An Introduction to International Arbitration

ATLAS
ATLANTA INTERNATIONAL ARBITRATION SOCIETY

What Every Practitioner in Today's Global Economy Should Know

April 19, 2013
Atlanta, Georgia

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Panel

Moderator

John A. Sherrill, Partner, Seyfarth Shaw LLP, Atlanta, GA

Speakers

- Erika C. Birg, Partner, Nelson Mullins Riley & Scarborough LLP, Atlanta, GA
- Shelby Guilbert, Counsel, King & Spalding LLC, Atlanta, GA
- Stephen L. Wright, Partner, Taylor English Duma LLP, Atlanta, GA
- Douglas H. Yarn, Professor, Georgia State University Law School, Atlanta, GA
- Frank M. Young, III, Partner, Haskell Slaughter Young & Redliker, LLC, Birmingham, AL

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Agenda

I. International Arbitration Overview
II. International Framework Supporting Arbitration
III. Drafting Effective International Arbitration Agreements
IV. Procedural Features of International Arbitration
V. Enforcement and Challenge of International Arbitral Awards
VI. Georgia's New International Arbitration Code
VII. ATLAS and Atlanta's Role as an International Arbitration Center

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I. International Arbitration Overview

- **What is international arbitration?**
  - A contractually agreed upon method for resolving disputes between parties from different countries
  - Results in a final, binding award – like a court judgment, but with no appeals on the merits
  - Differs from domestic arbitration in that the award may be subject to enforcement or challenge in more than one jurisdiction

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Concept of arbitration goes back to ancient times:

Greece

Roman Empire

Asia

Europe

Overview, cont.

- Arbitration in France goes back to ancient courts set up by boroughs to settle disputes between merchants on market days
- Trading guilds in medieval German also used arbitration to resolve disputes between burghers
- Earliest law dedicated to arbitration in England was in 1697

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Overview, cont.

- In the 19th century, as nation-states became more powerful, arbitrators were seen as rivals to the sovereign power of national courts
- Pendulum slowly began to swing back in favor of international arbitration in the early 20th century in response to increased international trade and the industrial revolution
- In 1919, the world's business community established the International Chamber of Commerce (the "ICC")
- After World War II, proliferation of international arbitral institutions and pro-arbitration law

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Overview, cont.

- International arbitration is increasingly a preferred mechanism for resolving international business disputes

- Track record of use in disputes under:
  - domestic and international contracts
  - transactions with developing countries
  - transactions involving States and governmental entities

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Other advantages of international arbitration:

- Neutrality (away from local courts)
- Competence of arbitrators (experts selected by the parties)
- Party autonomy and participation in shaping the process
- Enforceability
- Finality
- Cost?
- Privacy and Confidentiality
- Foreign language and cultural differences easier to accommodate
- Speed
- Bottom line - often the least worst alternative to home field advantage

Overview, cont.

Possible Disadvantages and Limitations Inherent in Arbitration

- Limited scope of arbitral jurisdiction - defined by contract
- An arbitrator or arbitrators generally must be selected before anything can happen
- Limited powers of arbitrators, e.g. to order injunctions with effective sanctions/impact on third parties and (in practice) to give summary judgments
- The problem of multi-party disputes/lack of consolidation powers
- Awards are not precedents, nor binding on third parties
- Not all courts will provide provisional remedies in aid of arbitration
- Litigation to avoid arbitration or avoid enforcement
- Perception that arbitrators "split the baby"
- No appeal, unless the parties have agreed to allow appeals in their arbitration agreement

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II. International Framework Supporting International Arbitration

New York Convention

- Adopted in 1958
- Over 140 countries are signatories
- Lord Musthill, High Court, Queens Bench: described the Convention as "the most effective instance of international legislation in the entire history of commercial law."
- Now well accepted that agreements to arbitrate and arbitration awards will be enforced by courts of countries that are parties to the New York Convention

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Other arbitral conventions and treaties:

