutaisi Courts of Appeal. We have studied 9 Decisions of the Kutaisi Court of Appeal and 13 Decisions of the Tbilisi Court of Appeal randomly selected by the respective courts and provided in a depersonalized manner. 18 out of 22 court decisions dealt with the award rendered on consumer arbitration matters arising out of loan and credit line agreements, loan guarantee agreements and, in one case, brokerage agreement. Based on the deeper analysis of the case law, some important determinations can be made, which are discussed in detail below.

Issue of proper notice. In cases of application for the recognition and enforcement of arbitral awards, the losing party had not challenged enforcement in most of the cases. In cases of annulment and the recognition and enforcement of arbitral awards, where party did challenge enforcement, the most frequently relied upon ground is that the party was not duly informed of the commencement of arbitration and the constitution of the tribunal and therefore, did not have a possibility to present their case. The issue of notice, however, is not as problematic as claimed – in many cases, the respondent has either received proper notice and/or even participated in arbitration by way of submitting a statement of defense. In rare cases, when a proper notice was in fact disputable, several major problems have surfaced. On one case, the party did not receive notice as the address provided in the agreement was not complete; the court was satisfied with the futile attempts of the trader to deliver notice at a non-established address. Court failed to further examine whether other ways of providing

40 Statistical information provided by the Tbilisi Court of Appeals, letter N2/14194, 8 September 2022.
41 *ibid.*
42 The time-frame covers the period from 2020 through first half of 2022.
43 Statistical information provided by the Kutaisi Court of Appeals, letter N607-2/10, 12 September 2022. We have only included the cases on which the proceedings have been finalized before the Kutaisi Court of Appeals.
44 Tbilisi Court of Appeals Statistics, (n. 25).
45 *ibid.*
46 Kutaisi Court of Appeals Statistics, (n. 29).

notice to the Respondent were explored as considered by the law (work or other alternative address, telephone, electronic communication, etc.). The court did not consider the perspective of the consumer as a weaker and uninformed party in the negotiations, as well as did not appeal to the fact that trader did not make sure that the agreement contained proper address for notices and/or explain to the consumer the importance of the notice for various purposes, including for the purposes of arbitration. There are decisions where the court thoroughly examined the issue of notice and refused to enforce on this basis.

Stakeholder interviews mostly confirmed the same. In the experience of counsel, the notice is not a problem in general; in rare case, either respondent refuses to accept the delivery or the notice cannot be delivered by ordinary mail, after which it is published in a newspaper or through another public source of information. Financial institutions have mostly reported the same; this is not seen as an issue, especially in those arbitral institutes that have moved on to electronic communication of notices (via email). Certain major banks noted that providing notice in material form is problematic. However, this is not due to the ineffectiveness of arbitral institutes or courts, but is a general problem as people constantly change address, the establishment of factual address is difficult, providers of postal services are behaving irresponsibly by failing to make genuine effort to deliver, etc. Representatives of arbitral institutes have explained that they give high importance to the issue of notice; they use all means of communications (ordinary mail, email, phone call, etc.) to provide notice to the party. The most important is the delivery of the first notice to the responding party; for future notices parties and the tribunal agree on the means of communication and delivery or they use a method that turned out to be successful for the first notice on the matter. In their practice, arbitral institutes generally do not encounter problem of delivering notice, however, there are cases where the delivery of the first notice by ordinary mail is unsuccessful (change of address, or wrong or non-existent address); in this case they send notice again. If the second attempt is also unsuccessful, the notice will be published by public means (in the magazine) upon the other party's request in accordance with the practice established by Georgian Courts for the purposes of court litigation.

Consumer as a weaker party. In general, the court does not consider challenge to the arbitration clause, arbitration procedure or the notice thereto from the perspective of consumer as a weaker party with the low bargaining power and limited awareness of arbitration as a dispute settlement mechanism. In one case, Court completely disregarded the consumer's argument that the arbitration was provided in a small print in the Agreement and the trader did not explain to the consumer terms of the agreement with respect to arbitration as a dispute settlement mechanism. Court established that small print is not a valid ground to challenge the arbitration clause and that the consumer should have asked questions during the negotiations, if any; court also did not recognize a duty of the trader to explain terms of the arbitration clause to the consumer.

Review of awards on merits. Another problematic issue revealed through closer examination of the case law is the review of awards on merits - most frequently, with respect to the findings on damages. In particular, even in those cases where the losing party does not challenge the decision, the court reviews the award on damages and refuses to recognize and

enforce arbitral tribunals' award on penalties. The court does not stop there but proceeds to examine the matter under the Civil Code of Georgia and corrects the arbitral tribunal's decision by reducing the penalties to what it considers to be a reasonable amount. The court qualifies its decision as a 'partial recognition and enforcement' of arbitral award. In some cases, the court does so on the grounds of public policy *ex officio* invoked by the court; in most of the cases, however, the court fails to indicate the grounds, whatsoever, for such review of the award. Even if one were to agree that the imposition of unreasonably high penalties is against the public policy of Georgia, which is disputable, it is crystal clear that Georgian laws do not authorize court to review the award on merits and correct the award on damages.

Another major shortcoming identified in the court practice is the application of substantive and procedural civil law in resolving matters related to the annulment and recognition and enforcement of arbitral awards in lieu of arbitration law as *lex specialis*. Kutaisi Court of Appeals on one of the matters concerning the application for annulment of arbitral award determined that there was no arbitration agreement between the parties and that the Respondent was never informed of arbitration and therefore, deprived of the possibility to participate in arbitration proceedings. While the given scenario might have been sufficient ground to annul the decision on the ground of public policy (contrary to the basic principles of fairness and justice, good faith, etc.), the court relied on norms of Civil Procedure Code of Georgia applicable to the appeal on merits of lower court judgments. In particular, court established that it is authorized to review the decision on both legal and factual bases and to adopt new decision in case of procedural violations that lead to the wrong decision or if the reasoning of the decision is so incomplete that it does not allow to review legal bases thereto. Instead of deciding the issue of annulment pursuant to the grounds of annulments exhaustively laid out in the Law on Arbitration, the Court proceeded to annul the award based on the substantive and procedural norms of civil legislation. In the same manner, on another case Kutaisi Court of Appeal relied on the material norms of Civil Code on inheritance to annul the decision. For the sake of fairness, it should be noted that the Court does refer to Law on Arbitration and public policy as a ground, however, the actual reasoning and legal determination is completely detached from the said legal norms.

