Institutional Conflict of Interest in Arbitration – Georgian Reality

By Sophio Janjalia

LL.M. Capstone Thesis

Supervisor: Professor Markus Petsche

Central European University

June 17, 2024

Vienna, Austria

Table of Contents

List of Abbreviations

LLC or LLCs	Limited Liability Company
UNCITRAL	United Nations Commission on International Trade Law
ICSID	International Centre for Settlement of Investment Disputes
ICC	International Chamber of Commerce
ADC	Anaklia Development Consortium
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
RAC	Russian Arbitration Center
JAMS	Judicial Arbitration and Mediation Services Inc
GAR	Global Arbitration Review
US	The United States of America
EU	The European Union
EU ADR Directive	European Union's Alternative Dispute Resolution Directive
FTA	Free Trade Agreement
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
BIT	Bilateral Investment Treaty
EUSIPA	European Union-Republic of Singapore Investment Protection Agreement
HKIAC	Hong Kong International Arbitration Centre
LCIA	London Court of International Arbitration
GIAC	Georgian International Arbitration Center
VIAC	Vienna International Arbitration Center
DIS	German Arbitration Institution
NAI	Netherlands Arbitration Institute

AAA/ICDR	American Arbitration Association and the International Centre for Dispute Resolution
TAI	Tbilisi Arbitration Institute
ELR	Epicenter Loss Recovery
PAI	Permanent Arbitral Institution

Abstract

Institutional conflict of interest, (hereinafter "institutional conflict") represents a relatively underexplored aspect of arbitration on a global scale. While instances of institutional conflicts may be increasingly prevalent today, the international legal community has yet to categorize specific circumstances as institutional conflicts, often associating them with general conflicts of interest. This research aims to shed light on the phenomenon of institutional conflict, particularly within the context of arbitration in Georgia, identifying it as a distinct form of conflict of interest, and providing similar problems on an international level for the comparison.

The thesis explores the nature and various manifestations of institutional conflict, focusing on the associated risks and methods for assessing and preventing such conflicts. It highlights instances where institutional conflict undermines the impartiality and fairness of arbitration proceedings. Specifically, the thesis argues for the importance of establishing arbitration institutions as non-profit organizations, identifying significant drawbacks when these institutions operate on a for-profit basis. This legal structure often leads institutions to prioritize profit over their primary function of administering fair arbitration proceedings.

The research emphasizes the need for robust arbitration institutions in Georgia, supported by examples from Georgian case law, statistics on arbitration within the context of institutional conflict, and notable cases of institutional malpractice in Georgia, such as issues in the public procurement of arbitration services and unfair consumer-arbitration clauses. By comparing international approaches to similar issues, the thesis provides valuable insights for addressing these problems in Georgia. It also demonstrates that such issues may be present in other jurisdictions, including the United States, the United Kingdom, and Russia. Additionally, the thesis examines useful approaches from the European Union to protect consumers in arbitration

disputes and compares these with the Georgian approach. Despite the issue's relevance beyond Georgia's borders, there is a notable gap in scholarly investigation regarding potential institutional conflicts of interest in arbitration. This lack of academic exploration adds significance to the research, highlighting a globally pertinent problem that remains without a precise international or globally acknowledged definition.

Acknowledgments

The thesis is dedicated to my hometown, Georgia. I hold a profound belief in its potential to evolve into a truly arbitration-friendly country, provided that the current challenges are promptly addressed and resolved. I wish to express my deepest gratitude to my supervisor, Markus Petsche, for his invaluable guidance and unwavering support throughout this journey. His insightful advice and thoughtful critiques have been essential in refining my thoughts and structuring this thesis in a clear and coherent manner. Moreover, his passion for arbitration has profoundly inspired me and deepened my appreciation for this field.

I am also grateful to one of the most successful Georgian lawyers, Rusa Tchkuaseli, who provided me with current updates regarding arbitration in Georgia, and invaluable information during my master's studies. Her guidance has greatly enhanced my legal knowledge in Georgian law and arbitration. Additionally, I am deeply thankful to Central European University for giving me the opportunity to be a part of this amazing community and to all the Global Business Law and Regulations program's professors, who are true professionals and have been incredibly supportive throughout my studies. I also extend special appreciation to my professor and friend, Dina Bratslavskaya, whose encouragement and guidance were instrumental in my decision to apply to CEU. Her steadfast support and assistance throughout the university search process were invaluable. Finally, I express my sincere appreciation to my family and friends, whose encouragement and patience have been a continuous source of strength and motivation.

Introduction

I. Background

Arbitration serves as a method of alternative dispute resolution in modern legal systems, offering parties a flexible and confidential mechanism to resolve disputes outside traditional court proceedings.[1] Nevertheless, the effectiveness and fairness of arbitration can be compromised when conflicts of interest arise within the institutions tasked with administering these proceedings. Within the framework of the Georgian legal landscape, the Tbilisi City Court, in one of its rulings, interpreted the matter as follows: "When an arbitration institution maintains affiliations with one of the parties or their representatives, the potential for a conflict of interest arises."[2] The decision also elucidates that this scenario predominantly occurs in countries where arbitration institutions are established as limited liability companies (LLCs).[3] As a Georgian lawyer with experience in practicing law and closely following arbitration development in Georgia, I acknowledge the relevance of institutional conflict issues in the current context. During my research, I found that this matter is relevant not only in Georgia but also on an international scale. The term "institutional conflict" lacks a universally accepted definition, despite its occurrence in various forms. This is particularly noteworthy as Georgia has more clearly defined instances of institutional conflict compared to many other countries, primarily due to its higher incidence in Georgia itself. The thesis delves deeply into these complexities, focusing on Georgia while also providing relevant global examples.

[1] Blackaby Nigel, et al., Redfern and Hunter on International Arbitration, Section 1.04., p.1, 2023.
[2] Decision of the Tbilisi City Court of October 6, 2014, Case Number: N2/16444-14.
[3] Ibid.

II. Thesis Objective

The crux of the issue lies in the fact that when arbitration institutions function as LLCs, their primary goal is financial gain. This situation can lead to undue influence on arbitrators and interference in the decision-making process, often resulting in biased outcomes that favor the party from which the institution stands to gain financially. Institutional conflict arises when a shareholder of an arbitration institution assumes the role of a party representative in a dispute administered by the same institution. In this scenario, the potential for conflict is evident, as the shareholder's dual roles may undermine the fairness and impartiality of the arbitration process. Consequently, institutional conflict becomes apparent, especially in consumer-bank and general consumer arbitration disputes, where institutions have their "well-established clients" as parties to a dispute and might favor them to secure financial benefits. Even if not favoring these clients, incorporating an arbitration clause into contracts that mandates all disputes to be administered by a single institution, without discussion and negotiation with the other party, creates a reasonable perception of conflict of interest in the eyes of third parties. These matters are particularly relevant in Georgia and require prompt attention to establish robust arbitral institutions and foster trust in arbitration proceedings.

In today's context, Georgia is in urgent need of a strong arbitration system due to the inadequacy of its court system. Without reliable access to fair judicial processes, parties may feel excluded and deprived of justice. This underscores the importance of arbitration as a viable alternative. However, if arbitration institutions are financially tied to parties in disputes, bias may taint outcomes. Therefore, I believe a crucial solution is for institutions to operate independently as non-profit organizations. Surprisingly, Georgia's Arbitration Law, modeled after UNCITRAL, is silent on this matter, allowing institutions to potentially prioritize profit over fairness.

Consequently, interviews with individuals reflected that trust and awareness of arbitration are not as high as they should be in a developed country's legal system.

III. Research Methodology

The research employs a multifaceted methodology, utilizing legal frameworks, case studies, scholarly articles, and practical examples to explore institutional conflict in arbitration. It focuses on Georgia, comparing it with other jurisdictions, and examines conflicts of interest in cases administered by ICSID and ICC. The study references the Law of Georgia on Arbitration and Consumer Rights, presenting case studies from Georgian courts to illustrate domestic institutional conflict issues. Scholarly articles provide further insight, along with reviews of internal rules of arbitration institutions and legal analyses from blog posts focusing on post-Soviet practices, including Russia's approach to pocket arbitration. Additionally, the research analyzes the European Union's ADR Directives and examines relevant cases from the US and UK, highlighting global perspectives on for-profit arbitration institutions and institutional conflicts.

IV. Structure of the Thesis

The thesis is structured into four chapters, each addressing distinct aspects of institutional conflict of interest in arbitration within the Georgian context. Firstly, it begins with an overview of the concept and scope of conflict of interest. It then discusses two decisions from the ICSID and ICC, which delineate forms of conflict of interest and their implications, referencing the IBA Guidelines on Conflicts of Interest in International Arbitration, ("IBA Guidelines"). This critical section serves as the starting point for analysis, thereby aiding in further revealing the relationship between conflict of interest and institutional conflict. The second part explores the

importance of institutional conflict and its relation to biases in arbitration outcomes, noting its lack of international definition. It draws examples from various jurisdictions, including instances from Russian Federal law and practices observed at institutions like the Russian Arbitration Center (RAC). Additionally, the chapter highlights the risks associated with institutional conflict, such as scrutiny of the awards and the potential for arbitral institutions to influence arbitrator appointments. It emphasizes the need for further research and guidelines to address conflicts of interest within arbitral institutions globally. Furthermore, the chapter analyzes the most important decision of the Tbilisi Court of Appeals, which clearly demonstrates how the affiliations of the parties and the institution can lead to institutional conflict. Finally, it concludes by examining public procurement of arbitration services and its impact on institutional impartiality in consumer arbitration disputes, discussing real-world examples and potential consequences, providing the ADR Directives of the European Union as an example of the types of measures that can be implemented in Georgian legislation.

Chapter III delves into specific cases to illustrate instances where conflicts of interest occur and when they do not, drawing from decisions made by the Tbilisi Court of Appeals, and the Supreme Court of Georgia. Section 3.1. of the thesis compares non-profit institutional organizations versus for-profits in the context of arbitration, assessing their structures, motivations, and potential impacts on institutional conflicts. The focus then shifts to exploring the actual benefits of institution-administered arbitration proceedings, elucidating how they simplify the entire process and why they are advantageous. The subsequent section primarily aims to provide background information on Georgia's existing arbitration landscape, focusing on institutional conflict and emphasizing the imperative need for establishing a robust arbitration institution within the country. Additionally, pertinent research findings will be

presented to underscore the significant situation regarding arbitration and arbitration institutions in Georgia.

