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CIVIL PRACTICE

Arbitration: Amend Article 1 of Chapter 9 of Title 9 of the Official Code of Georgia Annotated, Relating to General Provisions for Arbitration, so as to Repeal Part 2, Relating to International Transactions; Provide for a Short Title; Provide for a Statement of Purpose; Provide for Applicability; Provide for Definitions; Provide for Procedure; Provide for Court Intervention; Provide for an Arbitration Agreement; Provide for Selection and Disqualification of Arbitrators; Provide for Challenges to Arbitrator Selection and Substitution of Arbitrators; Provide for Interim Measures; Provide for Commencement of Arbitration Proceedings and Statements of Claims and Defenses; Provide for Default; Provide for the Appointment of Experts; Provide for Rules Applicable to Disputes; Provide for Settlements and the Form and Contents of Arbitration Awards and Corrections to an Arbitration Award; Provide for Recourse Against an Arbitration Award; Provide for Recognition and Enforcement of Arbitration Awards; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 9-9-20 to -29 (new); §§ 9-9-30 to -43 (amended); §§ 9-9-44 to -59 (new)
BILL NUMBER:	SB 383
ACT NUMBER:	713
GEORGIA LAWS:	2012 Ga. Laws 961
SUMMARY:	The Act repeals the previous international transactions portion of the arbitration code and establishes an entirely new framework governing international commercial arbitration. Parties to an international contract containing an arbitration agreement may now look solely to the Act for rights, remedies, and procedures relating to the international arbitral

process, rather than having to refer to the domestic code and international code in tandem. The Act is based upon the UNCITRAL Model Arbitration Law, as amended in 2006, and includes several provisions adopted from other states and countries, as well as new provisions unique to Georgia. The Act is compatible with federal law, including international treaties, and serves arbitration's goals of fairness, efficiency, and party autonomy.

EFFECTIVE DATE: July 1, 2012

History

In an era where globalization and multinational corporations are commonplace, business partners from different countries inevitably encounter legal disputes and turn to arbitration for settlement.¹ Locations around the world compete for the opportunity to host these arbitrations by crafting a favorable legal regime.² International businesses benefit from a neutral, arbitration-friendly site in which to arbitrate, and the host location receives increased local revenues from the adverse parties, judges, and lawyers that come to the area.³ Georgia modernized its arbitration statute in 1988, addressing international arbitration in a separate part intended to supplement both the federal and state domestic statutes.⁴ Beginning with a list of

1. *See generally* Interview with Douglas Yarn, Professor of Law and Director, Consortium on Negotiation and Conflict Resolution, Georgia State University College of Law, in Atlanta, Ga. (Apr. 12, 2012) [hereinafter Yarn Interview] (discussing the evolution of arbitration law in Georgia).

2. *Id.*

3. *Id.* Hosting arbitrations generates revenues similar to convention business, provides the possibility of hiring local attorneys to help arbitrate, and makes the location more attractive to international commerce. Electronic Mail Interview with Sen. Bill Hamrick (R-30th) (Apr. 10, 2012) [hereinafter Hamrick Interview]; Yarn Interview, *supra* note 1. Florida has been a vanguard in America for international arbitration since it adopted an international arbitration provision, as it has pursued arbitrations between South American and Caribbean corporations. Yarn Interview, *supra* note 1.

4. 9 U.S.C. §§ 1–16 (2011); O.C.G.A. §§ 9-9-1, -30 (2011). A “modern” arbitration statute provides for the arbitration of future disputes as well as submissions of existing disputes. Yarn Interview, *supra* note 1. At the time of its passage, Georgia only had a modern arbitration statute for disputes arising in the construction industry, and groups, such as the Georgia Bar, supported

exceptions, Part One of the arbitration statute covered domestic disputes.⁵ Part Two provided for international arbitrations but was not a stand-alone system.⁶ International parties that sought to arbitrate in Georgia had to operate under the general domestic arbitration statutes and then consult with the second part for additional provisions intended to fill any gaps for international arbitrations.⁷ At that time, there was a consensus that Georgia did not need an independent international arbitration statute and that the domestic statutes, augmented by these few specialized provisions, would adequately manage any procedural issues that arose.⁸

The 1988 legislation did not succeed in making Georgia a hotspot for international arbitration, as the dual provisions, coupled with the inherent shadow of federal preemption, proved too complex for parties not already familiar with Georgia law.⁹ When passed, the Georgia Arbitration Code was on the leading edge of international arbitration legislation¹⁰; however, other states and countries continued to improve their own arbitration statutes, and a new set of international norms began to evolve.¹¹ The United Nations Commission on International Trade Law (UNCITRAL) model arbitration law (MAL) emerged as a foundation for international

modernizing the entire arbitration system. *Id.*; see also Douglas Yarn, *Proposed Changes in the Arbitration Law of Georgia*, 23 GA. ST. BUS. J. 152 (1986–1987).