- ICSID - investor/state arbitrations
- Bilateral Investment Treaties ("BITS")
- Panama Convention
- European Convention on International Convention Arbitration

- **National laws supporting international arbitration**
  - Chapter II of the FAA
  - English Arbitration Act of 1996
  - French Arbitration Law, Decree No. 2011-48 of Jan. 13, 2011
  - UNCITRAL Model Law on international arbitration adopted in part by over 50 jurisdictions

III. Drafting Effective International Arbitration Agreements

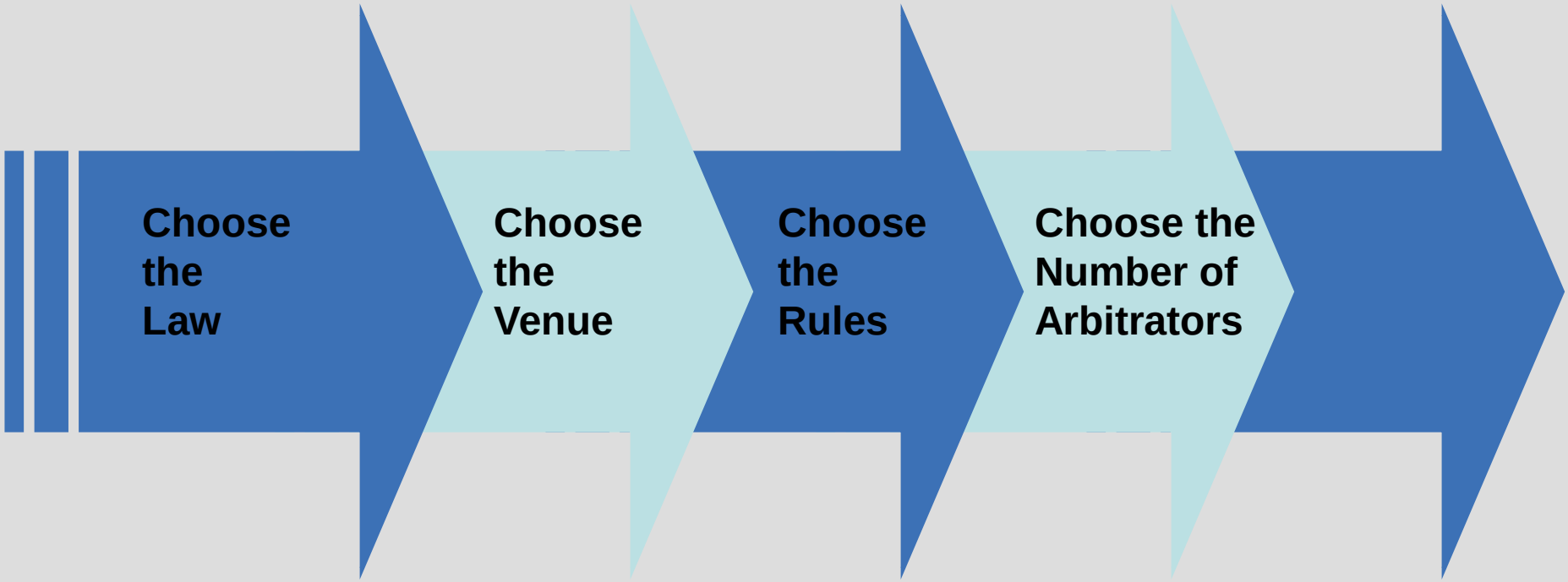
HOW <u>NOT</u> TO DRAFT AN ARBITRATION CLAUSE:

- "In case of arbitration, the ICC Rules of Arbitration shall apply; in case of litigation, any dispute shall be brought before the Courts of England"
- "Arbitration, if any, by ICC Rules in London"
- "All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known chamber of commerce (like the International Chamber of Commerce) designated by mutual agreement between buyer and seller"
- "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration"
- "All disputes to be resolved through arbitration by the AA"

Practice pointers:

- Do not over-elaborate: use a model clause whenever possible and reproduce it correctly
- Do not equivocate: you may end up in court
- Do not use shorthand or ambiguous terminology: you may end up in court
- Do not designate an appointing authority without verifying its existence and willingness to accept the role: you may end up in court
- Do not try to combine irreconcilable applicable laws as a means of compromise: you may end up confused - and in court

Drafting Agreements, cont.