Chapter IV includes international examples to illustrate how institutional conflict can be identified on a global scale and what outcomes might be expected in situations similar to those mentioned above. The Chapter centers around the Monster Energy Co. vs. City Beverages, LLC case, which involves Judicial Arbitration and Mediation Services Inc. (JAMS) and exemplifies the issue of bias and the importance of disclosing the affiliations between parties and arbitrators. Similarly, a lawsuit cited as an example highlights allegations of undisclosed ties between a funding entity and the arbitration institution, as discussed in a Global Arbitration Review ("GAR") article. Section 4.1. of the chapter further explores the issue of institutional conflict, often referred to as pocket arbitration, within the context of post-Soviet countries. It once again underscores the connection between these conflicts and arbitration institutions operating as for-profit entities.

The conclusion emphasizes the thorough examination of institutional conflict within Georgia's arbitration framework, while also acknowledging its global significance. It underscores the problematic areas and the thesis's main discoveries regarding institutional conflict in arbitration. The conclusion highlights the urgency of addressing institutional conflicts promptly to ensure equitable arbitration proceedings. Moreover, it proposes some recommendations and solutions to mitigate such conflicts within the Georgian context.

Chapter I. The Notion of Conflict of Interest

In the discussions about institutional conflict, legal practitioners frequently associate it with general conflicts of interest, especially in jurisdictions with well-established arbitration practices where the term "institutional conflict" is less commonly used. Conflict of interest in arbitration may manifest in various forms, one of which, in Georgian reality, is the institutional conflict. Before identifying and exploring the intersection between conflict of interest and institutional conflict, as well as the aspects that differentiate them, it is crucial to first define the general concept of conflict of interest. Besides theoretically defining conflicts of interest, this chapter will also provide case studies that involve challenges to arbitrators, thereby illustrating how conflicts of interest arise in practice.

Conflict of interest is a clash between the private interests and the official responsibilities of a person in a position of trust.[4] To safeguard the integrity of the arbitral process, arbitrators must be independent and impartial.[5] Conflicts of interest may concern arbitrators, as well as ad hoc committee members, counsel, experts, and secretaries.[6] The Georgian Explanatory Dictionary of Arbitration defines conflict of interest as circumstances that may raise reasonable doubts about the arbitrator's impartiality and independence, directly referencing the IBA Guidelines.[7] As evident, both explanations pertain to the independence and impartiality of arbitrators. This chapter will further focus on challenging arbitrators based on issues of bias, independence, and impartiality.

[4] Khoury May, 11.03.2024, Conflicts of Interest, I. Definition, Jusmundi, https://jusmundi.com/en/document/publication/en-conflicts-of-interest, accessed:21.03.2024.
[5] Ibid.
[6] Ibid.
[7] Injia B., Lapiashvili N., "Explanatory Dictionary of Arbitration,"(Georgia, Zviad Kordzadze Publishing, 2016) p.24.

1.1. Overview of the IBA Guidelines on Conflicts of Interest

The above-mentioned IBA Guidelines, prepared by a working group of experts from the IBA Arbitration Committee, serve as a soft law.[8] This means that it is not binding but may be an important resource for practitioners and arbitrators regarding the impartiality and independence of arbitrators, as well as disclosures in specific circumstances.[9] To promote consistency and avoid unnecessary challenges, arbitrator withdrawals, and removals, the Guidelines categorize specific situations into "Red", "Orange", and "Green" Lists.[10] These lists illustrate the General Standards, assist arbitrators with disclosures, and help parties evaluate potential doubts about an arbitrator's independence and impartiality.[11] To describe the list briefly: the Non-Waivable Red List includes situations where a fundamental conflict of interest is present, based on the principle that no one can act as their own judge.[12] This type of conflict cannot be resolved simply by the parties' agreement to accept it.[13] The Non-Waivable Red List includes situations where conflicts of interest are deemed so severe that they cannot be waived by the parties. An example includes cases where an arbitrator has a significant financial or personal stake in one of the parties or in the outcome of the case.[14] Additionally, it involves situations where there is an identity between a party and the arbitrator, or where the arbitrator acts as a legal representative in the arbitration, or is an employee of a person or entity involved in the arbitration.[15] The list continues with Waivable Red List, which includes situations where conflicts of interest are serious but may be waived by the parties if they are made aware of the

[8] International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," p.2., 2024.
[9] Ibid.
[10] Ibid, p.4.
[11] Ibid.
[12] Ibid, p.14.
[13] Ibid.
[14] Ibid, p.15.
[15] Ibid.

conflict and expressly agree to the arbitrator's appointment.[16] While these situations raise concerns about impartiality and independence, they are not deemed as severe as those on the Non-Waivable Red List. Examples may include past professional relationships between the arbitrator and one of the parties, or the counsel, or the arbitrator's direct or indirect interest in the dispute.[17]

There is no automatic requirement for disclosure in situations not covered by the Orange List or those that fall outside its specified time limits.[18] However, an arbitrator must evaluate each situation individually to determine if it could raise doubts about their impartiality or independence in the parties' view.[19] Since the Orange List provides examples but is not comprehensive, there might be instances not listed that still require disclosure based on the specific context.[20] Examples include the appointment of an arbitrator who, within the past three years, has either represented or advised one of the parties or their affiliate in an unrelated matter without maintaining an ongoing relationship with them.[21] Similarly, the arbitrator may have served as counsel against one of the parties or their affiliate in an unrelated matter within the past three years.[22] Finally, the Green List includes situations where no appearance or actual conflict of interest exists either subjectively or objectively, and therefore, the arbitrator has no duty of disclosure as there is no potential for bias or impartiality.[23] For instance, the arbitrator has expressed a legal opinion (such as in a law review article or public lecture) on an issue relevant to the arbitration, but not focused on the case, or a firm associated to the arbitrator's

[16] Ibid, p.14., 2024.
[17] International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," p.16., 2024.
[18] Ibid, p.15.
[19] Ibid.
[20] Ibid.
[21] Ibid, p.17.
[22] Ibid.
[23] Ibid, p.15.

law firm or employer rendering services to one of the parties or their affiliate in an unrelated matter, without significant fee or revenue sharing with the arbitrator's law firm or employer.[24]

In conclusion, understanding and managing conflicts of interest is paramount in ensuring the integrity and fairness of the arbitral process. The IBA Guidelines serve as a valuable resource, offering structured guidance through their "Red", "Orange", and "Green" Lists. By adhering to these guidelines and comprehending the nuanced differences between types of conflicts, the arbitral process can be safeguarded against bias, thereby promoting trust and consistency in arbitration decisions.

1.2. Challenge of the Arbitrators

Understanding conflicts of interest requires consideration not only of theoretical frameworks but also of real-life case studies and decisions. These provide practical illustrations of what constitutes a conflict of interest and what does not, enriching the understanding of the concept. This is significant because, in the event of institutional conflict, arbitrators are entrusted with resolving disputes. Given that arbitrators bear the responsibility for the outcome, it is crucial that their decisions remain unbiased and unaffected by members or shareholders of the institutions involved. By establishing the scope of what constitutes a conflict of interest and what does not, readers can differentiate between the approaches of the Georgian court, as discussed in Chapter III, and those of the International Centre for Settlement of Investment Disputes (ICSID), and the International Chamber of Commerce (ICC).

[24] Ibid, p.19.

In the ICSID case between Alpha Projektholding GMBH ("Claimant") and Ukraine ("Respondent"), a conflict-of-interest allegation was raised by the Respondent regarding the Claimant's appointed Arbitrator, Dr. Turbowicz, due to his past relationship with Dr. Leopold Specht, who serves as Counsel to the Claimant.[25] The issue revolved around whether the Arbitrator should have disclosed his past acquaintance with the Counsel to the Claimant, despite graduating Harvard Law School 20 years ago and not maintaining a relationship since then.[26] However, the Arbitrator's CV, which detailed this educational affiliation, had already been transmitted to the Respondent.[27] The tribunal considered the issue of acquaintance and a brief phone call between the Counsel to the Claimant and the Arbitrator. Referring to the IBA Guidelines on Conflicts of Interest, the tribunal determined that these fell within the scope of the Green List, where no appearance of actual conflicts of interest exists from an objective standpoint, thus requiring no disclosure by the Arbitrator.[28] Additionally, the tribunal found that the Respondent failed to provide sufficient evidence to support its claim of bias as required by the ICSID Convention and the Arbitration Rules.[29] The tribunal concluded that, according to Arbitration Rule 6(2), the Counsel to the Claimant had no obligation to disclose the additional facts outlined in the Respondent's Proposal within the Arbitrator's Declaration.[30]

In summary, mere acquaintance with an arbitrator, without an ongoing relationship, does not imply bias, partiality, or dependence. Parties to a dispute can utilize relevant arbitration rules and IBA Guidelines to determine the scope of disclosure requirements. Requests for disclosure of information from the arbitrator should be made based on reasonable and valid grounds,

[25] *Alpha Projektholding GMBH vs. Ukraine*, ICSID Case No. ARB/07/16, 08.11.2010, Chapter I, Procedural and Factual Background, p.1.
[26] *Alpha Projektholding GMBH vs. Ukraine*, ICSID Case No. ARB/07/16, 08.11.2010, Chapter I, Procedural and Factual Background, p.5.
[27] Ibid, Chapter I, Procedural and Factual Background, p.1-2.
[28] Ibid, Chapter III, Analysis, p.22.
[29] Ibid, Chapter III, The Brief Phone Call, p.26-27.
[30] Ibid, Chapter IV, Conclusion, p.30

within a prescribed timeframe aimed at addressing concerns about the arbitrator's independence and impartiality. This timeframe can typically be determined by referencing the UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended in 2006.