Arbitrators, counsel and representatives of arbitral institutes have confirmed in their stakeholder interviews that Georgian courts do review awards on merit and exceed their authority in this regard. However, it should be noted that all the respondents confirmed a positive trend of a decrease of such interference by the court.

Reasoning of the Decision. Another problematic issue is the reasoning of the decision. In most of the cases, the decisions of the court lack reasoning: in some cases, court fails to indicate proper legal grounds for annulment and/or refusal to recognition and enforcement of award; in others, court rejects the challenge of the losing party without relevant reasoning thereto or, conversely, annuls or refuses to recognize or enforce awards without providing sufficient reasoning in relation to grounds raised by losing party or those raised by the court *ex officio*.

Finally, in relation to all the issues and challenges mentioned above, the case-law is highly inconsistent.

Delays. As regards the issue of delays in deciding applications for recognition and enforcement of awards, the complaints in this regard are justified. In the case of Tbilisi Court of Appeals, in the majority of cases examined by the Expert Group it took the Court from 9 months to up to 3 years to decide applications for recognition and enforcement of award. In most of these cases the court also dealt with the applications for annulment of the award. This could not serve as an excuse, however, since pursuant to the Law on Arbitration grounds for annulment of the award are the same as grounds for recognition and enforcement and therefore, major delays could not be justified on this basis. For the sake of fairness, we should note that there are exceptional cases when applications are decided in one month period or even as fast as 3 days. The situation is much more positive in the case of Kutaisi Court of Appeal. In the majority of cases examined by the Expert Group, the Kutaisi Court of Appeals has decided applications within the period of 2 to 3 months; in rare cases the applications are handled over a longer period of 7 months. The stakeholder interviews have also confirmed the situation in terms of delays. All interviewed counsel, arbitrators, arbitral institutes, financial institutions, and other businesses have complained about the major delays by the courts on recognition and enforcement stage. In their view, arbitration is not a priority for the court; while there is a general issue of overload in the court system, this cannot serve as an excuse for such a straightforward procedure as recognition and enforcement of awards. In the words of one of the interviewed counsels, such a simple procedure cannot justify one year or even longer delays; one interviewed arbitrator considers that some of these cases can be resolved in the matter of hours not months or even a year. While almost all interviewed arbitrators, counsel, arbitral institutes as well as financial institutions and other businesses agree that the existing New York Convention model of recognition and enforcement of arbitral award is a good mechanism, all regret to note that the poor practice, lack of organization and unreasonable delays in the courts have tainted this mechanism. Many of them noted that their clients and themselves have been waiting for decision for more than a year or two. Financial Institutions explain these delays by essentially the same reasons as stated above - courts do not consider arbitration as a priority or view them as competition. One of the interviewed banks has stated that another reason is the irresponsible attitude of certain judges to matters of recognition and enforcement of awards – if some judges manage to issue a ruling in 2 months, why does it take others 2 years or more in the same judicial establishment? Almost all interviewed stakeholders expressed deep regret that court practice, especially such unexplainable delays, deprives arbitration its most significant value, which is the speedy resolution of the matter and, thus, makes it unpopular as a means of dispute settlement.

ANALYSES OF EXISTING CONSUMER ARBITRATION STUDIES IN GEORGIA

Over the past years several studies have been undertaken in consumer arbitration in Georgia. The Group has collected and analyzed previous studies to benefit from the findings therefrom, feel the gap in the research, and adapt the findings to Georgia's realities and needs.

In 2017-2018 Caucasus Research Resource Center (CRRC) undertook comprehensive research into the Legal and Practical Aspects of Arbitration in Georgia. In its report of 2018 (CRRC Report), CRRC briefly touched upon the problems of consumer arbitration in Georgia as well. In particular, CRRC established that a significant majority of arbitration cases in Georgia are consumer-related (consumer loan disputes) and that malpractices in consumer arbitration taint the practice as well as the reputation of commercial arbitration in Georgia. Therefore, the CRRC Report recommends addressing shortcomings in consumer arbitration in order to restore minimum standards of fairness and trust towards arbitration.[47] SRRC Report does not suggest banning or otherwise suppressing consumer arbitration, but rather advocates for its regulation to benefit the consumers. Thus, CRRC Report recommends the following:

"a model of regulation or self-regulation, which would ensure minimum standards of fairness, professionalism, and transparency of consumer arbitrations, should be employed. It should not prohibit the arbitration of consumer disputes and should not lead to the over-regulation of arbitration by the legislature."

Given its wider scope of research, CRRC Report does not go further than that in elaborating on possible reform of consumer arbitration. The Report suggests, however, conducting further research and designing the model most suitable for Georgia. The Group largely shares the recommendations of CRRC Report and agrees that comprehensive research and analyses are required to design the model that is adapted to the realities and needs of Georgia and Georgian consumers.

The Expert Group has taken a closer look at a more recent Report by Christopher R. Drahozal that focuses on consumer arbitration in Georgia (Drahozal Report). Although addressing specifically consumer arbitration, in terms of findings and recommendations, the Report is quite high level. The Report draws upon the experience of United States and proposes a menu of options for possible reform.[48] The Report suggests that the proposed reform models are alternative solutions[49] and that other models or combinations of models can be adopted.[50] The menu of options proposed in Drahozal Report is quite comprehensive in that it covers various angles of possible reform, however, the Report does not go into details of particular options, neither does it explain how these options correlate or whether they overlap or exclude one another. The Report does present certain examples of regulatory or

47 Legal and Practical Aspects of Arbitration in Georgia, Caucasus Research Resource Center (CRRC), February 2018, p. 11.
48 See, Models for Regulating Consumer Arbitration in Georgia, Christopher R. Drahozal, December 2021, EU, UNDP.
49 *Ibid.*, p.11.
50 *Ibid.*, p.21.

institutional approaches in United States. However, it does not present a comprehensive study of the law and practice of the United States. It should also be noted that the experience of United States might not directly translate to the reality in Georgia. In the US, the society is more litigious and therefore, the consumers are more sophisticated and knowledgeable with respect to various forms of dispute settlement (litigation, arbitration, mediation); whereas in Georgia, the situation is completely opposite and, therefore, more comprehensive regulation and another form of interventions might be warranted. Thus, for designing an appropriate reform model for Georgia, it is recommended to take into consideration models from different jurisdictions together with US experience.

