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TBILISI

it takes more than great wine to create an arbitration hub

International arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, according to the 2021 International Arbitration Survey[1] by Queen Mary University (London) and White & Case LLP. In addition to the top five traditional seats for arbitration – London, Singapore, Hong Kong, Paris, and Geneva – the same survey also found that regional seats are growing in reputation and popularity. These include, for instance, for the African region – Cairo and Nairobi; for the Asia–Pacific region – Shenzhen; and for the Caribbean/Latin American region – São Paolo, Miami, Madrid, and Lima.

Tbilisi too has great potential to be transformed into a regional arbitration hub - the benefit of which cannot be overstated. The prospect of attracting commercial parties from Central Asia, the CIS region, or Turkey to Tbilisi as a seat of arbitration in their contracts could drive millions of dollars to the state budget annually through dispute resolution and related services.

However, parties chose a seat of arbitration not for convenience, good food, or nice wine (although Tbilisi boasts all three). The most important driver in choosing a seat is the formal legal infrastructure. In other words, users seek out a seat where arbitration laws and the local judiciary are supportive of the arbitral process and provide sufficient indications of predictability and impartiality. While modern arbitration law is essential, a good track record in enforcing arbitral awards and agreements to arbitrate are key components to making a particular jurisdiction attractive as an arbitral seat. While Georgia can pride itself on its arbitration law, which is based on UNCITRAL Model Law and is thus considered to be a state-of-art legislation, Georgian courts still present an issue.

In its most recent decision[2], the Tbilisi Court of Appeals set aside an arbitral award rendered in an arbitration seated in Georgia on the basis that the parties had not entered into a valid arbitration agreement. The court noted that the parties had previously agreed that each party could appeal the decision of a dispute board in arbitration within the specific deadline. In absence of an appeal, the decision of the dispute board would be final and binding for the parties. The court's decision stated that the express will to arbitrate is an essential element for the validity of an arbitration agreement; it continued that in a hypothetical case when neither party appeals the decision of the dispute board, nor the losing party complies with it, effectively, there would be no express will of the parties to arbitrate. Therefore, the court concluded, the arbitration agreement was not validly established between the parties. It also noted that Georgian law is not familiar with the notion of a "dispute board", so the court was not able to assess the validity of the decision of the dispute board.

The reasoning of the court in this case is highly unsatisfactory and problematic for Tbilisi's aspirations to establish itself as a regional arbitration hub. A dispute board is one of the most frequently used dispute resolution tiers in construction contracts, especially in FIDIC standard contracts or contracts tailored under FIDIC drafts. This decision potentially undermines the validity and enforceability of arbitration clauses under such agreements as well as awards rendered thereunder. This court's decision presents two other major concerns. First, it was rendered almost two years after the application was made by the party (while the statutory deadline is only 30 days); second, the court noted that failure of the party to raise an objection to the jurisdiction of a tribunal during the arbitration process does not preclude the parties from raising such objection later in court (notwithstanding that the Georgian law on arbitration expressly provides that such failure shall amount to a waiver of the right to object).

As a comparison, in its recent decision, the Paris Court of Appeals upheld a $44 million ICC award against Albania over a mountain highway project – issuing an apparent first-of-its-kind decision that a party's failure to submit a dispute to a dispute board provided for in an FIDIC contract raises an issue of admissibility and does not deprive the arbitral tribunal of jurisdiction to hear the dispute. The court held that the ICC panel's decision to uphold a VAT-related claim against Albania that the claimants had not raised in a prior dispute[3] board proceeding was an issue of admissibility – not one related to the tribunal's jurisdiction. In other words, such failure did not undermine the will of the parties to arbitrate the dispute and thus, the jurisdiction of the tribunal. With this decision, it is unsurprising that Paris ranks fourth in the world for most preferred seats of arbitration.

To conclude, an arbitration-friendly approach from the local courts is one of the major determinants of having a successful seat of arbitration. The failure of Georgian courts to respect the will of the parties to arbitrate, apply the law with pro-enforcement bias, and comply with statutory deadlines makes it unappealing for potential clients. On a more positive note, Georgia already has modern arbitration law and a pool of knowledgeable arbitration professionals (and, of course, good wine) to make arbitration work in Georgia. For now, the city's reputation as a regional arbitration hub depends on the will of the government to modernize the local courts and join efforts with all stakeholders. Perhaps then we will spot Tbilisi as an emerging regional seat in the next arbitration survey.

Rusa Tchkuaseli,
Legal Director of BLC Law Office

FOR MORE INFORMATION AND ADVISE
PLEASE CONTACT US:
129ª David Aghmashenebeli Ave, Tbilisi, 0102, Georgia
Tel.: +995 32 292 24 91, 292 00 86, 200 04 91
blc@blc.ge blc.ge

[1] 2021 International Arbitration Survey: Adapting arbitration to a changing world, by White & Case LLP and School of International Arbitration Centre for Commercial Law Studies, Queen Mary University of London.

[2] Decision of Tbilisi Court of Appeals, dated 19 November 2021.

[3] Decision of the Paris Court of Appeals on case N58 /2022 dated 31 May 2022, Albanian Road Authority vs. AKTOR S.A. et.al. on applicant's motion to set aside the ICC award on case ICC n° 23998/MHM/HBH dated 1 September 2020.