5. See O.C.G.A. § 9-9-2 (2011).

6. *Id.* § 9-9-30.

7. *Id.*

8. Yarn Interview, *supra* note 1.

9. *Id.* For instance, the Georgia domestic arbitration statute provided that arbitration decisions could be overturned judicially for “manifest disregard of the law.” O.C.G.A. § 9-9-13 (b)(5) (2011). However, federal law preempts vacatur on such grounds in international disputes. See *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (holding that the FAA provides exclusive grounds for vacatur); Interview with Glenn P. Hendrix, Managing Partner, Arnall Golden Gregory, LLP, Founding Member, President, AtlAS, in Atlanta, Ga. (Apr. 9, 2012) [hereinafter Hendrix Interview]; Yarn Interview, *supra* note 1; Video Recording of House Judiciary Committee, Mar. 15, 2012 at 1 hour, 45 min. 38 sec., (remarks by Prof. Douglas Yarn), <http://www.house.ga.gov/committees/en-US/CommitteeArchives106.aspx>. Only a party familiar with the American system of federalism would appreciate this distinction, and the additional complexity made Georgia less attractive as a neutral arbitration location. Yarn Interview, *supra* note 1.

10. Executive Summary, Douglas Yarn, Proposed Revisions to Georgia’s International Commerce Arbitration Law (Jan. 26, 2012) (on file with the Georgia State Law Review) [hereinafter Executive Summary].

11. *Id.* International conventions emerged such as the New York Convention. Yarn Interview, *supra* note 1. More states began adopting international arbitration statutes, and countries like Singapore aggressively pursued the international arbitration business. Executive Summary, *supra* note 10; Yarn Interview, *supra* note 1.

arbitration statutes.¹² Although the UNCITRAL MAL had been adopted in 1987 prior to the adoption of the Georgia statute, no countries had yet adopted the MAL; thus, the MAL was not the international standard at the time, and Georgia legislators adopted only the portions that were useful at the time.¹³ The MAL has since become the standard in international arbitration, and many states use the approach for their own statutes.¹⁴ For example, Florida replaced its own international arbitration scheme with the UNCITRAL model.¹⁵ In response to these developments in international arbitration, the Atlanta International Arbitration Society (Atlas), formed in January 2011 to promote Atlanta and Georgia as a situs of choice, created a task force of attorneys and legal scholars to analyze this issue and craft a solution for Georgia.¹⁶

Initial suggestions that the original integrated scheme could be salvaged gradually gave way to the consensus that the entire international arbitration code should conform to the UNCITRAL MAL.¹⁷ While the original Georgia provision was unique in its design, basing the Georgia code on a widely-accepted model such as the UNCITRAL MAL ensured that outside parties would more readily understand and be able to adopt the Georgia law.¹⁸ The task force adopted the UNCITRAL MAL as its foundation and began examining how to improve upon it.¹⁹ In addition to bringing the language in conformity with the laws of Georgia, the task force studied amendments to MAL introduced by other states and countries and considered additional original improvements.²⁰

The task force found ample support for their recommended arbitration overhaul. Senator Bill Hamrick (R-30th) acted as the main advocate of the Act in the legislature.²¹ Governor Nathan Deal had sponsored the original Georgia international arbitration legislation in

12. Executive Summary, *supra* note 10.

13. Yarn Interview, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. Executive Summary, *supra* note 10.

18. *Id.*; Yarn Interview, *supra* note 1.

19. Executive Summary, *supra* note 10.

20. Yarn Interview, *supra* note 1.

21. *Id.*

1987 and became a staunch ally of the new legislation.²² Various business interests, Chambers of Commerce, the State Bar, and the Georgia Department of Economic Development supported the revision.²³ With this support, Senator Hamrick introduced the Act as Senate Bill (SB) 383 during the 2012 Regular Session.²⁴

Bill Tracking of SB 383

Consideration and Passage by the Senate

Senators Bill Hamrick (R-30th), Joshua McKoon (R-29th), Jesse Stone (R-23rd), Jason Carter (D-42nd), and Charlie Bethel (R-54th) sponsored SB 383.²⁵ The Senate read the bill for the first time on February 6, 2012.²⁶ Lieutenant Governor Casey Cagle (R) assigned the bill to the Senate Judiciary Committee, which made no changes and favorably reported the bill on February 9, 2012.²⁷ The Senate read the bill for the second time on February 15, 2012, and for the third time on February 21, 2012.²⁸ The Senate passed the bill on February 21, 2012, by a vote of 51 to 0.²⁹

Consideration and Passage by the House

Representative Wendell Willard (R-49th) sponsored SB 383 in the House, and the bill was first read on February 22, 2012.³⁰ The bill was read for a second time on February 23, 2012.³¹ Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Committee, which favorably reported the bill on March 19, 2012.³²

22. Hamrick Interview, *supra* note 3.

23. *Id.*

24. SB 383, as introduced, 2012 Ga. Gen. Assem.

25. *Id.*

26. State of Georgia Final Composite Status Sheet, SB 383, May 10, 2012.

27. *Id.*

28. *Id.*

29. *Id.*; Georgia Senate Voting Record, SB 383 (Feb. 21, 2012).