Overall, we believe that Drahozal Report is a decent base document for the policy makers to start their inquiries in terms of developing particular policy and reform model for Georgia. However, further research is needed in order to study the experience and best practices of other countries and to design a reform model that dovetails different elements to address particular needs and challenges of consumer arbitration in Georgia.

OBLIGATIONS OF GEORGIA UNDER THE ASSOCIATION AGREEMENTS

On 27 June 2014 Georgia signed the Association Agreement with the European Union and European Atomic Energy Community and their Member States (AA). The AA fully entered into force on 1 July 2016 following the ratification of the Agreement. After the agreement's entry into force, the parties have agreed Association Agenda to implement the objectives of the AA. The first Association Agenda was adopted in November 2017 and covered the period from 2017 through 2020. In August 2022 Association Counsel adopted new Association Agenda, which sets new priorities for the period from 2021 through 2027.[51] Agenda facilitates the accomplishment of objectives of political association and economic integration of Georgia through short-term and medium-term priorities, whereby short-term priorities should be achieved, or significant progress thereon should be made in 3-4 years, while the term for the long-term priorities is seven years.

One of the priority areas under the Association Agenda 2021-2027 is "Democracy, Human Rights and Good Governance". In this area, in the justice sector, one of the priorities set by the Association agenda concerns ADR and is defined as follows:

> "Enhance the use and quality of mediation; *address deficiencies in consumer arbitration*, and create conditions for increasing the use of business-to-business arbitration [Emphases Added]."[52]

This is a short-term priority i.e. a priority that should be achieved or on which significant progress should be made within 3-4 year period. The Association Agenda does not provide any further details as to the deficiencies of consumer arbitration or the measures to address them. It is noteworthy that the previous Association Agenda did not provide such a specific commitment with respect to consumer arbitration or arbitration in general, for that matter. Association Agenda of 2017-2020 was more general in this area in setting the priority to "[i] ntroduce fair and efficient, and more widely used, alternative means of dispute settlement".[53]

It should also be noted that Consumer Protection is a stand-alone priority in the area of Economic and Sectoral Cooperation of the Association agenda 2021-2027.[54]

In light of the above, consumer protection, including through the resolution of "deficiencies in consumer arbitration" is a priority under the current Association Agenda, and it is Georgia's obligation to implement necessary measures to achieve this priority.

51 See, Recommendation No 1/2022 of the EU-Georgia Association Council of 16 August 2022 on the EU-Georgia Association Agenda 2021-2027 [2022/1422] Official Journal of the European Union L 218 (2022).
52 Association Agenda 2021-2027, (n. 51).
53 Recommendation No 1/2017 of the EU-Georgia Association Council of 20 November 2017 on the EU-Georgia Association Agenda [2017/2445] Official Journal of the European Union L 344 (2017), p. 73.
54 Association Agenda 2021-2027, p. 69, (n. 51).

FOREIGN EXPERIENCE IN CONSUMER ARBITRATION

The policy and practice with respect to consumer dispute settlement, including consumer arbitration, varies in different jurisdictions. The approach is based on varied considerations such as consumer protection, access to justice and protection of minimum fair trial guarantees, promotion and support of arbitration, etc. It should also be noted that regulations in different countries are not established in isolation but are deeply rooted in the general principles and norms of the respective legal system. Therefore, while the approach of other countries is interesting and valuable, it is also essential that any approach implemented in Georgia is in accord with the general principles of law underlying the Georgian legal system.

We will consider the approach of several jurisdictions on a very high level basis as far as the scope and resources of this project permit. However, we do recommend conducting more in-depth research into the policy and practice of other countries to support the future work towards the reform of consumer arbitration in Georgia.

EUROPEAN UNION

The European Union has adopted a comprehensive system of settlement of consumer disputes through alternative dispute resolution (**ADR**). The main instruments with respect to the ADR in consumer disputes is the Directive on Alternative Dispute Resolution for Consumer Disputes (the **ADR Directive**), the Directive on Unfair Terms in Consumer Disputes (the **Directive on Unfair Contract Terms**) and the Regulation on Consumer Online Dispute Resolution (the **ODR Regulation**).

The principle of access to justice goes to the roots of EU Law. Article 47 of the EU Charter of Fundamental Rights guarantees rights to an effective remedy and fair trial. The access to court for parties with weaker bargaining powers, such as consumers, is further ensured by private international law of the Union.[55]

The Directive on Unfair Contract Terms considers as unfair term a provision "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions".[56] This provision is mirrored in the Consumer Law of Georgia (See, Chapter III.B above).

The approach of the EU is to allow the use of ADR in consumer disputes in limited cases, but at the same time, protect consumers from unfair ADR clauses and guarantee access to justice, fairness and quality of ADR services. Although within a limited scope, the ADR Directive promotes ADR as a "simple, fast and low-cost out-of-court solution to disputes

55 See Section 4 of the Regulation (EU) of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), No 1215/2012, 12 December 2012.

56 Council Directive 93/13/EEC, Directive on Unfair Terms in Consumer Contract, 5 April 1993 as amended by Directive 2019/2161 on 27 November 2019, Article 3(3), Annex 1(Q).

between consumers and traders".[57] Furthermore, the ADR Directive specifically encourages to disseminate ADR in countries with a substantial backlog of cases pending before national courts "preventing Union citizens from exercising their right to a fair trial within a reasonable time."[58] At the same time the Directive requires that states implement system that ensures "affordability, transparency, flexibility, speed and quality of decision-making by the ADR entities".[59]

The ADR Directive aims to limit pre-dispute arbitration clauses in consumer contracts. Thus, ADR clauses concluded before "the dispute has materialized" and that deprive consumers to bring action before court are not binding on consumers.[60] It should be noted, however, that the ADR directive only applies to disputes initiated by consumers against the traders, not the other way round, nor with respect to disputes between the traders.[61]

Only those entities that comply with the quality requirements provided in the Directive and are listed accordingly shall be considered ADR entities.[62] Among others, the ADR Directive requires ADR entities to publish sufficient information for consumers and ensure the fairness[63] and effectiveness[64] of their services, including in terms of costs and duration.

