# ГОСПОДАРСЬКЕ ПРАВО

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## ARBITRAL AGREEMENT

*The work thoroughly presents the characteristics and analysis of the Georgian law of arbitration. The improved arbitral legislation is directly connected to the foreign investing. When having the business relations to the Georgian party they need the stable legislative base and first of all the alternative analysis of solving disputes suitable to the international level standards. The society' interest and the court support toward the arbitral law is also important.*

**Keywords:** arbitral agreement, arbitral legislation, foreign investment, stable legislative base, solving disputes, international level standards, court support.

The existence of the world economy as well as every country's economy is unimaginable without business. Based on it each state tries to promote business development through the legislative base smartening or other different programs. The state must interfere into the business sphere only with intention of development and promotion. The successful way of doing business is first of all the flexible system of solving the disputes. The business activities without disputes are practically impossible as it involves the wide circle of physical and juridical persons. Consequently as much the dispute solution system will be regulated as quickly it will be developed.

The oldest way of the dispute solution is the court system as one of the basic mechanisms in the state. Though when the matter deals with the private relations and their corresponding dispute solution, in the contemporary world we come across the alternative ways of solving the disputes, for example, the negotiation, agreement, the arbiter institution, the arbitration, etc.

Today the arbitration is the most effective and popular institution in the business and not only the business sphere among the alternative and other ways of the private disputes' solution. The wide spreading of the arbitration in the world business is caused by definite priorities in comparison with the country's courts. Based on the Georgian law of the arbitration the arbitration is plenipotentiary to discuss the privet property argument based on the parties' equality which can be solved between each other by the parties themselves.

The arbitration advantage is first of all caused by its free nature. The parties are able to appeal to the arbitration without any law or norm restrictions. In particular, here we deal with the basic principle "parties' autonomy' of the agreement law. The parties are able to choose the best way of solving the dispute between them according to their own wish. The advantages of the arbitration are the following: the comparative independence towards the state, the flexible and accessible procedures, the possibility of process formation, qualified arbiters, solution finality, solution making, quick and effective solution of the dispute, the confidentiality and justice.[1] All these factors cause the arbitration's high popularity and trust towards the world business.

During the latest years the number of foreign invests has greatly risen. They greatly influence the local employers and the Georgian business in a whole. The investors joining the private juridical relations with the local companies with intention to solve the disputes against the state they make a choice in favor of the arbitrations. Though only the foreign investors are not the only source of the arbitration's popularization. Support from the state is necessary expressed by the legislation improvement.

The discussion of the private disputes through the arbitration way totally depends on the free will of the parties. The arbitration choice made by the parties and the decision how, where and what procedures to make is the key factor during solving every particular dispute. The arbitral

[1] see.*Robert Donald Fischer and Roger S. Haydock*, Drafting an Enforceable Arbitration Agreement, The Comparative Law Yearbook of international business, KLUWER LAW, 2001, 33–43.

agreement nature needs the parties' will to appeal the arbitration. This will is expressed in the arbitration agreement made between the parties. The arbitral agreement is the agreement according to which the parties agree to impart the arbitration's some or all the disputes prepared for the discussion based on this or that agreement or other juridical relations.[1] Consequently if the agreement does not exist upon the arbitration the possibility to discuss the dispute is automatically excluded by the arbitration.

The arbitral agreement is enormous phenomenon in the arbitral law and totally presents the arbitral basis. The arbitral agreement is the basis of discussing the dispute through the arbitral way. The agreement itself means the expression of the parties' will to impart the dispute to the arbitration to make the final solution. The free will expression of the parties is called the arbitral agreement, regulated by the national law norms and meets the international demands.

On the international level there are different rules regulating the arbitral dispute. Based on the private law nature of the arbitrations there is no particular rule regulating the arbitral agreement which would be obligatory for every international trade arbitrations taken into consideration by every states'legislation. That's why in order to discuss and describe the arbitral agreement more thoroughly, it is necessary to make its analysis based on the international charter. Besides, the arbitration law of different countries is quite important. The detailed research of the arbitral agreement also must be made according to the examples of the country's juridical norm according to which the issue is regulated.

In the above mentioned international rules regulating the arbitral agreement is meant UNCITRAL[2]model law of 1985 "about international trade arbitrations",[3] "about foreign arbitration agreements notices and materialization", the New York convention of 1958 (later – the New York convention), "about the international trade arbitrations" the European convention of 1961 (later the European convention), "about the invest disputes' solution among the states and other countries' citizens" of 1965 Washington convention,[4] etc. also in the international laws the biggest and improved international trade arbitral rules can be meant, as for the International Commerce Chamber (ICC), American Arbitration Association (AAA), London International Arbitration Court (LCIA), International Center of Disputes Regulation (ICDR) and International Center Solving Investment Disputes (ICSID), etc.

