

Georgia Business Litigation

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DAILY
REPORT

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or delivered.²⁰⁴ Under the GAC a party has three months after delivery of a copy of the award to that party to apply to a court to vacate or modify the award.²⁰⁵

Under both the GAC and the FAA, a court shall confirm an award and enter a judgment of the court on that award if a party applies for confirmation within one year after the award, unless the award is vacated or modified by the court.²⁰⁶ Under the GAC, the award confirmation application shall be “made within one year after [the award’s] delivery” to that party,²⁰⁷ while under the FAA the period is “any time within one year after the award is made.”²⁰⁸

11-5 INTERNATIONAL ARBITRATION

As the global economy grows, the need for international arbitration has increased. Recently, Georgia has seen dramatic legal developments related to international arbitration, including the enactment of a new Georgia international arbitration statute; pro-arbitration rulings by both Georgia courts and the Eleventh Circuit U.S. Court of Appeals; and changes in bar rules supportive of international arbitrations in Georgia. As a result, Georgia is now among the friendliest jurisdictions to international arbitration in the United States.²⁰⁹

In 2011 the Atlanta International Arbitration Society (ATLAS) was formed by a broad coalition of law firms, major arbitral institutions, law schools, local chambers of commerce, in-house counsel and others, to promote Atlanta as a seat of international commercial arbitration and to provide a forum for dialog and education in the international arbitration field.²¹⁰

^{204.} 9 U.S.C. § 11.

^{205.} O.G.C.A. §§ 9-9-13(a), 9-9-14.

^{206.} O.C.G.A. § 9-9-12; 9 U.S.C. § 9.

^{207.} O.C.G.A. § 9-9-12.

^{208.} 9 U.S.C. § 9.

^{209.} Glenn P. Hendrix, *Will Atlanta Be the Next International Arbitration Venue?*, DR Currents 4, 4-5 (Spring 2012).

^{210.} Chartered Institute of Arbitrators, *Atlanta Launches Arbitration Society*, The Resolver 16 (May 2012); Kenneth Hannahs, *Georgia on Our Minds: The Atlanta International Arbitration Society Makes the City a Compelling Site for International Arbitration Proceedings*, Inside Counsel, October 8, 2012; Shelby R. Grubbs and Glenn P. Hendrix, *International Commercial Arbitration, Southern-Style*, Tennessee Bar Journal, September 2012.

11-5:1 Overview

Most international arbitrations take place in just a few cities, traditionally London, New York, Geneva, Paris, Hong Kong, and Stockholm. More recently other cities such as Singapore, Dubai, and Miami have begun to emerge as sites for international arbitration. Atlanta is well suited to join those ranks since it offers a sophisticated community of international business and legal experts, a desirable legal environment for parties to international arbitration, a concentration of Fortune 500 company headquarters in Georgia and the southeastern U.S., and practical features such as a convenient international airport and reasonably priced hotel accommodations.²¹¹

In 2012 ATLAS hosted an international arbitration conference that drew participants from 20 nations. The conference received very positive reviews from leading arbitration authorities throughout the world and has become an annual event.²¹²

11-5:2 Arbitration's Special Appeal in International Business Disputes

International arbitration is the leading method of resolving cross-border disputes.²¹³ Litigation is not a preferred option for international business disputes, because businesses may resist litigating disputes in the courts of a foreign nation with which the business may have little connection, other than being the location of an opposing party. Such resistance may be based on the limited reach of the foreign nation's legal system, or concerns such as home bias, undeveloped rule of law, or possible corruption. Unlike arbitration, mediation has not gained the status internationally

²¹¹ Glenn P. Hendrix, *Will Atlanta Be the Next International Arbitration Venue?*, *The Atlanta Lawyer* (Feb. 2012); Kathleen Baydala Joyner, *Arbitration Haven Seen in Georgia*, *The Daily Report* (Dec. 1, 2011).

²¹² Stephen L. Wright, *"The United States and Its Place in the International Arbitration System of the 21st Century: Trendsetter, Outlier or One in A Crowd."* *Inaugural Conference of the Atlanta International Arbitration Society*, *Paris J. Int'l Arb.* 18-21 (2012); Sebastian Perry, *Coke – and Arbitration – Are It*, *Global Arb. Rev.* (April 17, 2012).

²¹³ Shelby R. Grubbs and Glenn P. Hendrix, *International Commercial Arbitration, Southern-Style*, *Tenn. B. J.* (September 2012).

that it has within the United States as an accepted way to resolve business disputes.²¹⁴

11-5:2.1 Greater International Enforceability of Awards Versus Court Judgments

While the United States has no treaties with any other country for the enforcement of U.S. court judgments, over 140 countries including the United States are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²¹⁵ There is growing confidence that New York Convention-compliant international arbitration may eliminate the need to consider litigating in the court of an opposing party's nation and may produce more broadly enforceable awards than litigation.²¹⁶

11-5:3 2012 Georgia International Commercial Arbitration Code

In 2012, the legislature enacted a new Georgia International Commercial Arbitration Code,²¹⁷ based in large part on a 1985 United Nations Commission on International Trade Law (UNCITRAL) model law, as amended in 2006.²¹⁸ The UNCITRAL model law has been adopted in over 60 civil and common law jurisdictions around the world. The version adopted in Georgia

²¹⁴ Daniel J. King, Brian A. White, and Ryan J. Szczepanik, *International Arbitration in Georgia*, 16 Ga. B. J. 12, 13-14 (April 2011).

²¹⁵ UNCITRAL website, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited May 6, 2013) (listing 148 parties to the New York Convention, which seeks to provide common legislative standards for foreign and nondomestic arbitration award recognition and enforcement).