30. SB 383, as introduced, 2012 Ga. Gen. Assem.; State of Georgia Final Composite Status Sheet, SB 383, May 10, 2012.

31. State of Georgia Final Composite Status Sheet, SB 383, May 10, 2012.

32. *Id.*

The bill was read to the House for a third time on March 26, 2012.³³ That same day, the House voted 159 to 3 to ratify the bill.³⁴

The Senate sent the bill to Governor Nathan Deal on April 4, 2012, and the Governor signed the bill into law on May 2, 2012.³⁵

The Act

Section 1 of the Act

The Act amends Article 1, Chapter 9, Title 9 of the Official Code of Georgia Annotated by repealing Part 2 relating to international arbitrations and adopting a new Part 2.³⁶ Code section 9-9-20 states that the purpose of the Act is to “encourage international commercial arbitration in this state, . . . to facilitate prompt and efficient arbitration proceedings . . . and to provide a conducive environment for international business and trade.”³⁷

Code section 9-9-21 makes the Act applicable to international arbitration and defines the scope of that application, while Code section 9-9-22 defines key terms in the Act.³⁸ Code section 9-9-23 provides that questions not expressly answered in the Act shall be construed in conformity with the international agreements upon which the Act is based.³⁹ Code section 9-9-24 provides that communications in writing “shall be deemed to [be] received” if delivered personally or delivered to the addressee’s residence or place of business.⁴⁰ Parties that knowingly proceed in the arbitration, despite being aware of derogation from the Act, waive any future objections under Code section 9-9-25, and under Code section

33. *Id.*

34. *Id.*; Georgia House of Representatives Voting Record, SB 383 (Mar. 26, 2012). Neither the House nor Senate amended the bill from its original form. State of Georgia Final Composite Status Sheet, SB 383, May 10, 2012. *Compare* SB 383, as introduced, 2012 Ga. Gen. Assem., with SB 383, as passed Senate, 2012 Ga. Gen. Assem.

35. State of Georgia Final Composite Status Sheet, SB 383, May 10, 2012.

36. *Compare* O.C.G.A. §§ 9-9-20 to -59 (Supp. 2012), with O.C.G.A. §§ 9-9-30 to -43 (2011).

37. O.C.G.A. § 9-9-20(b) (Supp. 2012).

38. *Id.* §§ 9-9-21, -22.

39. *Id.* § 9-9-23(b).

40. *Id.* § 9-9-24(a)(1).

9-9-26, a court may not intervene in matters provided for by the Act, except as specified.⁴¹

Code section 9-9-27 places jurisdiction in the superior court of a county chosen by the parties and sets priorities regarding alternative venues if the parties have not agreed on a venue.⁴² Code section 9-9-28 specifies that “[a]ll . . . agreements shall be in writing” and defines a “writing.”⁴³ Civil actions involving an arbitration agreement are addressed under Code section 9-9-29.⁴⁴ “Interim measure[s] of protection” may be requested from and granted by the court at any time “before or during the arbitral proceeding.”⁴⁵ Parties may determine the number of arbitrators, but Code section 9-9-31 sets the default number to one.⁴⁶ Code section 9-9-32 outlines the requirements for being an arbitrator, sets forth a procedure for selecting arbitrators if the agreement does not already provide one, and protects the arbitrator from liability arising from his role.⁴⁷ Under Code section 9-9-33, the chosen arbitrator must then disclose any information regarding conflicts of interest with the proceedings.⁴⁸ Code section 9-9-34 discusses the procedure for challenging an arbitrator.⁴⁹ Code section 9-9-35 provides for the removal or resignation of arbitrators, and Code section 9-9-36 provides for the appointment of a new arbitrator.⁵⁰

Under Code section 9-9-37, which incorporates the principle of separability, “[t]he arbitration tribunal may rule on its own jurisdiction”, and pleas that the tribunal lacks jurisdiction must be raised before the statement of defense.⁵¹ The tribunal may initially rule on such a challenge, and then, if the tribunal permits, the moving

41. *Id.* §§ 9-9-25 to -26.

42. *Id.* § 9-9-27.

43. O.C.G.A. § 9-9-28 (Supp. 2012). This Code section explains that a writing “means that its contents are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.” *Id.* § 9-9-28(b).

44. *Id.* § 9-9-29(a).

45. *Id.* § 9-9-30.