The ADR Directive is very strict with respect to the issues of conflict of interest and excludes any ADR entity that engages decision-makers that are employed or remunerated by the trader.[65] Persons in charge of ADR should be "independent of all those who might have an interest in the outcome".[66] The ADR Directive prescribes particular requirements to exclude any conflict of interest or undue influence on persons in charge of ADR.[67]

Aside from conflict of interest, the ADR Directive requires that ADR entities are accessible and transparent.[68] Traders should provide information regarding ADR entity they intend to use to resolve disputes with traders.[69] The obligation to inform the consumers is also ascribed to a competent authority.[70] The consumer organizations and business associations are also expected to land a hand in informing consumers with respect to ADR entities and ADR services.[71]

In order to ensure the implementation of the detailed regulation of consumer arbitration and compliance thereto from various entities and persons involved, EU law puts in place specific control and enforcement mechanisms. The ADR Directive requires that member

57 Preamble, Recital (5), Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013/11/EU, 21 May 2013.
58 *ibid*, Preamble, Recital (15).
59 *ibid*, Preamble, Recital (10).
60 *ibid*, Preamble, Recital (43), Article 10.
61 *ibid*, Preamble, Recital (16).
62 *ibid*, Preamble, Recitals (15) and (24).
63 *ibid*, Article 9.
64 *ibid*, Article 8.
65 *ibid*, Preamble, Recital (22).
66 *ibid*, Preamble, Recital (32).
67 *ibid*, Preamble, Recital (32-35).
68 *ibid*, Preamble, Recital (39).
69 *ibid*, Preamble, Recital (47), Article 13.
70 *ibid*, Preamble, Recital (55).
71 *ibid*, Preamble, Recital (55).

states designate competent authority that will monitor ADR entities' compliance with the requirements of the Directive.[72] The ADR Directive further requires member states to introduce "effective, proportionate and dissuasive" penalties to ensure the enforcement of the Directive.[73]

Finally, EU Law also deals with the issue of cost efficiency. The ADR Directive proposes but does not impose that ADR services be free of charge for the consumers; however, the Directive does require that cost-wise the ADR is "accessible, attractive and inexpensive for consumers" i.e. subject to "a nominal fee".[74]

UNITED STATES

The US has almost no regulation of consumer arbitration on a federal level. Contrary to EU, the pre-dispute consumer arbitration clauses are not questioned, let alone prohibited. Moreover, US courts have widely enforced *ex-ante* consumer arbitration clauses, even in the most controversial cases. Thus, the US Supreme Court has reversed decisions from the courts at the state level and has enforced arbitration clauses in consumer contracts in favour of federal policy to promote arbitration; the Supreme court took this approach even in cases when the clause also excluded the right to class action and even when low value of dispute would make arbitration an unviable if not impossible option for the consumer.[75]

This approach has only limited exceptions; for example, the Truth in Landing Act prohibits mandatory arbitration or any other non-judicial procedure in consumer credit transactions.[76] Creditor and consumer could, however, agree on arbitration after the dispute arises.[77]

Despite the high endorsement of consumer arbitration clauses, there are certain requirements that clauses should meet in order to be enforced. The US courts will not enforce a contract or a clause that is unconscionable at the time of conclusion based on the common law doctrine of unconscionability.[78] According to the Official Commentary, the following test applies:

> "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. […] The principle is one of the prevention of oppression and unfair surprise […] and not of disturbance of allocation of risks because of superior bargaining power."[79]

Thus, for US legal doctrine and practice, the 'superior bargaining power' is not a relevant factor in accessing the unconscionability of the clause; hence, the consumer is not considered such a weaker party after all. The law and practice in US seem to be informed more by the principles

72 *ibid*, Preamble, Recital (55).
73 *ibid*, Preamble, Recital (56).
74 *ibid*, Preamble, Recital (41).
75 See, American Express Co. v. Italian Colors Restaurant, 133 S Ct 2304 (2013); See Also, At&T Mobility LLC v. Concepcion 131 S Ct 1740 (2011); Directivo Inc. v. Imburgia 136 S Ct 463 (2015).
76 Truth in Landing Act: Overview, 67 <Truth in Lending Act - Overview (wa.gov)> accessed 23.11.2022.
77 *ibid*.
78 Uniform Commercial Code as amended in 2002, Sec. 2-302.
79 Uniform Commercial Code as amended Sec. 2-302 Official Comment.

of freedom of contract and party autonomy and the promotion of arbitration. In Consideration of this policy approach, the Supreme court has set very high standard for applying the uncountability doctrine with respect to consumer arbitration clauses.

Conversely to the approach of the legislator and the national courts, arbitral institutes felt the need to introduce certain regulations for consumer arbitration. American Arbitration Association (the **AAA**) and Judicial Arbitration and Mediation Services (the **JAMS**) require protection of due process and 'minimum standards of fairness' for arbitrating consumer disputes. Thus, the AAA has adopted the Due Process Protocol for Mediation and Arbitration of Consumer Disputes (the **AAA Protocol**), which recommends certain measures to guarantee "Fundamentally-fair ADR process" for consumers. Although the Protocol is a non-binding instrument, the AAA declares that it will **"decline administration of arbitration demands where an arbitration clause contains material violations of the AAA Consumer Due Process Protocol"**.[80] In particular, the Protocol requires that consumers are adequately informed of arbitration clauses and their consequences, the arbitration process (including main distinctions between arbitration and court), and a clear statement of means whereby the consumer can exercise option (if any) to apply to court or arbitration.[81] The AAA Protocol also requires that traders develop ADR program that "entails reasonable costs for Consumers".[82] 'Minimum standards of fairness' established by the JAMS shall only apply if there is "minimal, if any, negotiation between the parties"; the standards do not apply if an arbitration clause was negotiated between the consumer and the company.[83]

OTHER JURISDICTIONS

The United Kingdom (the **UK).** The UK has not implemented such a comprehensive regulation as provided by the EU Law, however, it had put in place certain measures that would ensure the protection of consumer rights and guarantee access to justice. First or all, pursuant to Section 91 of the 1996 UK Arbitration Act, the consumer arbitration clause with respect to any claim for a pecuniary remedy that does not exceed GBP 5,000.00 is not enforceable.[84] Any claim above the established value threshold will be then subject to the regulation of unfair terms embodied in 2015 UK Consumer Rights Act and the binding precedents established by the Courts of the UK. Pursuant to Section 2 of the Act, a consumer contract term is unfair if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer".[85]