²¹⁶ Glenn P. Hendrix, *Will Atlanta Be the Next International Arbitration Venue?*, DR Currents 4 (Spring 2012).

²¹⁷ O.C.G.A. §9-9-20 (the law's stated purpose is "to encourage international commercial arbitration ... to enforce arbitration agreements and arbitration awards, to facilitate prompt and efficient arbitration proceedings ... and to provide a conducive environment for international business and trade"; it applies to international agreements entered into on or after July 1, 2012). See generally King & Spalding Client Alert, *Enactment of the New Georgia International Commercial Arbitration Code Solidifies Atlanta's Status as a Hub for International Arbitration*, <http://www.kslaw.com/imageserver/KSPublic/library/publication/ca060512.pdf> (June 5, 2012); Douglas H. Yarn, *Executive Summary: Proposed Revisions to Georgia's International Commercial Arbitration Law*, Be Neutral (Spring 2012).

²¹⁸ UNCITRAL website, http://www.uncitral.org/uncitral/on-uncitral-texts/arbitration/1985Model_arbitration_status.html (cataloguing roughly 60 nations that have enacted legislation based on the UNCITRAL Model Law, and enumerating Georgia as one of eight adopting states in the United States).

contains several non-UNCITRAL provisions that represent international best practices in the arbitration field.

11-5:4 Court Decisions and Bar Rules Favoring International Arbitration

Pro-arbitration rulings under domestic law signal to the international community that arbitrations conducted in that jurisdiction will be upheld by its courts. Such rulings may indicate the willingness of a jurisdiction's courts to enforce arbitration agreements; assist arbitration as appropriate (for example, by providing interim relief); refrain from meddling in arbitration; and enforce rather than vacate awards.²¹⁹

11-5:4.1 Bar and Court Rules

In addition to considering domestic case law, parties to international disputes may consider arbitration venues based on their accessibility to the parties' preferred counsel. The Georgia bar rules are quite flexible in permitting parties to select counsel and arbitrators of their choice in arbitration proceedings, including attorneys not licensed in any U.S. jurisdiction.²²⁰ In addition, Georgia superior court rules permit non-U.S. lawyers to represent their clients on a pro hac vice basis.²²¹ Recently, the American Bar Association recommended that other states follow Georgia's lead, permitting foreign parties to have counsel from their own jurisdictions represent them in Georgia-based arbitration.²²²

11-5:4.2 United States Court of Appeals for the Eleventh Circuit

There is a fear in international arbitration that U.S. courts will overturn arbitral awards based on a losing party's assertion of the arbitrator's "manifest disregard of the law." Thus, domestic limitations on the application of a "manifest disregard of the law"

²¹⁹ Daniel J. King, Brian A. White, and Ryan J. Szczepanik, *International Arbitration in Georgia*, 16 Ga. B. J. 12, 21 (April 2011).

²²⁰ Ga. R. of Prof. Conduct 5.5(e)(3).

²²¹ Ga. Unif. Super. Ct. R. 4.4.

²²² American Bar Association Task Force on International Trade in Legal Services, *ABA Report on International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Feb. 4, 2012).

standard tend to promote the certainty of arbitration awards in the eyes of the international community.

A recent Eleventh Circuit case, though not involving an international arbitration, made it clear that manifest disregard is not a basis to vacate an award under the FAA in this circuit.²²³ The Eleventh Circuit has also held that the New York Convention trumps domestic law exclusions regarding matters that may be subject to arbitration;²²⁴ that a foreign arbitration proceeding constitutes a foreign international “tribunal,” giving U.S. courts the power to order parties to produce documents or give testimony for use in foreign arbitration proceedings;²²⁵ and that sanctions should be imposed to deter baseless challenges to arbitration awards.²²⁶ Each of these decisions indicates federal court recognition and respect for arbitral decisions in Georgia, including those in international arbitration.

11-5:4.3 Georgia Court of Appeals and Georgia Supreme Court

In recent years Georgia courts have increasingly recognized that the FAA preempts state laws, finding that state laws in conflict with the liberal federal policy favoring arbitration agreements are unenforceable.²²⁷ Continued development of state court jurisprudence favorable to arbitration will help Georgia advance as a desirable international arbitration venue.

^{223.} *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010). Notwithstanding the Eleventh Circuit’s decision, whether “manifest disregard” survives as an independent grounds for judicial review of an arbitration award remains an open question in circuits that have not addressed the issue, as the Supreme Court has declined to decide the question. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, ____ n.3, 130 S. Ct. 1758, 1768 n.3 (2010). See § 11-3:2-1d.

^{224.} See, e.g., *Bautista v. Star Cruises*, 396 F.3d 1289, 1295-1300 (11th Cir. 2005).

^{225.} See *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 993-997 (11th Cir. 2012). See also Brian A. White, *Will the Eleventh Circuit Become a Magnet for Applications for Discovery in Aid of International Arbitrations Pursuant to 28 U.S.C. § 1782?*, Kluwer Arb. Blog <http://kluwerarbitrationblog.com/blog/2012/07/05/will-the-eleventh-circuit-become-a-magnet-for-applications-for-discovery-in-aid-of-international-arbitrations-pursuant-to-28-u-s-c-%C2%A7-1782/> (July 5, 2012).

^{226.} See *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 Fed. Appx. 468 (11th Cir. 2010); *B.L. Harbert Int’l LLC v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006), overruled on other grounds, in *Hall Street Associates LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008).

^{227.} See § 11-2:2; see also *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 208-09, 679 S.E.2d 785, 790 (2009) (holding that the FAA preempts a Georgia statute prohibiting pre-dispute arbitration agreements for medical malpractice claims).