46. *Id.* § 9-9-31.

47. *Id.* § 9-9-32.

48. O.C.G.A. § 9-9-33 (Supp. 2012).

49. *Id.* § 9-9-34.

50. *Id.* §§ 9-9-35, -36.

51. *Id.* § 9-9-37(1)–(2); *see generally* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (establishing the principle of separability, which states that an agreement to arbitrate may be reviewed by the arbitrator for its validity separately from the validity of the contract as a whole).

party may request the court chosen in Code section 9-9-27 to issue a ruling if the tribunal decides that jurisdiction exists; however, the arbitration may continue until that court makes a final ruling, which is not subject to appeal.⁵²

Code section 9-9-38 states that “the arbitration tribunal . . . may grant any interim measures it deems appropriate” and may then amend them upon its own initiative.⁵³ The moving party may need to provide appropriate security for the measure and may be liable for compensation should the measure later be deemed inappropriate.⁵⁴ Code section 9-9-39 provides for the refusal of an interim measure only when refusal is appropriate under the Act, when security has not been provided as requested by the tribunal, when the measure has already been terminated or suspended by the tribunal or court, or when the measure is outside the power of the tribunal.⁵⁵

Code section 9-9-40 stipulates that the parties be treated equally and that each side be given the opportunity to make its case.⁵⁶ Code section 9-9-41 grants the parties the freedom to agree to procedures followed by the tribunal, and it provides that upon disagreement of the parties, the tribunal may conduct the arbitration as it deems appropriate, subject to the limitations in Part 2 of the Act.⁵⁷ It also grants the tribunal the power to decide evidentiary matters.⁵⁸ The parties are also free to agree upon the place of arbitration and language used, but under Code sections 9-9-42 and 9-9-44, the arbitration tribunal may determine the location and language if the parties cannot agree.⁵⁹ Additionally, the tribunal may, unless the parties agree otherwise, meet independently at any location for consultation among its members, for hearing witnesses, or for inspection of goods or evidence.⁶⁰

According to Code section 9-9-43, the arbitration commences when the respondent receives the request for arbitration, and under

52. O.C.G.A. § 9-9-37(3) (Supp. 2012).

53. *Id.* § 9-9-38(a)–(b).

54. *Id.* § 9-9-38(e).

55. *Id.* § 9-9-39.

56. *Id.* § 9-9-40.

57. *Id.* § 9-9-41.

58. O.C.G.A. § 9-9-41 (Supp. 2012).

59. *Id.* §§ 9-9-42(a), -44.

60. *Id.* § 9-9-42(b).

Code section 9-9-45, the claimant begins by submitting his or her evidence, points of contention, and desired remedy within the agreed upon time.⁶¹ Under Code section 9-9-47, should the claimant fail to do what is required under Code section 9-9-45, the provision requires that the arbitration tribunal terminate the proceedings.⁶² Additionally, if a respondent fails to produce documentary evidence or provide an answer to the tribunal, the tribunal may issue the arbitration award based on the evidence actually before it.⁶³ Unless otherwise agreed to, either party may amend their pleadings at any time during the proceedings unless the arbitration tribunal refuses due to unnecessary delays in making the amendment.⁶⁴ Under Code section 9-9-46 and unless the parties agree otherwise, the arbitration tribunal determines whether oral hearings will occur, but the provision provides that parties be given adequate notice to prepare, and evidence delivered to the tribunal shall be shared with the opposing party.⁶⁵ However, the arbitration tribunal lacks the power to consolidate hearings unless the parties expressly agree to grant such power.⁶⁶

The arbitration tribunal may appoint experts to discuss with the tribunal specific issues relevant to the proceedings and may require the parties to reveal pertinent information to the experts under Code section 9-9-48.⁶⁷ Under Code section 9-9-49, arbitrators also have the power to issue subpoenas to procure evidence and witnesses, and these subpoenas shall be “enforced in the same manner [as] . . . subpoenas in a civil action.”⁶⁸ Notices to produce relevant “documents . . . depositions, and other discovery” may be used according to the rules created by the arbitrators, and parties shall have access to witness lists and documents to be utilized in the arbitration.⁶⁹

Code section 9-9-50 requires that the arbitration tribunal base its ruling on the system of laws chosen by the parties or the laws that the

61. *Id.* §§ 9-9-43, -45(a).

62. *Id.* § 9-9-47.

63. *Id.* § 9-9-47(3).

64. O.C.G.A. § 9-9-45(b) (Supp. 2012).

65. *Id.* § 9-9-46.

66. *Id.*

67. *Id.* § 9-9-48.

68. *Id.* § 9-9-49(a).