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TIPS WHEN CHOOSING LAW

- Must be respected/understood
  - available jurisprudence
- Must be compatible with:
  - contractual expectations of the parties
  - procedural regime at the arbitration venue/seat
  - mandatory laws of “host” state or country
- Remember stabilization option/”freezing” the law – and possible limits on the scope/application of local law (e.g. compatibility with federal or international standards)

Drafting Agreements, cont.

- **Perhaps with the exception of the arbitrator selection, the decision on the seat of arbitration is the most important decision in the process**
- **The place / seat of the arbitration will typically determine:**
  - **Procedural law governing the arbitration, which will in turn determine:**
    - **the degree of potential court intervention in the proceedings**
    - **the tools and powers available to the arbitrators**
    - **The set aside jurisdiction of the award**

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Drafting Agreements, cont.

TIPS WHEN CHOOSING THE VENUE

•**Legal environment:** local courts not unduly interfering or restrictive; will enforce arbitration agreement (NB check for anti-suit jurisdiction); and respect finality of awards

•**Neutrality and convenience:** location does not favor either party or inconvenience one more than the other; ease of airport connections and hotel accommodations

•**Availability of arbitrators**: sufficient pool of experienced, qualified candidates

•**Logistical support**: adequate hearing facilities and services for arbitrators, parties and advisers.

•**Enforceability of award**: outside the US, signatory of New York Convention to benefit from reciprocity provisions; a necessary condition – but not a sufficient one

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CHOOSING THE RULES

- **Pure *ad hoc* arbitration:** tailor made to the (likely) dispute but heavy administrative/fiscal burden on parties and risk of delay (or worse) through non-cooperation (e.g. expensive applications to court to appoint arbitrators)
- ***Ad hoc* arbitration with UNCITRAL Rules:**
  - UNCITRAL rules developed in the 1970s and updated in 2010. Some published case law and commentary has developed on application and interpretation of rules.
  - Originally intended to be acceptable to both capitalist and socialist countries, as well as developing countries and
  - Preferable to pure *ad hoc* arbitration; must specify appointing authority and exclude appeals

Drafting Agreements, cont.

- **Institutional arbitration:** may seem slower and more expensive, but generally recommended
  - **always adopt model institutional arbitration clause**

- **Choice of institution:** choose a major international institution absent a particular reason not to do so
  - check track record/durability of regional alternatives
  - Institutional arbitration institutions have their own rules which become part of your arbitration agreement when you agree to arbitrate thereunder

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Drafting Agreements, cont.

Leading international arbitration institutions:

- London Court of International Arbitration ("LCIA"), based in London, est. 1892
- Stockholm Chamber of Commerce ("SCC"), based in Stockholm, est. 1917
- International Chamber of Commerce ("ICC"), based in Paris, est. 1919
- American Arbitration Association ("AAA"), based in New York, est. 1926
- China International Economic and Trade Arbitration Commission ("CIETAC"), based in Beijing, est. 1956
- Hong Kong International arbitration Center ("HKIAC") based in Hong Kong, est. 1985
- Singapore International Arbitration Centre ("SIAC"), based in Singapore, est. 1991
- International Centre for Dispute Resolution ("ICDR") established in 1996 by the AAA with offices in New York, Dublin and Mexico City with an office scheduled to open in Singapore

Drafting Agreements, cont.

