# Avoiding Potential Bias in the Handling of Interim Measures Applications in Georgia

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Recent legislative developments have shown that Georgia strives to become a hub for dispute resolution in the Caucasus region. The legislative framework on commercial arbitration is now fully tailored to the needs of international commercial arbitration: the law of Georgia on arbitration (the "Law on Arbitration") is based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. Georgia is also a contracting party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Georgian case law on commercial arbitration generally reflects Georgia's pro-arbitration stance.

Yet despite all the efforts made at the legislative level, arbitration has not been very popular and has not been able to gain the trust of businesses in Georgia thus far. A 2018 report on the Legal and Practical Aspects of Arbitration in Georgia produced with the help of the European Union and the United Nations Development Programme (the "Report") identified the limited liability form of Georgia's arbitral institutions as one of the main factors hindering the development of arbitration in Georgia.[fn]*See* Report, at pp. 27-28.[/fn] The Report explains that arbitral institutions in Georgia are usually incorporated as limited liability companies and, hence, are "profit-oriented." Due to the potential "client

relationship" between the arbitral institutions and their users, the impartiality of these arbitral institutions is somewhat in doubt.[fn]Ibid.[/fn] Generally, arbitral institutions in other jurisdictions operate on a non-profit basis (*e.g.*, LCIA, HKIAC, and SIAC) because adopting a profit-oriented form may imperil such institutions' ability to offer an impartial and independent arbitration service to its users.[fn]Remy Gerbay, *The Functions of Arbitral Institutions* (Wolters Kluwer, 2006), at pp 23-24.[/fn] By way of example, an institution formerly known as the National Arbitration Forum (the "NAF") in the USA, which was operating on a for-profit basis, was accused of favoring debt collection companies and eventually, in 2009 NAF stopped accepting the debt collection related claims.[fn]Ibid.[/fn]

This article argues that this potential for "profit-oriented" behavior could prove damaging to users' faith in arbitration and one such example relates to how Georgia's domestic arbitral institutions handle interim measure applications before the formation of a tribunal.

**Issuance of Interim Measures in Georgia**

As in most other jurisdictions, in Georgia, interim measures can be granted either before or after the arbitral tribunal has been constituted. Before the tribunal is constituted, claimants have two possible strategies: either applying for an interim measure to a court or requesting the arbitral institution that administers the dispute to issue an interim measure.

The author's review of the rules of arbitral institutions in Georgia that are incorporated as limited liability companies shows that if a claimant applies for an interim measure before a tribunal is constituted, an employee of the arbitral institution (who is most likely the president of the arbitral institution) will decide whether the request should be granted. None of the rules require that an independent person not affiliated with or employed by the institution be appointed as an emergency or temporary arbitrator. However, the rules call upon a "special or an emergency arbitrator," who is an employee of the arbitral institution, to decide before the formation of the tribunal whether to grant a request for interim measures. By way of example, Article 32 of the Rules of the Dispute Resolution Center states that the president of the institution will act as an emergency arbitrator to review an application of an interim measure before a tribunal is

constituted. The rules of other arbitral institutions in Georgia that are incorporated as limited liability companies have a similar provision. Only the Georgian International Arbitration Center (the "GIAC"), which is the first non-profit arbitration institution in Georgia and is not incorporated as a limited liability company, specifies that parties may apply to a court for an interim measure before the commencement of arbitration proceedings.

Thus, for the institutions in Georgia that are incorporated as limited liability companies, before the tribunal is constituted, interim measures are technically issued by the arbitral institutions themselves through one of their employees or a closely affiliated person. Similar procedures in other jurisdictions are quite rare but not unheard of.[fn]Garbey, at pp. 71-72.[/fn] By way of example, section 13.1 of the Rules of The Arbitration Court Attached to The Czech Chamber of Commerce and Agricultural Chamber of The Czech Republic states that the president of the arbitration court may issue measures for the preservation of evidence before a tribunal is constituted. However, this provision only mentions measures relating to the preservation of evidence. For other types of measures, section 13.2 of the same rules states that a party may apply to a court for an interlocutory measure if the enforcement of an award could be at risk.

