Recent Advances in International Arbitration in Georgia:

Winning the Race to the Top

by Stephen L. Wright and Shelby S. Guilbert Jr.

Key recent developments propel Georgia forward as a desirable jurisdiction for international arbitration proceedings and promise to increase international trade and investment in the state. Although Georgia is already an arbitration-friendly jurisdiction, these developments create an even more hospitable environment for international arbitral proceedings. Together with the state's well-known reputation as a transportation hub and place of hospitality, the advances in rules for international arbitration proceedings redound positively for the economy at large and increase opportunities for all Bar members.[1]

This article examines the recent confluence of developments promoting international arbitration in Georgia. Perhaps the single most important development in this regard is the passage and signing into law by Gov. Nathan Deal in 2012 of a new Georgia International Commercial Arbitration Code (the ICA Code).[2] With enhancements to the widely adopted United Nations Commission on International Trade Law (UNCITRAL) international model arbitration code, the new ICA Code targets an optimal balance of judicial aid to enable successful arbitration while nonetheless leaving parties free to structure the dispute resolution process that works best for them.

Complementing the statutory innovation are recent pro-arbitration decisions from the 11th Circuit and state courts in Georgia confirming the local judiciary's strong support for international arbitration, setting Georgia apart from other U.S. jurisdictions where judicial support for international arbitration is less clear. Finally, amendments to the State Bar Rules pave the way for easier appearance by foreign counsel in international arbitral hearings in the state and otherwise to provide services on a temporary and limited basis.

Georgia's New International Arbitration Code: A Strong Legal Framework to Support International Arbitration in Georgia

Last year, Gov. Deal signed into law the new SB 383, replacing Part 2 of the Georgia Arbitration Code pertaining to international transactions with a new Georgia International Commercial Arbitration Code. Although the pre-existing international arbitration code was pioneering when first adopted some 25 years ago, countries around the world have been updating their own law to keep pace with changes in practice stemming from the increased use of arbitration in increasingly globalized commercial trade and transactions.[3] When former senator now Judge Bill Hamrick was a member of the Georgia Senate and introduced SB 383 last year, he declared, "Amending Georgia's current code to incorporate internationally recognized law is a step in the right direction towards becoming a

prominent venue for international commercial arbitration."[4]

The new ICA Code went into effect on July 1, 2012, and applies to all international commercial arbitrations in Georgia.[5] The ICA Code itself is based primarily upon the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law), as amended in 2006.[6] In basing its new ICA Code on the Model Law, Georgia now joins more than 50 civil and common law jurisdictions around the world that have adopted some version of the Model Law.[7]

Many may ask about the Federal Arbitration Act (FAA), which is already applicable, and provides the rules for international arbitration proceedings. The FAA, along with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention),[8] and the Inter-American Convention on International Commercial Arbitration (the Panama Convention),[9] was in its time progressive and continues to provide a firm foundation for the enforceability of international arbitration agreements and international arbitral awards in the United States. Yet with 90 years in service and little updating, the FAA and ancillary laws do not reflect changes in the global commercial environment and provide only limited guidance on potentially critical issues that often arise in international arbitrations today, such as whether an international arbitral tribunal has the authority to award equitable relief, or standards for judicial assistance to assist parties in the taking of evidence for use in an arbitral hearing. As the FAA does not exclude state rules on international arbitration,[10] the Georgia state legislature stepped in to provide a modern legal framework for the promotion of international arbitration.

Greater Uniformity and Predictability

In basing the new ICA Code on the Model Law, the Georgia Legislature directed that "regard shall be given to its international origin and to the need to promote uniformity in its application."[11] The Model Law has been the subject of extensive, well-publicized commentary and case law that will aid Georgia courts and practitioners in applying the new ICA Code.[12] At the same time, foreign parties and their counsel will find greater predictability in the use of the new ICA Code and have greater comfort with Georgia as a suitable venue for arbitration.

Clarification on the Role of Georgia Courts in Facilitating International Arbitration

One highly prized advantage of arbitration, both in domestic and international settings, is the ability of parties to structure the dispute resolution process as they see best,

free from excessive judicial interference. Yet because arbitrators lack the coercive powers of the state, occasions arise where courts must be relied upon to enforce arbitration agreements and arbitral awards. Georgia's new ICA Code attempts in numerous ways to tread the fine line between providing for judicial assistance where needed while avoiding excessive interference.