Acknowledging the provided example of what does not constitute a conflict of interest, the thesis progresses to explore another question: what actions can be perceived as a conflict of interest? In this context, reference is made to the ICC Court's decision to disqualify German Arbitrator Klaus Sachs from adjudicating a port developer's claim against Georgia ("Respondent").[31] This disqualification stemmed from Sachs' concurrent involvement in a related ICSID case.[32] The Anaklia Development Consortium ("Claimant", "Consortium", or "ADC") raised concerns regarding Klaus Sachs' dual roles, as he had been appointed by Georgia in the ICC case and simultaneously accepted a role in the ICSID case initiated by Bob Meijer, an indirect investor in ADC.[33] The ICC Court acknowledged the potential for unconscious biases stemming from Sachs' involvement in these overlapping proceedings.[34] ADC was concerned that Sachs might gain access to information exclusive to one case, potentially influencing his judgment in the other.[35] Despite Georgia's assertion that Sachs could manage both cases fairly, ADC highlighted the asymmetry of information and raised concerns about possible prejudgment.[36] The Court recognized the factual and legal overlap between the two cases, which raised concerns about the possibility of Klaus Sachs encountering similar issues in both proceedings.[37] The increased risk of prejudgment derived from the ICSID case potentially taking longer to conclude compared to the ICC proceedings. This prolonged

[31] Perry Sebastian, GAR Article, "ICC disqualifies Sachs over related ICSID appointment," 12.03.2021.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.

duration could potentially expose Sachs to information or arguments that might influence his judgment in the ICC case.[38] Furthermore, discrepancies in Sachs' initial disclosure regarding his appointments further fueled ADC's reservations about his impartiality.[39] Despite finding no reason to doubt Sachs' commitment to fulfilling his duties with fairness and integrity, the Court recognized that the risk of unconscious biases could not be disregarded.[40] As a result, the challenge against Sachs was upheld on February 25, 2021, and the ICC Court provided detailed reasons for its decision eight days thereafter.[41]

The cases discussed exemplify various forms of conflicts of interest and illustrate when such conflicts can present significant challenges, as well as when they may be less prominent. The first case provides an example of what cannot be perceived as a conflict of interest and clarifies the types of arguments that qualify as falling within the scope of conflicts of interest. These explanations not only enhance our comprehension of the concept and manifestations of conflicts of interest but also assist in analyzing the rationale behind the decisions rendered by the Tbilisi Court of Appeals, as described in Chapter III of the thesis. The second case illustrates the inherent risks of conflicts of interest when individuals participate in interconnected disputes administered by different institutions. Despite efforts to ensure impartiality, there is a significant risk of bias and compromised independence, particularly when one party has unrestricted access to all materials relevant to both cases. This situation is particularly evident in the ICC case, where tribunal members other than Klaus Sachs have limited access to case-related materials, potentially creating an imbalance and fostering perceptions of privilege that may lead to bias.

[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

Chapter II. Institutional Conflict of Interest

When individuals research the topic of institutional conflict or otherwise known as institutional conflict of interest in international commercial arbitration, they initially encounter discussions and articles primarily focused on conflicts of interest. This is not entirely surprising, given the prevalence of such discussions. This misunderstanding can be especially pronounced among legal professionals who may not be familiar with the nuances of the Georgian legal and arbitration system. Therefore, this chapter aims not only to define the term "institutional conflict" based on Georgian decisions and practices but also to provide regulations on institutional conflict from another country as an illustrative example to broaden understanding of the concept. The following section will examine the Tbilisi Court of Appeals' decision to demonstrate institutional conflict. This analysis will provide a concrete example of how such conflicts are identified and managed within the Georgian legal system. The subsequent section addresses public procurement issues, focusing on tenders for arbitration services and the interactions and financial dependencies between banks and arbitration institutions involved in concluding consumer-bank contracts. The final section focuses on the use of standardized arbitration clauses in consumer contracts concluded in Georgia, comparing Georgia's approach with the European Union's ADR Directives that prioritize consumer protection.

It is essential to clarify that institutional conflict specifically refers to a type of conflict of interest, distinct from general conflicts of interest or conflicts between institutions. However, institutional conflict can manifest in situations where institution's involvement dictates a specific outcome to arbitrators, potentially leading to dependent and biased outcomes. In the context of Georgia, conflicts of interest may arise when an arbitration institution is connected to one of the parties involved or their representatives, particularly resulting in institutional

conflict.[42] This issue is especially pertinent in countries where arbitration institutions are established as limited liability companies.[43]

2.1. The Concept of Institutional Conflict of Interest

The exploration of potential conflicts of interest within arbitration institutions remains largely unexplored within the international academic community.[44] Remarkably, international legal instruments and best practice guidelines generally do not directly address these conflicts.[45] Although, free trade agreements, investment protections agreements like the Canada-Chile FTA, CETA, 2019 Netherlands Model BIT, and EUSIPA, along with arbitration rules such as the HKIAC Rules and LCIA Rules, include lists of entities subject to rules on conflict disclosure, arbitration institutions themselves are not consistently included. Even the IBA Guidelines on Conflicts of Interest in International Arbitration do not specifically regulate institutional conflicts.[46] Despite of the above-mentioned, some internal regulations of arbitral institutions and national practices, such as the Russian Federal Law on Arbitration and Russian Arbitration Center (RAC) may provide internal regulations that likely address institutional conflicts of interest in arbitration.

Identifying the areas of risk within institutional conflict reveals two primary issues. Firstly, there is a risk of an arbitral institution leveraging its influence to appoint an arbitrator who may favor one party due to pressure from the institution's shareholders. In cases where an institution has a founder or shareholder driven by profit motives, financial interests may unduly influence

[42] Decision of the Tbilisi City Court of October 6, 2014, Case Number: N2/16444-14.
[43] Ibid.
[44] Akulina Arina, Piskunovich Katarina, "Arbitral Institutions' Conflicts of Interest," Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2021/07/28/arbitral-institutions-conflicts-of-interest/, 28.07.2021, accessed: 05.04.2024.
[45] Ibid.
[46] Ibid.

decision-making. Given the scenario, the Russian Federal Law on Arbitration and the internal regulations of the Russian Arbitration Center (RAC) that address conflicts of interest within arbitration institutions provide valuable guidance. An example of avoiding institutional conflict involves the Members of the RAC Board, a permanent collective body responsible for appointing and challenging arbitrators, as well as terminating their mandates.[47] As the institutional conflict revolves around party or its representatives with affiliations to arbitral institution, this provision plays vital role by stating that the RAC Board must refrain from making decisions regarding arbitrator appointments, challenges and other matters if they encounter conflicts of interest.[48] National laws also remain relevant. For instance, according to the Russian Federal Law on Arbitration, a conflict of interest is prohibited in the performance of arbitral institution's activities if one of the parties is: the non-profit organization that established the institution, its founders, or individuals and their affiliates who are part of the institution's governing bodies and have authority over decisions regarding arbitrator appointments, challenges, and termination of arbitrator powers.[49] The RAC also stipulates that within its activities, it prohibits any situations where personal interests, whether direct or indirect, may compromise the due, objective, and impartial performance of its functions (conflict of interest).[50] In contrast, in Georgia, even the most renowned and successful arbitration institution, the Georgian International Arbitration Center (GIAC), does not include such clauses within its rules, despite the occurrence of institutional conflicts not being uncommon. This indicates that while GIAC addresses the impartiality and independence

[47] Russian Arbitration Center at the Autonomous Non-Profit Organisation, "Russian Institute of Modern Arbitration," Internal Rules of the RAC, Article 2 (1), p.57, Moscow, 2021.
[48] Ibid, Article 7 (6), p.61.
[49] "Federal Law No. 382-FZ on Arbitration (Arbitral Proceedings) in the Russian Federation," Article 46 (2) (1,2,3), p.68
[50] Russian Arbitration Center at the Autonomous Non-Profit Organisation, "Russian Institute of Modern Arbitration," Internal Rules of the RAC, Article 7 (1), p.60, Moscow, 2021.

concerning arbitrators, it remains silent on the issue of institutional conflict matters as outlined in the RAC rules.

The second risk arises during the scrutiny of the award, where biases or undue influence may compromise the integrity of the process. For example, the ICC Rules provide a mechanism specifically for conducting the scrutiny of the award.[51] The rules entail that "*before signing any award, the arbitral tribunal shall submit it in draft form to the Court, the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance*."[52] Not specifically referring to the ICC, but generally, institutions equipped with mechanisms for scrutinizing awards may also have the ability to make alterations that could potentially align with the interests of the institution and its shareholders, especially if they are affiliated with a specific party. This alignment could potentially lead to perceptions of favoritism or bias in favor of that party.

To summarize, arbitration institutions consist of individuals who inevitably have their own connections, which can lead to conflicts of interest during proceedings.[53] Full disclosure of any connections between the institution's employees and affiliates is imperative to avoid potential biases and uphold the principles of neutrality, independence and impartiality throughout the process. Additionally, the lack of a universal definition of the term underscores the necessity for further scholarly exploration and perhaps the formulation of guidelines or regulations specifically tailored to addressing conflicts of interest within arbitral institutions. Nevertheless,

[51] Arbitration Rules, International Chamber of Commerce, Article 34, 2021, https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf, accessed: 05.04.2024.

[52] Arbitration Rules, International Chamber of Commerce, Article 34, 2021, https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf, accessed: 05.04.2024.

[53] Akulina Arina, Piskunovich Katarina, "Arbitral Institutions' Conflicts of Interest," Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2021/07/28/arbitral-institutions-conflicts-of-interest/, 28.07.2021, accessed: 05.04.2024.

the absence of explicit terms like “institutional conflict” or “institutional conflict of interest” does not negate the presence of such issues on a global scale.

2.2. Institutional Conflict Perspectives of Tbilisi Court of Appeals

The Tbilisi Court of Appeals serves as the second instance for appealing decisions rendered by the first-instance court. Simultaneously, it is also the venue where awards rendered by domestic arbitrations in Georgia are recognized and enforced.[54] Institutional conflict is a significant and debated issue among legal professionals and their clients in Georgia. This issue has been relevant since 2011, when the Tbilisi Court of Appeals adjudicated a decision concerning the enforcement of an arbitral award. The decision presented below not only elucidates the origins and sources of institutional conflict but also, in my opinion, clearly demonstrates the potential impact when arbitrators appointed by the institutions preside over a case and issue an award in favor of a party who concurrently holds a shareholder position within the same institution.