69. *Id.* § 9-9-49(b).

tribunal deems appropriate based on application of conflicts of laws principles should the parties fail to decide.⁷⁰ The tribunal may not make an award *ex aequo et bono* or as *amiable compositeur* unless expressly asked by the parties to do so, and the tribunal shall consider the terms of the contract and the customs of the trade when making its decision.⁷¹ When more than one arbitrator is present, a majority vote determines the outcome of the proceedings; however, under Code section 9-9-51, a presiding member of the tribunal will unilaterally make decisions if authorized by the parties and the tribunal.⁷²

In the event that the parties settle the dispute during the arbitration, Code section 9-9-52 provides that the tribunal must terminate the proceedings immediately, and, upon request of the parties, record the agreement in the form of an award; this procedure will have the same effect as if the tribunal had decided the arbitration on the merits of the case.⁷³ Code section 9-9-53 requires that the arbitration award be made in writing and be signed by the tribunal.⁷⁴ The recorded award must include the date and location of the arbitration as well as reasons for the determination.⁷⁵ Finally, a signed copy of the arbitration award must be delivered to the parties.⁷⁶ The arbitrators are entitled to award reasonable fees actually incurred as a result of the proceedings.⁷⁷

Under Code section 9-9-54, if the parties fail to reach a settlement, the arbitration must be terminated by order of the tribunal when the claimant withdraws his or her claim, the parties agree to terminate, or the tribunal finds that continuing is impossible or unnecessary.⁷⁸ Code section 9-9-55 gives parties thirty days from the receipt of an arbitration award to request a correction of clerical errors or an interpretation of a part of the award.⁷⁹ The tribunal, in turn, has thirty

70. O.C.G.A. § 9-9-50 (Supp. 2012).

71. *Id.* § 9-9-50(c), (d).

72. *Id.* § 9-9-51.

73. *Id.* § 9-9-52.

74. *Id.* § 9-9-53(a).

75. *Id.* § 9-9-53(b), (c).

76. O.C.G.A. § 9-9-53(c)–(d) (Supp. 2012).

77. *Id.* § 9-9-53(e).

78. *Id.* § 9-9-54.

79. *Id.* § 9-9-55(a).

days from the receipt of the request to fulfill such a request.⁸⁰ A party may also request the award of additional claims omitted from the arbitration award within thirty days of the receipt of the original award, and the tribunal must address the request within sixty days.⁸¹ The tribunal retains the power to extend its deadline if necessary.⁸²

Under Code section 9-9-56, a party may ask a court to set aside the arbitration award only if: (1) the party suffered some incapacity or the agreement was invalid under the laws to which the arbitration subjected it; (2) the party lacked sufficient notice of the arbitration to make its case, (3) the award contains or the tribunal considered matters beyond the scope of the arbitration; or (4) the arbitration procedure diverged from the agreement of the parties.⁸³ Alternatively, the reviewing court may set aside the award if the court decides that the subject matter was not eligible for arbitration under the laws or public policy of the United States.⁸⁴ Parties have three months to move to set the award aside.⁸⁵ The court may suspend its proceedings to allow the tribunal to resume or take action to eliminate the need to set the award aside.⁸⁶

Code section 9-9-57 makes arbitration awards binding and subject to enforcement by a competent court.⁸⁷ A court may refuse to recognize the award only if it meets the criteria for setting aside an award—as outlined in Code sections 9-9-56 and 9-9-58—and the court receives the application for setting aside judgment within three months of the award.⁸⁸ Any judgments made under the Act shall be considered final and subject to appeal under Chapter 6 of Title 5.⁸⁹

80. *Id.* § 9-9-55.

81. *Id.* § 9-9-55(c).

82. O.C.G.A. § 9-9-55(d) (Supp. 2012).

83. *Id.* § 9-9-56(b)(1).

84. *Id.* § 9-9-56(b)(2).

85. *Id.* § 9-9-56(c).

86. *Id.* § 9-9-56(d).

87. *Id.* § 9-9-57.

88. O.C.G.A. § 9-9-56, 58 (Supp. 2012).

89. *Id.* § 9-9-59.

Section 2 of the Act

Section 2 provides an effective date of July 1, 2012, but states that the Act shall not apply to international arbitration agreements made prior to this date.⁹⁰

Analysis

Arbitration law in the United States has developed significantly since the passage of the Federal Arbitration Act (FAA) in 1925.⁹¹ Moving from a general hostility towards arbitration, the courts have shaped the body of arbitration law in the United States over the last eighty-seven years and have become increasingly accommodating to the intent of the parties while protecting due process.⁹² The FAA, however, has remained unchanged since its passage.⁹³ As the United States has entered into international treaties and the use of arbitration in international transactions has correspondingly risen with the growth in global business, concerns about the FAA's disparate use in domestic and international disputes have arisen.⁹⁴

Reasons to Change Georgia's International Arbitration Law

To address these concerns, align their laws with the provisions of the New York Convention of 1958, and attract settlement of international disputes, many states have introduced their own versions of international arbitration law, delinking the treatment of arbitrations that are international from those that are domestic.⁹⁵

90. 2012 Ga. Laws 961.