Independence of the parties is preserved as the ICA Code limits judicial intervention in arbitral proceedings to those instances called out in the ICA Code.[13] Courts must refer disputes to arbitration where so provided in a writing unless the provision is found void or unenforceable for one of a limited number of reasons.[14] The new ICA Code expressly incorporates the "competence-competence" and separability principles, which affirm arbitrators' authority to rule on questions relating to their own jurisdiction, including those on the validity and scope of an arbitration agreement.[15]

While assuring the independence of the arbitral process, the new ICA Code also brings Georgia law current with international practice[16] by allowing judicial enforcement of interim measures ordered in the arbitration proceedings.[17] Interim measures may, for example, protect property and preserve it from dissipation for the eventual enforcement of an arbitral award.[18] Resort to Superior Court enforcement of interim measure orders is expressly permitted.[19] As a corollary, provision in the arbitration agreement for interim measures and their judicial enforcement does not alone undermine enforceability of the arbitration agreement.[20] In a similar manner, interim awards are likewise judicially enforceable.[21]

Georgia Enhancements to the Model Law

Although the Georgia Legislature used the Model Law as its starting point when drafting the international arbitration code, it departed from the Model Law in several important respects that give the ICA Code a definite Georgia flavor. For example, in a state blessed with 159 counties, the Model Law's provision for centralized judicial supervision[22] would have required an amendment to the Georgia Constitution. Georgia's new ICA Code instead provides by default that supervisory functions be performed by the Superior Court in any county where any portion of the hearing has been conducted, although parties remain free to jointly select the court for the exercise of these functions.[23]

In another Georgia enhancement, the ICA Code provides that arbitrators may issue subpoenas for attendance of witnesses and for the production of records and other evidence.[24] By contrast, the generic provisions in the Model Law give little guidance on how courts should assist an arbitral tribunal in the taking of evidence.[25] Fear of protracted and expensive discovery often discourages parties and counsel in civil law countries from arbitration in the U.S. This fear is addressed under the ICA Code in the discretionary aspect of subpoena issuance, whereby the arbitrator has an ability to limit discovery from becoming overly burdensome and time-consuming. The parties are in any event assured of obtaining a list of witnesses for the hearing and being allowed to examine and copy relevant documents.[26]

The Georgia Judiciary's Strong Support for International Arbitration

Having a progressive international arbitration code is critical for efforts to raise Georgia's stature as a center for international arbitral activity. A great code is worthless, however, without a judiciary ready to enforce it. Fortunately, state and federal courts in Georgia have repeatedly affirmed Georgia as one of the most pro-arbitration jurisdictions in the United States, if not the world.

The 11th Circuit strongly declared its support for international arbitration, holding that an international arbitration award issued in a U.S. proceeding is subject to vacatur only on the grounds set forth in Article V of the New York Convention,[27] thereby being one of few federal circuits to expressly reject "manifest disregard of the law" as a permissible ground.[28] The 11th Circuit is the only federal circuit to eliminate domestic arbitration law as a basis for vacating international arbitration awards and to find domestic law exclusions trumped by the New York Convention.[29] In 2012, the 11th Circuit became the only circuit where federal judicial enforcement of discovery measures under 28 U.S.C. § 1782 extends to foreign private arbitral proceedings.[30] In short, federal courts in the 11th Circuit follow the fundamental principle that the judiciary must "ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest."[31]

Georgia state courts have likewise made exceedingly clear their support for arbitration, and refrain from undue interference with arbitral proceedings. Grounds for vacatur of an arbitration award are "among the narrowest known to the law."[32] The Supreme Court of Georgia declared the grounds for vacating an award expressly enumerated in Georgia's domestic arbitration code as the sole grounds for such action,[33] a rule which should apply under the new ICA Code as well. Where "no ground exists for vacating or modifying the award, it is the duty of the court to confirm it."[34]

The strong support of the local state and federal judiciary in Georgia for arbitration will encourage confidence that international arbitration agreements and awards will be upheld under the new ICA Code.

New Georgia Bar Rules Welcome International Business

Georgia boasts an expanded port in Savannah and the world's

busiest airport, with direct flight connections to more than 90 international destinations in 55 countries. Hotel and conference facilities in the state are top-rated and benefit from world-renowned southern hospitality and provide a much better value proposition than many international locations. With the globalization of business comes the globalization of the practice of law, as lawyers increasingly follow their clients around the world to support commercial transactions or to represent their clients in cross-border disputes.