The above-mentioned practice of issuing interim measures via a decision of an employee or affiliate of an arbitral institution before a tribunal is constituted can be problematic in Georgia and it is arguably inconsistent with the spirit of the Law on Arbitration. Article 17 of the Law on Arbitration provides that any party, before the commencement of arbitration proceedings or at any time during such proceedings but before an arbitral award is rendered, may request "arbitration" to grant interim measures. By using the word "arbitration," Article 17 likely refers to an arbitral tribunal rendering decisions on the substantive issues in a dispute, not an arbitral institution that merely administers the dispute. In the author's view, Article 17 and any other similar provisions employing the word "arbitration" should be construed as referring to the tribunal that hears the merits of the case or, if available under the applicable rules, an emergency arbitrator.

One of the general observations made by the Report is that courts in Georgia find it hard to distinguish between the arbitral tribunal and the institution that administers the dispute.[fn] Report, p. 13.[/fn] This is especially true in cases involving the issuance of interim measures before the formation of the tribunal. Does it make a difference that sometimes the institutions' arbitration rules call a

person employed by the institution who decides on the request for interim measures "a special arbitrator"? It arguably does not, since the "special arbitrator" is still an employee of the institution, and such interim measures should be considered as if they are issued by the institution itself.

**Can this be a Problem?**

As mentioned previously, businesses in Georgia do not generally trust local arbitration. This problem can be compounded by the fact that there is sometimes a real or perceived identity of interests between the institution and one of the parties to an arbitration. One of the notable cases in this regard is a 2011 ruling rendered by the Tbilisi Appellate Court.[fn]Ruling #2b/2130-11 of the Tbilisi Appellate Court, dated 20 July 2011.[/fn] In that case, the Tbilisi Appellate Court refused to enforce the arbitral award on the grounds that the applicant and the arbitral institution that administered the dispute had a common shareholder. The court deemed that enforcement of the award was against public policy. In another 2014 ruling rendered by the Tbilisi District Court, the court found a conflict of interests between the arbitral institution that administered the dispute and a representative of a party on the grounds that the same people appeared to be employed by the arbitral institution and by the law firm representing the party.[fn]Ruling #2/16444-14 of the Tbilisi District Court, dated 6 October 2014.[/fn]

As such, it might further damage the reputation of arbitration in Georgia to continue leaving the power of issuing interim measures before the formation of the tribunal to arbitral institutions. This post does not in any way suggest or imply that such interim measures issued before the formation of the tribunal are or have ever been issued in a partial way. However, considering that the arbitral institutions in Georgia have incentives to issue interim measures to keep their clients – that is, users – happy, the potential for abuse by the institution is surely present and something for users to be concerned about.

It is true that after the establishment of the tribunal, the tribunal can always amend or cancel interim measures. In addition, pursuant to Article 21 of the Law on Arbitration, a court is in charge of enforcing interim measures. However, institutions still have the incentive to grant various interim measures, including freezing orders. Appointing an employee or an affiliate of an arbitral institution as

someone who issues interim measures before the formation of the tribunal does not guarantee the impartiality of the process. As the majority of arbitration cases handled by arbitral institutions in Georgia are related to consumer loans between financial institutions and individuals,[fn] Report, at p. 11.[/fn] the party against whom the interim measure is granted is highly unlikely to even challenge the interim measure, either in court or before the tribunal. To be clear, the only institution that administers international disputes in Georgia is GIAC and, as discussed above, it does not have these problematic issues, but it is the author's view that these issues are nonetheless important to address for the overall growth of arbitration in Georgia.

**What is the Solution?**

Erasing the difference between the institution that administers disputes and the tribunal that hears the case is not legally sound. Importantly, the problem is not in the legislation, which generally states that interim measures can be granted by "arbitration" before or after the commencement of arbitration proceedings. The problem is in the understanding of the word "arbitration," which should be construed as the tribunal that hears the case and not as the institution that deals with the administration of the case. Although the problem associated with the issuance of interim measures is not the sole problem hindering the development of arbitration in Georgia, as the Report suggest that there are multiple contributing factors, it is important that before the formation of the tribunal interim measures are granted either by a court or by an independent arbitrator who is not affiliated or employed by the institution that administers the dispute. Hence, in Georgia, as in most arbitration-friendly jurisdictions, interim measures before the formation of the tribunal should be granted either by a court or by an emergency arbitrator who is not an employee of the institution. This would guarantee impartiality in the process of issuing interim measures and would be another step forward for Georgia to establish itself as a regional dispute resolution hub.