Provisions on Selecting Arbitrators:

- **Number of arbitrators**: one or three member tribunal depending on circumstances of case and amount in dispute. If no agreement, default may be one or three depending on jurisdiction
- **Method of selection**: ensure provision is made for selection of arbitrators by parties/appointing authority so not left to local courts **(choosing any of the major sets of rules will accomplish this)**
- **Qualifications/restrictions**: professional/technical/nationality requirements; can be agreed in advance but should not be too restrictive (consider language issues if applicable)
- **Impartiality and independence:** requirement of disclosure by arbitrators, including party-nominated arbitrators - otherwise, grounds for challenge – AAA approach v. IBA guidelines
- **"Member of the Club"**: it's a small (specialist) arbitration world

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Drafting Agreements, cont.

CONSIDER INCLUDING

- Obligation to continue performing the contract pending arbitration
- Staged ADR: pre-arbitration negotiation and/or mediation
- Confidentiality
- Fast-track procedure (e.g. appointment of tribunal)
- Overall time limit? For whole case? For the award?
- Specified scope of discovery
- If contracting with state entity, specific waivers of sovereign immunity, etc.

OFTEN INCLUDED IN PRACTICE

- Authority to tribunal to apportion costs
- Carve-out of permitted applications to court (e.g., interim measures)
- Exclusion of certain remedies/relief (e.g., punitive damages)
- Provision that award is final and binding (but beware of too restrictive language re: possible challenge)
- Agreement that award can be enforced in courts of competent jurisdiction

Drafting Agreements, cont.

Bare minimum in any arbitration agreement:

- "Any dispute, controversy or claim arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under the Rules of [name of institution] in force at the date hereof, which Rules are deemed to be incorporated by reference into this clause
  - The tribunal shall consist of [a sole/three] arbitrator[s]
  - The place of arbitration shall be [city]
  - The language of the arbitration shall be [language]"
- See also model clauses in Appendix I
- Remember to specify the governing law in a separate clause
- Remember problem areas: multi-party transactions; contracts with state entities (e.g. immunity issues); appointing authority, binding parent or subsidiary corporations and exclusion of appeals for UNCITRAL Rules

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IV. Procedural Features of International Arbitration

- Request for Arbitration and Answer
  - arbitrator selection
  - content: minimum requirements
  - claim value/costs implications
- Terms of Reference or equivalent preliminary session
  - procedural significance/sizing up the tribunal and the opposition in person
  - possible bifurcation on jurisdictional, damages, or other issues, but be careful what you wish for.

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Procedural Features, cont.

- Typical pleadings:
  - Statement of claim
  - Statement of response
  - Reply
  - Rejoinder

Dispositive motions are rarely considered.

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Procedural Features, cont.

- Limited "discovery"
  - Parties typically present their "case-in-chief" with their statement of claim and response through documents and witness statements
  - After first round of briefs, typically an opportunity to exchange disclosure requests
  - No depositions
  - Arbitration is not the best mechanism for discovering evidence in support of a claim you aren't sure you have
- Increased reliance by arbitrators on the International Bar Association Rules on the Taking of Evidence in International Arbitration
- As stated in a series of 11th Circuit Court decisions, "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's abilty to offer simplicity, informality, and expedition." *Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005); Dale v. Comcast Corp., 498 F.3d 1216, 1220-21 (11th Cir. 2007).*

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Procedural Features, cont.

- **U.S. court style request for production of documents in ACME Corp. v. XYZ Corp.:**
  - All documents and communications in any way relating to XYZ's drafting, negotiation, interpretation, and implementation of the contract.

- **IBA style disclosure request:**
  - A copy of the notes XYZ's CFO took at the January 15, 2009 meeting in Zurich.

- Much more limited than US court discovery see IBA Rules, Article 3(3) in appendix II

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Procedural Features, cont.