Rules that address this reality directly and thoughtfully tend to make a jurisdiction a more attractive place not only for international arbitration, but also for global businesses to invest, and also reduce the risk that foreign lawyers inadvertently engage in the unauthorized practice of law. After changes adopted by the Supreme Court of Georgia on Dec. 1, 2012, Rule 5.5(e) of the Georgia Rules of Professional Conduct stands revised to encourage a greater role for international counsel alongside domestic attorneys representing clients in the state. The rule continues to prohibit international counsel from a "systematic and continuous presence" in the state, but permits temporary practice.[35]

The change reflects the five clusters of activities identified by the American Bar Association Task Force on International Trade in Legal Services as ways in which international lawyers might want to practice in a U.S. jurisdiction like Georgia:

1. Temporary Transactional Practice, or "fly in-fly out" practice, where a foreign lawyer flies into Georgia for negotiations or a transaction with a company with Georgia operations.
2. Foreign-licensed In-House Counsel, such as where a foreign multinational client with operations in Georgia may want one of its in-house lawyers to work in Georgia for a limited time.
3. Permanent Practice as a Foreign Legal Consultant, where a foreign lawyer practices in Georgia on matters governed by non-U.S. law, but does not hold himself or herself out as a fully licensed member of the State Bar of Georgia.
4. Pro Hac Vice Admission, where a foreign lawyer associates with a member of the State Bar of Georgia in a particular matter.
5. Full Licensure as a Georgia Lawyer, whereby a foreign-trained lawyer actually sits for the Georgia bar examination and becomes licensed to practice law in the state of Georgia.[36]

Georgia is now the only Bar in the United States that has adopted specific rules and policies governing all five of these categories of activity,[37] which are often referred to as the "foreign lawyer cluster."[38] Indeed, recently amended commentary to Georgia Rule of Professional Conduct 5.5(e)(3), which governs the temporary practice of law by international practitioners in Georgia, goes beyond the ABA commentary to ABA Model Rule 5.5, further confirming Georgia's openness to international practitioners.[39]

Georgia's new rules provide for a more hospitable locale for involvement of foreign attorneys in arbitration seated in the state than other states. For example, California Rule of Court No. 9.43,[40] which governs the ability of attorneys who are not members of the State Bar of California to act as counsel in international arbitrations seated in California, allows attorneys admitted to the bars of other states to participate in international arbitrations, but does not permit foreign attorneys who are not otherwise admitted in another U.S. jurisdiction to participate.

With the new ICA Code, a federal and state judiciary strongly disposed in favor of arbitration, and the liberalized rules for participation of international attorneys and parties, Georgia now stands well-poised to further grow international business in the state. To promote the state's stature as a hub of international arbitration, a new organization has been formed: the Atlanta International Arbitration Society (AtlAS). Its first annual conference in April 2012 was a huge success and featured some of the most prominent names in international arbitration. Attendees came from more than 23 countries, and the proceedings won notice in several international publications.[41]

AtlAS held the 2013 conference in Atlanta on April 21-23. The conference theme was "Convergence and Divergence in International Arbitration Practice" and featured leading practitioners and scholars from around the world. Panels focused on experiences "in the trenches" in proceedings around the world, issues with enforcement of interim and final measures and awards, matters involving sovereign actors, drafting arbitration agreements and developments in discovery availability under 28 U.S.C. § 1782. More details are available at AtlAS's website at www.arbitrateatlanta.org. GBJ