Based on this test, a term "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy", in particular, requiring consumer to go to "arbitration not covered by legal provisions" is considered unfair.[86] Unlike US Courts, the UK Courts have given

80 AAA, Practice Area: Consumers, < AAA Consumer | ADR.org> accessed 23.11.2022.
81 Due Process Protocol for Mediation and Arbitration of Consumer Disputes (AAA Protocol), Principle 11.
82 *Ibid*, Principle 6.
83 JAMS, "JAMS Policy on Consumer Arbitrations Pursuant to Pre-dispute Clauses Minimum Standards of Procedural Fairness", 15 July 2009, FN 1.
84 Section 91, Chapter 15, UK Consumer Rights Act 2015.
85 *ibid*, Section2.
86 *ibid*, Schedule 2, Part 1.

great importance to the prohibitive cost of arbitration that can hinder consumer access to justice. The UK courts have refused to enforce arbitration clauses where a consumer would be exposed to unreasonable costs in the arbitration, which was disproportionate in relation to the value of the dispute; the UK Courts have also found unfair an arbitration clause that was not sufficiently disclosed to the consumer, and that was simply put in standard terms of the contract.[87]

New Zealand. New Zealand has taken a similar approach as the EU with respect to pre-dispute clauses. According to the Arbitration Act of New Zealand only those arbitration agreements that have been entered by the consumer in separate document and after the dispute arose are binding and enforceable.[88] This approach intends to ensure that the consumer has full information, thus, strengthening the likelihood of genuine consent to arbitration. Section 11 of 1996 Arbitration Act of New Zealand provides that the arbitration clause in a consumer contract is enforceable where:

> "c. the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it."

Canada. In Canada, the law and practice are somewhat unsettled and differ from state to state. In general, Canada takes the approach of the US in that the Canadian Courts enforce mandatory arbitration clauses in consumer contracts in view of the requirements of arbitration laws, even if the clause is contained in an adhesion contract and even if it prohibits access to courts through a class action.[89] There are some exceptions, however; Quebec and Ontario prohibit arbitration clause that "restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action".[90] However, even in this case, the Supreme Court of Canada found that the carve-outs in Consumer Protection Acts would not cover such category of consumers as business consumers.[91] The general practice of endorsement of mandatory pre-dispute arbitration clauses might change, however. The recent practice of the Supreme Court of Canada has overturned the long-established presidents of the Canadian courts. The Supreme Court refused to stay class action of Uber drivers invalidating pre-dispute arbitration clause on the bases that the arbitration filing fees and the fact that it was seated in Netherlands rendered arbitration "realistically unattainable" and denied access to justice to consumers. The court ruled based on the principle of unconscionability, having established an unequal bargaining power between the parties and "unfair and overwhelming benefit" in favour of the drafting party.[92]

87 See, Zealander v. Laing Homes Ltd. 2 TCLR 724 (TCC) (2000); Mylcrist Builders Ltd. v. Buck EWHC 2172 (TCC) (2008).
88 Sec. 11, Arbitration Act 1996, N99 as reprinted on 30 January 2021.
89 See, Dell Computer Corp v. Union des Consommateurs 2 SCR 801 (2007).
90 See, Sec. 11.1, Quebec Consumer Protection Act, 7 June 2012. See also, Sec. 8, Ontario Consumer Arbitration Act, 2002.
91 See, Telus Communications Inc. v. Wellman, 1 SCR 531 (2011).
92 See, Uber Technologies Inc. v. Heller, SCC 16, [2020] 2 S.C.R. 118 (2020).

MAIN FINDINGS AND CONCLUSIONS

Based on the desk research, which included the analyses of previous research, relevant statistics, case-law and doctrine, as well as the stakeholder interviews, the main findings of the Expert Group are as follows:

THE AWARENESS OF ARBITRATION IS VERY LOW IN GEORGIA

As previous surveys, further research, and stakeholder interviews demonstrated, the awareness of arbitration in Georgia is very low (for the relevant statistical data please refer to Chapter IV.A above). This is true in case of both businesses and ordinary citizens. The main source of their information is a television and social media; the roles of professional business and legal advice, which should be the driving factor in choosing arbitration as a dispute settlement mechanism, are insignificant.

The awareness and knowledge of arbitration are extremely low among ordinary citizens i.e., among potential or actual consumers. The stakeholder interviews have revealed that consumers do not have sufficient or any knowledge of arbitration as a dispute settlement mechanism, its application and the consequences of its use, nor are they informed in any form or at any stage by traders or other relevant stakeholders or institutions to enable their active and informed participation in the process. The fact that, in the overwhelming majority of cases, the claimants are traders is also telling. The awareness of arbitration and its potential benefits is so low among consumers that there are only a handful of cases in hundreds of consumer matters resolved through arbitration, where consumers used the system to defend their rights.

ARBITRATION PLAYS AN IMPORTANT ROLE IN THE FIELD OF CONSUMER RELATIONS IN GEORGIA

Statistical information collected from major Georgian arbitral institutes and stakeholder interviews have demonstrated that the vast majority of arbitration matters in Georgia is consumer related. Thus, despite many challenges, arbitration plays a central role in consumer dispute settlement. The Satisfaction Surveys conducted in previous years among businesses as well as among ordinary citizens have shown that those Respondents who are familiar with arbitration and/or have used this mechanism are very satisfied or somewhat satisfied with the mechanism, consider arbitration as the most favoured mechanism and would recommend others to use one. In the same way, in consumer arbitration, despite many challenges that will be discussed in the subsequent chapters, financial institutions as well as businesses, would prefer arbitration over any other dispute settlement mechanisms. It is also important to note that all stakeholders interviewed in their different capacities, unanimously agree that consumer arbitration should not be banned outright but rather should be regulated to make it more accessible, effective and just for all users.

In our view, consumer arbitration can play an important role in effectively resolving consumer disputes. In the circumstances of a highly overloaded court system, when the resolution of even the simplest legal matters might take months or even several years, arbitration can be a simple, faster and cheaper alternative. We believe this could be achieved though the will, right

regulation, and organization of the process.