Among the international rules the special attention must be paid to the UNCITRAL model rule (later – model rule). The commission[5] working under the model rule aimed to create that kind of the procedural norms of the commercial arbitration that would directly fit to any state's law – may it be the developed or the developing country; the general law or the continental European law countries. The model law has really been spread and it corresponds many countries' arbitral legislation or it stands greatly close to it.[6]

Based on the above mentioned, according to the arbitral law, today the definite number of the countries having the legislation corresponding to the model law must be separated (there are about 50 such countries[7] in the world) and the states which were independently established and possess[8] some kind of novelties are the following: the legislations of Argentina, Brazil, England, France, Switzerland, Italy and USA (some states).

[1] Georgian law about arbitration, chapter II, article 8.

[2]UNCITRAL – united nations commission of international trade law, it is an assistant organ of the UN General Assembly, playing important role in the international trade development from the standpoint of forming the international legislation. See in details: http//www.uncitral.org

[3] Since 1985 in the UNCITRALimportant amendments have been put in the model law 2006.

[4]the mentioned convention is also called ,,ICSID convention" – the center to solve the international disputes established on the mentioned convention. The convention has been prepared by the international bank of reconstruction and development. See in details http//worldbank.org/icsid.

[5] See note 3.

[6] See *Peter M. Bider*, Georgian law comments about arbitration, review of the Georgian law, 10/2007–2/3, 184.

[7] The countries' legislations suitable to the model law are the following: Australia, Austria, Azerbaijan; In the USA: California, Louisiana, Oregon, Texas; New Zealand, Bahrain, Bangladesh, Belarus, Bermuda islands, Bulgaria, Germany, Guatemala, Denmark, In the United Kingdom of Great Britain and Northern Ireland: Scotland, Egypt, Spain, Zambia, Zimbabwe, Turkey, India, Iran (Islamic republic), Ireland, Japan, Jordon, Cambodia, Canada, Kenya, Cyprus, Korea Republic, Lithuania, Madagascar , Malta, Mexico, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, Poland, Russian Federation, Greece, Singapore, Thailand, Tunis, Ukraine, Hungary, The Philippine Islands, Sri Lanka ,Chile, China: Special administrative region of Hong-Kong, Special administrative region of Masau; Croatia, see n details http//www.uncitral.org/uncitral/en/uncitral_text/arbitration/1985model_arbitration_status.html.

[8]see. *Paul D. Friedland*, Arbitration Clauses For International Contracts, 2nd ed., JURIS PUBLISHING, Inc., New York, 2007, xvii.

The general definition of the arbitral agreement is taken into consideration underdifferent interpretations almost by every international rule and country's arbitral legislations. The arbitration agreement can be made by the form of the arbitral compact or separate agreement. The arbitral agreement definition is also presented in such countries' legislations that are not made according to the model rule. For example, the France civil process code,[1] separately defines the arbitration agreement kind's concept. Though there are some legislations that do not present any definition of the arbitral agreement.[2]

Based on the arbitral agreement concept the parties' will is the most important condition in the arbitral law. This will is presented in the arbitral agreement and is put in its definite frame from the technical standpoint. The determination of these frames is made by the legal norms.

The parties' will to appeal to the arbitration is showed in the arbitral agreement. The free will show is the basis of the main principle "parties' autonomy" of the continental European law. The arbitral agreement origin depends on the free will. Based only on the parties' will the arbitral agreement depends on the country's material law.

All the cases when the persons agree to restrict their rights by the third person's decision chosen by themselves is not always discussed as an arbitral agreement. In order to better define the arbitral agreement nature, it is important to clear out what was the parties' intention during making the agreement. Whether it was made through the court procedure dispute solution or the parties' agreement aimed to avoid the dispute. If the matter deals with only the fictive agreement aiming the dispute prevention, than such kind of the agreement cannot be taken as the arbitral agreement.[3] Based on the arbitral agreement the parties should intention to solvethe dispute through the arbitral way.

The regulating thesis of the arbitral agreement is too close to the model law by which it corresponds the international norms and is different from the law in force.

The legislators took into consideration the experience of those numerous countries that corresponded the arbitral legislation to the model law and prepared it according to the mentioned one. Though in order to smarten the arbitral agreement's regulation norms it would be better to take into consideration those countries' arbitral legislations that were formed and developed independently from the model law. Some of such countries' legislations were discussed in the previous chapters of the work.

Based on the Georgian law about arbitration we can say the following: the arbitral agreement is considered to be made in the written form.

The arbitral agreement can be considered in a written form if its content is fixed in any form, despite the arbitral agreement or any form of agreement. The request to the arbitral written form is made through the electronic messages, if the information in the agreement is available for the farther use. The arbitral agreement is considered to be made in the written form, if it is formed through the change of the arbitral suit and arbitral action, when one party states and the other does not reject the existence of the arbitral agreement.

The instruction upon any document of the agreement including the arbitral compact is the arbitral agreement of the written form if such kind of the instruction makes the mentioned impact the part of it.

If one of the parties of the agreement of the arbitral agreement is a physical person or the administrative organ, the arbitral agreement is considered to be made in the written form. If the both parties of the arbitral agreement are the physical persons, the arbitral agreement must be signed by the advocates of the parties as well or the arbitral agreement must be certified through the notary way.