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Endnotes

1. A recent study shows that arbitration proceedings have a significant and positive impact on regional economies. See Charles River Associates, Arbitration in Toronto: An Economic Study (2012), available at http://www.crai.com/uploadedFiles/Publications/Arbitration%20in%20Toronto%202012-09-06.pdf. This private study, conducted for Arbitration Place in Toronto, found that arbitration activity in that region would generate $256 million in economic activity in 2012 and an estimated $273 million for 2013. Id. at 4. International arbitral proceedings typically require the use of local counsel, expert witnesses, translation services, court reporters and arbitrators, thereby benefiting the local bar, without burdening the local courts. International arbitration also brings revenues to the local hospitality industry when foreign parties and their lawyers attend arbitration hearings in Georgia.
2. O.C.G.A. §§ 9-9-20 to 9-9-59 (2012).
3. Georgians have a huge interest in promoting international commerce. With the world's busiest airport in Atlanta, two deep water ports, one of the top three distribution cities in the country and the third-highest concentration of Fortune 500 companies in the United States, global trade is one of Georgia's greatest competitive strengths. Metro Atlanta Chamber, http://www.metroatlantachamber.com/why-metro-atlanta (last visited Apr. 2, 2013); Georgia Ports Authority, http://www.gaports.com (last visited Apr. 2, 2013). In Atlanta alone, there are 67 consulates and government-sponsored trade organizations, 48 bi-national chambers of commerce and approximately 2,800 international businesses from some 65 countries that have established their U.S. headquarters. Metro Atlanta Chamber, http://www.metroatlantachamber.com/economic-development/global-commerce (last visited Apr. 2, 2013). In 2010, $28.7 billion in exports and $60.2 billion in imports passed through Georgia's ports. Jacques Couret, Ex-Im Bank Opens Atlanta Center, Atlanta Bus. Chron., Aug. 15, 2012, http://www.bizjournals.com/atlanta/news/2012/08/15/ex-im-bank-opens-atlanta-center.html.
4. Bill Hamrick, Sen. Bill Hamrick Files Legislation to Revise Georgia's International Commercial Arbitration Laws, Times-Georgian, Feb. 7, 2012, http://www.times-georgian.com/pages/full_story/push?blog-entry-Sen-+Bill+Hamrick+Files+Legislation+to+Revise+Georgia%E2%80%99s+International+Commercial+Arbitration+Laws%20&id=17443624.
5. O.C.G.A. § 9-9-21(a) (2012).
6. UNCITRAL Model Law on International Commercial Arbitration [hereinafter UNCITRAL Model Law], available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
7. See list of Model Law jurisdictions at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
8. *See* 9 U.S.C. §§ 201-208.
9. *Id.* §§ 301-307.
10. The "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Info. Scis. v. Bd. of Trustees, 489 U.S. 468, 477 (1989).
11. O.C.G.A. § 9-9-23 (2012).
12. The legislative history of the UNCITRAL Model Law and the 2006 Amendments is available at www.uncitral.org. To promote greater uniformity in the application of model law provision, UNCITRAL also has begun collecting case law from UNCITRAL Model Law jurisdictions. See, e.g., UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, available at http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.
13. O.C.G.A. § 9-9-26 (2012).
14. *Id.* § 9-9-29(a). Such agreements may be challenged as with other contractual agreements for fraud, duress or unconscionability. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 209, 679 S.E.2d 785, 790 (2009). A finding that the balance of a contract is void will not, without more, render the arbitration agreement void. O.C.G.A.§ 9-9-37(1) (2012). The Code also broadly defines "arbitration agreement" to mean "an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not," and confirms that arbitration agreements "may be in the form of an arbitration clause in a contract or in the form of a separate agreement." Id. § 9-9-22(a)(2).
15. A party challenging an international arbitration tribunal's decision that it has jurisdiction may appeal that decision to a court within 30 days, but the filing of an appeal will not stay the arbitral proceedings, thus reducing the opportunity for posing meritless procedural hurdles. Id. § 9-9-37(1)(3).
16. *See*, e.g., Int'l Chamber Com. R., Art. 28, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/; London Ct. Int'l Arb. R., Art. 25, available at http://www.lcia.org/Dispute_Resolution_

Services/LCIA_Arbitration_Rules.aspx; Int'l Arb. R., Art. 21, available at www.adr.org.