The case illustrates that the Claimant’s Representative appealed to the Tbilisi Court of Appeals, seeking recognition and enforcement of the arbitration award.[55] However, the Respondent contested the recognition of the arbitral award, arguing that one of the shareholders of the law firm representing the Claimant is also a shareholder in the arbitration institution that administered the proceedings.[56] Notably, this arbitration institution is established in the form of a limited liability company. After reviewing the case materials, the Court of Appeals found the Respondent’s argument reasonable and ruled against the Claimant’s request for recognition

[54] Law of Georgia on Arbitration, Chapter VIII, Article 44(1), https://matsne.gov.ge/en/document/view/89284?publication=8, 02.07.2009., accessed: 06.04.2024.
[55] Decision of the Tbilisi Court of Appeals of October 6, 2014, Case Number: N2b/2130-11.
[56] Ibid.

and enforcement of the arbitration award.[57] Under the Law of Georgia on Arbitration, one of the grounds for refusing to recognize and enforce an arbitral award is its contravention of public order.[58] Although neither the Civil Procedure Code of Georgia nor the Law of Georgia on Arbitration defines "public order", it logically encompasses any arbitral award that significantly infringes upon the parties' procedural rights to an independent and impartial arbitrator.[59] The arbitrators remain impartial and independent unless circumstances arise that cast reasonable doubt on these principles.[60] The Court of Appeals concluded that the mentioned fact indeed raised such doubt about the arbitrator's impartiality, thereby affecting the fundamental principle of equal protection of the parties' rights.[61] Moreover, violation of procedural norms during the consideration of this case should also be considered as a breach of public order under Article 45 (b)(a) of the Law of Georgia on Arbitration.[62] As a result, the Court of Appeals did not satisfy the claim regarding recognition and enforcement of the award.[63]

At first, it is noteworthy that arbitration institutions being established as limited liability companies present one distinct issue. However, another significant concern arises when an arbitrator, potentially biased, renders an award favoring a client and their representative who is a shareholder of the institution. This situation raises serious questions regarding impartiality and independence. Although the Court of Appeals did not rule in favor of the Claimant, the issue remains relevant and widespread today. Additionally, under certain circumstances, the appointment of arbitrators by an institution may lead to biased outcomes. This is because the staff of the institution responsible for appointing arbitrators may be acquainted with the

[57] Ibid.
[58] Law of Georgia on Arbitration, Chapter VIII, Article 45(b)(b), https://matsne.gov.ge/en/document/view/89284?publication=8, 02.07.2009., accessed: 06.04.2024.
[59] Decision of the Tbilisi Court of Appeals of October 6, 2014, Case Number: N2b/2130-11.
[60] Ibid.
[61] Ibid.
[62] Decision of the Tbilisi Court of Appeals of October 6, 2014, Case Number: N2b/2130-11.
[63] Ibid.

institution's shareholders, which could influence the appointment of arbitrators. Awareness of such circumstances diminishes the attractiveness of arbitration for individuals seeking resolution through domestic arbitration in Georgia. As defined at the outset of Chapter II, institutional conflict arises when an arbitration institution is connected to one of the involved parties or their representatives, potentially leading to bias or conflicts of interest. The institution itself cannot render an award without an arbitrator, as arbitrators are responsible for this task.[64] Therefore, there is a logical explanation and connection that institutional conflict can encompass not only its shareholders but also extend to arbitrators.

This issue holds particular significance within the Georgian context, where courts are often accused of corruption, partiality, dependency, undue influence, flawed judicial appointment, and the dominance of certain judges.[65] Therefore, arbitration is seen as an alternative mechanism among legal professionals and citizens of Georgia. However, frequent bias undermines the fairness and impartiality of the process, thereby causing institutional conflict. These conflicts compromise essential principles necessary for effectively resolving disputes. Consequently, if these issues cannot be promptly addressed, arbitration may lose its preferred status over litigation.

2.3. Public Procurement of Arbitration Service

When it comes to public procurement, the initial association typically pertains to the acquisition of goods, works or services. However, it is uncommon to encounter scholarly reviews, or any information regarding the procurement of arbitration services from specific institution. The

[64] Blackaby Nigel, et al., "Redfern and Hunter on International Arbitration," Section 1.164, p.22, 2023.
[65] Transparency International Georgia, "Corruption Risks in Georgian Judiciary," 2018, https://www.transparency.ge/en/post/corruption-risks-georgian-judiciary, accessed:03.06.24.

European Commission defines public procurement as "*the process by which public authorities purchase goods, works or services from private companies*."[66] In contrast, according to the Law of Georgia on Public Procurement, it is defined as "*the procurement of goods, construction works, or services by a procuring organization in accordance with the procedure established by this Law, regardless of the purpose of the purchase of these goods, works or services*".[67]

In Georgia, the major commercial banks are initiating public procurement processes to engage institutions to provide services.[68] The winning institution would have its arbitration clause incorporated into all consumer contracts of the bank.[69] Consequently, all consumer disputes would pile up with this institution.[70] This Close cooperation between arbitration institutions and banking or microfinance organizations can be termed as "pocket arbitrations."[71] This setup creates a concerning dynamic where the selected institution, likely operating for profit (such as a limited liability company), becomes financially reliant on the bank due to the significant volume of consumer disputes it handles. Unlike chambers of commerce or autonomous non-profit organizations, these institutions may prioritize their financial ties with the bank over impartiality. The financial dependence on the bank could incentivize the selected institution to favor the bank's interests in dispute resolutions, driven by the need to maintain their business relationship and secure future engagements. As previously noted, the institution itself does not have the authority to render awards, and this power lies exclusively with the arbitrators.

[66] An official website of the European Union, Help for exporters and importers, Public procurement, https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/public-procurement_en, accessed: 19.05.24

[67] Law of Georgia on Public Procurement, Chapter I, Article (3) (1) (a), https://www.matsne.gov.ge/ka/document/view/5714621, 09.02.2023, accessed: 19.05.24.

[68] The electronic procurement system (eProcurement system), https://etenders.ge/view/62524/, https://etenders.ge/view/57852/, accessed: 19.05.24.

[69] Ibid.

[70] Ibid.

[71] United Nations Development Programme, Caucasus Research Resource Center, "Legal and Practical Aspects of Arbitration in Georgia," p.1, 2018, https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_Arbitration_Study_20180312_eng.pdf, accessed:03.06.24

However, the shareholder of the institution might exert significant influence and pressure over the arbitrator's decisions. This influence arises because the institution's financial dependence on the bank could potentially compromise the impartiality of the arbitrators when adjudicating cases involving the bank, especially considering that a significant portion of the arbitrator's income comes from the institution itself.

One crucial aspect is that most institutions in Georgia provide a closed list of arbitrators, meaning that parties cannot appoint arbitrators outside of this limited list provided by the institution. For instance, the Tbilisi Arbitration Institute has a list consisting of only eleven arbitrators.[72] This list may become even more limited based on specific requirements, such as when a party requests an arbitrator with industry-specific knowledge. For example, a party might require an arbitrator experienced in construction disputes, or one with an understanding of the finance and banking industry, maritime issues, or the energy sector. But in any case, the institution has direct access to the arbitrators, who may become aware that a particular bank is a "client" of the institution. Consequently, the arbitrator might receive directives on which party to favor in the dispute. The arbitrator's financial dependence on the institution is a significant factor here, as they can potentially be disqualified from the list of arbitrators if they do not comply with the directives of the institution's shareholders. This raises concerns about financial dependence once again.

The above-mentioned factors can indeed raise concerns regarding bias, dependence, partiality, all stemming from institutional conflict. While there is a high probability that these issues could arise, it does not necessarily mean they will occur in all consumer-bank disputes or in all institutions administering arbitration proceedings. However, simply being aware of this

[72] Tbilisi Arbitration Institute, 2009, https://taiarbitration.com/arbitrators, accessed: 19.05.24

potential can create the appearance of bias in the eyes of a third party. It is important to consider that independence and impartiality have two angles: the objective part (adopting an objective reasonable third-party test), which assesses whether a reasonable third party, knowing all relevant facts, would believe that a conflict of interest exists, and the subjective part (adopting a subjective, in the eyes of the parties' test), which considers whether the parties involved believe there might be a conflict of interest that requires disclosure.[73] Thus, when deciding whether to decline an appointment or refuse to continue acting, the arbitrator should apply the objective standard to evaluate the relevant facts or circumstances. An arbitrator must decline an appointment or refuse to continue to act under General Standard 2(b) if an objective conflict of interest exists unless that objective conflict is waived.[74] If a reasonable third party perceives a potential conflict of interest, it has the potential to damage the reputation of both the institution and arbitrator. This perception could create doubts about the institution and its appointed arbitrators, making the institution appear less attractive. Additionally, it casts as doubt on the professional skills and ethical behavior of arbitrators involved in the process.

To summarize, ideally, arbitrators should not have personal interests independent from the institution since institutions announce tenders for arbitration services. Consequently, the primary interest originates from the institution, potentially affecting the arbitrators' decision-making and leading them to favor a particular party. When institutions provide directives to arbitrators, it can result in biased and dependent outcomes, compromising the tribunal's independence and impartiality, and undermining the advantages of institution-administered arbitration. This dynamic constitutes an institutional conflict, and the interconnection between conflict of interest and institutional conflict can once again be logically established through this chain of affiliation.

[73] International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," p.4., 2024.
[74] Ibid, p.7.

2.4. Consumer Arbitration in Georgia

Consumer arbitration is a crucial aspect to consider, especially since public procurement contracts involve consumers. The problem lies within the consumer contracts and the disputes arising from them. Under the Law of Georgia on Arbitration, all types of arbitration, including consumer arbitration, are treated without differentiation. Pursuant to Article 1(2)(a) of the Law on Arbitration, "*any property dispute of a private nature based on the equality of the parties, which can be resolved by the parties can be addressed through arbitration*." Therefore, consumer disputes can be arbitrated as long as they comply with legal requirements. As a result, all aspects of consumer arbitration are subject to the same regulations as commercial arbitrations, such as those between businesses.[75] This encompasses the formulation of arbitration clauses, arbitration procedures, and the recognition and enforcement of arbitration awards.[76]

Consequently, the vast majority of cases in Georgia pertain to consumer relations. According to statistics from the leading Georgian arbitration institutions, from 2018 to 2022, the Dispute Resolution Centre (DRC) administered a total of 1,521 cases, out of which 1,188 (78%) were consumer related. During the same four-year period, the Tbilisi Arbitration Institute (TAI) reported a total of 600 cases, with 92% of them involving consumer disputes.[77] Georgia adopted the Law on the Protection of Consumer Rights (Consumer Law), which recognizes the right of parties to seek recourse in both courts of law and alternative dispute resolution mechanisms like

[75] Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, p.12., 2023.
[76] Law of Georgia on Arbitration, Chapter I, Article 2 (a), https://matsne.gov.ge/en/document/view/89284?publication=8, 02.07.2009, accessed: 19.05.2024.
[77] Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, p.15., 2023.

arbitration or mediation,[78] Furthermore, the law explicitly states that "*any clause forcing consumers to apply only to arbitration not regulated by Georgian legislation, or limiting their ability to obtain evidence, or imposing an unfair burden of proof on them, is considered an unfair contract term.*"[79] Additionally, under the Consumer Law, any standard contract term is deemed unfair if it binds the consumer without providing them with a genuine opportunity to understand it before entering into contractual relationship.[80] While this provision is not specifically tailored for arbitration, it could be employed to contest at least one instance of an inappropriate consumer arbitration clause.[81] Such a provision could also potentially challenge improper consumer arbitration clauses incorporated into bank-consumer contracts, as discussed in the preceding section on public procurement. This is particularly relevant because individuals entering into contractual relationships, such as loan or credit contracts, with banks often have limited awareness of arbitration in general.[82]

