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THE EU CALLS FOR IMPROVING THE JUSTICE SYSTEM IN GEORGIA: DEMOCRACY AND DISPUTE SETTLEMENT

Abstract

Strengthening democracy is primarily linked with effective and independent judiciary in any jurisdiction. Enhancing the fair and well-functioning judicial system remains the challenge for Georgia, as highlighted recently by the European Parliament's Committee on Foreign Affairs (AFET) Report on the implementation of the EU Association Agreement with Georgia. It is worth mentioning that Georgia has undergone several rounds of related reforms under different governments varying from the idea of establishment special economic zones with different legal regimes, introduction of commercial and tax courts/chambers or formation of local branch of reputable international arbitration institution. However, irrespective of several attempts in the past, there remains a considerable criticism regarding efficiency and quality of justice in the country and there are still substantial reforms Georgia needs to undertake to achieve truly effective dispute resolution system.

Keywords: EU, Georgia, Judiciary, Arbitration, Reforms

§ 1. Introduction

Implementation status of the EU Association Agreement with Georgia with regard to judiciary system and criticism

In 2018 the European Parliament's Committee on Foreign Affairs ("AFET") has published the assessment of current status of the implementation of the Association Agreement between the European Union (the "EU") and the European Atomic Energy Community and their Member States, of the one part, and Georgia (the "European Union Association Agreement with Georgia").¹ While evaluating the overall progress positively, AFET also identified the areas necessitating additional efforts for Georgia to get closer to membership of the EU.² According to the AFET's press office, Members of the European Parliament ("MEPs") assessed that "high-level corruption, full independence of the judiciary and the depoliticization of media content remain key areas of concern" in Georgia.³ The report regarding the implementation process of the EU-Georgia Association Agreement was prepared by MEP Andrejs Mamikins, which particularly undervalued democracy and justice-related reforms in Georgia.⁴ On 13 November 2018

¹ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, entered into force on 1 July 2016.

² Official web-site of the European Parliament, Documents in dossier AFET/8/11788 on the implementation of the EU Association Agreement with Georgia, available at <http://www.europarl.europa.eu/committees/en/afet/draft-reports.html?ufolderComCode=AFET&ufolderLegId=8&ufolderId=11788&source=&linkedDocument=true&urefProcYear=&urefProcNum=&urefProcCode=>.

³ Official web-site of the European Parliament, News, Press Release "EU association efforts: MEPs praise Georgia and criticise Moldova", available at <http://www.europarl.europa.eu/news/en/press-room/20181009IPR15403/eu-association-efforts-meps-praise-georgia-and-criticise-moldova>.

⁴ Report on the implementation of the EU Association Agreement with Georgia (2017/2282(INI)), Committee on Foreign Affairs, Rapporteur: Andrejs Mamikins, A8-0320/2018, Dated 15.10.2018, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2018-0320+0+DOC+PDF+V0//EN>.

at the European Parliament's plenary session discussion and debates around the report, Johannes Hahn, the EU Commissioner for European Neighborhood Policy, stated that while the report showed Georgia's progress regarding implementation of the European Union Association Agreement with Georgia, he also noted that the Georgian government should work further on law enforcement and judiciary reforms.⁵

In consideration of the foregoing, via report on the implementation of the EU Association Agreement with Georgia, the European Parliament "acknowledges Georgia's results in fighting low and mid-level corruption leading to a good regional ranking in perception indexes; highlights nevertheless that high-level elite corruption remains a serious issue;... and stresses that fighting corruption requires an independent judiciary and a solid track record of investigations into high-level cases of corruption, yet to be established."⁶ The European Parliament further "takes note of the ongoing judicial reform and signs of greater impartiality and transparency of the judiciary, but recalls the Venice Commission's concerns over proposed legislative amendments, which do not ensure the political neutrality of the Prosecuting Attorneys' Council of Georgia; calls for all the necessary measures to strengthen the justice system – [...], also with a view to guaranteeing transparency, notably in terms of the selection, appointment and promotion of judges as well as in disciplinary proceedings pertaining to them."⁷ The EU principal legislative body also "calls on the Georgian authorities to take further steps to uphold fundamental freedoms and human rights, notably for vulnerable groups, by fighting hate speech and discrimination, including on the labour market through an amended Labour Code."⁸