THERE ARE CERTAIN OBSTACLES DISCOURAGING THE USE OF ARBITRATION IN CONSUMER RELATIONSHIPS

The research and stakeholder interviews have brought to the surface certain challenges and concerns that discourage and/or prevent users from using arbitration in consumer relationships. Regulatory gaps, legislative shortcomings or inadequate and improper practices created such obstacles that financial institutions and businesses had to change their dispute settlement policies and revert to court systems in respect to certain cases or a certain category of disputes. Thus, for example, the legislation allows courts to interpret law in a way that they still retain jurisdiction on certain legal issues (e.g. unjust enrichment) in relation to the dispute that parties subjected to arbitration; arbitration and corresponding court practice with respect to provisional measures is highly unsettles and uncertain; the Law on Enforcement excludes use of summary proceedings if parties agreed on arbitration. The logic behind this latter regulation in the Law on Enforcement is unclear – if the law provides for the possibility to bypass court litigation through summary proceedings, how could it prevent the same in case of arbitration, which is an alternative i.e. substitute for the court litigation in the first place.

Another serious obstacle and reason for the change of hearts of users towards arbitration is significant delays in national courts at the stage of recognition and enforcement of arbitral awards. As described in Chapter IV.C above, the court delays in handling the simplest and the most straightforward procedure of recognition and enforcement of arbitral awards are beyond unreasonable. This is a serious discouragement for users to use arbitration in consumer as well as and even more so in business-to-business arbitrations. Stakeholders have expressed serious concerns and dissatisfaction with this situation noting that the unserious approach of national courts ruins the reputation of arbitration in Georgia and deprives it of its most important benefit, which is a speedy resolution of a dispute.

Finally, as mentioned several times in this Report, the arbitration system is highly underused by consumers as parties to the dispute. There are only a handful of known cases where consumers have launched arbitration against the trader. In all other cases initiated by a trader, the consumer either does not participate or is involved without proper representation against the experienced in-house counsel of the trader and, sometimes, even highly paid professional counsel engaged by the latter. The reason for such reluctance on the part of the consumer to use arbitration is manyfold; to name a few: 1. Consumers are unaware of the arbitration clause in the contract, which has been imposed on them as a standard clause without any information, explanation and negotiation; 2. Consumers do not have relevant knowledge and information as to how arbitration works, including its benefits and consequences; 3. Consumers do not have the means to access the system (pay fees, retain qualified counsel, participate in proceedings, etc.); 4. Consumers do not trust arbitral institutes or arbitrators as they still suffer (in some cases legitimately so) from reputational issues of lack of independence and impartiality; 5. The established environment, procedure, and practice do not guarantee the minimum standards of fairness for consumers in arbitration. The measures to reform the system should also be directed at eliminating these obstacles and creating an enabling environment for consumers to benefit from the system.

CONSUMER ARBITRATION IS HIGHLY UNREGULATED IN GEORGIA

The general legal framework in arbitration in Georgia is robust and corresponds to the latest trends and best practices. There are still many challenges in commercial arbitration practice in Georgia, such as low level of awareness, lack of professional practitioners in arbitration (arbitrators, counsel, etc.), unreasonable delays in courts in dealing with the recognition and enforcement of arbitral awards, etc. Despite these challenges, however, we do not see a need for legislative intervention in the general legal framework on arbitration. These problems can be addressed through concerted actions in various different directions, including by providing professional training and qualification-raising activities, awareness campaigns, institutional reforms, etc.

This said, the strong general legal framework, while extremely reassuring for the fate of commercial arbitration, is not sufficient for the development of consumer arbitration in Georgia. The latter faces serious challenges that, in our humble opinion cannot be resolved without intervention on multiple fronts, including legislative and regulatory reform in the field. The poor practices developed on consumer arbitration matters, which appears to be the vast majority of cases in the entire arbitration practice in Georgia, have a negative spillover effect on commercial arbitration that threatens the trust and reputation of this most favoured dispute resolution mechanism among businesses. Conducted research and views of the principal stakeholders in the field support the position that consumer arbitration should be distinguished from commercial arbitration and subjected to additional requirements.

All interviewed arbitrators, counsel and arbitral institutes are against the absolute ban on arbitration for consumer matters; instead, they propose that consumer arbitration is distinguished from commercial arbitration and is subject to regulation. In the view of the practicing lawyers, consumer arbitration shall be subject to separate regulations, which among other would ensure that relevant information regarding arbitration, its respective procedure and consequences is provided to the consumer at the time of concluding arbitration agreement. Several interviewed counsels have proposed establishing specific requirements for arbitral institutes, including with respect to the corporate form of the institute, which in their views, should not be a profit-making entity. Interviewed counsel have also suggested that there should be separate arbitration rules for arbitrating consumer matters, which among other, would provide: specialized procedure and a different standard for providing notice; appointment of arbitrators; ethics and conflict of interest rules for both arbitrator and arbitral institutes; additional qualification requirements for arbitrator; more flexibility for arbitral institutes and arbitrators to assist a weaker and uninformed party such as consumer in understanding the procedure and specificities of arbitration. One of the interviewed counsels has noted that it would advise arbitration for consumer matters only if the consumer arbitration is regulated so that the trader is not in the dominant position to impose terms on the consumer.

Arbitrators and arbitral institutes have voiced similar views on the possible regulation of consumer arbitration. They likewise advise introducing certain regulations with respect to the arbitration clause and their conclusion, arbitration procedure, including timelines and notice procedures. Representative of one of the arbitral institutes even suggested introducing practice of concluding arbitration clause in a separate document. One arbitrator further

suggested regulation not only on a legislative but also institutional and supervisory levels (for example, on the level of National Bank in relation to financial services). In the view of several interviewed arbitrators and one of the interviewed counsels, arbitration procedure and the administration of the matters should be so straightforward and simplified that consumers should not be required to retain counsel or obtain special legal advice. The other counsel has proposed that arbitral institutes collect and process statistics on consumer arbitration matters, including studying the reasons why the majority of matters are resolved in favour of traders. These categories of stakeholders also concur on the view that lack of separate regulation of consumer arbitration facilitates the development of poor arbitration practices that have a negative spillover effect on commercial arbitration, including with respect to the recognition and enforcement of arbitral awards. Some arbitrators and representatives of arbitral institutes have clarified that in reality courts try to protect the consumer as a weak party by misinterpreting established arbitration law, norms and procedure and, thus, developing poor practices which then they apply as a matter of established case law to commercial matters as well, where such power disbalance between the parties is absent.