- **Oral hearing:**
  - Witness attendance, conferencing, etc.
  - Compulsion vs. the power of inference
  - Limited direct examination
  - Possibility of panel appointed expert
  - Little concern for rules of evidence or admissibility issues
  - Cross-examination of witnesses (under the tribunal's control); "know thy tribunal" and "listen actively"
  - Common law vs. civil law influences
  - Interventionist tribunal? Beware the silent types!
  - The principle of courteous persistence

- **The Award**
  - One or more? (interim, partial, or final)
  - In writing
  - With reasons
  - Costs and other formalities
  - Specify where made (important for set aside)

V. Enforcement and Challenge of International Arbitral Awards

- May not be necessary – most awards are performed voluntarily
- Basic procedure:
  - Identify jurisdiction(s) where assets are located (and attach them if possible)
  - File proceeding to enforce the award under the law of that jurisdiction
- The New York Convention:
  - Makes enforcement easy: minimal burden on enforcing party
  - Very limited grounds for refusal of enforcement
  - Opposing party enforcement has burden of proof
  - Beware elastic concepts of due process and public policy

Enforcement and Challenge, cont.

- Enforcement outside the New York Convention
  - –Depends on law of place of enforcement
  - –Sometimes more favorable, but usually less so

- Safest course is to arbitrate in a New York Convention state (see Appendix II)

- **Bottom line: an international arbitration award is almost always easier to enforce - and therefore worth more - than a national court judgment**

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Enforcement and Challenge, cont.

- Strong national public policy in favor of arbitration affirmed in trio of Supreme Court decisions
- *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (U.S. 1974)
- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)
- *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)

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Enforcement and Challenge, cont.

- 11th Circuit is arguably more pro-arbitration than any other circuit
  - Completely excludes "manifest disregard for the law" as a viable ground for vacating arbitral awards. *Frazier v. CitiFinancial Corporation*, 604 F.3d 1313 (11th Cir. 2010).
  - An international arbitration award issued from an arbitral seat in the U.S. may be vacated only on the grounds set forth in Article V of the New York Convention. *Industrial Risk Insurers v. M.A.N. Gutenhoffnungsbutte*, 141 F.3d 1434 (11th Cir. 1998).
  - Follows a liberal approach with respect to allowing arbitrators to determine arbitrability (that is, whether the dispute is properly submitted to arbitration). See *Terminex International Co. LP v. Palmer Ranch Ltd*., 432 F.3d 1327 (11th Cir. 2005)

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Enforcement and Challenge, cont.

- **The prospects**? Low – awards are rarely set aside, particularly by courts in the major arbitration venues
- **Where**? Prevailing view is that the courts of the place of arbitration have exclusive jurisdiction over setting-aside proceedings; decision then has extraterritorial effect
- **On what grounds**? Very limited under most modern arbitration laws – basically the absence of a valid arbitration agreement, arbitrator bias or a serious and prejudicial procedural irregularity

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VI. Georgia's New International Arbitration Code

- Signed by Governor Deal on May 2, 2012
- Replaces Part 2 of the Georgia Arbitration Code pertaining to international transactions
- Codified at O.C.G.A. § 9-9-20 *et seq.*
- The new law will apply to international arbitration agreements entered into on or after July 1, 2012.

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Georgia's New Code, cont.

The stated purpose of the new statute is to:

- Encourage international commercial arbitration
- Enforce arbitration agreements and arbitration awards
- Facilitate prompt and efficient arbitration proceedings
- Provide a conducive environment for international business and trade

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Creating a predictable pro-arbitration legal framework

- Georgia's new law is based largely – but not wholly -- on the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law, as amended in 2006.
- Georgia now joins over fifty civil and common law jurisdictions around the world that have adopted some version of the Model Law.
- Georgia's adoption of the 2006 Model Law amendments will ensure greater uniformity and predictability to international businesses that choose to arbitrate their disputes in Georgia.

Georgia's New Code, cont.

Georgia's new law also incorporates several non-UNCITRAL provisions that represent international best practice, including:

- The ability of the parties to chose any superior court in the State of Georgia to provide assistance and supervision in aid of arbitration
- Quasi-judicial immunity for arbitrators and arbitral institutions
- Appeal by permission of partial negative jurisdictional rulings
- Streamlined provisions governing applications for interim relief
- Provisions permitting the consolidation of multiple arbitral proceedings upon the agreement of the parties
- Enhanced powers for arbitrators to assist in the taking of evidence
- A provision allowing non-Georgia parties to opt out of certain grounds for judicial review of an arbitration award

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Georgia's New Code, cont.