91. 9 U.S.C. §§ 1–16 (2011). *See generally* AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011); Hall St. Assoc. v. Mattel, Inc., 552 U.S. 576 (2008); Southland Corp. v. Keating, 465 U.S. 1 (1984).

92. *See, e.g.*, Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774 (2010) (explaining that in construing an arbitration clause, as with any other contract, “the parties’ intentions control”) (citations omitted).

93. Hendrix Interview, *supra* note 9.

94. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 1970 WL 104417 (entered into force Dec. 29, 1970) [hereinafter New York Convention]; Hendrix Interview, *supra* note 9.

95. Hendrix Interview, *supra* note 9.

The UNCITRAL MAL, originally introduced in the mid-1980s, underwent major amendments in 2006, and it has since experienced great success as a fair and efficient model for international arbitration law in the states and countries that have adopted it.⁹⁶ This success was a motivating factor in the overhaul of Georgia's law on international commercial arbitration, which was previously linked to the domestic arbitration law by reference.⁹⁷

Meeting over the course of a year, the AtLAS legislative working group addressed concerns regarding the existing Georgia law, looked to other jurisdictions for guidance, and crafted provisions unique to Georgia that were intended to increase efficiency and party autonomy while protecting the parties' due process rights.⁹⁸

Georgia's domestic arbitration law, to which the previous international arbitration law was linked, has several provisions that many in the international community view as out of line with prevailing international standards.⁹⁹ Specifically, Georgia is the only state in the country with "manifest disregard" of the law as a statutory ground for vacatur of an arbitration award.¹⁰⁰ With the international skepticism towards "manifest disregard" and the federal courts' uncertain treatment of its viability as a statutory ground for vacatur under the FAA, the working group sought to eliminate concern that a Georgia court could invalidate an arbitral award based on grounds not articulated in the New York Convention.¹⁰¹ By

96. *Id.*

97. Yarn Interview, *supra* note 1.

98. *Id.*

99. Hendrix Interview, *supra* note 9.

100. O.C.G.A. § 9-9-13(b)(5) (2011); Hendrix Interview, *supra* note 9.

101. Hendrix Interview, *supra* note 9. The federal circuit courts are currently split over the issue of whether "manifest disregard" is contemplated within the FAA's grounds for vacatur of an arbitral award. *See infra*. While the First, Fifth, Seventh, Eighth, and Eleventh Circuits have expressly held that it is not a ground under the FAA, the Second, Third, Fourth, Sixth, Ninth, and Tenth Circuits have held that the FAA does contemplate "manifest disregard," either as an independent ground for review or as a judicial gloss on the express grounds listed. *See infra*. The Supreme Court has not yet resolved the issue. *Hall St. Assoc. v. Mattel, Inc.*, 552 U.S. 576, 584–85 (2008). For circuits where "manifest disregard" no longer exists, see *Affymax Inc. v. Ortho-McNeil-Janssen Pharm. Inc.*, 660 F.3d 281 (7th Cir. 2011); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 487, 489 (8th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). For circuits where "manifest disregard" survives, see *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 482 (4th Cir. 2012); *Jock v. Sterling Jewelers, Inc.* 646 F.3d 113, 121 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); *Lynch v. Whitney*, 419 F. App'x 826, 833 (10th Cir. 2011); *Rite Aid N.J., Inc. v. United Food Commercial Workers Union*, 449 F. App'x 126, 129 (3d Cir. 2011); *Coffee Beanery Ltd. v. WW*,

delinking Georgia's international arbitration law from the domestic law, the drafters were able to take the already globally accepted UNCITRAL MAL and make Georgia an attractive venue for international disputes while leaving the domestic arbitration law in place.

Because the previous international arbitration law in Georgia was intended as a gap-filler, the Act was intended to address inconsistencies in the FAA, the existing domestic code, and the UNCITRAL MAL.¹⁰² Some of the inconsistencies addressed in the Act include clearly defining what satisfies the requirement that an agreement to arbitrate be evidenced in writing, as well as the provisions for the enforceability of interim awards.¹⁰³

Significant Changes From the UNCITRAL MAL

Unlike Florida, for example, which adopted the MAL wholesale (and consequently experienced some problems with provisions that have proven inefficient), the working group decided to make changes to the UNCITRAL MAL to improve upon its efficiency, grant parties greater autonomy, and harmonize it with the FAA.¹⁰⁴ Specifically, the Act diverges from the MAL in its provisions regarding ex parte preliminary relief, standards for granting interim relief, an arbitrator's jurisdictional ruling, arbitral immunity, consolidation of claims, and judicial review.¹⁰⁵

While the MAL provides for ex parte preliminary relief and the standards for granting interim relief, the Act does not.¹⁰⁶ Ex parte preliminary relief occurs when a party, prior to initiating the proceedings, petitions the tribunal to grant relief without first consulting the other party.¹⁰⁷ This arises most frequently in international disputes when one party, afraid that the other party will shift assets making enforcement of any subsequent award more

LLC, 300 F. App'x 415, 415–16 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009); Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1281 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009).