The findings from research and stakeholder interviews in Georgia highlight that arbitration clauses in consumer contracts are typically standard terms formulated by the traders without any negotiation with consumers.[83] External counsels emphasized that consumers frequently lack awareness and understanding of arbitration, thus effectively consenting without full comprehension, as traders fail to provide adequate information or clarification on arbitration procedures and implications.[84] Despite efforts by counsels to negotiate these clauses on behalf of consumers, traders frequently reject alterations.[85] Given that arbitration clauses are

[78] Law of Georgia on the Protection of Consumer Rights, Chapter VII, Article 28(2), https://matsne.gov.ge/en/document/view/5420598?publication=0, 29.03.2022, accessed:19.05.2024.
[79] Ibid, Article 22(3)(s).
[80] Ibid, Article 22(3)(k).
[81] Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, p.13., 2023.
[82] Ibid, p.20.
[83] Ibid.
[84] Ibid.
[85] Ibid.

standardized contract terms, consumers have limited to no autonomy in this matter.[86] Financial institutions and businesses corroborate this stance, acknowledging their failure to inform consumers about arbitration terms due to the absence of regulatory requirements, resource limitations, or consumer indifference, as long as the loan is secured.[87] Additionally, the Expert Group has found that traders often include pre-selected arbitration institutions or arbitrators in clauses.[88] Various stakeholders attribute this practice to affiliations or understandings between traders and these institutions or arbitrators, or simply to traders' frequent use of the same institutions or arbitrators in the past.[89] An interviewed arbitrator, with experience in over 200 consumer arbitration cases, expressed concern that some arbitral institutions essentially operate as extensions of financial institutions, and neglect consumer interests.[90]

In contrast, the European Union adopted a Directive on Alternative Dispute Resolution for Consumer Disputes (ADR Directive) aimed at restricting the use of pre-dispute arbitration clauses in consumer contracts.[91] As per this directive, arbitration clauses agreed upon before a dispute arises and that prevent consumers from seeking legal recourse in court are not enforceable against consumers.[92] It is important to note that the ADR Directive is applicable solely to disputes initiated by consumers against traders and does not extend to disputes initiated by traders against consumers, nor does it apply to disputes exclusively between traders.[93] Furthermore, to ensure the implementation and compliance with EU regulations on consumer

[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, p.29., 2023.
[92] Preamble, Recital (43), Article (10), Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013/11/EU, 21 May 2013.
[93] Ibid, Preamble, Recital (16).

arbitration, EU law mandates specific control and enforcement mechanisms.[94] The ADR Directive mandates that member states designate a competent authority responsible for monitoring ADR entities' compliance with the requirements of the Directive.[95] The ADR Directive further stipulates that member states must introduce penalties that are "effective, proportionate and dissuasive" to ensure the enforcement of the Directive.[96]

In conclusion, although Consumer Law addresses the issue of protecting consumers from unfair arbitration clauses that limit their choice of dispute resolution, the issue of institutional conflict stemming from consumer protection remains unresolved. Certain arbitration institutions may show bias towards financial institutions or banks perceived as their "clients". This bias can lead institution shareholders, driven by financial motives, to influence outcomes in favor of these "clients," in the same way as mentioned in the public procurement section. The bias often arises from unregulated consumer contracts that include clauses disadvantaging consumers, compelling them to settle disputes with the institution specified in the contract. This dynamic results in institutional conflict, where the shareholder of the institution has the power and benefits, but it undermines the impartiality and fairness of the arbitration process. Additionally, consumers are deprived of party autonomy as they are bound by contracts containing arbitration clauses without negotiation opportunities. Opting for court resolution instead of arbitration is typically not an option once a consumer has signed such a contract. In contrast, the European Union's ADR Directive takes a more consumer-centric approach by limiting pre-dispute arbitration clauses in consumer contracts. This ensures that consumers retain the right to seek legal recourse in court, thereby maintaining a balance of power and protecting the interests of the weaker party. The ADR Directive also requires member states to establish competent

[94] Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, p.30., 2023.
[95] Ibid, Preamble, Recital (55).
[96] Ibid, Preamble, Recital (56).

authorities to monitor compliance and enforce penalties. This ensures the protection of consumer rights and promotes fairness in the arbitration process. The comparison underscores the need for Georgia to consider adopting similar measures, for instance incorporating such provisions into the Law of Georgia on Arbitration, or complying with existing provisions of Consumer Law, to enhance consumer protection and ensure a fairer arbitration system. Implementing stringent criteria for ADR entities, ensuring transparency, and preventing conflicts of interest are crucial steps towards achieving this goal.

Chapter III. Georgia in Need of Robust Arbitration System and Arbitration Institutions

The primary concern necessitating a robust arbitration system in Georgia pertains to unhelpful court practice. This chapter addresses the issue through an examination of decisions from the Tbilisi court of Appeals and an analysis of an article comparing these decisions with that of the Supreme Court of Georgia, focusing on conflicts of interest. This comparison sheds light on how Georgia's approach contrasts with methodologies employed by ICSID and ICC in resolving conflicts of interest, as detailed in Chapter I, section 1.2.. The forthcoming section of the chapter will focus on a comparative analysis between non-profit and for-profit arbitration institutions, highlighting the worldwide preference towards non-profit institutions and the prevalent legal entity models in Georgia. Subsequently, the discussion transitions to the advantageous nature of institution-administered arbitration, exploring various aspects that could potentially affect its benefits. The concluding section delves into factors hindering arbitration in Georgia, with a focus on issues pertinent to institutional conflict of interest.

As arbitration is a form of alternative dispute resolution, it might be assumed that courts have no involvement or interference in the process, however, this is not the case. The court's involvement in the arbitration process is vital, as courts maintain a degree of control to ensure that the private system of justice adheres to minimum standards of fairness, preventing arbitration from becoming fraudulent, corrupt, or lacking in due process.[97] Additionally, parties often seek court assistance in specific ways during arbitration. Courts may be asked to enforce arbitration agreements by suspending or halting ongoing court proceedings and compelling

[97] Moses, Margaret L., "Principles and Practice of International Commercial Arbitration," (2nd edition, Cambridge University Press, 2012), p.87.

arbitration.[98] They may also rule on the tribunal's jurisdiction, address challenges to arbitrators, appoint arbitrators in ad hoc arbitrations, or provide emergency relief before the tribunal is formed.[99] Courts can assist with discovery from non-party witnesses and rule on issues like consolidation and motions to vacate or enforce arbitration awards.[100] While courts can generally be helpful during arbitration, there are circumstances where their interference might have a negative impact on the reputation of arbitration, particularly in Georgia.

In two recent rulings, the Tbilisi Court of Appeals has determined that the mere inclusion of a representative of one party in the list of arbitrators of an arbitration institution constitutes a conflict of interest.[101] As a result, the court has declared the arbitration institution incapable of adjudicating the dispute and has refused to enforce the arbitration agreement based on this reasoning.[102] Georgian legal professionals have highlighted this issue as extremely problematic for several reasons. Firstly, it discourages reputable legal practitioners from serving as arbitrators while continuing their primary practice of representing parties.[103] Furthermore, these decisions contradict with a previous ruling by the Supreme Court of Georgia regarding a similar matter.[104] Thus, establishing a consistent court practice in arbitration is crucial for ensuring predictability and fostering the development of this field.[105] Additionally, this positions Georgia unfavorably on the arbitration map, signaling to international stakeholders that it is an

[98] Moses, Margaret L., "Principles and Practice of International Commercial Arbitration," (2nd edition, Cambridge University Press, 2012), p.88.
[99] Ibid.
[100] Ibid.
[101] Decision of the Tbilisi Court of Appeals, Case N 2b/1605-23, Case N2b/3653-23.
[102] Ibid.
[103] Tchkuaseli Rusa, Georgian Arbitration Update: "unhelpful court practice continues," 2023, https://www.investor.ge/wp-content/uploads/2020/07/blc_2024-2.pdf, accessed: 27.05.24.
[104] Ibid.
[105] Ibid.

unfriendly jurisdiction for arbitration.[106] Lastly, this could ultimately impact the investment climate in Georgia and undermine its aspiration of becoming a regional arbitration hub.[107]

By deeming the arbitration institution incompetent to consider the dispute and denying the effect of the arbitration agreement based solely on the representative's registration as an arbitrator, the court unjustly nullifies the parties' choice of dispute resolution method. This denial undermines the principle of party autonomy and the enforceability of arbitration agreements. Moreover, these judgments signal to Georgian courts that they can intervene in arbitral proceedings despite the presence of a valid arbitration clause. Additionally, the judgments cast doubt on the widely accepted competence-competence doctrine (acknowledged by the law), undermine the principle of non-interference in arbitration,[108] restrict the ability of lawyers to serve as arbitrators, and pave the way for future unwarranted and inadequately reasoned decisions. It is crucial to remember that institutions do not hear the disputes; rather disputes are heard by a tribunal composed of specific arbitrators. An arbitrator listed with an arbitral institution has no authority to influence the decisions in a dispute where they solely act as a representative of a party, not as an arbitrator.[109] As a result of these rulings, the effectiveness and credibility of arbitration agreements are undermined. Parties may question the reliability of arbitration as a means of resolving disputes if courts are inclined to invalidate agreements based on such broad interpretations of conflicts of interest. Lastly, denying the arbitration agreement without a clear demonstration of actual bias or conflicts of interest on the part of the representative, deprives the parties of their right to a fair and impartial resolution

[106] Ibid.
[107] Ibid.
[108] Moses, Margaret L., "Principles and Practice of International Commercial Arbitration," (2nd edition, Cambridge University Press, 2012), p.91.
[109] Tchkuaseli Rusa, Georgian Arbitration Update: "unhelpful court practice continues," 2023, https://www.investor.ge/wp-content/uploads/2020/07/blc_2024-2.pdf, accessed: 27.05.24.

of their dispute. This lack of procedural fairness could diminish the attractiveness of arbitration, making it appear less appealing.

The comparison between the recent decisions by the Tbilisi Court of Appeals and the international arbitration cases handled by ICSID and ICC incorporated into Chapter I, Section 1.2. highlights the divergent approaches and challenges within domestic and international arbitration frameworks. The nature of conflicts of interest and the standards for addressing them can vary significantly between domestic and international arbitration settings. While international cases often involve complex relationships and overlapping roles among arbitrators, parties, and counsel, domestic cases may focus on more straightforward criteria, such as the mere inclusion of a party representative on an arbitration panel. Consistent and transparent practices are essential for fostering trust and predictability in arbitration proceedings. Inconsistencies in decision-making, as observed in the Tbilisi Court of Appeals' decisions, can undermine confidence in the arbitration process and deter potential participants from engaging in arbitration.