WHEN WILL IT APPLY?

- Preemption issues under the FAA. *Triad Health Management of Georgia III LLC v. Johnson*, 2009 WL 1532509 (Ga Ct. App., June 3, 2009) (FAA pre-empts state laws that conflict with the federal policy favoring arbitration).
- Removal under the FAA (for "international" cases only). 9 U.S.C. § 203 (NY Convention); 9 U.S.C. § 302 (Panama Convention).
- State law applicable in Federal Court. Fed. R. Civ. P. 64.
- Discovery?

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Georgia's New Code, cont.

INTERIM MEASURES:

Federal Rule 64:

(a) Remedies Under State Law—In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

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INTERIM MEASURES:

- O.C.G.A. § 9-9-30: Requests for interim measures to a court are not incompatible with an agreement to arbitrate.
- O.C.G.A. § 9-9-22(a)(3): Interim/ interlocutory *awards* are enforceable in court.
- O.C.G.A. § 9-9-38(f): Interim measures *orders* are enforceable in court.

Georgia's New Code, cont

DISCOVERY

O.C.G.A. § 9-9-49:

- (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. Subpoenas shall be served and, upon application to the court specified in Code Section 9-9-27 by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.
- (b) Notices to produce books, writings, and other documents or tangible things, depositions, and other discovery may be used in the arbitration according to procedures established by the arbitrators.
- (c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.
- (d) Witnesses shall be compensated in the same amount and manner set forth in Title 24.

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VII. ATLAS and Atlanta's Role as an International Arbitration Hub

Mission Statement of the Atlanta International Arbitration Society

To serve the global business community in providing world-class quality and efficient service, in a highly-cost competitive and value-driven environment by:

- promoting the use of international arbitration and the selection of Atlanta as the *situs* for international arbitration proceedings;
- providing a forum where practitioners, neutrals, corporate counsel and others interested in international arbitration can network and exchange ideas and information (including interaction between external and in-house counsel on improving the efficiency of the process);
- working to enhance the local legal infrastructure for international arbitration through legislation and judicial education;
- enhancing the Georgia bar's knowledge of international arbitration;
- interacting with and supporting local academic programs on international arbitration at area universities; and;
- promoting and organizing international arbitration conferences in Atlanta.

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Why Atlanta?

"Atlanta is Arbitration Central. The home of Coca-Cola, Martin Luther King Jr. and President Jimmy Carter has a century of experience in conflict resolution of every type. Coming to Atlanta, the world cannot only discuss issues but experience the result of diverse groups and opinions living and thriving beyond conflict."

- *Andrew Young, Co-Chair GoodWorks International, former U.S. Ambassador to the United Nations, Congressman from Georgia 5th District and Mayor of Atlanta*

"Over the last twenty years, Georgia and the Southeast have been a magnet for German business. Atlanta is ripe with international trade, academic, social and cultural opportunities, including a significant German cultural network. The Atlanta Consular Corps and the countries we represent are well-served by Georgia's welcoming environment for international business."

- *Dr. Lutz Görgens, Consul General of the Federal Republic of Germany and Dean of the Consular Corps in Atlanta*

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Appendix I

- List of New York Convention Jurisdictions
  - Australia, Brazil, Canada, China, Colombia, Eqypt, Estonia, France, Georgia, Germany, Hong Kong, India, Italia, Latvia, Lithuania, Russia, Switzerland, U.K., U.S.A. and many more
  - For more information visit: http://www.newyorkconvention1958.org

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Appendix II

Model Arbitration Clause:

- "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.
- The parties should consider adding:
  - The number or arbitrators shall be (one or three);
  - The place of arbitration shall be [Atlanta, Fulton County, State of Georgia, United States of America].
  - The language(s) of the arbitration shall be _____."
- For other clauses:
  - http://arbitrateatlanta.org/sample-arbitration-clauses

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