17. *See generally* O.C.G.A. § 9-9-27 (2012). Judicial assistance is also available where parties have failed to agree upon the procedure for appointing an arbitrator or arbitrators, id. § 9-9-32(c); where an agreed-upon method for appointing arbitrators fails due to actions by any party, party-appointed arbitrator or third party such as an arbitral institution, id. § 9-9-32(d); where a party challenges the appointment of a particular arbitrator, id. § 9-9-34; where an arbitrator becomes unable to perform his or her functions or otherwise refuses to do so without undue delay, id. § 9-9-35; where a party challenges a tribunal's interim award on jurisdiction, id. § 9-9-37(3); where a tribunal needs court assistance in the issuance of subpoenas for witnesses or other evidence, id. § 9-9-49; and where a party seeks to set aside an arbitration award for one of the limited enumerated grounds in the code, id. § 9-9-56.
18. Examples of interim measures can be found in Fed. R. Civ. P. 64(b).
19. O.C.G.A. § 9-9-38(f) (2012). Judicial refusal to recognize or enforce such interim measures may be based solely on those factors enumerated in O.C.G.A. § 9-9-39.
20. *Id.* § 9-9-30.
21. *Id.* § 9-9-22(a)(3).
22. *See* Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, cmt. 22, in UNCITRAL Model Law, supra note 6, at 29.
23. O.C.G.A. § 9-9-27 (2012).
24. *Id.* § 9-9-49(a). The ICA Code here again makes judicial aid available, this time for enforcement of subpoenas with treatment equal to that in civil actions.
25. UNCITRAL Model Law Article 27 states: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."
26. O.C.G.A. § 9-9-49(c) (2012). Other Georgia enhancements to the UNCITRAL Model Law include streamlined provisions on the procedures for applying for interim relief, id. § 9-9-38; a provision allowing non-Georgia parties to opt out of certain grounds for judicial review of an arbitration award, id. § 9-9-56(e); and a provision permitting the consolidation of multiple arbitral proceedings upon the agreement of the parties, id. § 9-9-46(d).
27. Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998).
28. Frazier v. CitiFin. Corp., 604 F.3d 1313, 1323-24 (11th Cir. 2010). In other leading arbitral centers in the United States, such as New York, "manifest disregard [of the law] remains a valid ground for vacating arbitration awards." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339-40 (2d Cir. 2010).
29. *See* Bautista v. Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005).
30. *See In re* Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc., 685 F.3d 987, 996-97 (11th Cir. 2012).
31. B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006), overruled on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
32. Malice v. Coloplast Corp., 278 Ga. App. 395, 397, 629 S.E.2d 95, 98 (2006).
33. Greene v. Hundley, 266 Ga. 592, 595, 468 S.E.2d 350, 353 (1996) (reversing Court of Appeals' decision that an arbitration award may be vacated if court determines there was no evidence supporting it); accord Johnson Real Estate Invs., LLC v. Aqua Indus., 282 Ga. App. 638, 642, 639 S.E.2d 589, 594 (2006); Ralston v. City of Dahlonega, 236 Ga. App. 386, 387, 512 S.E.2d 300, 301 (1999).
34. Lanier Worldwide, Inc. v. Bridgecenters at Park Meadows, LLC, 279 Ga. App. 879, 880, 633 S.E.2d 49, 51 (2006) (quoting Universal Mgmt. Concepts, Inc. v. Noferi, 270 Ga. App. 212, 214, 605 S.E.2d 899, 901 (2004)).
35. Ga. Rules of Prof'l Conduct R. 5.5(e).
36. Feb. 4, 2012, Memorandum from ABA Task Force on International Trade in Legal Services to State Supreme Courts and State and Local Bar Associations, International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience, available at http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf [hereinafter Feb. 4, 2012, ABA Memo].
37. *See* Ga. Rules of Prof'l Conduct R. 5.5(e) (temporary practice of law), 5.5(f) (foreign licensed in-house counsel); Sup. Ct. of Ga. Rules Governing Admission to the Practice of Law, Part E (Foreign Legal Consultants); Ga. Unif. Super. Ct. R. 4.4 (pro hac vice admission of foreign lawyers); State of Georgia Board of Bar Examiners, Waiver Process and Policy Admission to Practice, available at https://www.gabaradmissions.org/waiver-process (Georgia Bar admission process for foreign-educated lawyers).
38. Feb. 4, 2012, ABA Memo, supra note 36, at 6.
39. Compare Ga. Rules of Prof'l Conduct R. 5.5 cmts. with Model Rules of Prof'l Conduct R. 5.5 cmts.
40. Cal. R. Ct. R. 9.43, available at http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_43.
41. *See*, e.g., Stephen L. Wright, "The United States and Its Place in the International Arbitration System of the 21st Century: Trendsetter, Outlier of One in a Crowd?" — Inaugural Conference of the Atlanta International Arbitration Society — Atlanta, 15-17 April 2012, 2012 Paris J. Int'l Arb. 741, available at http://arbitrateatlanta.org/wp-content/uploads/2012/11/Cahiers-de-lArbitrage-2012-n%C2%B03-Br%C3%A8ves-comptes-rendus-de-colloques-e....pdf (summary of proceedings); see also Reports of the Conference Rapporteurs, available at http://arbitrateatlanta.org/wp-content/uploads/2011/11/AtlAS-Conference-Report1.pdf (full report of proceedings).