102. Hendrix Interview, *supra* note 9.

103. O.C.G.A. §§ 9-9-28, -38, -39 (Supp. 2012).

104. Hendrix Interview, *supra* note 9.

105. *See infra*, *Analysis* section B.

106. Hendrix Interview, *supra* note 9.

107. *Id.*

difficult, petitions the tribunal to freeze the other party's assets.¹⁰⁸ The working group deliberated over whether to include this provision but ultimately rejected it in favor of greater party autonomy and arbitrator discretion in granting interim relief.¹⁰⁹

With regard to interim relief, the MAL includes a set of guidelines describing when an arbitrator may grant such relief.¹¹⁰ In crafting the Act, the drafters decided that leaving more discretion for arbitrators to decide when to grant interim relief was a more efficient and ultimately fair way to approach this issue.¹¹¹

Differences between the MAL, the FAA, and the Act exist with regard to an arbitrator's jurisdictional ruling. The Act provides for complete party control over competence—the ability of the tribunal to rule on its own jurisdiction.¹¹² The MAL provides only for review of a positive jurisdictional ruling—when the tribunal rules that it has jurisdiction to hear the matter.¹¹³ Unlike the FAA, the MAL does not provide for appeal from negative jurisdictional rulings.¹¹⁴ The Act, however, like the FAA, provides for appeal from this type of ruling, granted at the discretion of the arbitrator.¹¹⁵ A negative jurisdictional ruling occurs when a tribunal rules that it does not have jurisdiction over a case or over an issue in the case—also referred to as a partial jurisdictional ruling.¹¹⁶ Thus, the Act will allow a party to petition the tribunal to allow it to appeal the tribunal's jurisdictional ruling.¹¹⁷ This lends efficiency to the process by ensuring that all arbitrable issues covered by the arbitration agreement are clearly defined and by providing parties with the opportunity to seek appeal from any jurisdictional ruling without having to wait until the arbitration has concluded.¹¹⁸ Thus, parties can avoid the risk of having to re-arbitrate a certain issue should the court later conclude that the arbitrators

108. *Id.*

109. *Id.*; Yarn Interview, *supra* note 1.

110. Hendrix Interview, *supra* note 9.

111. *Id.*

112. Yarn Interview, *supra* note 1.

113. Hendrix Interview, *supra* note 9.

114. *Id.*

115. Compare 9 U.S.C. § 16 (2011), with O.C.G.A. § 9-9-37 (Supp. 2012).

116. Hendrix Interview, *supra* note 9; see also O.C.G.A. § 9-9-37 (Supp. 2012).

117. Hendrix Interview, *supra* note 9.

118. *Id.*

should have considered the issue from the beginning.¹¹⁹ The provision is also helpful to arbitrators, as it gives them the discretion to grant a challenging party leave to appeal a jurisdictional ruling. Thus, in granting that discretion, the Act allows for efficiency while ensuring that legitimate challenges to jurisdictional rulings are immediately reviewable by the courts.¹²⁰ Further, the appeal from a jurisdictional ruling permitted under Code section 9-9-37, at the discretion of the arbitrators, is limited to the court of first impression designated either by agreement of the parties or by the priorities of venue established in Code section 9-9-27; the ruling of such court is final and not subject to further appeal.¹²¹

With regards to arbitral immunity, the working group surveyed the existing law at the federal and state level and drafted a provision that neither expanded nor contracted the level of immunity granted to arbitrators under existing Georgia law.¹²² Additionally, the Act extends immunity to arbitral institutions as well as the agents and employees of the arbitral tribunal; this provision is unique to Georgia and evinces the positive landscape the Act creates for international arbitrators and their institutions.¹²³

Similarly, while arbitrators previously had the implied discretion to award attorney's fees, the Act provides for this discretion expressly, thus specifically granting the power to award fees and expenses, including attorney's fees.¹²⁴

While the previous Georgia law on international arbitration referred to the domestic statute allowing consolidation of arbitral claims by a court, the Act provides for consolidation of claims only upon express consent of the parties, in keeping with the goal of party autonomy.¹²⁵

A unique provision of the Act is the "opt-out" provision.¹²⁶ Typically there are limited grounds for judicial review of an award,

119. *Id.*

120. *Id.*; Yarn Interview, *supra* note 1.