Accordingly, enhancing the fair and well-functioning judicial system remains the challenge for Georgia. Strengthening democracy is primarily linked with effective and independent judiciary in any jurisdiction. It is worth mentioning that Georgia has undergone several rounds of judicial reforms under different governments. However, there remains considerable criticism regarding efficiency and quality of judicial system in the country. Some often-noted grounds of criticism include: unpredictability of outcome of decisions, lack of professionalism of judges (could be result of low salaries), deficiency in number of judges as compared to number of cases to hear per year, nepotism and favoritism in appointment and removal of judges, lack of modernization and other reasons. All these factors result in many low-quality and unconvincing judgments and more generally, in lack of trust in Georgian judicial system as a whole, both in the eyes of foreign investors and Georgian citizens.

§ 2. Past attempts to reform dispute settlement system in Georgia and future prospects

a) Commercial and Tax Courts/Chambers Reform

In the near past, there had been some attempts in Georgia to offer trust-worthy dispute settlement mechanisms to facilitate fast and effective resolution of business disputes, especially involving foreign investors. The example of such attempt is discussions about introducing specialized commercial and tax courts/chambers in Georgia. In this regard, in October 2016 the private law reform council, consisting of the Minister of Justice and representatives of different public bodies and private interest groups considered the concept paper on introduction of commercial and tax courts/chambers prepared by law firm "Dechert Georgia LLC".⁹ The concept paper overviews the judicial systems in many legally advanced jurisdictions, including England and Wales, Ireland, Netherlands, Singapore, France, USA and other jurisdictions, based on which the paper elaborated the recommendations for the government of Georgia, including hiring foreign judges with required expertise.¹⁰ In September 2017 it was officially announced by the Georgian Ministry of Justice that the first commercial chamber will start to operate in January

⁵ News Agency "Agenda.ge", "MEP calls Georgia a star of the region for commitment to European values", dated 14 Nov 2018, available at <http://agenda.ge/en/news/2018/2394>; See also News Agency "Civil.ge", "MEPs Positive on Georgia's EU Association Agreement Implementation", dated 10/10/2018, at <https://civil.ge/archives/257777>.

⁶ Report on the implementation of the EU Association Agreement with Georgia (2017/2282(INI)), *Supra* note 5, Para 21.

⁷ Report on the implementation of the EU Association Agreement with Georgia (2017/2282(INI)), *Supra* note 5, Para 24.

⁸ Report on the implementation of the EU Association Agreement with Georgia (2017/2282(INI)), *Supra* note 5, Para 34.

⁹ Georgian Ministry of Justice official webpage, information on private law commission meeting regarding introducing specialized commercial courts, dated 25 October 2016, available at <http://justice.gov.ge/News/Detail?newsId=5307>.

¹⁰ The concept paper is confidential. The author of this article had been involved in preparation of the concept paper.

2019.¹¹ The same source suggested that donors, including the European Bank for Reconstruction and Development (the “EBRD”), the UK Government’s Good Governance Fund (the “GGF”) and Die Deutsche Gesellschaft für Internationale Zusammenarbeit (English: German Corporation for International Cooperation GmbH) (the “GIZ”) expressed their willingness to support the reform financially.¹² However, later the reform has apparently been suspended and as of writing this article, no further plans have been announced or measures taken in this regard.

b) Establishment of local branch of reputable international arbitration institution

Further attempt of Georgian Government to offer high quality and effective dispute resolution to foreign businesses was negotiations with International Court of Arbitration of International Chamber of Commerce (the “ICC”), as a result of which it was announced that Memorandum of Understanding would be signed on 20 December 2018.¹³ The ICC press-release thereof notes that “under terms outlined in the MOU, ICC and the Government of Georgia commit to promoting the use of ICC Dispute Resolution Services in Georgia, including through awareness-raising and marketing efforts. With support from the government of Georgia, where relevant, the ICC Court will also undertake efforts to foster academic and educational activities in Georgia for local as well as regional or international purposes and audiences. Both parties commit to maintaining continued dialogue and the organization of joint encounters and to intensify the operation of a joint working group along with consultation among relevant stakeholders.”¹⁴