3.1. Comparative Analysis of Non-Profit Arbitration Institutions vs. For-Profit

From a global vantage point, when referring to arbitral institutions, it is widely acknowledged that the majority of these institutions are closely associated with chambers of commerce and function as non-profit organizations. This structure ensures that they are not driven by shareholders focused solely on financial gain, but rather prioritize the pursuit of justice over personal profit. Alternatively, arbitration institutions exist independently, as subjects of private law, formed by certain organizations in the form of associations, or established by an

association.[110] Chamber of Commerce is defined as an organization of businesses seeking to further their collective interests, while advancing their community, region, state or nation.[111] Both chambers of commerce and arbitration institutions aim to promote international trade and investment. By offering reliable dispute resolution services, they create a more secure and predictable business environment, providing access to justice and the rule of law to facilitate peace, prosperity and opportunity through global trade.[112] Some of the globally recognized institutions that operate as structural bodies within the Chambers of Commerce, yet maintain structural independence from the Chambers themselves, include International Chamber of Commerce (ICC),[113] and Stockholm Chamber of Commerce Arbitration Institute.[114] Institutions established by or with the participation of chambers of commerce include Vienna International Arbitration Center (VIAC), German Arbitration Institute (DIS), and Netherlands Arbitration Institute (NAI).[115] In the second scenario, where the arbitration institutions exist independently as subjects of private law and are formed by organizations in the form of associations or established by an association include International Centre for the Dispute Resolution of American Arbitration Association (AAA/ICDR),[116] explicitly noted as a not-for-profit organization,[117] London Court of International Arbitration (LCIA), which also emphasizes its not-for-profit nature,[118] and Singapore International Arbitration Centre (SIAC), described as an independent, neutral, and not-for-profit global arbitration institution.[119]

[110] "Report on Formation of the Georgian International Arbitration Centre," Chapter III (3.1.), p.7. 2014, https://giac.ge/wp-content/uploads/2014/09/GIAC-REPORT-ENG.pdf, accessed: 28.05.24
[111] Association of Chamber of Commerce Executives, https://secure.acce.org/pages/chambers/ accessed:28.05.24
[112] International Chamber of Commerce, https://iccwbo.org, accessed:28.05.24
[113] International Chamber of Commerce, https://iccwbo.org, accessed:28.05.24
[114] Stockholm Chamber of Commerce Arbitration Institution, https://sccarbitrationinstitute.se/en, accessed: 28.05.24.
[115] "Report on Formation of the Georgian International Arbitration Centre," Chapter III (3.1.), p.7. 2014, https://giac.ge/wp-content/uploads/2014/09/GIAC-REPORT-ENG.pdf, accessed: 28.05.24.
[116] Ibid.
[117] American Arbitration Association https://www.adr.org/about, accessed: 28.05.24
[118] London Court of International Arbitration https://www.lcia.org/LCIA/organisation.aspx, accessed:28.05.24.
[119] Singapore International Arbitration Center, https://siac.org.sg, accessed: 28.05.24.

In comparison to Georgia, according to the statistics provided by the National Agency of Public Registry of Ministry of Justice of Georgia, the majority of registered arbitration institutions operate as Limited Liability Companies.[120] Such practice of arbitration was shaped by the "Law on Private Arbitration," which was replaced by a new law in 2009.[121] While the new law adopted after UNCITRAL does not specify the form of establishment for arbitral institutions, the former law explicitly required arbitration institutions to be established as LLCs.[122] Consequently, many arbitration institutions were formed as LLCs by law firms, banks, and other financial institutions.[123] This requirement led to mistrust towards arbitration, as these institutions were often associated with specific law firms or banks, providing them with an opportunity to generate profit.[124] However, to address these issues and to align with both international and domestic best practices, the Georgian International Arbitration Institution (GIAC) was established as the first non-commercial, non-profit legal entity dedicated to arbitration.[125] Nonetheless, the presence of only one non-profit institution amidst numerous for-profit entities may not lead to rapid change.

It is crucial for arbitration institutions to operate as non-profit organizations rather than as Limited Liability Companies (LLCs). LLCs, by nature, prioritize profit generation,[126] which may conflict with the core principles of the arbitration - impartiality and independence. An arbitration institution established as an LLC implies the presence of shareholders whose interests are inherently tied to financial gain. In the context of arbitration, the financial interest of shareholders arises from disputes referred to the institutions. This poses a problem in the

[120] National Agency of Public Registry of Ministry of Justice of Georgia, https://www.my.gov.ge/ka-ge/services/6/service/179, accessed: 29.05.24.
[121] "Report on Formation of the Georgian International Arbitration Centre," Chapter III (3.1.), p.8. 2014, https://giac.ge/wp-content/uploads/2014/09/GIAC-REPORT-ENG.pdf, accessed: 28.05.24.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Georgian International Arbitration Center, https://giac.ge/en/text/3/2/1, accessed:28.05.24.
[126] Ibid.

sense that a for-profit arbitration institution may prioritize financial gain over fair and impartial dispute resolution. Nevertheless, it is important to note that not all institutions may administer in this manner, however, there is a concern that the institution, driven by profit motives, could influence arbitrators to decide in favor of certain parties. This automatically raises doubts regarding the impartiality, independence, and fair adjudication of disputes.

The overall long-term impact of operating arbitration institutions as for -profit entities, rather than as non-profit organizations, can gradually erode the principles of justice and fairness. When financial motives override the commitment to impartiality, arbitration loses credibility and effectiveness as an alternative dispute resolution mechanism. Conversely, establishing institutions as non-profit organizations eliminates the presence of shareholders or founders with a financial interest in the outcome of disputes. Given that institutional conflict is tied to the affiliations of an institution's shareholders with one of the parties or their representatives, it is important for these institutions to operate as non-profit organizations. Establishing a non-profit oriented arbitral institution ensures that no one in the background has a financial motive influencing the outcome, thereby preventing institutional conflict. As a result, arbitration gains credibility and effectiveness as a trusted alternative for resolving disputes.

3.2. Benefits of Institution Administered Arbitration

Institutional arbitration, administered by specialized arbitral institutions, operates under its own set of rules tailored for the arbitration process.[127] These rules, although varying in approach and emphasis, outline the procedures from initiation to the final award.[128] They are typically crafted to govern arbitrations conducted by the specific institution and are commonly integrated into

[127] Blackaby Nigel, et al., "Redfern and Hunter on International Arbitration," Section 1.155 p.21, 2023.
[128] Ibid.

contracts through arbitration clauses.[129] This mechanism ensures a standardized procedural framework and enables the enforcement of arbitration agreements even if one party is unwilling to participate.[130] Overall, arbitration clauses serve as a convenient method for integrating procedural rules and institution oversight into contracts, thereby facilitating the effective resolution of disputes through arbitration.[131]

Institution-administered arbitration has both benefits and drawbacks. Despite the drawbacks, this section will solely focus on outlining the numerous benefits of institution-administered arbitration, as they outweigh any associated drawbacks for the purposes of this research. The advantages of institutional arbitration encompass several key factors that elevate the arbitration process. Firstly, established arbitral institutions offer precisely crafted rules that have stood the test of time.[132] These rules undergo continuous refinement to incorporate evolving legal standards and best practices in international arbitration.[133] Consequently, parties can trust in the reliability and effectiveness of these rules to guide their dispute resolution process. Secondly, institutional rules provide a clear and structured framework for resolving disputes.[134] By incorporating these rules into arbitration agreements, parties establish a solid foundation for conducting proceedings, ensuring consistency, and facilitating efficient case management.[135] This structured approach minimizes ambiguity and streamlines the resolution process, contributing to timely and effective outcomes.[136] Furthermore, arbitral institutions play a pivotal role in administering arbitration proceedings. Their specialized staff possess extensive experience and expertise in managing all aspects of arbitration, from arbitrator appointments to

[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.

procedural logistics.[137] This administrative support ensures that proceedings run smoothly and efficiently, enabling parties to focus on presenting their cases without being burdened by administrative complexities.[138] Additionally, the guidance and assistance provided by the institution's secretariat offer invaluable support to parties and their legal representatives throughout the arbitration process.[139] Whether clarifying procedural matters, providing logistical support, or offering strategic advice, the institution's secretariat serves as a trusted resource, enhancing parties' understanding and navigation of the arbitration process.[140]

Despite the benefits of institution-administered arbitration, individuals in Georgia are more likely to perceive it as having more drawbacks than benefits. This perception arises from the fact that arbitral institutions operate as for-profit entities, potentially prioritizing financial gain over their core goal of simply administering proceedings. Moreover, there is a recognized risk of institutional influence on arbitration outcomes, which contradicts the fundamental principles of arbitration. In practice, instances of institutional influence on arbitration outcomes have been observed in Georgia, raising concerns about the integrity of the process. If left unaddressed, these issues could compromise the preferred nature of institution-administered arbitration. To preserve its credibility and effectiveness, it is imperative to ensure the independence and impartiality of arbitrators. Arbitrators must be free from any undue influence or interference from arbitral institutions, and institutions should not possess authority that could compromise the autonomy of arbitrators. Failure to address these issues promptly may result in the weakening of institution-administered arbitration's preferred status, potentially diminishing public confidence in the arbitration process and its capacity to deliver equitable outcomes.

[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.

3.3. Factors hindering Arbitration in Georgia in the Framework of Institutional Conflict

Regarding the arbitration system's challenges in Georgia, institutional conflicts of interest raises awareness about the arbitration proceedings and overall affects the attractiveness of arbitration in Georgia, creating the perception of Georgia as an arbitration-unfriendly country in the region. This thesis has identified several issues related to institutional conflict and its effects on the arbitration system, as well as broader concerns surrounding arbitration in Georgia. This section will primarily focus on relevant statistics concerning institutional conflicts, providing concise information to underscore areas that require attention and remediation within arbitration to address underlying issues. However, some investigated matters that do not directly relate to institutional conflict are not elaborated upon in this thesis.