The court where the action is brought in about the main points of the arbitral agreement dispute is obliged to deny the action appeal or quit the case about the arbitral discussion except the case if it reveals that the arbitral agreement is invalid, or is impossible to perform. The arbitral case party is obliged in some cases to inform the court about the main factors of the suit about the arbitral discussion beginning which is the object of the arbitral agreement.

As a recommendation some issues can be divided and their implementation would make the law about the arbitral agreement comprehensive and flexible.

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[1] See French Civil Process Code, articles 1442, 1447.

[2] See as an example "the federal code of Swiss private international law" where the regulatory norms of arbitration are presented. In connection to the arbitral agreement it is limited with its validity terms determination.

[3] *S.K. Roy Chowdhury & H.K. Saharay*, Law Of Arbitration and Conciliation, 4th ed., EASTERN LAW HOUSE, 1996, 239.

The division of the arbitral agreement kinds is quite important in the bill. The determination of the arbitration agreement with different articles of the date and the suit's transmission to the arbitration would clear up the difference between their differences and content. The independent formation of their definitions would also promote the separation of different issues connected to the arbitral agreement depending on the kind of the arbitration. This would simplify understanding of the issues and point of the arbitral agreement among those persons who are eager to impart the suit to the arbitration. Such kinds of the arbitral agreements are presented by the French and Italian arbitral legislations regulating the agreement imparting the arbitral date and suit through the different articles.

In order to simplify the suit solution by the arbitration and solve the dispute between the parties in time,[1] it would be better to share the arbitral legislation practice of Switzerland and England by the bill and determine which material law norms are used for the validity of the arbitral agreement concept and form.

In Georgia to make more flexible the arbitral legislation and to regulate this sphere it is quite important to have those articles that deal with the international commercial arbitration. Here are meant such arbitral agreements that are made by the other countries' citizens or juridical persons. In spite of the fact that the law is adopted based on the model law which is used according to the approbated practice both for the international and local arbitration, the reflection of the international commercial arbitration regulator norms as a separate chapter would define its definition in details and those specific issues that are characteristic only for the international commercial arbitration. The reflection of this issue in the law will be easier if the arbitral legislation experience of France, Italy and Switzerland[2] will be shared giving the international arbitration the separate chapter where its concept and points are defined characteristic for the international commercial law.

Taking into consideration the international arbitrations in the law is important as the number of invests increase in Georgia raising the use of the arbitral institution to solve the disputes based on the mentioned relations.

The comparative analysis of the research shows the enormous role of the arbitral agreement in the court. If there is no agreement between the parties to appeal the arbitration than there is no use to speak about arbitration as there is no general rule and the state legislation obliging the parties to appeal to the arbitration in case of the dispute. Based on it the whole arbitral law depends on the arbitral agreement and starting the arbitral activity is incredible without it.

The international commonwealth and all the developed countries pay great attention to the regulation of the arbitral agreement and it is quite clearly shown in the work based on the comparative analysis of the European countries' arbitral legislations.

The dispute solution based on the business activities totally depends on the arbitral agreements made by the participant parties. Based on it making them correctly according to the law is a guarantee of solving the disputes effectively and quickly.

The arbitral agreement's regulating law in force comparative analysis clearly showed those gaps that are characteristic for the Georgian law of arbitration.

The improved arbitral legislation is directly connected to the foreign investing. When having the business relations to the Georgian party they need the stable legislative base and first of all the alternative analysis of solving disputes suitable to the international level standards.

The arbitral law suitable to the international level standards in Georgia is not enough factor for raising the trust and popularization, the court support is also important as well as the total non-interference from the court side. The society' interest towards the arbitration and the arbitral agreement making by the agreement parties is also very important.

*Literature*

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[1] See English arbitral law, part 2: law "About Swiss private law", article 178(2).

[2] See French Civil Process Code, text-book IV, part V; Italian Civil Process Code, Part IV; about Swiss international private law, chapter 12.

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**Н. Піцхелаурі**

Арбітражна угода

У роботі наводиться характеристика та аналіз грузинського законодавства про арбітраж. Поліпшення арбітражного законодавства безпосередньо пов'язане із зовнішнім інвестуванням. При наявності ділових відносин з грузинською стороною інвестори потребують стабільної законодавчої бази та, насамперед, альтернативного способу вирішення суперечок на рівні міжнародних стандартів. Також значення має суспільний інтерес і судова підтримка арбітражного права.

**Ключові слова:** арбітражна угода, арбітражне законодавство, іноземні інвестиції, стабільна законодавча база, вирішення спорів, міжнародні стандарти, судова підтримка.

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Арбитражное соглашение

В работе приводится характеристика и анализ грузинского законодательства об арбитраже. Улучшение арбитражного законодательства напрямую связано с внешним инвестированием. При наличии деловых отношений с грузинской стороной инвесторы нуждаются в стабильной законодательной базе и, прежде всего, альтернативном способе решения споров на уровне международных стандартов. Также значение имеет общественный интерес и судебная поддержка арбитражного права.

**Ключевые слова:** арбитражное соглашение, арбитражное законодательство, иностранные инвестиции, стабильная законодательная база, решение споров, международные стандарты, судебная поддержка.