While financial institutions likewise oppose the ban on consumer arbitration, conversely to other stakeholders, they do not see the need to distinguish consumer arbitration and to further regulate it. It has been noted that NBG already imposes quite extensive regulations on financial institutions concerning consumer contracts/products, and it would be burdensome to expand them further. The representative of one of the banks has expressed a view that such regulation will be counterproductive as it would obstruct the development and intellectual growth of consumers as a party to contractual relationships. The representative of one of the micro-finance organizations advised educating and informing consumers in lieu of legal regulations.

In light of the above findings, the Expert Group believes that the reform of consumer arbitration should entail legislative and regulatory intervention as well as concerted afford from various stakeholders and institutions to ensure higher awareness among consumers, access to relevant information, enabling environment for the consumers to become users of the system themselves; the system of consumer dispute settlement/arbitration shall further guarantee the access to justice and protection of minimum requirements of fairness and due process for the consumers.

MINIMUM STANDARDS OF FAIRNESS ARE NOT OBSERVED IN RELATION TO CONSUMER ARBITRATION IN GEORGIA

In general, the consumers are considered to be a weak parties in the transaction with traders. More precisely, the consumers do not have bargaining power and sufficient knowledge to dictate or influence contractual terms, therefore, they are left without a choice but to agree to the terms pre-drafted by the trader. This creates a problem of genuine consent of the consumer to arbitration. Even if such terms were subject to negotiations, consumers would lack the knowledge to understand and negotiate arbitration clauses. It would not be viable for the consumer to engage external counsel advise or representation for single transaction as the value of such advise would most likely outweigh the cost of such transaction; traders

on the other hand, have all the incentive to invest sufficient resources in designing arbitration clause for contract with a multitude of consumers. Naturally, traders would have standard contract terms, including arbitration clauses, drafted in their favour, especially in such situations when terms could be easily imposed on consumers due to the reasons described above. This is the case in consumer-trader relationships in Georgia. Financial institutions, businesses, and other stakeholders interviewed on this Project have confirmed that arbitration clauses in consumer contracts are standard terms. It has also been signaled that the consumers are not involved in negotiating arbitration clauses, nor are they provided with any information regarding arbitration, procedure and consequences of its application. As a result, arbitration clauses are not individually negotiated with consumers and are presented by traders on a "take it or leave it bases". Therefore, it can be argued that consumers do not give informed consent and/or do not have real choice in the matter as without agreement to the proposed clause, they would not be able to purchase the good or service at hand.

This lack of bargaining power and capacity to make an informed decision disrupts the balance between the right of consumer and trader and makes consumer arbitration clauses unfair. The problem would be resolved if consumers were provided with the possibility to make informed decisions and certain requirements of fairness were guaranteed in the arbitration clause.

Informed consent. The party autonomy lies at the heart of arbitration. A party can be compelled to arbitration and be bound by the award only in case of it consents to such procedure. UNCITRAL Model Law and hence, Georgian Law on Arbitration requires the written consent of the party to the arbitration agreement. Moreover, in order to protect the weaker, less informed or educated party, the law specifically requires a signature to a written document when an arbitration clause is concluded with a natural person.[93]

One way to ensure the consumer's informed consent is to provide arbitration clauses in a separate document. This way arbitration clause is no longer a mystical phrase included with small letters in the standard provisions that no one pays attention to. This is a separate stand-alone document that catches the eye and invites separate revision by the consumer. For example, this approach has been adopted by New Zealand (See, in Chapter VII.C above) and Germany.[94] In the case of Germany, besides embodying the arbitration clause in a separate document, the law requires that such document is personally signed by the consumer, similar to the requirement under Article 8 of Georgian Law on Arbitration.

Access to information. To ensure informed consent to arbitration agreement as well as effective use and benefit of arbitration system by the consumer, the latter shall have access to relevant information. Consumer shall have sufficient information regarding arbitration, the risks entailed thereunder and the implications of arbitration. Such information should clearly indicate that choosing arbitration contemplates forgoing the right to courts of law, so that the consumer does not waive its right to go to court inadvertently. Consumer shall also be duly informed of arbitral institutes and the arbitration rules chosen by the trader as well as the administration of disputes by such institutes.

93 Article 8(8), Arbitration Law of Georgia, (n. 1).
94 See, Article 1031(5), German Civil Procedure Law.

We have discussed above that the level of awareness of arbitration among consumers is very low in Georgia; we have also determined through the research and stakeholder interviews that consumers are not provided with relevant information during contract negotiation or later in the process of arbitration by any relevant stakeholder. Access to information is also problematic as the traders or relevant agencies or arbitral institutes do not make sufficient information available to the consumer (through public, online means); and in cases of limited available information, the access thereto is hindered by technical difficulties (the websites are not operational, there are no clear channels of communications for enquiries, information is not provided in a format and language that would be comprehensible for consumer, etc.).

We believe that the availability of relevant information for consumers is key for the legitimate and effective use of arbitration in consumer relationships. We also believe that access to information shall be ensured at multiple levels; not only traders (businesses, financial institutions) but also other agencies and institutions, such as arbitral institutes, consumer protection agencies and other administrative structures dealing with consumer issues could play an important role in providing vital information and data to consumers. The EU regulations, in particular ADR Directive, could be a good guiding instrument to design the proper system of access to information for consumers at different levels (See, Chapter VII.A above).

Cost-effectiveness. Arbitration proceedings in consumer disputes should be cost-effective and affordable for consumers. It would be unfair to invite, let alone force, consumers to waive their right to court and drag them into arbitration, that is more costly than litigation. Arbitration would also be ineffective if arbitration costs effectively exceed the value in dispute.