The study includes interviews with a wide range of stakeholders involved in arbitration.[141] The objective of these interviews was to evaluate their comprehension of arbitration, their stances toward it, and their perspectives on the current challenges within the arbitration landscape.[142] The challenges and obstacles confronting arbitration in Georgia, as identified through interviews with arbitration institutions, encompass several key factors. Firstly, there is a notable lack of awareness, knowledge, and trust among businesses, primarily influenced by attorneys who may view arbitration as a challenge to their role or rights, and therefore prefer court proceedings.[143] Two institutions pointed out that arbitration institutions operating as limited

[141] United Nations Development Programme, Caucasus Research Resource Center, "Legal and Practical Aspects of Arbitration in Georgia," p. 26., 2018, https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_Arbitration_Study_20180312_eng.pdf, accessed:03.06.24.
[142] Ibid.
[143] Ibid, p.27.

liability companies pose challenges.[144] They argue that such structures inherently prioritize profit, which raises concerns about impartiality and fairness.[145] Some interviewees expressed apprehensions about arbitration being conducted within legal or consultancy firms, citing potential conflicts of interest and bias.[146]

Many business representatives are unfamiliar with arbitration as a viable option for dispute resolution.[147] Business individuals expressed concerns regarding the perceived lack of independence within arbitration institutions, noting their alignment with private organizations and banks.[148] The situation is particularly concerning for private individuals. Four out of five private individuals indicated that both the selection of arbitration and the specific arbitration institution were dictated by the other party.[149] When asked if they would alter the arbitration clause given the chance, three of the four respondents expressed a willingness to make changes, while one disagreed.[150] One respondent mentioned relying on their lawyer's guidance when opting for arbitration.[151] Notably, another respondent perceived the selection of arbitration as driven by the other party's personal interests, while yet another suspected collusion between the arbitration institution and the bank involved in the dispute.[152]

The findings underscore the critical need for increased awareness and understanding of arbitration among businesses and individuals. They also highlight the importance of addressing concerns related to independence, conflicts of interest, and bias within arbitration institutions, which can sometimes lead to institutional conflicts. The fact that individuals feel compelled to

[144] Ibid, p.28.
[145] Ibid.
[146] Ibid.
[147] Ibid, p.30.
[148] Ibid.
[149] Ibid, p.37.
[150] Ibid.
[151] Ibid.
[152] Ibid.

accept the choice of arbitration and the specific institution without their involvement suggests a potential imbalance of power. Similarly, the perception that the selection of arbitration is driven by the other party's personal interests raises significant concerns about fairness and impartiality in the arbitration proceedings. These findings emphasize the importance of ensuring that arbitration proceedings are conducted transparently and independently, free from undue influence or manipulation, particularly in cases where institutional conflict is prevalent.

Chapter IV. Global Perspectives on Institutional Conflict of Interest

Institutional conflict of interest in arbitration, often referred to as institutional conflict, carries global implications, although it is not yet thoroughly examined or defined as a distinct form of conflict of interest. However, based on the observations from Georgia, we can conclude that it pertains to affiliations with arbitration institutions and one of the parties or its representatives. This chapter aims to explore analogous situations on an international scale through the analysis of two cases. While institutional conflict may not be as prevalent in other countries as in Georgia or post-Soviet countries, it is essential to recognize its occurrence in other jurisdictions, such as the United States of America and the United Kingdom. This acknowledgment is crucial since such jurisdictions have robust arbitration systems, and arbitration institutions are often tied to chambers of commerce or exist independently as subjects of private law. Notably, one of them does not have founders or shareholders in the background, signifying its status as non-profit independent organizations. The Chapter also delves into the concept of pocket arbitration, which is synonymous with institutional conflict. It emphasizes the necessity of non-profit arbitral institutions and highlights the correlation between these conflicts and for-profit institutions.

4.1. Decisions Reflecting Institutional Conflict of Interest

In a 2019 decision by the US Court of Appeals for the 9th Circuit, a JAMS-appointed tribunal rendered an arbitration award.[153] Unlike other US arbitration institutions, JAMS operates as a

[153] Decision of the US Court of Appeals for the 9th Circuit, *Monster Energy Co. v. City Beverages LLC*, No. 17-55813.

for-profit entity, not a non-profit organization.[154] The court vacated the arbitration award citing the following factors: the arbitrator, who was a shareholder of JAMS, had a financial interest in the arbitration institution; over the past five years, JAMS had administered 97 disputes involving Monster Energy, one of the parties involved in the dispute.[155] The basis for vacating the award was also the arbitrator's failure to adequately disclose these circumstances.[156] The arbitrator indicated in the disclosure form that, like all JAMS arbitrators, he had a general economic interest in JAMS's success.[157] Thus, he failed to disclose his specific membership in JAMS or the extensive history of disputes administered by JAMS involving one of the parties to the current dispute. Although these circumstances did not establish a direct connection between the party and the arbitrator, the court deemed that, indirectly, given the arbitrator's interest in the institution, these circumstances could create an impression of bias in the eyes of third parties and should have been disclosed.[158]

On the other hand, the core issue in the case involves allegations of bias and lack of neutrality in the process overseen by the London Court of International Arbitration (LCIA), with claims by Epicenter Loss Recovery (ELR) accusing Burford Capital, a litigation funder, of maintaining undisclosed ties with the LCIA, suggesting that the LCIA is financially dependent on the claims funded by Burford, potentially compromising its neutrality in the case where Burford was a party.[159] The case was brought to the Arizona District Court, where it ruled that it lacked jurisdiction to review the arbitration awards under the LCIA rules and the US Federal Arbitration Act.[160] The court emphasized that any challenges to the arbitration awards should

[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Order of the United States District Court for the District of Arizona, No. CV-18-03300-PH-DJH.
[160] Ibid.

be addressed in the English courts, stating that it only had jurisdiction to enforce a foreign arbitral award, which Burford was not seeking at the time.[161] The court also noted that allegations of bias and conflicts of interest should be resolved within the arbitration framework or through appropriate English legal channels.[162] Although the court had no power to interfere in a London-seated LCIA arbitration, it is crucial to note that both the case itself and the subsequent article were centered on allegations of undisclosed connections between the funder, who was also a party in a dispute and the arbitral institution. Therefore, scholars and legal professionals view this as a significant issue worthy of attention.[163]

the case involving JAMS serves as a lesson learned about the potential consequences of inadequate disclosure by arbitrators. The court's decision to vacate the arbitration award emphasizes the necessity for arbitrators to fully disclose any financial interests or affiliations that could create an appearance of bias, even if those interests are indirect or seemingly insignificant. This underscores an institutional conflict where an arbitrator may appear to have an interest in the institution's gain, which although not consistent in every case, it still appears to override the principle of avoiding an appearance of bias as outlined in the IBA Guidelines, from the perspective of a reasonable third person test.[164] Moreover, as JAMS is a for-profit organization by its nature, this highlights the potential for close connections between arbitral institutions operating as for-profits and their affiliated persons. Consequently, this situation could plausibly compromise the impartiality and independence of the arbitration process. Conversely, in the ELR vs. Burford case when one of the parties is affiliated or somehow connected with the institution, it gives a potential rise to an institutional conflict. The conflict becomes apparent when the overall case is decided in favor of the funder, Burford, resulting in

[161] Ibid.
[162] Ibid.
[163] Ballantyne Jack, GAR Article, "US court declines to interfere in Burford LCIA dispute," 12.01.2024.
[164] International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," p.2., 2024.

the dismissal of the claims in their entirety.[165] The critical issue here underscores the importance of disclosing third-party funding. Such disclosure logically ensures transparency in the arbitration process, enabling all parties to be fully informed about any financial interests that could potentially influence the proceedings. Furthermore, it aids in the identification and avoidance of any potential conflict of interest, particularly institutional conflicts that may arise due to the relationships between the institution, arbitrator, parties, and the third-party funder.

4.2. Pocket Arbitration or Institutional Conflict of Interest in Arbitration

Although institutional conflict of interest is not explicitly mentioned, it manifests in the form of "pocket arbitration," a phenomenon prevalent primarily in post-Soviet countries. As outlined in Chapter II, section 2.3., pocket arbitration is further defined under Russian Arbitration Law as a circumstance where corporations involved in disputes also serve as founders of the administering institutions, leading to conflicts of interest.[166] Similarly, Latvian Law, also encompasses situations where the parties have ties to the arbitration courts themselves.[167] In Georgia, pocket arbitration includes instances such as bank-arbitration relationships or any affiliations between one of the parties or their representatives with the arbitration institution, thereby creating potential for institutional conflict of interest. Therefore, pocket arbitration is synonymous with institutional conflict.

[165] Ballantyne Jack, GAR Article, "US court declines to interfere in Burford LCIA dispute," 12.01.2024.
[166] Burova Elena, "New Rules of the Game for Arbitral Institutions in Russia: Two Recent Governmental Authorizations," Kluwer Arbitration Blog, 23.05.2017, https://arbitrationblog.kluwerarbitration.com/2017/05/23/new-rules-game-arbitral-institutions-russia-two-recent-governmental-authorizations/, accessed: 09.06.24.
[167] Nerets (Sorainen) Valts, "What has Changed in Six Years Since the Latvian Arbitration Law "Reform" and What Needs to Be Changed?" Kluwer Arbitration Blog, 11.03.2021, https://arbitrationblog.kluwerarbitration.com/2021/03/11/what-has-changed-in-six-years-since-the-latvian-arbitration-law-reform-and-what-needs-to-be-changed/, accessed:09.06.24.

The new Russian Arbitration Law introduced significant measures to prevent pocket arbitrations. Specifically, the law mandates that only non-profit organizations can establish Permanent Arbitral Institutions (PAIs), which are subdivisions of non-profit organizations tasked with administering arbitration on a permanent basis.[168] These PAIs must obtain authorization from the Russian Government based on recommendations from the Council of Development of Arbitration by the Ministry of Justice.[169] These measures aim to eliminate opportunities for misuse of arbitration proceedings and ensure independence and impartiality of arbitral tribunals. Moreover, the law emphasizes that the reputation of the non-profit organization establishing the arbitral institution is a crucial factor.[170] This includes assessing the reputation of the organization's founders and ensuring that the organization's activities are aimed at promoting arbitration and providing high-quality arbitration services.[171] In essence, when a for-profit entity establishes or is closely linked to an arbitration institution, there is a risk that the institution may prioritize profit over fairness in its arbitration proceedings.[172] This alignment of interests between the corporation and the arbitration institution can lead to what is colloquially termed as pocket arbitrations or institutional conflict of interest.[173] In such circumstances, the corporation essentially controls or has significant influence over the arbitration process, potentially undermining the neutrality and independence that arbitration is meant to uphold.[174] Restricting arbitral institutions to non-profits also helps to align their objectives more closely with the public interest rather than profit motives. This alignment enhances perceptions of neutrality, integrity, and impartiality in arbitration proceedings, as non-

[168] Burova Elena, New Rules of the Game for Arbitral Institutions in Russia: Two Recent Governmental Authorizations, Kluwer Arbitration Blog, 23.05.2017, https://arbitrationblog.kluwerarbitration.com/2017/05/23/new-rules-game-arbitral-institutions-russia-two-recent-governmental-authorizations/, accessed: 09.06.24.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Ibid.

profit status signals a commitment to serving the arbitration community and promoting fair dispute resolution. Additionally, focusing on non-profits encourages the establishment of institutions genuinely dedicated to arbitration rather than those primarily driven by financial gain. This approach fosters the development of a more robust and reputable arbitration system, appealing to both domestic and international parties seeking reliable dispute resolution mechanisms.