It seems that Georgian government has great expectations from this cooperation. According to official announcement of Minister of Justice, Georgian Government hopes to establish ICC local arbitration branch or representative office in Georgia.¹⁵ However, it is not officially confirmed from the side of ICC, that it intends establishment of local arbitration centre in Georgia, which would offer the same dispute resolution services in Tbilisi as in Paris. In this regard, ICC had recently declared its plans to expand operations worldwide. In July 2017 it announced to open a representative office for the Middle East and North Africa (MENA) in Abu Dhabi, United Arab Emirates (UAE). The office will be located in Abu Dhabi Global Market (ADGM), an international financial centre located on Al Maryah Island in the capital of UAE. The move is the latest in a series of measures undertaken by the Court to expand operations worldwide. They include the opening of a representative office in Brazil, announced in May 2017, and the establishment of a case management office in Singapore, announced in June 2017.¹⁶ However, all these jurisdictions have already been established as business centers with vast number of arbitration disputes, something economically developing country with emerging market like Georgia cannot offer. It is worth noting that currently there is only one international law firm operating in Georgian legal market (Dentons). Another global law firm Dechert announced it decided to leave Georgia in 2017. Apart from potential number of arbitration disputes and demand for arbitration services, the presence of high-quality legal services is another important prerequisite without which it will be hard to envisage successful functioning of an international arbitration centre.

As opposed to ICC, another leading arbitration institution - the London Court of International Arbitration (the “LCIA”) has a long-term practice of opening international offices, offering local dispute resolution services. For instance, in 2008 the LCIA has founded the DIFC-LCIA Arbitration Centre in Dubai, within Dubai International Financial Centre (“DIFC”) upon a strategic partnership between two institutions. The DIFC-LCIA Arbitration Centre administers the effective resolution of international business disputes through arbitration and mediation, offering all the services that are offered by the LCIA casework secretariat in London. Under the DIFC-LCIA Rules, the LCIA Court plays exactly the same supervisory role as it does under the LCIA’s own rules in connection with such matters as the

¹¹ Georgian Ministry of Justice official webpage, information on meeting of Georgian Minister of Justice with the EBRD president, dated 5 September 2017, available at <http://www.justice.gov.ge/News/Detail?newsId=6492>.

¹² Georgian Ministry of Justice official webpage, information on meeting of Georgian Minister of Justice with the EBRD president, dated 5 September 2017, available at <http://www.justice.gov.ge/News/Detail?newsId=6492>.

¹³ News Agency “Reginfo”, dated 20 October 2018, available at <https://reginfo.ge/economic/item/9815-saqartveloshi-saertashoriso-savachro-palatis-arbitraj-i-dapuwndeba>; See also Georgian Ministry of Justice official webpage, dated 17 December 2018, available at <http://www.justice.gov.ge/News/Detail?newsId=7838>.

¹⁴ ICC official web-site, Home / News & Speeches / ICC and Government of Georgia sign dispute resolution advancing MOU, available at <https://iccwbo.org/media-wall/news-speeches/icc-government-georgia-sign-dispute-resolution-advancing-mou/>.

¹⁵ Georgian Ministry of Justice official webpage, Press Release, dated 4 October 2018, <http://www.justice.gov.ge/News/Detail?newsId=7785>.

¹⁶ ICC official web-site, The ICC International Court of Arbitration is to open a representative office for the Middle East and North Africa (MENA) in Abu Dhabi, United Arab Emirates (UAE), at <https://iccwbo.org/media-wall/news-speeches/icc-court-establish-mena-representative-office-uae/>.