Various measures could be implemented to ensure that arbitration is cost-effective and affordable for consumers. Such measures could include the possibility of online arbitration procedure; handling consumer matters by a sole arbitrator; deciding cases based on written submissions without a oral hearing unless both parties agree otherwise; making the procedure so simple and straightforward that consumers would not need to be represented by counsel, etc. It is a very positive trend that in Georgia the majority of consumer arbitration cases are resolved by a sole arbitrators, some institutions have separate procedures for small disputes, consumers are allowed to participate in proceedings without counsel, and arbitral institutes seem to generally understand the importance of assisting consumer as uninformed and underrepresented party in the proceedings. However, these practices are spontaneous and inconsistent as well as lack structure and sophistication. For example, while it is a good approach to encourage sole arbitrator for small disputes such as majority of consumer cases, some institutes directly appoint arbitrators and exclude the possibility for party agreement to choose sole arbitrator; moreover, as established above in some institutes, the same arbitrator or a small number of arbitrators deal with all disputes. In the vast majority of matters, consumers either do not participate or are not properly represented in the proceedings; while in the well-organized system, this might be encouraged to reduce cost, it should not happen at the expense of consumers' ability to properly represent its case against the trader. The consumer arbitration system should be so well organized, with simplified and straightforward rules and procedure that consumers should not require counsel. Unfortunately, this is not the

case in Georgia at the moment, and lack of proper representation in this situation probably is to the detriment of consumers' case in the dispute. EU regulation could be instructive in this aspect; pursuant to ADR Regulation, consumers should not be required to retain a lawyer or legal advisor but should not be deprived of such right either.[95]

In terms of specific cost-models, Georgia could consider the EU approach of making arbitration free or subject to nominal fees for the consumer. Spain has adopted an interesting state-supported consumer arbitration model whereby consumers shall refer matters to public consumer arbitration boards that are free of charge.[96] In the US, in cases when a consumer initiates arbitration JAMS established a nominal fee of USD250 which is equivalent to the court filing fee for similar matter; in cases when the trader initiates matter all costs shall be borne by the latter.[97] Alternatively, arbitration proceedings could be funded solely by traders, and consumers would be required to pay the relevant portion only in case of adverse outcome in arbitration and as allocated by the arbitrator/tribunal.

The above is an expression of general thoughts on a possible cost-model for consumer arbitration proposed by the Expert Group as food for thought for further discussion. The cost model for consumer arbitration in Georgia shall be designed based on the thorough study of the market, availability of recourses and needs and challenges of all stakeholders involved.

Independence and impartiality. Based on the research and stakeholder interviews, we can observe a general positive trend of abandoning the malicious practice of using pocket arbitration and the affiliation of traders and arbitral institutes in resolving consumer disputes. Another positive trend is that after GAA's adoption of Code of Ethics, the majority of arbitral institutes subject themselves and arbitrators appointed pursuant to their rules to the Code of Conduct and ethical rules embody therein. There are some concerns, however, that remain and continue to harm the reputation of arbitration. As stakeholder interviews have revealed, there are still some institutions that offer special arrangements to financial institutions or other traders; in the case of some arbitral institutes the same individual or a small number of individuals decide all cases by the same trader or group of traders thereby developing some sense of loyalty to them or perception thereto; there is still a large mistrust among consumers towards arbitration as institutions favouring traders' interests, etc.

Given the above, Georgia could consider developing additional ethical standards and requirements to exclude conflict of interest or any affiliation of arbitrators or arbitral institutes with the trader. Arbitral institutes could be asked to establish relevant requirements, procedures and proper list of arbitrators to ensure independent and impartial resolution of consumer matters. Furthermore, information campaigns could be conducted that would reassure consumers that old malignant practices of consumer arbitration have been abandoned and thus, increase the legitimacy of and trust towards arbitration among consumers. The EU legislation and practice of EU countries could be good guidance in this aspect of possible reform.

95 Article 8 (b), (n. 58).
96 Royal Decree 231/2008, 15 February 2008.
97 Paragraph 7, JAMS Minimum Standards, (n. 63).

Arbitration procedure and arbitral institutes. The majority of arbitral institutes do not have special rules or procedures for resolving consumer arbitration matters. Arbitration rules and administrative procedures of these institutions, thus, do not differentiate between consumer arbitration and any other business-to-business disputes. Some institutes provide for different procedure or approach to small disputes based on monetary thresholds, but even in these cases, the rules for small disputes are not sophisticated enough and only provide some limited distinction from the general rules of arbitration of these institutes. As discussed above, arbitral institutes do not provide sufficient information or assistance to a consumer in the process of arbitration to ensure effective use of arbitration and participation in arbitral proceedings by consumers.

Rules of procedure, policy and practice of arbitral institutes in the administration of disputes is key in ensuring consumers' access to arbitration, providing minimum fair trial guarantees to consumers in arbitral proceedings, and making proceedings efficient and effective for consumer disputes in general. As discussed above, the procedure should be so straightforward and simple that consumers should not require counsel or other representation in arbitration.

Georgia could establish a registry of arbitral institutes that would include institutions that comply with the list of requirements to qualify for resolving consumer arbitration matters. These requirements and standards should be carefully considered to balance the protection of the rights of all parties to the consumer relationships and ensure independent development of arbitration practice and operation of arbitral institutes in Georgia. The EU law and regulations could again be guiding in this aspect of possible reform.

RECOMMENDATIONS

A. The pre-dispute consumer arbitration clauses shall be allowed and enforced.

B. The validity and enforceability of pre-dispute arbitration clause shall be subject to minimum requirement of fairness, such as:

1. Ensuring informed consent of consumer to arbitration;
2. Providing sufficient information by trader to consumer regarding arbitration, arbitration rules and arbitration institute chosen by trader, including the clarification that consent to arbitration clause entails waiver of the right to courts of law;
3. Setting the requirements for arbitral institutes willing to administer consumer matters to guarantee clarity of their rules and procedure, minimum standards of fair proceedings, their impartiality and independence, etc. The requirements of independence and impartiality as well as good ethics shall equally extend to arbitrators engaged in such arbitrations;
4. Ensuring accessibility of arbitration for consumers, including in terms of cost effectiveness of such procedures.

C. Adopt appropriate legislative amendments to the Law on Arbitration and Consumer Law. Implement other necessary legislative and regulatory measures.

D. Implement activities to raise awareness of consumer arbitration and ADR among consumers.

E. Implement measures to increase awareness and qualification on consumer dispute resolution, including consumer arbitration and ADR among all stakeholders (whether public of private) and professionals (counsel, arbitrator, judges, employees of arbitral institutes, etc.).