In conclusion, it is evident that institutional conflict or pocket arbitrations are closely linked to arbitration institutions operating as for-profit organizations. This reiterates the urgent need to address this issue in countries where arbitration institutions are established as for-profit entities. Similar measures as those outlined above could be adopted in Georgia to ensure that arbitration institutions are established as non-profit organizations. Prioritizing non-profit structures serves to significantly reduce the potential for conflicts of interest arising from affiliations with parties or their representatives.

Conclusion

Through comprehensive analysis and discussion, the thesis clarified the concept of institutional conflict and its relevance, both within Georgia's legal framework and on a global scale. By examining Georgian case law and exploring the implications within the context of public procurement of arbitration services, the study sheds light on how institutional conflict arises, the underlying risks, and its potential impact on legal processes. It emphasizes the need to identify and label actions as institutional conflict, particularly at the international level in countries like the United States and England, where similar issues exist even if the term "institutional conflict" is not explicitly used. While the term "pocket arbitration" shares similarities with institutional conflict, its definition and usage are primarily found in post-Soviet countries such as Russia and Latvia. The study further underscores the importance of distinguishing institutional conflict from general conflicts of interest, advocating for its recognition as a distinct form of conflict of interest.

The thesis aimed to demonstrate the crucial connection of how profit-driven institutions serve as one of the fundamental sources of institutional conflict and advocates for drawing on insights from international practices to improve institutional frameworks. It particularly emphasizes the necessity of establishing the arbitration institutions on a non-profit basis to mitigate conflicts of interest. The thesis highlights the paradox of how an institution can influence arbitrator's decisions, and reveals institutional conflict as a form of conflict of interest. Furthermore, the study presents a foreign example that demonstrates how specific arbitral institutions can incorporate particular provisions into their rules to mitigate institutional conflict. This comparison includes relevant European Union Directives concerning consumer protection in arbitration clauses. Additionally, through an examination of problematic judicial practices and an analysis of the merits of institutional arbitration, the research provides valuable insights into

discerning conflicts of interest. It emphasizes the advantages of institution-administered arbitration and presents pertinent conclusions and statistics on institutional conflict, informed by professionals seeking to comprehend the factors impeding the efficacy of arbitration in Georgia.

The examination of potential solutions and recommendations to mitigate conflicts of interest within arbitration institutions underscores the necessity for comprehensive regulatory frameworks and internal mechanisms to uphold impartiality and independence. Drawing from examples such as the Russian Arbitration Center (RAC), which implements internal regulations governing conflicts of interest at the institutional level among its board members, it becomes evident that such measures are crucial for maintaining the integrity of arbitration proceedings. The absence of comparable internal regulations, especially in well-established institutions like the Georgian International Arbitration Center (GIAC), highlights a substantial gap that requires. attention.

As institutional conflict is primarily defined by court decisions and scholarly investigations, it is imperative for the Law of Georgia on Arbitration to clearly outline provisions addressing this issue. Additionally, it would be beneficial to introduce clear guidelines, protocols, more scholarly articles or legal doctrines for identifying and addressing institutional conflicts of interest in arbitration. This could involve requirements for the disclosure of potential conflicts involving affiliated parties, such as institution employees, board members, or founders associated with a party or its representative. Furthermore, measures should be implemented to limit the probability of a founder of an institution acting as a representative in a dispute administered by their own institution. All of the above-mentioned solutions can be effectively implemented if the core issue is addressed. The crux of the matter lies in the fact that the Law

of Georgia on Arbitration does not specify the form of establishment for arbitration institutions. In my view, an amendment mandating arbitration institutions to operate as non-profit organizations would be beneficial. Such a provision would safeguard their independence by eliminating shareholders and founders from direct or indirect influence over arbitrators, thereby averting potential biases in outcomes driven by profit motives. This measure would foster impartiality among arbitrators and effectively mitigate the occurrence of institutional conflicts during arbitration proceedings.

Another potential solution for addressing institutional conflict is to prohibit the public procurement of arbitration services. This practice often results in the preselection of a winning institution by the tender announcer, effectively tying all disputes to one specific institution without the agreement of the parties involved. Moreover, in consumer disputes, instead of consistently specifying a single institution, a clause could be incorporated mandating civil litigation or, as suggested by the EU ADR Directives, restricting the use of pre-dispute arbitration clauses in consumer contracts. Alternatively, when incorporating an arbitration clause, not designating a specific institution could be a solution. Instead, parties could draft a submission agreement, allowing them to jointly choose an administering institution in the event of a dispute. The EU ADR Directive provides valuable insights that Georgia could leverage when drafting comparable regulations to safeguard consumer rights. This could entail the implementation of specific control and enforcement mechanisms, such as appointing a competent authority tasked with monitoring and ensuring that ADR entities' comply with regulatory requirements. To ensure compliance, Georgia could introduce effective and proportionate penalties for instances of non-compliance, as mandated by the EU ADR Directive.

Ultimately, promoting arbitration as an alternative dispute resolution method could be advantageous, especially since individuals entering into contracts often have limited awareness of arbitration. This involves raising awareness of arbitration procedures, initiation processes, its nature, and the benefits or drawbacks it presents. Implementing effective public relations strategies can assist in promoting arbitration by objectively presenting its advantages and disadvantages, enabling individuals to make informed decisions before committing to arbitration proceedings.

Bibliography

Georgian Legislation:

Law of Georgia on Arbitration, 02.07.2009;
Law of Georgia on the Protection of Consumer Rights, 29.03.2022;
Law of Georgia on Public Procurement, 09.02.2023.

Russian Legislation:

Federal Law No. 382-FZ on Arbitration (Arbitral Proceedings) in the Russian Federation;
Russian Arbitration Center at the Autonomous Non-Profit Organisation, "Russian Institute of Modern Arbitration," Moscow, 2021.

Directives:

DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

Case Law:

Decision of the Tbilisi City Court of October 6, 2014, Case Number: N2/16444-14;
Decision of Tbilisi Court of Appeals of July 20, 2011, Case Number: 2b/2130-11;
Decision of Tbilisi Court of Appeals of September 04, 2023, Case Number: 2b/3653-23;
Decision of Supreme Court of Georgia of March 02, 2021, Case Number: Na-3947-y-93;
Alpha Projektholding GMBH vs. Ukraine, ICSID Case No. ARB/07/16, 08.11.2010;
Decision of the US Court of Appeals for the 9th Circuit, *Monster Energy Co. v. City Beverages LLC*, No. 17-55813;
Order of the United States District Court for the District of Arizona, No. CV-18-03300-PH-DJH.

Books:

Moses, Margaret L., "Principles and Practice of International Commercial Arbitration," (2nd edition, Cambridge University Press, 2012);
Blackaby Nigel, Partasides Constantine, Redfern Alan, "Redfern and Hunter on International Arbitration," (7th edition) (©Kluwer Law International Oxford University Press 2023);
Injia Beka, Lapiashvili Natia, "Explanatory Dictionary of Arbitration,"(Georgia, Zviad Kordzadze Publishing, 2016).

Academic articles:

Perry Sebastian, GAR Article, ICC disqualifies Sachs over related ICSID appointment, 12.03.2021;
Ballantyne Jack, GAR Article, US court declines to interfere in Burford LCIA dispute, 12.01.2024.

Guidelines and Reports:

International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration," 2024;
Georgian Association of Arbitrators, the USAID Economic Governance Program Grant: Diversifying Training Portfolio of Georgian Association of Arbitrators, Qualitative Study in Arbitration in Georgia, 2023.

Online sources:

Khoury May, Conflicts of Interest, 11.03.2024, Website of Jus Mundi > https://jusmundi.com/en/document/publication/en-conflicts-of-interest;

International Chamber of Commerce Arbitration Rules > https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf;

Akulina Arina, Piskunovich Katarina, "Arbitral Institutions' Conflicts of Interest," 28.07.2021, Kluwer Arbitration Blog, > https://arbitrationblog.kluwerarbitration.com/2021/07/28/arbitral-institutions-conflicts-of-interest/;

Burova Elena, "New Rules of the Game for Arbitral Institutions in Russia: Two Recent Governmental Authorizations," 23.05.2017, Kluwer Arbitration Blog > https://arbitrationblog.kluwerarbitration.com/2017/05/23/new-rules-game-arbitral-institutions-russia-two-recent-governmental-authorizations/;

Nerets (Sorainen) Valts, "What has Changed in Six Years Since the Latvian Arbitration Law "Reform" and What Needs to Be Changed?" 11.03.2021, Kluwer Arbitration Blog > https://arbitrationblog.kluwerarbitration.com/2021/03/11/what-has-changed-in-six-years-since-the-latvian-arbitration-law-reform-and-what-needs-to-be-changed/;

Analytical Business Magazine Investor.ge > https://www.investor.ge/wp-content/uploads/2020/07/blc_2024-2.pdf;

The official website of Transparency International Georgia > https://www.transparency.ge/en/post/corruption-risks-georgian-judiciary;

The official website of electronic procurement system > https://etenders.ge/view/62524/, https://etenders.ge/view/57852/;

The official website of the European Union, Help for exporters and importers, Public procurement > https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/public-procurement_en;

United Nations Development Programme, Caucasus Research Resource Center, Legal and Practical Aspects of Arbitration in Georgia, 2018, > https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_Arbitration_Study_20180312_eng.pdf;

The official website of the National Agency of Public Registry of Ministry of Justice of Georgia > https://www.my.gov.ge/ka-ge/services/6/service/179;

Report on Formation of the Georgian International Arbitration Centre, 2014 > https://giac.ge/wp-content/uploads/2014/09/GIAC-REPORT-ENG.pdf;

The official website of Georgian International Arbitration Center > https://giac.ge/en/text/3/2/1;

The official website of International Chamber of Commerce > https://iccwbo.org;

The official website of Stockholm Chamber of Commerce Arbitration Institution > https://sccarbitrationinstitute.se/en,

The official website of American Arbitration Association > https://www.adr.org/about;

The official website of London Court of International Arbitration > https://www.lcia.org/LCIA/organisation.aspx;

The official website of Singapore International Arbitration Center > https://siac.org.sg.