selection and appointment of Tribunals, determining challenges to arbitrators, and controlling costs.¹⁷ LCIA India is another independent arbitral institution founded under the LCIA umbrella in 2009, based in New Delhi, with rules that are closely modelled on the LCIA rules. LCIA India offers all the administrative services offered by the LCIA in the UK.¹⁸ Though, the LCIA has announced that as of 1 June 2016 it will service the needs of users in India, including those who have adopted LCIA India Rules, from the LCIA's London office and its London based casework team. Hence, after six years of its establishment, it has become apparent that Indian parties are equally content to continue using the LCIA Rules and there are insufficient adopters of LCIA India clauses to justify a continuation of the LCIA India Rules as a separate offering.¹⁹ Another example is LCIA-MIAC Arbitration Centre in Mauritius, founded by LCIA together with the Government of Mauritius in 2011 as a joint venture. However, The LCIA and the Government of Mauritius have mutually agreed to terminate the joint venture agreement which established the LCIA-MIAC Arbitration Centre in Mauritius, with effect since 27 July 2018. Consequently, from 27 July 2018 the LCIA-MIAC Arbitration Centre was announced to cease operations.²⁰ As follows, the establishment of local arbitration centres of reputable international arbitration institutions are not always as successful as they may appear in the beginning. The reason for that most probably is that the services offered by those arbitration institutions are far from being cheap. However, the businesses who can afford those fees, can also afford to sponsor travel costs i.e. the disputes to be heard abroad, e.g. in Paris or London. In arbitration the major costs do not come on travel and logistical costs, but rather on institutional fees, honorarium of arbitrators and charges of legal counsel. The services rendered by arbitrators with right experience is not low-priced. Use of internationally recognized brands such as ICC and LCIA also comes with a price, since these institutions enjoy high reputation and their arbitration awards are easier to enforce at courts than other arbitration centres' or ad hoc arbitration tribunals' decisions. Hence, the possibility to receive the same dispute resolution services locally may not be such a big advantage for its users at the end of the day.

c) Special Economic Zones with different legal regimes

Another interesting initiative in Georgia to follow is discussions on provision of Georgian Constitution allowing establishment of Special Economic Zones ("SEZ") with special legal regimes, specifically mentioning Anaklia SEZ. Introducing special legal regime in such zones means a possibility to introduce law other than Georgian law, as well as implies the need of establishing independent judicial and arbitration system to hear disputes based on such law. The ambitious plan for Anaklia SEZ is development of a common law framework based on English law principles, as well as formation of its own independent judicial system and an international arbitration centre for commercial and civil cases with highly qualified international judges and arbitrators, to facilitate time- and cost-effective dispute resolution for international business companies. Such approach is quite common for many SEZs, Special Administrative Regions or other free zones around the globe. Many of such zones have chosen English law through direct application or codification of its key legal principles. For instance, Hong Kong and Singapore adopted English law without codification. For example, the Singapore Application of English Law Act makes English common law and certain English statutes directly applicable in Singapore. As opposed to this approach, Dubai International Financial Centre ("DIFC") in United Arab Emirates ("UAE") and the Astana International Financial Centre ("AIFC") elected the codification approach. In the case of AIFC, its governing law is founded on the Constitution of Kazakhstan and has a special legal regime, based on English common law and standards of leading international financial centres.²¹ As for DIFC, it has its own laws and regulations, independent of the civil and commercial laws of the UAE, modelled on the best practices of the world's major financial jurisdictions and embody the best of international financial and commercial law.²² The DIFC judicial authority has drafted its own statutes based largely on English commercial law,

¹⁷ LCIA official website, available at <http://www.lcia.org/LCIA/international.aspx>; see also official website of DIFC-LCIA, available at <http://www.difc-lcia.org/other-advantages-of-the-difc-lcia.aspx>.

¹⁸ LCIA official website, information available at <http://www.lcia.org/LCIA/international.aspx>, see also official website of LCIA India at <http://www.lcia-india.org/>.

¹⁹ Official website of LCIA India, available at <http://www.lcia-india.org/>.

²⁰ LCIA official website, available at <http://www.lcia.org/LCIA/international.aspx>, see also official website of LCIA-MIAC available at <http://www.lcia-miac.org/>.

²¹ Philip Kim (Herbert Smith Free hills), The Astana International Financial Centre: AIFC Court and International Arbitration Centre Legal Systems to be based on English Common Law, dated 6 August 2017 available at <http://arbitrationblog.kluwerarbitration.com/2017/08/06/astana-international-financial-centre-aifc-court-international-arbitration-centre-legal-systems-based-english-common-law/>.