121. O.C.G.A. § 9-9-27, -37 (Supp. 2012).

122. *Id.* § 9-9-32(f); Yarn Interview, *supra* note 1.

123. O.C.G.A. § 9-9-32(g) (Supp. 2012); Yarn Interview, *supra* note 1.

124. O.C.G.A. § 9-9-53(e) (Supp. 2012).

125. *Id.* § 9-9-46(d); Executive Summary, *supra* note 10.

126. O.C.G.A. § 9-9-56(e) (Supp. 2012).

such as arbitrator bias or an arbitrator exceeding its jurisdiction.¹²⁷ Code section 9-9-56 provides that two non-Georgia parties may, in writing, opt out of any statutory grounds for judicial review of an arbitration award, with the exception of public policy.¹²⁸ This choice must be entirely clear, advisably with written reference to the Code section, to ensure its enforceability.¹²⁹ Thus, parties who want to completely limit judicial review of the arbitral award may include that in their agreement; this provision provides a level of party autonomy unparalleled in any state.¹³⁰

Three Advantages of the Act's Passage

The Act's passage has three distinct advantages for Atlanta and the State of Georgia: (1) it will make Georgia an attractive situs of arbitration for Georgia companies as well as companies with no existing ties to Georgia; (2) it will boost local economies; and (3) it will enhance Georgia's international profile.¹³¹

First, companies will be incentivized by the favorable arbitration regime to designate Georgia, and Atlanta in particular, as the seat of arbitration in their contracts.¹³² The Act aimed to make Georgia the most attractive center for international arbitration so companies in business negotiations would view Georgia as having arbitration law that favors party autonomy and provides for the fair, efficient resolution of disputes.¹³³ The hope is that by making the new arbitration law more attractive than Florida's, for instance, Georgia law will be a draw for companies negotiating the site of an arbitral location, whether they have ties to Georgia or not.¹³⁴

Second, state business catering to arbitration will increase.¹³⁵ Some of the Act's ancillary effects are the increase in business for lawyers, court reporters, accountants, experts, hotels, and restaurants.¹³⁶ This

127. 9 U.S.C. §§ 10–11 (2011).

128. O.C.G.A. § 9-9-56(e) (Supp. 2012); Hendrix Interview, *supra* note 9.

129. Hendrix Interview, *supra* note 9.

130. *Id.*

131. *See infra*, *Analysis* section C.

132. Hendrix Interview, *supra* note 9.

133. *See id.*

134. *See id.*

135. *Id.*

136. *Id.*

effect is evident in London, whose main arbitral institution is the London Court of International Arbitration (LCIA).¹³⁷ The LCIA has grown in prominence, giving rise to an entire industry centered around international arbitral practice.¹³⁸ At the LCIA, over 70% of its disputes do not even involve a single English party.¹³⁹ The sheer number of international parties settling their disputes there has led to a cottage industry around international arbitration, described by the Chancellor of the Exchequer as one of the “unsung success stories” of the British economy.¹⁴⁰

Finally, the Act will have a large reputational impact on Georgia and the City of Atlanta.¹⁴¹ From an international standpoint, the passage of the Act will improve the stature of Georgia and Atlanta as a center for international commerce.¹⁴² Georgia already has the world’s busiest airport, Hartsfield-Jackson Atlanta International Airport, but this Act will have a penumbral effect, raising the overall international profile of Atlanta, which will only draw more business to the state.¹⁴³

Conclusion

Even though the Act was non-controversial and was passed with virtually no opposition, its sheer ease in passage is remarkable in itself.¹⁴⁴ The support from the State Bar of Georgia, Georgia legislators, and the Georgia and Metro Chambers of Commerce was immense and speaks to the overall attitude that Georgia belongs on the vanguard of international business and law.¹⁴⁵ By crafting the Act to maximize efficiency and party autonomy while protecting against due process concerns, those involved with its creation have set the

137. *Id.*; *Frequently Asked Questions*, LCIA—THE LONDON CT OF INT’L ARB., http://www.lcia.org/Frequently_Asked_Questions.aspx#_London_ (last visited August 13, 2012).

138. Hendrix Interview, *supra* note 9.

139. *Frequently Asked Questions*, *supra* note 136.

140. *2011 Budget Statement by the Chancellor of the Exchequer, the Rt. Hon. George Osborne MP*, HM TREASURY, http://www.hm-treasury.gov.uk/2011budget_speech.htm (last visited August 13, 2012).

141. Hendrix Interview, *supra* note 9.

142. *Id.*

143. *Id.*; *Airport Information*, HARTSFIELD-JACKSON ATLANTA INT’L AIRPORT, http://www.atlanta-airport.com/Airport/ATL/GM_Letter.aspx (last visited July 29, 2012).

144. Hendrix Interview, *supra* note 9.

145. *Id.*

stage for Georgia to compete with the world's leading arbitral centers.

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