²² Andrew Tarbuck & Chris Lester, Dubai's legal system, Published by Motivate Publishing, 2009, available at <https://www.lw.com/thoughtleadership/dubai-legal-and-regulatory-system>.

however where DIFC law is silent, such as area of intellectual property, the law of England and Wales applies directly.²³ The reason why the DIFC has chosen English common law in preference to the codified system of civil law, being the major legal system in UAE, is said to be that common law allows the judges more discretion; It should be also mentioned that the principles of fairness and equity were introduced by the Court of Chancery 500 years ago to mitigate the unfair formalities of the common law, if any.²⁴ There are many other advantages to be named in favour of English law, such as: English Law dominates the international commercial contracts as it is considered as the most commercial friendly law. Because it is predominantly judge-made and not-parliament made law, it adapts more quickly to changing business realities. Further, English law is the only law which was intentionally introduced as part of the existing jurisdictions. All major financial centers are governed by the common law with strong judiciary, arbitration and mediation institutions operating on English law principles. Predictability of precedents with less interpretation power of judges; fact-based legal system, i.e. no need to be a lawyer to foresee the outcome of the dispute in line with similar cases; use of English as official language for procedures; better protection of freedom of contract and party autonomy principles, allowing more flexibility in drafting contracts – all these factors make English law the most popular and familiar law among international business companies. For this reason, it is clear why introducing English law as a governing law and founding the strong dispute settlement institutions based on the same legal principles can be a strong incentive to attract foreign and local investors in such free zones. Effective operation of judicial/arbitration institutions and the rule of law guarantees transparency, stability, predictability and consistency, which is crucial for any business entity.

§3. Conclusions

Judicial independence is the foundation of rule of law and democracy. Efficiency of judicial system is measured by how the courts support the protection of human and property rights, facilitate the peaceful resolution of disputes and allow citizens to hold their government accountable for its actions; Further, by ensuring the fair application of laws and the prompt enforcement of judicial decisions, an efficient judiciary encourages foreign and domestic investment, private sector development and national competitiveness, thus fostering economic growth.²⁵ A fair trial is a fundamental right of citizens, as well as a driving factor to underpin business confidence and economic development.²⁶ Having said that, the progress achieved by Georgia in harmonizing the different legal areas with EU law can be undermined without just and well-functioning judicial system, which ensures that the laws are respected and appropriate sanctions are taken when they are breached. Improving justice can be achieved through reforms related to courts and alternative dispute resolution mechanisms. As the judicial system includes a wide array of institutions and individual players, reform efforts should adopt a comprehensive, participatory, multi-faceted approach.²⁷ In the view of foregoing, Georgia continues to consider various options on making changes for improvement of the judicial system. Unfortunately and irrespective of several attempts in the past, there are still substantial reforms Georgia needs to undertake to achieve truly fair and effective dispute resolution system that can provide a country with a foundation for the rule of law.²⁸

²³ Joshua Rozenberg, British law is oasis of reassurance in Dubai, dated 2 Feb 2006, available at <https://www.telegraph.co.uk/news/uknews/4198952/British-law-is-oasis-of-reassurance-in-Dubai.html>.

²⁴ Joshua Rozenberg, British law is oasis of reassurance in Dubai, dated 2 Feb 2006, available at <https://www.telegraph.co.uk/news/uknews/4198952/British-law-is-oasis-of-reassurance-in-Dubai.html>.

²⁵ World bank Official Website, Judicial Reform, Available at <http://web.worldbank.org/archive/website00912B/WEB/OTHER/0052E4CB.HTM?>

²⁶ The European Commission, The Quality of Public Administration “Toolbox”, Theme 7: Quality justice systems, August 2017, available at file:///C:/Users/User/Downloads/09%202017%20Theme%207%20Justice%20systems_web.pdf.

²⁷ World bank Official Website, Judicial Reform, Available at <http://web.worldbank.org/archive/website00912B/WEB/OTHER/0052E4CB.HTM?>

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